Part Three

COMMENTS AND OBSERVATIONS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

Troisième partie

COMMENTAIRES ET OBSERVATIONS DES GOUVERNEMENTS ET ORGANISATIONS INTERNATIONALES

Part Three

COMMENTS AND OBSERVATIONS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

I. GENERAL COMMENTS ON THE REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. Many representatives noted that multilateral treaties were essential to the conduct of international relations and therefore an important source of international law. The elaboration of multilateral treaties constituted an essential part of the work of the United Nations system. Representatives from some of the developing countries referred to certain financial, technical or personnel difficulties that affected their effective participation in treaty-making, and expressed the hope that the present review might in some way come up with solutions which might reduce their burden. Some delegates, while supporting this review exercise, stressed that the existing procedures and techniques as developed in the United Nations were valuable and should be maintained, though they could be made more effeetive. A number of delegates questioned the usefulness of the present review and considered that there was insufficient interest and that the scope of the proposed exercise was too broad to permit effective examination.

2. There was some discussion on how the question of the multilateral treaty-making process could be studied. Some delegates thought these questions were best suited for experts or academic institutions; others suggested the setting up of a sessional or intra-sessional working group or advisory committee to study the subject.

3. Some delegates proposed that the present review should lead to the preparing of a manual which would elaborate on the various treaty-making techniques used and their advantages and disadvantages. Detailed and systematic information should be collected to show how multilateral treaties had been carried out in the United Nations in the past in order to have some basis on which to compare its methods with those used elsewhere.

4. With respect to the report requested of the Secretary-General to be submitted at the thirty-fifth session, representatives suggested the following points to be taken into account in preparing the report: (i) the primary concern of the study should be to enable States to participate more easily in the treaty-making process, which would facilitate the ratification and implementation of treaties at the national level; (ii) the study should concentrate on the process from the conception of a treaty to the stage of opening for signature and accession; (iii) the report should propose ways of ensuring fuller

participation by all States, particularly developing countries, in all stages of treaty-making preparation; (iv) it should be factual and analytical, and review a sufficient number of treaties to illustrate the whole range of methods used and the problems encountered; (v) the report should establish guidelines for the drafting of treaties and should provide an idea in the way in which such guidelines can be applied in terms of the amount of effort, time and expenditure involved. Some representatives felt that the study should avoid touching on questions connected with the acceptance and ratification of treaties; others however considered that these questions should be dealt with.

5. Some representatives felt that the International Law Commission should be the organ to prepare a report on the multilateral treaty-making process. A number of delegations also stressed that the report by the Secretary-General should not entail great expenses to the United Nations. Nor should the study require the creation of new machinery.

6. When the report of the Secretary-General on the review of the multilateral treaty-making process (A/35/312) was submitted at the thirty-fifth session, representatives considered that the report dealt with a very complicated legal matter, and was considered useful in providing an analytical account of treaty-making techniques and procedures employed in different fields and by various international organizations. While most representatives who commented on the Secretary-General's report found it generally acceptable, some felt that the report placed too much emphasis on the role of international organizations; in their view, States played the principal role in the making of treaties.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Australia (A/37/444, p. 5)

1. The elaboration of multilateral treaties on a wide variety of topics is an essential part of the work of the United Nations. There has been a considerable growth in the number of treaties negotiated and adopted under the auspices of the United Nations since the 1960s. While this trend is likely to continue, it has not been matched by any rationalization of the treaty-making process.

2. The growth in the number of treaties that are elaborated in the United Nations is placing serious strains on the resources of governments, particularly those of developing countries. This, coupled with difficulties in relation to States' constitutional processes, is leading to delays in ratification. There is a need to assess the methods of multilateral treaty-making used in the United Nations and in conferences convened under its auspices to determine whether the current methods of treaty-making are as efficient, economical and effective as they could be to meet the needs of the Members of the United Nations. We therefore welcomed the decision to establish a working group, at the 37th session of the General Assembly, which it is hoped will consider the responses to the very useful questionnaire raised in Part IV of the 1980 Secretary-General's Report (A/35/312) and in Annex 1 of the 1981 Secretary-General's Report (A/36/553), and decide what recommendations, if any, could be made to improve the treaty-making process.

Austria (A/35/312/Add.1, p. 2)

1. The last decades have seen a rapid increase in the number of multilateral legal instruments. The preparatory work and the servicing of international meetings, which led to the adoption of those instruments as well as the consequential integration of their results into the national context, placed and still place a heavy burden on the legal apparatus (executive and legislative) of States.

2. Under these circumstances a review of the United Nations treaty-making process, as presently undertaken by the General Assembly with a view to ascertaining ways and means for possible improvement, seems both necessary and timely. It would, however, be deceiving to attribute existing problems solely or even mainly to deficiencies in the treaty-making procedure and, hence, to expect that they would disappear with a revision of the latter. The problems originate primarily in the international community's unrestrained appetite for new international instruments, which it then has difficulties in digesting nationally. Only the setting of priorities and the concurrent reduction of the yearly output could provide a remedy to that unsatisfactory situation. It would, therefore, seem advisable for the General Assembly to include this aspect into its future considerations.

3. From a technical point of view the treaty-making procedure of the United Nations has by and large proved satisfactory over the years although it is, naturally, open to improvement. There are not many instances in which the difficulties encountered during either the preparation or ratification of multilateral instruments can be squarely attributed to deficiencies in the treaty-making process. A seemingly obvious exception, however, is the Third United Nations Conference on the Law of the Sea, whose problems apparently stimulated the present inquiry. It is doubtful, however, whether those problems could have been better or more quickly solved by a different procedure. They seem to originate mainly in the diversity of interests involved and the resulting multiplicity of negotiating positions, often changing in time or overlapping in subproblems. Such a somewhat diffuse pattern makes it difficult to imagine any sort of *general rules* for a speedy resolution of conflicts of interest and the experience of the Conference on the Law of the Sea should, therefore, be treated as a rather singular one. If a similar pattern were to appear at the outset of a future endeavour in international treaty-making, consideration should be given to dividing the subject-matter into more manageable separate parts.

4. In view of these circumstances any outcome, in concrete terms, of the present inquiry ought to be considered with caution. Although a comparison of different procedures which have evolved in practice and an assessment of experiences should permit the identification of techniques and/or approaches in need of improvement, the often quoted wisdom that the subject determines procedure ought to be borne in mind and a uniform code for all sorts of multilateral treaty-making should, therefore, not be attempted. A manual of treaty-making procedures, annotated with practical considerations derived from experience, permitting to choose those most appropriate for a particular exercise, would seem to meet best the current need of treaty-makers.

Brazil (A/36/553, p. 13)

1. The Brazilian Government believes that the consideration by the General Assembly of the item "Review of the multilateral treaty-making process" is a very useful exercise. It affords an opportunity to take a serious and comprehensive look at the treaty-making process as it has evolved in international practice and to devise, if necessary, improvements in that process.

2. The report of the Secretary-General (A/35/312) offers an excellent base for the consideration of the subject.

3. A careful examination of the report and of the annexes thereto leads to the conclusion, contained in the report itself, that 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.

4. One should therefore exclude, as impractical and unwise, any attempt to reduce the present flexibility in the treaty-making process, by drawing up a set of rules to be universally applied.

Bulgaria (A/35/312/Add.1, p. 11)

1. The Government of Bulgaria regards the consideration of the question of the review of the multilateral treaty-making process and of the enhancement of its effectiveness as an important step towards strengthening the role of the United Nations in the codification and progressive development of international law.

2. The systematization of norms and procedural rules applied in the elaboration of multilateral treaties thus far will be conducive to extending the options in each separate case of treaty-making, which will correspond to the character of the subject-matter discussed. Subsequently, the use of more rational methods would create conditions susceptible of alleviating the burden which the active participation in the international law-making process imposes on all Governments, particularly on those of developing countries, as well as of promoting a more rational use of the resources of the United Nations budget.

3. The Government of Bulgaria takes the view that concrete proposals on future improvements in the treaty-making process should be deferred until the report of the Secretary-General is comprehensively studied and submitted to the Sixth Committee at the thirty-fourth session of the General Assembly. For these reasons, the Government at this juncture confines itself only to the following remarks.

4. A survey of the methods for the elaboration of multilateral treaties should deal only with the international aspects of the issues involved, since the problems of ratification of international treaties and the implementation of the obligations assumed are of the exclusive domestic competence of the States and do not relate directly to the substance of the problem under consideration.

5. The Government of Bulgaria is of the opinion that the approach to the problems of treaty-making which require settlement and regulation should be devoid of any standardization and unification of norms. Preserving a flexible approach in implementing some or other methods according to concrete circumstances is a basic requirement for arriving at optimal solutions of questions arising out of the elaboration of multilateral treaties.

Byelorussian Soviet Socialist Republic (A/35/312/Add.1, p. 13)

1. International multilateral treaties play an important role in strengthening peace, in broadening and consolidating the various forms of co-operation between States, and in the progressive development of international law and its codification, and they represent one of the basic sources of international law.

2. The Byelorussian Soviet Socialist Republic is a party to various multilateral treaties and attaches great importance to the treaty-making process. It is steadfastly in favour of full observance of the principle of *pacta sunt servanda*. This principle calling for the scrupulous fulfilment of treaty obligations is embodied in article 28 of the Constitution of the Byelorussian Soviet Socialist Republic, in article 29 of the Constitution of the Union of Soviet Socialist Republics and in article 19 of the Union of Soviet Socialist Republics Act on the Procedure for Concluding, Implementing and Denouncing International Treaties. The Byelorussian Soviet Socialist Republic, which unwaveringly fulfils its treaty obligations, at the same time holds that other parties to international treaties by which it is bound should also strictly fulfil their obligations under such treaties.

3. The report being prepared by the Secretary-General, pursuant to General Assembly resolution 32/48, on the techniques and procedures used in the elaboration of multilateral treaties, could prove useful if, on the basis of an in-depth analysis of treaty practice, it was possible to find real opportunities for enhancing the effectiveness of such techniques and procedures. In this connection, the representative of the Byelorussian Soviet Socialist Republic in the Sixth Committee particularly stressed at the thirty-second session of the General Assembly that such a study should be undertaken without any increase in the United Nations regular budget or any additional manning provision.

4. A leading role in the elaboration of international multilateral treaties of a universal character, which are currently assuming special importance, belongs to the United Nations. Under Article 1 of its Charter, the Organization is called upon to be a centre for harmonizing the actions of nations in the attainment of common ends. The history of United Nations activity in connection with multilateral treaties shows that, under the auspices of the Organization and on the basis of its Charter, a large number of international treaties dealing with various aspects of relations between States have been concluded. In the light of the various legal systems existing in today's world, of the national practice of States, of the nature of organs belonging to the United Nations and other inter-governmental organizations, and of the specific details of problems, diverse techniques and procedures have evolved within the Organization itself for the elaboration of general international treaties. At the same time, each State or national liberation movement recognized by the United Nations has quite properly been accorded the right to take an active part at any stage in the preparation and elaboration of an international treaty.

5. The complexity of the process of establishing norms in contemporary treaty practice is a reflection of the special characteristics and level of development of relations between States, and it ensures that drafts of new legal documents are given full and deep scrutiny. The variety of existing techniques and procedures allows for flexibility in selecting, for each particular situation, the

most suitable techniques and procedures and avoiding the mechanical, ubiquitous use of stereotypes. It therefore seems unjustified and inadvisable to set up a unified procedure for elaborating international multilateral treaties. The Byelorussian Soviet Socialist Republic also believes that there is no justification for attempts to review the current, proven practice followed in drafting treaties on disarmament and other important political questions.

6.[2] On the whole, the Report of the Secretary-General (A/35/312) correctly reflects the multilateral treaty-making practice of States. The representative of the Byelorussian SSR pointed out at the thirty-fifth session of the United Nations General Assembly that the small number of replies received from Governments indicated that the question has been considered exhaustively in the Sixth Committee and that the discussion on it could be concluded at this stage.

Canada (A/35/312/Add.1, p. 14)

1. The Canadian authorities welcome the opportunity to offer some preliminary comments on the multilateral treaty-making process. In general, Canada sees the objective of the review of this process, initiated by General Assembly resolution 32/48, as the streamlining and rationalization of multilateral treaty-making in light of the current needs and concerns of the international community. It is hoped that the results of this examination will provide guidance to States to enable them to make the most effective and productive use of time and resources devoted to the negotiation of multilateral treaties.

2. A variety of methods has been employed in the multilateral treaty-making process; such diversity in the methods of treaty-making should be considered as a source of strength. It would be neither desirable nor practical to attempt to establish an identical procedure with respect to the variety of differing subjects considered suitable for embodiment in multilateral treaties. It is hoped then that this review will make more information available about the multilateral treaty-making process with a view to determining whether some aspects can be made more rational and systematic and to see if procedures and techniques used in some bodies can provide examples and guidance for others. The multilateral treaty-making process as a whole might be considered to see if it is producing the quantity and quality of agreements required by the international community.

3. It is clear that a comprehensive examination of the multilateral treaty-making process would be a vast undertaking comprising a number of different aspects from the initiation stage, when the idea to elaborate a treaty is proposed, to the entry into force of the new agreement. The Canadian authorities look forward to an exchange of views in the Sixth Committee in order to determine which aspects of this subject are most conducive to further study. It may be possible to identify such specific areas on the basis of discussion in the Sixth Committee, the Secretary-General's report and the view submitted to the United Nations by States in response to resolution 32/48. Possibilities for the rationalization of the process can be considered with respect to both the preparatory and negotiating stages of the multilateral treaty process.

4. The Canadian authorities look forward to the results of this initiative with respect to gaining more information about the multilateral treaty-making

process as well as obtaining a better idea of the views and concerns of other Governments on this important subject. It is hoped that the comments of Governments, the report of the Secretary-General and discussion of this item in the Sixth Committee will contribute to a greater understanding of the complexities of the multilateral treaty-making process and point the direction in which this question can be most fruitfully pursued.

Indonesia (A/37/444, p. 13)

1. The Government of the Republic of Indonesia in principle agrees with the efforts of the United Nations General Assembly for a review of the multilateral treaty-making process.

2. The Indonesian Government supports the proposal that the Report of the Secretary-General (Doc. A/35/312) be used as a basis for the subsequent negotiations, including the observations and comments from Member States.

3. The Indonesian Government will participate in the negotiations to be held under the auspices of the United Nations General Assembly and assist the said efforts by providing comments based on the questionnaires in the annex of document A/35/312.

Italy (A/36/553, p. 26)

1. Given the importance of the multilateral treaty-making process, the Italian Government is of the opinion that the idea of reviewing the functioning of that process is most worthwhile, and that the United Nations is the most appropriate forum for an over-all evaluation which, however, should not overlook the peculiarities of the treaty-making process in different contexts (United Nations specialized agencies, regional bodies, *ad hoc* conferences).

2. The Italian Government also believes that such an over-all evaluation might be resumed at appropriate intervals in order to take into account the development of international practice.

3. At the same time, Italy believes neither that such a review must necessarily lead to radical changes in practice nor, conversely, that it should give rise to an increased standardization of procedures which would impede the adaptation of practice to the needs of a particular negotiating context. Treaty law is in fact dominated by the principle of the freedom of contracting parties, which is evidenced mainly in the continuing search for *ad hoc* negotiating patterns aimed at overcoming political difficulties of various kinds which interfere from time to time with the achievement of an agreement. Thus, within the bounds of respect for negotiating "good faith" and for the rules of international *jus cogens*, the negotiating parties must be allowed to enjoy maximum freedom in the treaty-making process, and the treaty must be an act freely arrived at not only with regard to its provisions but also, as much as possible, in the procedures followed during its negotiation.

Japan (A/35/312/Add.1, p. 20)

1. The multilateral treaties recently concluded have greatly increased both in number and in scope, to include such areas as trade, investment, energy and environment. Further, the number of States participating in mul-

tilateral treaty-making conferences has also grown, and consequently the process of drafting and adopting treaties tends to require increasingly more time. There is now a greater need to achieve a higher degree of efficiency and economy in the treaty-making process, thereby reducing the burdens this process places on the participating States. Consistent with this understanding, and because the Japanese Government regards the United Nations as the most suitable forum for undertaking a review, it voted in favour of the resolution on this matter at the thirty-second session of the General Assembly.

2. While recognizing that the difficulties involved in the treaty-making process are caused in part by the inadequacy of existing procedures, the Government of Japan believes that they derive, to an even greater extent, from various elements pertaining to the substance of the treaties. These include, for example, disagreements among the participating States relating to the content of the treaty, the fact that there are completely new areas which are to be dealt with by the treaty, or the complexity of the subject involved.

3. Procedures will naturally differ with each treaty, depending upon such factors as the content, the degree of urgency involved, the number of States participating in the treaty conference, and whether or not the conference is held under the auspices of a particular international organization. Therefore, the amount of work (that is, the compilation and evaluation of information collected by the secretariat) required to establish procedures and methods suitable to each case will be enormous.

4. Further, there exist a number of points which also need to be studied regarding future efforts, such as how the results of this review should be formulated (for example, as a treaty, a resolution, or simply as a manual); whether domestic procedures should be included; what the role of the Sixth Committee of the General Assembly should be in making treaties, and so forth.

5. Accordingly, the Government of Japan would be inclined not to actively support any attempt to unduly hasten the conclusion of the treaty-making process review.

6. Nevertheless, the Government of Japan, recognizing the importance and the value of studying this matter from a long-term perspective, expresses its readiness to co-operate.

Mexico (A/36/553, p. 32)

1. In General Assembly resolution 32/48, which marked the beginning of the consideration of the item "Review of the multilateral treaty-making process", emphasis is placed on the duty of the General Assembly under Article 13, paragraph 1 (*a*), of the Charter of the United Nations to initiate studies and to make recommendations for the purpose of encouraging the progressive development of international law and its codification.

2. In this respect, there is no doubt that the General Assembly has played an important role in encouraging treaty making on matters of common interest, as well as definition of universally applicable norms of conduct, through the adoption of resolutions or declarations in which: (*a*) corollaries to the principles expressly recognized in the Charter of the United Nations have been formulated (e.g., the Declaration on Principles of International Law con-

cerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) and (*b*) other norms have been defined (e.g., the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction).

3. Consequently, it would seem appropriate that any study referring to Article 13, paragraph 1 (*a*) of the Charter of the United Nations should devote an important chapter to an analysis of the legal consequences of decisions of the United Nations General Assembly which fulfil certain conditions and which would help in determining the obligations of States, perhaps by seeking the views of States on the desirability of having the International Law Commission make a special study of this subject.

Netherlands (A/35/312/Add.1, p. 2)

1. The General Assembly of the United Nations, at the instigation of certain Member States, including the Netherlands, has undertaken an inquiry into the working of the procedures for multilateral treaty-making under the auspices of the United Nations. The inquiry aims, *inter alia*, to find methods which would use more efficiently the manpower and energy invested by the Governments of the Member States and the Secretariat in the preparation and drafting of multilateral treaties.

2. The limits which have been set for this inquiry call for some comment. First, the inquiry is primarily concerned with the procedures now employed and improvements which could be realized. It need scarcely be said that an examination of the causes of the defects which have been noted in the multilateral treaty-making process cannot limit itself exclusively to procedural aspects. If necessary, the proposed evaluation must extend to other factors, many of which lie in the political sphere.

3. Secondly, the explanatory memorandum (A/32/143, annex)[3] could give the impression, in point A (Purpose of the initiative), that the stage following the completion of the text can be disregarded. This conclusion would be wrong, since discord concerning the present procedures with regard to the drafting of multilateral treaties is partly related to the rate at which the Member States give their consent to be bound by the treaties, once they have been drawn up. The two stages of drafting and giving the consent to be bound are further linked in the sense that problems which have not been, or not adequately, dealt with in the first phase inevitably give rise to delays in the second, while, on the other hand, problems which may be foreseen for the implementation play an important role in making a treaty, and, in fact, set the pace for it. The different judicial systems of the Member States form an additional complication, the consequence of which is that the problems associated with implementation are different in practically every country. Thirdly, the enquiry is limited to multilateral treaties made within the context of the United Nations. This limitation seems to be justified, party because the enquiry was initiated by the General Assembly of the United Nations, and partly because the problems arising from treaties which have been or are being concluded in the United Nations context, particularly in view of their universal nature, are incomparably greater than those connected with treaties drawn up in a smaller, notably regional, context. Nonetheless procedures followed in

contexts other than in the United Nations and the specialized agencies may no doubt serve as comparisons.

4. One condition for a more substantive judgement on the subject-matter is the availability of a report containing an analysis of all the procedures currently used in the United Nations system.

Qatar (A/37/444, p. 14)

1. The State of Qatar attaches special importance to multilateral treaties of a universal character relating to the codification and progressive development of international law whose aims and purposes concern the international community as a whole.

2. Multilateral treaties have an important role in strengthening peace, expanding and deepening various forms of co-operation among States, and the progressive development and codification of international law. Multilateral treaties constitute a basic source of international law.

3. The methods and procedures pursued by the United Nations at present give States sufficient prospects for agreement on the system in the light of which a particular question is to be examined by the organs of the Organization or its international conferences. Hence the burden of the multilateral treaty-making process has no scientific significance. The main thing is that States should fulfil completely the obligations embodied in the Charter of the United Nations, especially with regard to the maintenance of international peace and security.

4. The work done by the International Law Commission, which is a focal point in codification aetivities, whether in terms of quantity or quality, is admirable, as is the work done by the United Nations Commission on International Trade Law in its field of expertise. The efforts to improve the multilateral treaty-making process cannot result in a system less effective than that of the International Law Commission and the United Nations Commission on International Trade Law.

Republic of Korea (A/37/444, p. 18)

1. Given the importance of the multilateral treaty-making process, the Government of the Republic of Korea believes that the consideration by the General Assembly of the subject "Review of the multilateral treaty-making process" is a highly useful exercise which provides for an opportunity to look into the existing treaty-making process as it has evolved and to address matters that may, where possible, need improvements.

2. Regarding the questions raised in the report of the Secretary-General (A/35/312), the Government of the Republic of Korea is of the view that, in terms of practicality, one should take into account the merits of flexibility in the current treaty-making process rather than a set of rules to be universally applied.

3. Considering realities of the treaty-making process in the international community, it would be advisable to follow gradual treaty-making practices which could ensure a wide basis of acceptance by sovereign States with varied interests and priorities.

4. It is suggested that, in connection with the effective functioning of the General Assembly throughout the process, a certain special procedural consideration be given to ensure full participation, without right to vote, of non-member States in the proceedings of the General Assembly.

Spain (A/36/553/Add.1, pp. 12-13)

1. The Spanish Government supports efforts directed towards the codification and development of international law through multilateral treaties and endorses the review of the multilateral treaty-making process initiated by the United Nations with a view to improving the various stages of that process. Apart from its response to the questionnaire submitted in accordance with General Assembly resolution 35/162, the Spanish Government would like to make a few preliminary comments of a general nature.

2. This subject is extremely complex and should not be unduly simplified. In view of the diversity of situations and circumstances, one should not make generalizations or seek miraculous formulas to solve each and every problem. Although the aim is to elaborate criteria and guidelines that are as general as possible, a certain amount of flexibility is needed to allow for this diversity of situations.

3. The most characteristic elements of the present situation are the following: excessive proliferation of international multilateral treaties and the need for co-ordination, excessive politicization of the international negotiating process, and technical and legal inadequacies in the texts of treaties.

(a) *Excessive proliferation and need for co-ordination*

4. In recent years there has been an exorbitant increase in the number of international conferences and meetings of international organizations, subcommissions and working groups at which international treaties are elaborated and, at times, adopted. States cannot regularly or attentively follow this proliferation of meetings and international treaties, which exceeds their "absorption capacity" in such matters.

5. Reasonable limits should be set for this type of international hyperactivity, especially since many of these meetings are held simultaneously and, even if they are not contradictory, they represent an unproductive duplication of effort. A minimum of international co-operation is needed in this process; accordingly, the United Nations should determine the guidelines and set the example. To that end, the efforts to co-ordinate international normative activities within the United Nations "family" should be increased. This applies to the bodies of the Organization itself as well as to its specialized agencies and organizations.

(b) *Politicization of the international negotiating process*

6. In recent years, there has been a gradual "delegalization" of international treaties and a growing politicization both of the negotiating process and of the contents of such treaties. The main, though not the only, reason for this phenomenon is the fact that the negotiating techniques used in the United

Nations to elaborate provisions of a political nature have been applied to the elaboration of the legal norms contained in treaties.

7. A characteristic of this trend is the growing importance of consensus as a negotiating formula which, although it is essential for the adoption of political texts and should be an objective in the negotiation of legal texts, disrupts the negotiating process if it is carried to the extreme.

8. This type of politicization can also be seen in the fact that technical and legal bodies—both permanent bodies (International Law Commission, UNCITRAL) and *ad hoc* bodies—are being excluded from the mainstream of the international treaty-making process and are being replaced by working groups composed of government representatives. The epitome of this situation can be found in the negotiating process of the Third United Nations Conference on the Law of the Sea, which the Spanish Government considers to be completely atypical and which should therefore be viewed with the utmost caution when the time comes to draw general inferences from that experience.

(c) *Technical and legal inadequacies*

9. The considerable politicization of the negotiating process and the conditions that accompany the use of consensus have logically resulted in a gradual undermining of the legal aspects of the international treaty-making process. All this, together with undue haste to conclude negotiations, the inadequate preparation of the relevant texts and the predominance of political bodies over legal bodies in the negotiating process, helps to explain the legal inadequacies of many of the treaties adopted recently, a situation which in turn creates major problems in terms of the interpretation and application of such treaties.

10. Therefore, greater attention must be devoted to the legal aspects of treaty-making, while allowing the necessary time for them to be properly negotiated, strengthening the participation of technical and legal bodies, avoiding excessive use of consensus and also avoiding wordings of dubious interpretation. This does not mean seeking legal perfectionism beyond the realm of political reality, for that would result in the elaboration of magnificent texts of treaties which would never come into force; instead, the right balance must be found between political requirements and possibilities and the need for precise legal wording.

11. This might be achieved in the following manner: (*a*) prior discussions at the political level, of the purpose of the treaty and adoption of basic guidelines to that end; (*b*) elaboration of a preliminary draft by legal experts, or supervision thereof, if it is drafted by technical experts; (*c*) request for the submission of the views of States before the final elaboration of the draft; (*d*) adoption of the treaty, preferably at an *ad hoc* diplomatic conference, which should have the benefit of the technical and legal participation of the Drafting Committee.

Switzerland (A/37/444, p. 20)

1. S'il est vrai que l'accroissement du nombre des traités multilatéraux, qui couvrent aujourd'hui pratiquement tous les aspects des relations internationales, impose une lourde charge aux gouvernements qui entendent parti-

ciper activement à leur élaboration, il faut voir aussi que cette prolifération ne fait que refléter le besoin ressenti par les Etats de conduire leurs rapports mutuels d'une manière aussi ordonnée et prévisible que possible. Sans doute convient-il d'utiliser de façon rationnelle les ressources dont disposent les gouvernements et les organisations au sein desquelles s'exercent des activités normatives. Mais il n'est pas sûr que les méthodes actuelles d'établissement des traités puissent être rendues plus efficaces et plus économiques — en admettant que ces deux objectifs ne s'excluent jamais l'un l'autre — par des efforts d'uniformisation qui ne tiendraient pas compte de la diversité des situations, des matières et des besoins.

2. On peut se demander d'autre part s'il est possible de corriger la situation actuelle en limitant la réflexion à un choix de moyens formels et de remèdes de procédure, sans l'étendre à des questions qui, au-delà des inconvénients matériels qu'on cherche justement à corriger, résultent aussi, mais pas exclusivement, du nombre toujours croissant des traités multilatéraux. L'insécurité juridique pouvant découler des chevauchements et des contradictions entre les traités est accentuée encore, par exemple, par l'introduction de considérations politiques dans la solution de problèmes techniques, par l'emploi, lors de la rédaction des traités, de formules qui ne fixent pas de manière suffisamment précise les obligations des parties et par la réticence des Etats à soumettre à un prononcé conforme au droit les divergences éventuelles touchant l'interprétation ou l'application des traités.

3. Dans la mesure où ces défauts procèdent des techniques législatives mises en œuvre, notamment du mode de prise de décisions, il conviendrait de se demander si la méthode du consensus est la plus appropriée en toutes circonstances. Si elle a pour avantage incontestable de contraindre à la négociation les Etats participant à l'établissement des traités jusqu'à la formation d'un accord général, elle peut aussi avoir pour conséquence, en ne révélant pas nettement les oppositions et les réserves, d'entretenir les ambiguïtés et de favoriser les incertitudes.

Ukrainian Soviet Socialist Republic (A/36/553, p. 36)

1. The general position of the Ukrainian SSR regarding the review of the multilateral treaty-making process has already been stated repeatedly at sessions of the United Nations General Assembly. The Ukrainian SSR holds the view that the improvement of the procedures and methods used in elaborating multilateral treaties is of considerable practical significance in contemporary international relations. The correct choice of appropriate procedures reflecting the character and aims of the future treaty facilitates fuller exposure of States' opinions and interests and reconciliation of their positions, and permits in-depth study of the draft treaty and the inclusion therein of provisions acceptable to the maximum number of States. There is also a saving of means, time and effort needed for treaty-making.

2. The report by the United Nations Secretary-General entitled "Review of the multilateral treaty-making process" on the whole gives a sufficiently detailed account of the procedures employed in organs within the United Nations system for the elaboration of treaties and generally reflects correctly State practice in this area. The extensive factual data provided in the report

can be put to practical use as reference material. Similar practical use should probably also be made of the auxiliary material being prepared by the Secretariat regarding the provision of legal assistance in multilateral treaty-making questions within the United Nations.

United Kingdom of Great Britain and Northern Ireland
(A/35/312/Add.1, p. 30)

1. The Government of the United Kingdom continues to support efforts to codify and progressively develop international law by means of multilateral treaties and welcomes the current review of the multilateral treaty-making process which is being undertaken in accordance with General Assembly resolution 32/48 with a view to the general improvement of the many different treaty-making procedures.

2. The report of the Secretary-General will clearly be the main focus of future discussion of this item and the Government of the United Kingdom look forward to studying the report in due course. It is hoped that in preparing the report the experience of those regional organizations which have developed particular techniques of multilateral treaty-making will be taken fully into account, as well as that of the United Nations and the specialized agencies.

Union of Soviet Socialist Republics (A/35/312/Add.1, p. 27)

1. The Soviet union attaches great importance to the question of the techniques and procedures used in the elaboration of multilateral treaties. Selection of the appropriate techniques and procedure can undoubtedly be of assistance in drafting a multilateral treaty which will be a reliable instrument for strengthening peace and will encourage international co-operation and the progressive development of international law and its codification. It promotes the further strengthening of the principle that every treaty in force is binding upon the parties to it and must be strictly observed by them. Strict observance of the obligations arising from the universally recognized principles and norms of international law is a constitutional principle of the foreign policy of the Soviet Union. It is affirmed in article 29 of the Constitution of the USSR, adopted in 1977, and in article 19 of the USSR Act concerning the Procedure of Concluding, Implementing and Denouncing International Treaties of the USSR, a law which emphasizes, *inter alia*, the USSR's position that the other parties to multilateral international treaties to which the USSR is a party must also strictly observe the obligations arising from such treaties.

2. The preparation of a report by the Secretary-General of the United Nations on the techniques and procedures used in the elaboration of multilateral treaties can be of assistance in achieving these objectives, provided that real possibilities for improving those techniques and procedures and for increasing their effectiveness are thus identified. The study of this question should not, of course, lead to increased expenditure under the regular budget of the United Nations or to the creation of any kind of additional machinery.

3. Soviet representatives in various bodies and at United Nations conferences have repeatedly pointed out that in today's world particular significance is attached to general multilateral treaties of a universal character which relate

to the codification and progressive development of international law and whose aims and purposes are of interest to the international community as a whole.

4. An important role in the elaboration of such treaties is played by the United Nations, which, under Article 1 of its Charter, is called upon to be a centre for harmonizing the actions of nations in the attainment of the common ends of the Organization. Various techniques and procedures for the elaboration of general multilateral treaties have emerged in the course of United Nations activities. Any State has the right to propose the conclusion of such treaties and to contribute to discussion and decision-making at any stage in the elaboration. The representatives of national liberation movements recognized by the United Nations can also take part in this process.

5. Taken as a whole, these techniques and procedures, which reflect the complexity of the process of establishing norms in present-day international law, ensure thorough comprehensive consideration of the substantive aspects of the drafts of new legal instruments. The diversity of the techniques and procedures currently employed in particular cases by States in the elaboration of treaties in specific areas of co-operation precludes the possibility of establishing universal models to be applied mechanically in concluding all multilateral treaties. It would not appear useful to try to create a single procedural scheme to be applied in all treaty-making efforts. Universal models of techniques and procedures for working on treaties are unlikely to yield positive results inasmuch as treaties differ substantially in their subject-matter and in the specific problems associated with them. We firmly believe that there is no reason to review the system by which treaties on disarmament and other important political questions are elaborated since that system has fully proved itself in practice.

6. There is no question that the techniques and procedures used within the United Nations system in the elaboration of multilateral treaties of a universal character could be improved. In particular, the International Law Commission remains extremely ineffective. The draft treaties prepared by the Commission could be finalized and adopted by the Sixth Committee without convening special international conferences; this would have the effect of further enhancing the legislative role of the Sixth Committee in accordance with the provisions of Article 13 of the United Nations Charter.

7.[4] The study of the multilateral treaty-making process contained in that report generally reflects correctly State practice in this area. The paucity of the observations submitted by Governments in response to the Secretary-General's inquiry indicates that the majority of Governments have little interest in broad studies on the question. Therefore, at the present stage, it would be advisable not to go beyond the results which have been achieved and published to date.

United States of America (A/35/312/Add.1, p. 31)

1. The Government of the United States strongly supports the growth of a more effective system of international law. The principal contemporary means of enacting international law is the multilateral treaty. Accordingly, the mechanics of that means are necessarily important. Its processes merit study, and its imperfections require the consideration and action of the international community.

2. The statements made in the United Nations General Assembly on the introduction of this item by the representative of Australia and others (A/C.6/32/SR.46-50) point to certain problems which have developed over the years which may impede the full utilization of the multilateral treaty-making process as a means of developing the content and efficacy of international law. While there may be differences of opinion among members as to which problems loom largest, there should be no such differences about the desirability of enhancing the efficiency of the process. Nor should the recognition that problems exist and that the process inevitably is susceptible of improvement becloud the fact that attainments in the codification and progressive development of international law during the last 30 years are substantial. In view of the deep differences of policy and even ideology that divide many States, those attainments appear the more impressive. At the same time, those differences impose limits on what further advances may be achieved at any rate, in the short run—respecting both the substance and procedures of international law.

3. The corpus of work of the International Law Commission, which stands at the centre of United Nations codification processes, is impressive in quantity and quality. That judgement applies as well, in its specialized sphere, to the United Nations Commission of International Trade Law. Care must be taken lest any efforts at improvement in the processes of multilateral treaty-making result in a system less effective than that pursued by the International Law Commission and by UNCITRAL.

4. Moreover, it must be borne in mind that at least some of the obstacles to the more expeditious and effective operation of the multilateral treaty-making process lie not in the area of identification and solution of problems of law and policy and the preparation of text but rather in what might be called the absorptive capacity of States. The sparsity and slowness of comments of States on treaty drafts, the state of preparation of delegations to committees and conferences of plenipotentiaries, the frequent requests to defer the convening of conferences because of the press of other business, and the length of time that States take to ratify treaties—when they ratify them at all—suggest that the problems may lie at least as much in the ability of States to absorb treaties and to participate in their preparation as in the capacity of existing or future mechanisms to elaborate them.

5. For the purposes of these comments, examination of the question may be usefully broken down into three main areas: the preparation of draft texts, the international legislative process, and the stage in which States agree to become parties to conventions.[5]

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

European Conference of Ministers of Transport (A/36/553, p. 47)

1. The Conference, although empowered to make such agreements as are necessary for the organization of international transport in Europe, seldom finds it necessary to proceed by way of formal treaties, though we are of course interested in any general guidelines you may be able to develop.

2. In pursuance of the mandate to co-ordinate the activities of international (transport) organizations, we do however work very closely with the European Community and with the United Nations Economic Commission for Europe. We therefore welcome the efforts being made by the General Assembly to improve procedures for drawing up, and implementing international instruments in the United Nations. ECMT has for example a particular interest in the 1968 (Vienna) Conventions and Agreements on Road Traffic and on Road Signs and Signals,[6] and in their further development. We would greatly welcome proposals to improve and simplify the amendment procedures for this type of technical instrument; perhaps along the lines suggested by the Working Group on the Simplification of Trade Procedures.

3. We appreciate however that the Secretariat may want to concentrate in the first instance on general principles and on the report to the thirty-sixth session, which we shall follow with interest.

International Atomic Energy Agency (A/37/444, p. 26)

1. Within the framework of the Agreement Governing the Relationship Between the United Nations and the IAEA the United Nations General Assembly could play a co-ordinating role in relation to the IAEA's treaty-making activities. Article III.B.1 of the IAEA Statute provides that the Agency shall:

> "1. Conduct its activities in accordance with the purpose and principles of the United Nations to promote peace and international co-operation, and in conformity with policies of the United Nations furthering the establishment of safeguarded worldwide disarmament and in conformity with any international agreements entered into pursuant to such policies."

2. The IAEA will consider a relevant resolution referred to it by the United Nations, although it would be open for the IAEA to decide how to respond to the resolution. The IAEA will also furnish any studies and information requested by the United Nations to the extent practicable and relevant to its functions.

International Telecommunication Union (A/37/444, p. 28)

1. Reference is made to the ITU's first contribution entitled "Report on the Techniques and the Procedures used in the Elaboration of Multilateral Treaties" which reflects, in a summary form, the ITU's practice of techniques applied and procedures followed in the Union's Multilateral Treaty-Making Process which is marked by the highly technical and specialized character of the various legal instruments adopted under the auspices of the Union and concerning general as well as specific telecommunication matters (see Part Four, B, ITU).

2. The ITU's practice is based on the pertinent provisions of the International Telecommunication Convention, Malaga-Torremolinos, 1973, adopted by ITU's Plenipotentiary Conference, the supreme organ of the Union. It would, therefore, rather be within the competence and prerogatives of that organ to reply, in a representative and authoritative manner, to a number of questions contained in the above quoted annex and concerning general policy

issues. As this cannot be done due to the lack of time available, the following observations and comments reflect only the view of the ITU's General Secretariat and do not, in any way, represent or pre-judge the position of the Union as a whole or of its individual Member counties on the issues under consideration.

3. The specific observations and comments on the questionnaire are made only on those questions (with reference to the numbers and letters given in that Annex), which are, in the view of the ITU's General Secretariat, of direct concern or interest to the I.T.U. or to which I.T.U. can usefully make any observations or comments. They are made on the understanding that the term "United Nations" means the United Nations Organization proper, not including the specialized agencies forming part of the United Nations Common System, and that the term "Secretariat" means the Secretariat of the United Nations Organization.

Organisation for Economic Co-operation and Development
(A/36/553, pp. 49-50)

1. The Organisation for Economic Co-operation and Development (OECD) is grateful for the opportunity to submit observations on the report of the Secretary-General entitled "Review of the Multilateral Treaty-Making Process" as this is clearly of considerable interest to the Organisation and to its Members. However, the observations of the Organisation are those of the Secretariat and should not be understood as reflecting necessarily the views of its individual Members.

2. It should be made clear from the outset that multilateral treaties are not the principal manner in which the Organisation achieves it aims. The two principal means of action are those provided for under Article (*a*) and (*b*) of the Convention on the OECD. The Organisation may take Decisions which, except as otherwise provided, shall be binding on the Members. In addition, the Organisation may make Recommendations to Members and such Recommendations are submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation. Decisions and Recommendations are adopted by the OECD Council which is composed of all the Members of the Organisation.

3. A number of international agreements have, nevertheless, been concluded under the auspices of OECD, covering several fields but principally the field of energy and in particular, nuclear energy. However, the agreements concluded in the field of energy (other than in the specific area of nuclear energy) do not necessarily come within the purview of the classic definition of multilateral treaties since they are not concluded solely among States. Agreements concluded among Members, under the auspices of the Organization, are varied as to form and subject.

4. As concerns the agreements concluded by the Organisation itself pursuant to Article 5 (*c*) of the Convention of the OECD of 14th December 1960 these have been limited principally to agreements with Members concerning privileges and immunities and co-operation agreements with other international organizations.

5. Finally, a wide range of other forms of agreement are also used frequently, according to the particular subject-matter, circumstances and desires of Members. Once again, these are not multilateral treaties in the formal sense.

6. As concerns the questionnaire itself, the OECD Secretariat does not consider that it is in a position to reply to a number of questions included therein to the extent that such questions are concerned with the internal procedures of the United Nations Organization or international organizations within the Organization of the United Nations or where such questions deal with the work of the International Law Commission. In some cases questions seem to be addressed principally to the United Nations Organization or organizations of the United Nations system but to the extent that these questions would appear to be germaine to the activities of other inter-governmental organizations such as OECD a reply has been given.

United Nations Educational, Scientific and Cultural Organization
(A/36/553, p. 54)

1. We find the "Review of the Multilateral Treaty-Making Process" to be an interesting and informative study, though we feel the emphasis was placed somewhat too strongly on examining the purely mechanical processes involved in treaty-making and insufficiently on the examination of Member States' policies toward treaty-making in the international forums.

2. In this connection, we feel that the questions in section IV of document A/35/312 will be best answered by Governments rather than the Secretariats of international organizations, as it is the former who are the vital factor in the treaty-making process, and it is they who best know what needs to be done to alleviate the burdens or remove obstacles to ratification for them in this respect.

3. Since the maximizing of the efficiency and the effectiveness of the multilateral treaty-making process is a challenge which must be primarily met by Governments themselves, we wonder whether it might not be useful to invite Governments to reflect on the following policy questions.

(*a*) Would it not be advisable, for Governments which negotiate international treaties through one of their branches and ratify them in another, to more closely co-ordinate contacts between the two branches so as to avoid the negotiation of treaties which are subsequently not ratified?

(*b*) Would it not be advisable, again on the national level, for Governments to more closely co-ordinate instructions to their delegations to the various international agencies so as to avoid having delegations adopt in those fora treaty-making policies which are over-lapping, redundant or conflicting?

4. In our view, the above policy questions go to the source of the major problem areas of the multilateral treaty-making process, and they are questions which only the prime actors in this process, the Governments, can answer.

Universal Postal Union (A/36/553, p. 55)

1. We have taken note of the report (A/36/312) with a great deal of interest, but we feel obliged to point out that the procedures described in that document are fundamentally different from those followed at UPU. However,

despite this distinction and the relative interest our practices may hold for this study, we would like to suggest that the text relating to UPU in paragraph 62 (*d*) of the report should be changed, since there is some misunderstanding about the Universal Postal Convention, which contains the basic rules of the international postal service, and the UPU Constitution, which concerns the structure of our organization. Only the latter Act is permanent in nature. Amendments to it are the subject of additional protocols. Moreover, we believe that some other features of UPU practice should be mentioned in addition to those stated in the paragraph referred to above.

2. These treaties, together with those concerning the organization and functioning of the Union, namely the Constitution and the General Regulations, are reviewed every five years at the Congress, in accordance with a well-defined procedure which has remained unchanged for many decades. All the UPU Acts, with the exception of the Constitution, are renewed at each Congress. Drafts of the new Acts are approved by member countries and signed by plenipotentiaries.

3. Lastly, it should be noted that, with a view to mitigating the disadvantages resulting from failure to ratify UPU Acts in good time (a problem which is dealt with in paragraph 57 of the report), UPU officially accepts the principle of tacit approval. According to this principle, countries which did not ratify the Acts of the last Congress before their entry into force but which are implementing those Acts are considered to have approved them.

World Intellectual Property Organization (A/37/444, p. 31)

1. With reference to resolution 36/112, we note that it is directed to an assessment of the methods of multilateral treaty-making used in the United Nations and in conferences convened under its auspices and that, to that end, an invitation is extended to Governments and international organization to submit, by June 30, 1982, observations and comments on the two reports of the Secretary-General, referred to above, taking into account the specific questions contained in Annex I of one of those reports (document A/36/553), as well as their comments on any other aspect of the subject, as they consider desirable.

2. Since the questions set forth in the said Annex are, for the most part, directed to matters of concern to the multilateral treaty-making process in the United Nations, any comments thereon or on other aspects of the subject are more appropriate for the bodies and organs of the United Nations to make, rather than for the Secretariat or other organs of WIPO to express a view thereon. As concerns the questions that relate to the additional studies that might be undertaken by the Secretariat of the United Nations (Part A), we would find it helpful if the replies were published in some form, if a manual on multilateral treaty-making techniques were to be published and if the Handbook of Final Clauses were to be updated and extended to additional categories of formal clauses.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] A/36/553/Add.1, p. 2.
[3] See part one of the present publication.
[4] A/36/553/Add.2, p. 2.
[5] See the comments of the United States on the ILC in section V.
[6] Both were signed at Geneva on 19 September 1949. Texts of the respective Conventions are reproduced in United Nations, *Treaty Series*, vol. 125, p. 3, and vol. 182, p. 229 (and vol. 514, p. 254, for amendments to the Protocol).

II. OVERALL BURDEN OF MULTILATERAL TREATY-MAKING PROCESS

1. *Is the burden of the treaty-making process too great for:*
   (a) *The personnel that States can make available to participate in expert and representative organs?*
   (b) *The personnel and budgets of the inter-governmental organizations concerned?*
   (c) *The domestic legal resources of States that must consider the ratification of duly formulated treaties?*

2. *To the extent that the burden of the current treaty-making process cannot be reduced through making it more efficient, should the international community seek:*
   (a) *To reduce the number of treaties being formulated (i.e. should the formulation of certain treaties be postponed temporarily or indefinitely) by setting priorities?*
   (b) *To increase the resources available, nationally and internationally as required, for multilateral treaty-making?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

Several representatives from the developing countries specifically mentioned the heavy burden placed on Governments in their active involvement in the process of multilateral treaty-making. In this connection reference was made to their financial, technical and personnel constraints. One representative also referred to the lack of sufficient legal specialists to participate in multilateral treaty-making. It was suggested that it might be possible to reduce the number of treaties being formulated by setting priorities or by increasing the resources provided at national and international levels. Some representatives felt, however, that sovereign States knew best what treaties they wanted and only they could set the priorities; others thought that the reduction of the number of treaties could not be done without sacrificing certain objectives. Some representatives were reluctant to support any increase of financial resources to international organizations for the purpose of treaty-making. Some representatives noted that the need to increase resources in developing countries related to their national development, which was itself difficult to achieve. A number of representatives thought that States should avoid initiating treaties

that merely reiterated well-established principles such as those already embodied in the United Nations Charter.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 5)

It should be borne in mind that the burden of the treaty-making process may be too great for the personnel that some States can make available to participate in expert and representative organs and for the domestic legal resources of States that must consider the ratification of treaties. Nevertheless, to the extent that this burden cannot be reduced and while studies on rationalizing the process are continuing, the United Nations should urge States to take the necessary steps to acquire such personnel and domestic legal resources. The international community, for its part, without prejudice to the setting of priorities in treaty-making and in realization of the fact that such treaty-making should not be an arbitrary exercise but a necessity of the international legal order, should seek to increase as much as possible the resources available at the international level for the multilateral treaty-making process, in order adequately to meet genuine needs.

Australia (A/37/444, p. 5)

There is evidence to suggest that the burden of the treaty-making process may be too heavy, particularly for smaller States, in each of the three cases listed in parts (*a*) to (*c*) of Question 1. Pending a further elaboration of States' views in the Working Group, it would be premature to attempt to answer Question 2.

Brazil (A/36/553, p. 13)

1. There is no doubt that the burden of multilateral treaty-making is becoming too cumbersome, both for governments and international organizations. However it does not seem possible to envisage a decision of a general and abstract character to reduce the number of treaties being formulated. If a decision is taken to prepare a treaty on any given subject, it is because a majority of the States involved believe that such a treaty is necessary.

2. It can only be hoped that States will exercise some restraint, and, when making their decisions will take into account their own possibilities and the possibilities of the international organizations in coping with the problems involved.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 2)

1. The methods and procedures currently in use in the United Nations offer States adequate opportunity to agree on the order of consideration of questions within United Nations bodies or at international conferences. Therefore the question of the burden of the multilateral treaty-making process has no significance in practice. The main thing is that States should strictly observe

their obligations under the United Nations Charter, particularly in matters concerning the maintenance of peace and international security.

2. The expansion of treaty relations in the modern world is resulting in a more efficient multilateral treaty-making process, but that growth in efficiency should be achieved not through standardization or by reducing the number of treaties but by making fuller use of a range of methods and procedures, which should be applied with due attention to the specific situation encountered in the consideration of questions.

Cuba (A/36/553, p. 16)

1. (*a*) The great quantity of legal documents which are drafted, and the protracted procedures involved in many cases, increase both the work-load of specialists and the burden on material budgets, affecting under-developed countries in particular.

(*b*) These too are affected, but to a less extent because of the professional nature of the staff.

(*c*) The excessive number of draft treaties to be considered may place too great a burden on the legal resources of the domestic organs of countries which have not enough specialists in the subject.

2. (*a*) The solution to the problem does not lie in a mechanical reduction of the number of treaties to be formulated, which would inhibit the work of codification that the United Nations has been carrying out. It would, however, be advisable to plan the future progress of such work by analysing the subjects which international experience has shown to be in need of regulation as a matter of priority.

(*b*) With proper selection and planning of work, there will be no need to solve the problem by increasing the resources available.

Germany, Federal Republic of (A/36/553, p. 22)

As the burden of treaty-making and treaty implementation can be quite considerable, especially for smaller States, it would indeed appear meaningful to set priorities in selecting material for treaty formulation.

Indonesia (A/37/444, p. 13)

1. The multilateral treaty-making process would be a burden to both States and non-governmental organizations concerned, and the problem is difficult because of its complicated nature.

2. However, efforts could be exerted to make it an effective process by establishing a scale of priorities with regard to some important aspects of the treaty. By so doing States could concentrate their attention on those aspects which relate to their direct interests.

Italy (A/36/553, p. 27)

The Italian Government can only reiterate what has already been observed by the Italian delegation in the debate of the Sixth Committee at the thirty-fifth session of the General Assembly. The question intended to ascer-

tain whether or not the multilateral treaty-making process presents too great a burden for States is ill-advised and cannot be answered. The truth, in fact, is that this cannot be judged in the abstract. The burden of negotiation is accepted or rejected by States according to the importance of a multilateral régime in a given sector. If we were to comment on this, we would merely say that all too often, because of an unwillingness to oppose a rebuttal, negotiations are undertaken without a true perception of their utility. And the inevitable consequence of this is that the negotiation continues wearily for years with an uncertain outcome. From this viewpoint, the proposal contained in question 2a has a certain basis, although it would not be easy to implement.

Mali (A/36/553, p. 30)

The burden of the interuational treaty-making process is too great for States and for the inter-governmental organizations concerned. The interuational community should seek to reduce the number of treaties being formulated by setting priorities.

Mexico (A/36/553, p. 33)

1. There is no doubt that, for a large number of countries, the burden of the treaty-making process is too great. Comprehensive review of the number and content of the multilateral treaties formulated on a world-wide and regional basis in the post-war period, and especially since the 1960s, shows that often the developing countries do not participate in the process, even in cases where the multilateral treaty is negotiated and drafted under the auspices of organizations of which those countries are members.

2. This sometimes affects the balance of the treaties in question, which, as a result of the non-participation of developing countries, tends to favour other groups of countries, a situation eventually reflected in the number of ratifications.

3. It is recognized that multilateral treaty-making is the best and most expeditious method of ensuring that the rule of law is universal. Nevertheless, in order to ensure that progress is not illusory, priorities must be assigned to subjects for inclusion in treaties, lest the codification and progressive development of international law should prove to be beyond the capacity of the civil services of the majority of States.

Netherlands (A/36/553/Add.1, p. 5)

The Netherlands Government wishes to emphasize that a reduction of personnel and resources involved in treaty-making may well be achieved if the question of the necessity of a particular treaty would receive more thorough examination, thereby reducing the over-all burden of the treaty-making process for Member States and inter-governmental organizations alike.

Qatar (A/37/444, p. 15)

There is no doubt that the burden of the multilateral treaty-making process is becoming too great for both Governments and international organizations. However, it is not possible to envisage a resolution of a general and

abstract character that would be conducive to reducing the number of treaties being formulated. If a decision is taken to formulate a treaty dealing with a specific topic, it is because the majority of States parties to the treaty believe in the need for such a treaty. It is to be hoped that States will exercise some moderation and, when making decisions, will take into consideration their own ability and the ability of international organizations to deal with the problems posed.

Republic of Korea (A/37/444, p. 19)

It should be admitted that only sovereign States as principal treaty-making actors can best decide on what treaties to conclude and on how to set priorities. However, the paramount importance which the international community places on the treaty-making process should be fully appreciated. The point here is how well to co-ordinate the costs with benefits in regard of treaties being formulated. It is clear that neither mere reduction of the number of treaties nor ideas to increase the resources available could solve the problem satisfactorily.

Spain (A/36/553/Add.1, p. 14)

1. The burden is too great for the legal and financial personnel and budgets, both of States and of international organizations.

2. The international community should try to reduce the number of treaties being formulated. However, it does not seem necessary, in principle, for there to be any over-all increase in the resources available internationally. Any increase in such resources at the national level should be left to the discretion of each State.

Ukrainian Soviet Socialist Republic (A/36/553, p. 38)

1. In the opinion of the Ukrainian SSR, there is in present circumstances no urgent need to consider the question of the sharing of the over-all burden of the multilateral treaty-making process.

2. The United Nations already has the necessary machinery, methods and procedures for the regular exchange of views between the overwhelming majority of States concerning the urgent necessity of concluding a particular treaty and for the establishment of priorities in the selection of questions to be discussed in United Nations organs and at international conferences. The obligations of States derived from the Charter of the United Nations, particularly as regards the maintenance of international peace and security, are naturally particularly important in this connection.

3. However, today's dynamic and intensified international relations objectively produce an increase in the number of general multilateral treaties, which in turn requires a more effective treaty-making process. Attention to the differences which exist in practice between treaty-making methods and procedures can and must improve the effectiveness of this process, provided that a correct and rational selection is made in each specific case of those methods and procedures which best reflect the character and aims of the treaty and take into account the specific subject-matter of the agreement concerned. For this

reason, the complete unification of the methods and procedures used and introduction of universal model provisions (i.e. the establishment of a single process, applicable in all cases, for the formulation of international agreements and the reduction of the number of treaties being formulated) would be undesirable and impracticable.

Union of Soviet Socialist Republics (A/36/553/Add.1, p. 2)

1. In present circumstances, the sharing of the burden of the multilateral treaty-making process is not an urgent question. The methods and procedures which already exist in the United Nations on the whole ensure that States can reach agreement on the establishment of priorities in the selection of questions to be discussed in United Nations organs and at international conferences. In this connection, States must do everything to observe their obligations deriving from the United Nations Charter, particularly as regards the maintenance of peace and international security.

2. The expansion of international legal regulating activities, in both qualitative and quantitative terms, requires a more effective multilateral treaty-making process. That can and must be achieved not through the introduction of universal models or a reduction in the number of treaties being formulated but by taking account of the differences in the existing treaty-making methods and procedures which are applied in each specific case and selecting them correctly and rationally in the specific circumstances which arise when the questions at issue are discussed.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 41)

1. The conclusion of conventions and agreements between member States is one of the principal working methods envisaged by the Statute of the Council of Europe (article 15 (*a*)), and in practice such instruments have often formed the basis for joint action to bring about greater unity among the States members of the organization. Having regard to its importance and the amount of resources needed to conclude a convention (usually two sessions a year of expert groups over an average period of two to four years), the treaty-making process in that Council of Europe cannot be said to place too heavy a burden on the organization's budget.

2. An increase in the resources available, even if only a moderate one, would obviously be the ideal solution. Since that, unfortunately, is impossible at a time of budgetary austerity both nationally and internationally, the setting of priorities is essential so that international organizations can postpone, temporarily or indefinitely, work which is of less obvious importance to States or to the international community. In the Council of Europe, priorities are set by the Committee of Ministers when it adopts its annual programmes.

International Labour Organisation (A/36/553, p. 48)

1. It would seem to be difficult to reduce the number of treaties being formulated by settling over-all priorities. Without a prior effort at co-ordination at the national level—which would increase rather than decrease the burden of the treaty-making process—no international body would have the expertise necessary to weigh the relative merits of treaties in different specialized fields. A further difficulty would be that of deciding between international and regional instruments, in respect of the priority of which the views of different groups of States may differ. And, since priorities are liable to change, the process of setting priorities would itself become a burden.

2. On the other hand, much can probably be done within the various fora which prepare multilateral treaties to weigh, at the outset of the process of preparation, the need for and the suitability of a treaty to deal with particular issues. In this connection, it should be pointed out that the ILO is one of the organizations in which "pre-initiation studies" in the meaning of paragraphs 24 and 25 of document A/35/312 are statutorily required (article 10 Standing Orders of the Governing Body). Moreover, by means of a recent in-depth review, which it is intended to update at intervals, the Governing Body determined those areas of ILO competence for which up-to-date standards exist, those in which there are standards in need of revision, and those in which further standards are desirable. There was discussion, in that connection, of the extent to which there might be forward planning of standard-setting activities, and of the criteria which might be established for the development of new standards,[2] para. 12 and following. Some forward planning is now achieved through the Medium Term Plan of the Organisation.

International Telecommunication Union (A/37/444, p. 28)

1. (*a*) to (*c*) These issues can only be determined and resolved by the States themselves in respect of their domestic resources and, as Members of the inter-governmental organizations concerned, with regard to the latter's personnel and budgets.

2. (*a*) to (*b*) With regard to the specific ITU treaty-making process, it has to be noted that it is primarily the Plenipotentiary Conference which sets the priorities in that respect or, in the period between two Plenipotentiary Conferences, the Administrative Council (holding annual sessions) which constantly reviews the calendar of conferences related to the treaty-making process, by taking account of the developments in telecommunication requiring elaboration or updating of pertinent legal instruments and adjusting the resources therefore accordingly.

Organisation for Economic Co-operation and Development (A/36/553, p. 51)

1. The burden of the treaty-making process within the OECD has not proved to be too great for the personnel and budget of the Organisation.

2. It is difficult to reply to this question in an abstract manner as it depends entirely on the requirements of the States and organizations concerned.

World Health Organization (A/36/553, p. 56)

1. Our experience tends to show that the burden of the treaty-making process is too great for States.

2. It would therefore seem nccessary to reduce the number of treaties being formulated (i.e. the formulation of certain treaties should be postponed temporarily or indefinitely) by setting priorities.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] See ILO document GB.199/9/22 (revised), para. 12 *et seq.*

III. OVERALL CO-ORDINATION OF MULTILATERAL TREATY-MAKING

1. *Should the General Assembly assume a co-ordinating role in respect of multilateral treaty-making activities of:*
   (a) *All United Nations organs?*
   (b) *All organizations of the United Nations system?*
   (c) *All inter-governmental organizations?*
2. *Should such a co-ordinating role by the General Assembly be:*
   (a) *Restricted to the gathering and dissemination of data about all treaty-making activities within the sphere specified under 1 above?*
   (b) *Extended to influencing, through decisions in respect of United Nations organs and through recommendations addressed to other inter-governmental organizations, the treaty-making process, such as by proposing subjects to be considered and identifying the organs or organizations most suitable to do so?*
3. *If such functions are to be exercised by the General Assembly, should this most suitably be done through the Sixth Committee?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. While several representatives supported the idea that the General Assembly should assunie an over-all co-ordinating role in treaty-making, most representatives who spoke on this issue expressed the view that it would be difficult for the General Assembly to assunie such a role. Different reasons were given: (i) such a role would slow down the process and increase the work of the General Assembly, whose agenda was already congested; (ii) the high degree of sensitivity of the other organs operating in a particular field; (iii) over-all co-ordination was dependent on the nature of each particular treaty and the circumstances of each case, which rendered a general role iinpractica-ble; (iv) the General Assemnbly had no competence in this regard.

2. Some representatives thought that co-ordination in treaty-making could be enhanced through the issuance by the Secretariat of an information

bulletin on a regular basis describing legal activities being carried out in the United Nations system as well as in other international organizations.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 6)

1. The General Assembly should, without prejudice to the gathering and dissemination of data, assume a co-ordinating role in respect of multilateral treaty-making activities, directly in the case of all organizations of the United Nations system and indirectly in the case of inter-governmental organizations.

2. With respect to the former, it should propose subjects to be considered or deal with subjects referred to it. In so doing, it should take into account the results of the search for existing instruments on the subject and the current work of other United Nations organs or organizations within the system and of all inter-governmental organizations. It should identify the organs and organizations of the United Nations system most suitable to conduct such a study.

3. With respect to inter-governmental organizations, it should co-ordinate the activities with those of the United Nations system, maintaining close co-operation through: the gathering and dissemination of data on all treaty-making activities, and the free exchange of such data; recommendations to inter-governmental organizations on the treaty-making process, including, for instance, proposals concerning subjects within their competence which they might consider, subjects which for stated reasons it would be advisable to leave to other organizations and subjects on which complementary work might exist concerning the majority necessary in order to give votes greater authority concerning voting by consensus on certain subjects; and concerning means of making treaties more flexible (reservations to be allowed, system of deposits, etc.). This could constitute a first step towards systematic reorganization of the international legislative process.

4. This task could be entrusted to the Sixth Committee, duly assisted by the United Nations Office of Legal Affairs or any other department considered appropriate in the interests of continuity, particularly administrative continuity. For example, with respect to studies to be carried out, these would be the gathering and publication of information, the exchange of information with inter-governmental organizations and the receipt and processing of information; memoranda to the legal offices of other organizations; and research and studies on subjects proposed or to be proposed.

5. Continuing research on the various procedures which the organs and organizations of the system could use, and of those used by inter-governmental organizations, should be carried on with the aim of identifying short-comings or possible improvements.

Australia (A/37/44, p. 6)

Australia has reservations about giving the General Assembly a co-ordinating role in respect of multilateral treaty-making activities of all United Nations organs, all organizations of the United Nations system or all inter-

governmental organizations. There is merit in leaving the burden of treaty-making to organs of the United Nations and inter-governmental organizations, particularly when the treaty in question is highly technical and when there has been a long tradition of entrusting the preparation of such a treaty to a technically competent organization. To give the General Assembly a co-ordinating role would have the effect of increasing the already heavy work-load of the General Assembly and slow down the multilateral treaty-making process. The treaty-making role of the General Assembly is best exercised in subject areas where it has traditionally had a primary role, or when specialized machinery is lacking.

Brazil (A/36/553, p. 14)

Although in theory it would seem possible for the General Assembly to play a co-ordinating role in the multilateral treaty-making activities, conceptual and practical considerations could be advanced against that course. On the one hand, it would imply an undersirable centralization, were the Assembly to attempt to concentrate in a single body, possibly the Sixth Committee, the responsibility of guiding the whole multilateral treaty-making process through the examination of such a very broad spectrum of subjects, sometimes of a very specialized nature. But, on the other hand, if the Assembly limits itself to the gathering and dissemination of information, the item would soon become just a routine exercise, like many others now in its agenda, without any meaningful content.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 2)

Co-ordination by the General Assembly of activities connected with multilateral treaty-making could make the process more fruitful. If international treaties are concluded under the auspices of other inter-governmental organizations, the United Nations Secretariat should, on the instructions of the General Assembly, collect information on the negotiations in progress and inform the Sixth Committee of them.

Cuba (A/36/553, p. 17)

1. Affirmative answers to all the questions posed in the first paragraph.

2. (*a*) This might be an alternative, although we consider (*b*) more decisive.

(*b*) Within the United Nations, the General Assembly should play a guiding role with respect to subjects to be considered, since this will avoid duplication of some studies and will vitalize the procedure. Interference with the legal status of organizations would, of course, have to be avoided.

3. This function should be exercised by the Sixth Committee, in view of its legal character.

Germany, Federal Republic of (A/36/553, p. 22)

In view of its composition and its heavy work-load, the General Assembly, being primarily concerned with political matters, is less suitable for co-ordination activities.

Indonesia (A/37/444, p. 13)

The United Nations General Assembly could take the initiative as co-ordinator in the framework of the treaty-making process. If the Assembly is given such a role the executive should be the Sixth Committee, which deals with legal matters.

Italy (A/36/553, p. 27)

1. The Italian Government has serious doubts on the usefulness of entrusting to the General Assembly a general responsibility for co-ordination in the area of multilateral treaty-making. Such a task cannot be accomplished in practice, and to impose it upon the General Assembly would have the effect of slowing down the multilateral treaty-making process. On the other hand, it is of the utmost importance to safeguard the technical specialization of both United Nations bodies and other international organizations without imposing upon them requirements that would often be meaningless.

2. Obviously, on the basis of the powers vested in it by the United Nations Charter, nothing prevents the General Assembly from exercising a stimulus or, as the case may be, a control with regard to the formulation of multilateral treaties. In these capacities it may address appropriate recommendations to various negotiating bodies connected with the United Nations or to Member States of the Organization.

3. It is also clear that there is no lack of multilateral treaties promoted by the Assembly and negotiated in its context. On the occasion of such negotiation it would be useful for the Sixth Committee to offer at least its advice before the close of the proceedings.

Mali (A/36/553, p. 30)

1. The General Assembly should have the responsibility for co-ordinating activities undertaken within this sphere by all organizations of the United Nations system.

2. The co-ordinating role of the General Assembly should be restricted to the gathering and dissemination of data about all activities undertaken within this sphere by the organizations of the United Nations system.

3. The Sixth Committee is the most suitable body since the International Law Commission appears to be somewhat overburdened.

Mexico (A/36/553, p. 33)

1. The universal character of the United Nations places the General Assembly in an ideal position to co-ordinate multilateral treaty-making, even at the regional level, and there is no doubt that its powers should include the possibility of making recommendations on subjects suitable for codification.

2. Obviously, the United Nations must carry out such co-ordination through recommendations which do not affect the autonomy of other international organizations. If the General Assembly should decide to exercise that function, there is no doubt that the Sixth Committee, as the Committee dealing with legal questions, would be called on to exercise that function in the first instance.

Netherlands (A/36/553/Add.1, p. 5)

1. The General Assembly should assume a co-ordinating role in respect of multilateral treaty-making activities of all United Nations organs and all organizations of the United Nations system. Only thus would it be able to live up to its obligation under Article 13 of the Charter, i.e. "make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification".

2. In respect of United Nations organs, the co-ordinating role should extend to influencing the treaty-making process by proposing subjects to be considered and to identifying the organs most suitable to do so.

3. In respect of the organizations of the United Nations system the co-ordinating role should be restricted to the gathering and dissemination of data about all treaty-making activities within those organizations.

4. This co-ordinating function is indeed most suitable to be exercised by the Sixth Committee.

Qatar (A/37/444, p. 15)

1. The General Assembly should assume a co-ordinating role in respect of multilateral treaty-making activities of all United Nations organs and all organizations of the United Nations system. Only in this manner can the General Assembly fulfil its obligations in accordance with Article 13 of the Charter, i.e. "make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification".

2. With regard to United Nations organs, the co-ordinating role should be extended to influencing the treaty-making process by proposing subjects to be considered and identifying the organs of the Organization most suitable to do so.

3. With regard to the United Nations system, the co-ordinating role should be restricted to the gathering and dissemination of data about all treaty-making activities which take place within these Organizations. In fact, the co-ordinating functions can best be exercised by the Sixth Committee.

Republic of Korea (A/37/444, p. 19)

The universal character of the United Nations could naturally place the General Assembly in a position to assume a co-ordinating role in regard to multilateral treaty-making activities at all levels in so far as the General Assembly does not compromise the autonomy of inter-governmental organizations. In this connection, there is no doubt that an increase in the role of the General Assembly in co-ordinating multilateral treaties would help enhance the effectiveness of treaty-making. However, such an additional role might overburden the General Assembly whose agenda was already congested, whereby subjects, in particular, of a very specialized nature might often be neglected. And, there may arise a danger that, in case the Assembly strictly confines itself to gathering and disseminating data on the treaties being formulated, its role of co-ordinating as such would become insignificant.

Spain (A/36/553/Add.1, p. 14)

1. The General Assembly should assume a co-ordinating role in respect of multilateral treaty-making activities of United Nations organs and other organizations in its systems. However, the Assembly's co-ordinating role should not be extended to other international organizations, since it does not have the necessary jurisidiction. The most it could do in connection with the latter is to submit recommendations to them.

2. The role of the General Assembly should not be restricted to the gathering and dissemination of data. It could be extended along the lines of the suggestion contained in subparagraph (*b*), but only in connection with organs and organizations in the United Nations system.

3. Yes, in principle.

Switzerland (A/37/444, p. 22)

La multiplicité des activités se déroulant dans le cadre des Nations Unies justifie une coordination des initiatives et des mises en œuvre en ce qui concerne en tout cas les organes de l'ONU et, dans une mesure appropriée, les organismes du système des Nations Unies. En assumant ce rôle, l'Assemblée générale devrait, par le biais de la Sixième Commission, se limiter à la collecte et à la diffusion des données relatives aux activités en question.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

An increase in the role of the United Nations General Assembly in the co-ordination of multilateral treaties concluded within the United Nations would help to improve the effectiveness of multilateral treaty-making. In the case of treaties concluded within other inter-governmental organizations, it would seem advisable for the General Assembly to instruct the Secretariat to gather data on the treaties being concluded and disseminate the information in the form of documents of the Sixth Committee.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 42)

1. (*a*) and (*b*) Such co-ordination within the United Nations system could have some advantages, in that it would allow for a more systematic handling of certain drafts. However, it would also have disadvantages, in that it would render the multilateral treaty-making process in the United Nations or the organizations belonging to the system even more cumbersome. It is for the competent organs of the United Nations to assess the arguments for and against such co-ordination.

(*c*) Co-ordination by the General Assembly of the activities undertaken by other international organizations would not be desirable. As explained above, it would inevitably delay the treaty-making process in those organizations and, in addition, would fail to take account of the specific nature of the various international organizations, particularly in the case of specialized or

regional organizations such as the Council of Europe, which have precise functions and operate in specific geographical and ideological contexts that the United Nations can hardly appreciate.

2. (*a*) If such action by the General Assembly were restricted to the gathering and dissemination of data about the treaty-making activities of the various international organizations (which could hardly be described as a co-ordinating activity), it would certainly meet a need and would therefore be useful, but it is to be feared that it would prove very costly. In its own activities, the Council of Europe could not but benefit from any study conducted or data collected by the United Nations.

(*b*) At the present stage of development of international law, such a proposal would seem to be out of the question for organizations not belonging to the United Nations system.

3. The Sixth Committee would logically seem best equipped to perform a co-ordinating role, but in view of the Committee's heavy agenda and, above all, its present major function as a fornm for discussion on the work of the International Law Commission, the solution envisaged does not seem realistic.

International Labour Organisation (A/36/553, p. 49)

1. The gathering and dissemination of data about treaty-making activities is of growing importance, with a view to avoiding duplication or conflict. It was the International Labour Office which, for that reason, initiated the process which led to the ACC decisions referred to in paragraph 50 of document A/35/312. Moreover, it would seem to be appropriate for organizations to consult on, and as necessary to refer to the one most competent in the field, proposals for treaties on matters falling within the competence of more than one of them. As regards the ILO, consultation is expressly provided for in the Standing Orders of the Governing Body (article 16) and the Conference (article 17 *bis*). There has been, in practice, co-operation with various organizations in respect of treaties adopted by or under the auspices of one of them.

2. On the other hand, it would seem to be difficult to envisage a centralised arrangement under which the General Assembly would seek to determine the subjects to be considered, and the organizations most suitable to do so. Such an arrangement would be liable to conflict with the specialized competences of other organizations. This problem would be of particular importance in relation to an organization, such as the ILO, in which the decision-making organs are not exclusively governmental.

International Telecommunication Union (A/37/444, p. 29)

1. (*a*) No comments.

(*b*) No, as it appears practically impossible and legally without sufficient justification to entrust the General Assembly of the United Nations to assume co-ordination in respect of multilateral treaty-making of all the organizations of the UN system, each of them having its own policy-making bodies and one supreme organ in charge of co-ordinating those activities for its own organization.

(*c*) No, for reasons similar to those given under 1 (*b*) above.

2. (*a*) In spite of the reply given under 1 (*b*) above, a restricted co-ordination by the United Nations General Assembly limited to the gathering and dissemination of data about all treaty-making activities might be helpful to all organizations concerned.

(*b*) The United Nations General Assembly, within the framework of the competence entrusted to it by the United Nations Charter, might make recommendations to other inter-governmental organizations with regard to the treaty-making process, but should usefully do so only after having obtained the prior agreement thereto by the organization concerned.

3. No comments.

Organisation for Economic Co-operation and Development (A/36/553, p. 51)

It does not appear appropriate to the OECD Secretariat that the General Assembly assumes a co-ordinating role in respect of multilateral treaty-making activities of OECD. The rest of the questions are not applicable.

World Health Organization (A/36/553, p. 57)

1. The General Assembly should assume a co-ordinating role in respect of multilateral treaty-making activities of all organizations of the United Nations system.

2. Yes.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

IV. GENERAL IMPROVEMENTS OF THE TREATY-MAKING PROCESS IN THE UNITED NATIONS

1. *Before embarking on the formulation of a particular treaty should more extensive efforts be made, in general, to:*
   (a) *Collect legal and factual data relevant to the proposed treaty?*
   (b) *Ascertain the potential interest of States in the proposed treaty?*
   (c) *Consider the utility of some less binding instrument (e.g., a declaration)?*
2. *Should the preliminary formulation of the text of a treaty generally or in respect of certain categories be entrusted to:*
   (a) *A representative organ?*
   (b) *An expert organ?*
   (c) *The secretariat?*
3. *Should an effort be made to reduce the number of treaty-making organs and procedures in the United Nations by concentrating them?*

4. *Should an effort be made to achieve in some or all treaty-making organs and procedures a more structured approach, aiming at completing some or all steps of the process within specified periods of time? To what fields might such an approach most profitably be applied?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. Several representatives stressed the need to collect factual, legal and other relevant information before embarking on the formulation of a particular treaty. This requirement was regarded as particularly important for determining the feasibility and acceptability of a treaty or for studying possible consequences on existing treaties and laws. It was further noted that any preparatory studies should not only be thorough but also clear in their objectives as to the purpose to be achieved.

2. Different views were expressed on whether the preliminary formulation of the text of a treaty as a whole or part of a text (e.g., the final clauses) should be entrusted to a representative body or to an expert group. Those representatives who emphasized the role of States and were concerned with the political sensitivity of treaties, preferred a body of government representatives; others felt that an expert group or the Secretariat might be more suited at the initial stage for preparing drafts, which should then be referred to a representative body. Still others felt that the choice depended on the subject-matter of a treaty and the circumstances involved; experts were best for preparing treaties dealing with legal and technical matters, whereas governmental representatives were necessary for formulating treaties having economic or political consequences.

3. Many representatives found it difficult to support the idea of taking a more structured approach to treaty-making in the United Nations either by having fixed, uniform rules of procedure or by specifying periods of time within which negotiation must be completed. Such structured approaches as the ones of the International Labour Organisation or the Hague Conference on Private International Law were regarded as mainly suitable for the negotiation of treaties dealing with technical issues. The nature of the work of the United Nations and the variety of subjects which may be involved rendered a structured approach impracticable. The need for flexibility both in procedure and approach was therefore stressed.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 7)

1. Before embarking on the formulation of a particular treaty, it would be advisable to ascertain the potential interest of States in the subject-matter. To that end, States should be supplied with background information together with the proposal and its source and any other useful data, so that Governments can form an advised opinion. The subject should have been thoroughly debated prior to these consultations, in order to gain a clear idea of the principles which it is intended to include, thus ensuring adequate political preparations of the treaty from the outset and disclosing whether consideration of it might be premature. The way towards the supreme act of ratification, in which

the whole process culminates, will thus be smoothed from the outset. Thorough debate followed by consultations will help to determine the need to undertake the work and its chances of success. This preliminary stage should also include studies aimed at determining the type of instrument to be formulated. Once a decision has been taken, formulation of the treaty can begin.

2. In the case of a subject with no political overtones or one where these are of minor importance within the subject as a whole, experience has shown that the preliminary formulation could be entrusted to an organ of experts serving in their personal capacity or to a Secretariat body. The latter would be particularly apt in the case of codification of pre-existing law. Formulation by a representative organ would appear to be preferable in the case of treaties with an important political dimension.

3. A thorough study should be made of the possibility of reducing, in particular, the number of treaty-making organs in the United Nations by concentrating them, in order to avoid duplication of functions and the resulting financial burden. With respect to the number of procedures, the Argentine Republic has previously stated that the preparation of a manual of recommended practices for multilateral treaty-making, which could serve as a guide for future work, would be of great value and would help to improve the techniques used in formulating the instruments which govern the international affairs of States. This task would consist of rationalizing and systematizing whatever already exists, and appraising what remains to be done, in the light of the results obtained over the years, and of identifying economical and efficient methods. It would not, however, be at all possible to accept a single procedure applicable to the codification of existing law when legislating in new areas, to treaties with substantial political aspects and to those which are of an essentially technical character. The mechanical application of a procedural model to any treaty is not advisable.

Australia (A/37/444, p. 6)

1. Before embarking on the formulation of a particular treaty more extensive efforts should be made in respect of matters covered in (*a*) to (*c*) of question 1.

2. The preliminary formulation of the text of treaties should generally be placed in the hands of an expert body (government or otherwise) or of a group of experts specially convened for that purpose. However, the choice of an organ for the drafting of a preliminary text of a treaty should depend on the subject-matter of the treaty in question. When the treaty subject-matter is vague or controversial, it will sometimes be helpful if a representative organ can consider and draft guidelines.

3. In answer to question 3, there is probably scope for reducing the number of treaty-making organs in the United Nations, and in particular to rationalise procedures. One of the problems currently experienced by United Nations treaty-making organs is the unavailability of information on the methods of work and procedures best suited to deal with a particular subject-matter.

4. A more structured approach should be explored particularly for treaties dealing with a technical subject. Such an approach is most profitably

applied to areas where there is a good deal of treaty-making activity, e.g. human rights or technical subjects. It is more difficult to achieve in areas of major political importance (e.g., disarmament). Moreover, the imposition of specific time limits needs to be handled with care and flexibility, since it can lead to rushed work, or to failure of consensus.

Austria (A/35/312/Add.1, pp. 3-4)

Type of organ to be entrusted with the preparation of a draft: influence of States

1. The choice of the organ to be entrusted with the preparation of the draft text for a multilateral instrument is obviously of the utmost importance, since the quality of the preparation determines the exigencies of the adoption process.

2. It needs no explanation that an organ with a numerous membership, such as a plenary organ, is ill equipped to prepare a meaningful draft on the basis of numerous and often conflicting proposals. In this respect the Third United Nations Conference on the Law of the Sea sets a warning example.

3. If it thus seems advisable to entrust the task to committees with limited membership, there are basically two different models or options: a committee of qualified representatives of States (e.g., Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space) or a committee of experts, elected in their individual capacity (e.g., International Law Commission).

4. A committee of experts, because of the independence of its members, seems to be in a better position to reach a community-oriented compromise than a committee of representatives of States who are obliged primarily to defend the interests of their countries and rather tend to reach a compromise mostly on the level of the lowest common denominator. It cannot be overlooked, however, that draft texts have to stand the test of acceptance by States in order to become part of the body of international law. And in this respect experience shows that whenever the International Law Commission, for instance, took a bold step towards the progressive development of international law and, for this purpose, had to make a policy decision by selecting one of several possible solutions as basis for its text, the draft sometimes met with stiff opposition, at least by a good number of States, either at the conference or the ratification stage. The Convention on the Continental Shelf of 1958 or Part V of the Vienna Convention on the Law of Treaties can be cited as examples.

5. Thus it becomes crucial to determine beforehand the appropriate influence which States should exercise on the preparation of a draft text. Generally speaking, this influence should be paramount in the formulation of new draft rules on matters that have not yet been regulated in international law, since the future regulation needs the concurrent—but as yet unexpressed—will of States to come into being. The matter is somewhat different with regard to the codification of existing norms of (customary) international law, since the primary task in preparing a draft text of that nature is to identify the existing norms. It is thus a quasi-scholarly exercise, more in the province of a committee of experts. The influence of States in this respect seems adequately safeguarded by their control over the committee of experts and by the final adoption of the draft at a diplomatic conference.

6. The success of a committee composed of representatives of States in preparing a draft multilateral instrument depends, on the other hand, largely on the careful selection of its membership, which should include all interests existing in the matter. Moreover, State-appointed members of a committee and representing specific interests ought to be willing and capable to convince other States with the same or similar interests but not represented on the committee that the solution which finally emerges in the best that could be achieved under present circumstances and that the solution would in any event adequately safeguard the interest in question. The problems facing the Third United Nations Conference on the Law of the Sea result at least partially from the facts that interests are too manifold to be effectively represented by a comparatively small number of States and thus to be settled in a committee of workable size.

7. If, nevertheless, a committee of experts is to be entrusted with the drafting of rules for a new field of international law, care should be taken to avoid the fate of the International Law Commission's "Model Rules on Arbitral Procedure". In such a case the committee should perhaps be instructed to prepare alteruative texts on points where fundamental differences between States are evident. This would permit the choice—on political grounds—of one of those alternatives in the course of subsequent negotiations between States, while still assuring that the chosen alternative would fit the rest of the text.

Brazil (A/36/553, p. 14)

There is no doubt that a close look should be taken at the real need for a treaty and at the feasibility of the treaty-making exercise before starting on the preparation of a treaty. However it would not seem to be practical to set down formal specific steps that should necessarily be taken before the actual drafting is begun. One does not see advantages in prescribing general rules as to which bodies would be entrusted with the preparation of certain categories of treaties or in trying to limit the number of bodies engaged in treaty-making processes. It would also seem unrealistic to set down rules trying to determine the duration of the process. Efforts should of course be made, in each case, to proceed with the work as quickly as possible, but account must be taken of the complexities of each exercise and of the resources that States are able to devote to it.

Bulgaria (A/35/312/Add.1, p. 11)

1. The Government of Bulgaria sees the fundamental direction of the process of enhancement of the efficiency of multilateral treaties in the strengthening of the Sixth Committee's role. The Sixth Committee ought to become an important factor in the planning and preparation of international multilateral treaties. Whenever necessary, it should hold joint meetings with other committees and render legal assistance on projects prepared by them.

2. To enhance the Sixth Committee's role closer interaction is required with the International Law Commission and the United Nations Commission on International Trade Law. This would contribute to more adequate reflection of the views expressed by Governments on projects prepared by these bodies.

3. As the Bulgarian Government sees it, the possibility of approval by the Sixth Committee of the final drafts of multilateral treaties deserves careful consideration. In that case, international diplomatic conferences would be convened on more limited occasions, upon recommendation of the General Assembly, such as conclusion of multilateral treaties of particular importance.

4. The Bulgarian Government believes that the difficulties linked with the unavoidable increase in the volume of work of the Sixth Committee, owing to an enhancement of its role in the process of codification and progressive development of international law, could be surmounted by raising the level of the preparatory work on documents to be submitted to it for consideration and by a clear-cut rationalization of the methods of its work.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 2)

1. In the process of preparing an international treaty under United Nations auspices, the Secretariat has the right, within the bounds of its authority, to collect relevant information and to ascertain the interest of States in drawing up the proposed treaty. It may also prepare useful auxiliary material.

2. With regard to the formulation of the texts of treaties, given the great variety of existing drafting methods it is inadvisable at present to decide which body should be entrusted with drawing up the actual draft treaty.

Canada (A/35/312/Add.1, pp. 15-16)

1. On the assumption that a particular subject is in fact appropriate for expression in a treaty and could not be more suitably formulated in, for example, a General Assembly resolution, the next question is whether the timing is opportune. Experience has shown that on occasion, even after the negotiating process has been commenced, there is not a sufficient degree of consensus to achieve agreement on the basic elements of the proposed treaty. This lack of consensus sometimes only becomes clear after the preparatory work has begun, but it may be apparent when the general discussion of a treaty is first raised. The results can be either failure to agree on a text or an instrument which attracts insufficient ratifications.

2. Of great importance is the preparatory work which establishes the basis for discussion, once representatives of States assemble to begin the negotiation process. The practice in United Nations organs and in the specialized agencies in this matter again varies. The most formal preparatory process is that engaged in by the International Law Commission. The detailed and scholarly examination of the matters referred to it and the presentation of successive series of draft articles by the Commission is well known, and the Canadian authorities look forward to having additional light thrown on the Commission's techniques and procedures when it too reports to the Secretary-General in accordance with resolution 32/48.

3. However, it is clear that the approach of the Committee is only one way of undertaking the preparatory work for the conclusion of multilateral treaties, and the procedure may be more appropriate to treaties of a general law-making nature where the task is one of codification or of progressive development in an area that is not beset by political differences. In presenting

the report of the ILC on its twenty-fifth Session, the Chairman suggested that the Commission was capable of going outside the traditional areas of international law, and he invited the General Assembly to submit topics of a nature different from those usually placed before the Commission.[2] A question that must be considered in any review of the multilateral treaty-making process is whether there is any consensus as to the kinds of questions that are appropriate for reference to the International Law Commission and the kinds of questions that should be referred elsewhere.

4. In addition to the ILC, draft conventions have been prepared in general conferences of States, by technical groups of experts, by organs of the United Nations, and by non-governmental organizations such as the International Committee of the Red Cross. In some cases it may be necessary to resolve certain issues at the outset in inter-State negotiations; in other instances it may be desired to avoid inter-State disagreements in the preparatory stages; in others a particular forum may be utilized simply because it is expeditious. The availability of special expertise may also be a reason for referring the issue to a particular body. An enquiry might, therefore, be made to determine why particular issues have been referred to certain bodies, and with what results.

5. In addition to the question of which body should undertake the preparation of a draft multilateral treaty, some attention might be directed to the preparatory process itself. The International Law Commission proceeds by a lengthly process that involves consideration of various drafts which at some stage are submitted to Governments for comment. While the input from Governments is essential, when the process extends over a period of years, it is often difficult for Governments to offer detailed criticism of articles that appear year by year in a piecemeal fashion. In order to comment meaningfully, a Government has to be in a position to see the character of thrust of the project as a whole. The Canadian authorities look forward with interest to the report to be submitted by the ILC for its comments on this aspect.

6. In some instances the preparatory process is not an identifiable process distinct from the actual negotiation of the treaty. The issue may be put before a conference or an organ of an international organization which will negotiate, prepare a draft, and adopt a final version of the treaty and recommend it be opened for signature. This occurred with the Convention on the Prevention and Punishment of Crimes against Internationally protected Persons, including Diplomatic Agents, in 1973. The Third United Nations Conference on the Law of the Sea provides a similar example. Inquiry ought to be made into the advantages and disadvantages of having preliminary preparatory work done prior to the convening of a formal conference.[3]

7. At the initial stages before the negotiating process has commenced, it is important, with regard to the subject-matter of the proposal treaty, to determine (1) whether there is any real need for a convention; (2) whether a consensus is possible; and (3) whether the convening of a conference to adopt a convention is practical. Adequate preparatory considerations might dispose of the technical and relatively non-contentious matters and identify the substantive areas of difference for subsequent negotiations. The experience of the multilateral trade negotiations shows that success in reaching agreement on the substance of a treaty often depends upon preparatory work which has avoided political controversy and has cleared the way for meaningful negotiations.

8. However, it is clear that while the careful and frequently lengthy preparatory process engaged in by the International Law Commission is suitable for certain kinds of treaties, it could not be taken as the model for all forms of multilateral treaty-making. Thus, it is essential that close attention be paid to the different types of preparatory work that might be undertaken in the treaty-making activities of international organizations. The Canadian authorities consider that a review of the multilateral treaty-process which focused principally, or even solely, on this aspect would be most profitable.

Cuba (A/36/553, p. 17)

1. (*a*) Yes.

(*b*) Yes.

(*c*) According to the importance of the subject, it must be decided whether the document to be formulated should be a treaty or some other instrument. If the subject is such that regulating it requires adoption by a large number of States, a declaration would not suffice.

If the proposed procedure of consulting States as to their interest in a subject were property carried out, it would be possible to form a presumption of their willingness to accept obligations under a treaty of that kind. Apart from that, we consider declarations to be advantageous in cases where it is not possible to reach agreement on a treaty or where the subject does not require a treaty.

2. (*a*) No.

(*b*) Yes, depending on the subject.

(*c*) Yes, preferably.

3. The drafting of treaties in the United Nations should preferably be entrusted to the Sixth Committee in co-ordination with the International Law Commission or, where appropriate, with the United Nations Commission on International Trade Law.

4. Technical improvements in treaty-making procedures should certainly be attempted; this would result in an improvement in quality and a reduction in the use of various resources. However, we do not think that it would be advantageous to set specific time-limits for each step of the process.

Germany, Federal Republic of (A/36/553, p. 22)

1. Thorough preparation of treaty negotiations and conferences in the sense of (*a*) to (*c*) is always desirable.

2. The preliminary formulation of the text of treaties should generally be placed in the hands of experts, as in the past.

3. It seems hardly possible to achieve more than a negligible reduction of the treaty-making organs and procedures in the United Nations.

Indonesia (A/37/444, p. 13)

1. In order to improve the multilateral treaty-making process the following steps should be taken:

(*a*) Collecting the necessary legal data, including factual data.

(*b*) Securing clear views from member States regarding their observations or comments relating to the treaty which is going to be considered.

(*c*) Making a possible alternative instrument which has a weaker binding instrument than the proposed instrument.

2. The first formulation could be done by an expert group assisted by the Secretariat. Such an approach will expedite the making of a first draft.

3. For uniformity of the treaty-making process, the organs should be limited, and the procedure should concentrate on certain organs.

Italy (A/36/553, p. 28)

1. As for group D, the questions under point 1 deserve a positive response since they are of obvious worth. With particular regard to subpoint (*c*), the usefulness of proposing alternative solutions such as Agreements or Recommendations is often considerable as a means to surmount serious political obstacles to the negotiation. The possibility might also be considered of drafting parallel instruments, one binding and one not, following the example of the ILO.

2. On point 2, the choice of the organ most appropriate for the drafting of the preliminary text of a treaty is often a function of the subject-matter of the treaty itself and of the likelihood of resolving in advance the main political difficulties. Thus, no one response can be valid for all cases.

3. The need to rationalize administrative procedures and to discourage the proliferation of subsidiary bodies, implied in point 3, certainly deserves support; while the vague manner in which the question contained in point 4 is expressed does not allow for a precise answer.

Mali (A/36/553, p. 30)

1. Before embarking on the formulation of a particular treaty, efforts should be made to collect legal and factual data relevant to the proposed treaty and to ascertain the potential interest of States.

2. The preliminary formulation of the text should be entrusted to an expert group.

3. A reduction of the number of treaty-making organs and procedures in the United Nations would be desirable.

Mexico (A/36/553, p. 34)

1. Undoubtedly, the more thoroughly Governments, by themselves or with the assistance of the Secretariat of the United Nations, study a subject before embarking on the formulation of a treaty, the more likelihood there will be that the treaty meets the needs of the international community.

2. Furthermore, practice has shown the usefulness in some cases of negotiating a Declaration for approval by the Assembly before undertaking the formulation of a Convention. Whether to proceed with the formulation of a treaty will depend, *inter alia*, on whether there is a need to broaden the provisions and to establish monitoring machinery.

3. With regard to the method of preparing a preliminary draft, in Mexico's opinion no uniform rule can be established and the flexibility now practised in the United Nations should be maintained, although it seems not only desirable but necessary, regardless of the method, that the convening of a plenipotentiary conference should in no case be authorized unless the preparation of a preliminary text has first been entrusted to a preparatory committee or a commission.

4. Any attempt to set time-limits for multilateral treaty-making organs is unrealistic. While in some cases it will be possible to predict more or less accurately how much time will be needed for the preparation of a treaty, in other cases any such prediction is impossible.

Netherlands (A/35/312/Add.1, pp. 22-24)

General

1. It is not uncommon at the United Nations for a decision to be taken to draw up a treaty at the proposal of one or more Member States while the broad outlines to be laid down in it are insufficiently clearly understood. At a later stage, this lack of political preparation often proves an obstacle to drawing up the text, or, where a treaty is established, only a small number of States may ratify it. Thus efforts should be made to ensure that a thorough discussion should be held to consider the points of departure prior to taking the decision to make a treaty. If such a discussion were to indicate that there was too little common ground on which to draw up a treaty, the matter would have to be dropped, at least for the time being. It is not improbable that such a discussion will at the same time bring to light a possibility of consensus on certain principles in a less binding form than a treaty, on the basis of which State-practice, doctrine and administration of justice can continue to develop. In fact, this initial discussion should be continued while the treaty itself is being drawn up, and could determine whether the common ground assumed at the outset was still present. If that were no longer the case, then work on the draft would have to be temporarily halted, or a less formal form of agreement, such as a recommendation, would have to be sought. This type of discussion could also clarify which of the procedures sketched out below could best be followed in the circumstances.

2. There is a variety of ways of drafting a treaty. Selection will be determined by a number of factors, which are primarily related to the nature of the subject to be regulated. These factors are, *inter alia*, the level of expertise required; the range of interest concerned; the procedural or substantive aspects; the question whether the treaty is to break new ground or to confirm an existing situation; and the number of parties involved (the more States wish to be working on the draft, the more difficult the formulation of a text becomes).

3. Once during the preparatory stage the decision to establish a treaty has been taken, proposed texts—with alternatives if necessary—should preferably be formulated as soon as possible, so that comments may be concentrated on the wording and selection of the best alternatives.

4. The making of the first draft text, depending on the relative importance of the factors mentioned above, may be carried out either by a committee of government representatives or by one or more special rapporteurs

(sometimes a draft is being prepared by the secretariat of an organization, by one Government or even by a non-governmental organization). The obvious example for the method of drafting by special rapporteurs is the procedure followed by the ILC, in which the text of the first reading is formulated by the ILC to be presented to Governments. The rapporteurs can make themselves aware of the opinions and wishes of Governments, by means of correspondence or by visits to the various capitals. In other cases it may be necessary to have viewpoints put forward prior to the preliminary drafting, so that the first text can be based on the views expressed.

5. After the first text has been sent to Governments for their comments, a second reading of the text is drawn up either by a committee of experts (cf. ILC procedure), or by a committee of government representatives (*ad hoc* or standing), in which all interests are represented: this again depends on the nature of the subject in hand. This second reading, or if necessary a third reading, which may or may not be accompanied by comments from Governments, is laid before a diplomatic conference to establish the text.

6. In preparation for the ultimate decision-making in a diplomatic conference, the bodies charged with making a draft text should also compile an explanatory report which would contain an analytical survey (and not merely a "catalogue") of the comments received from Governments. Such an approach could be encouraged if the General Assembly were to urge the Secretariat to consider this as one of its responsibilities. The report should also include an explanation of the factors which determined the selection of a particular wording. In some cases it may be worth considering whether to include in the report a survey on the consequences of the proposed provisions on the domestic law of the potential parties to the treaty. An assessment would have to be made in individual cases as to whether such a survey is significant. (Noted: in principle, the consequences for domestic law are, in the negotiation phase, primarily of importance to the State in question.)

7. In this context attention might also be drawn to the procedure followed by the International Committee of the Red Cross in establishing the two supplementary Protocols to the 1949 Red Cross Geneva Conventions. The sequence of the procedure was as follows: consultation by experts, then by government experts, followed by a conference (under the auspices of the Swiss Government) between government representatives.

8. At every stage in the preparation of a treaty text the secretariat fulfils an important function of collecting relevant material and obtaining the reactions of Governments, as well as in drafting the text at the first reading. It is often still necessary to work with alternative texts at this stage.

9. In some cases non-governmental organizations with special knowledge and experience with the subject-matter may well be brought in when a text is being prepared, whether in the form of a report or of a draft text. We could, for example, point to the text of a draft convention against torture which was drawn up by the International Association for Penal Law, and was presented through the International Commission of Jurists, to the United Nations Commission on Human Rights, together with a Swedish draft on the same subject.

10. Mention may also be made of the practice of holding intersessional meetings, which has developed within the framework of the Third United

Nations Conference on the Law of the Sea. Although there is no real certainty as yet as to the usefulness of such consultations to that Conference, they do represent, in principle, a means for a small group to break deadlocks, in which all delegations may possibly not be equally interested.

11. Whatever procedure is followed, it is recommended that all potential parties to a treaty should have the opportunity to submit comments so that a worthwhile decision-making process would be encouraged and guaranteed with regard to studying draft texts, the options (both political and those concerned with technical aspects of treaty-making) offered by the subject under consideration, and with regard to putting the treaty in its final form. Such consultations could take the form of answers to questionnaires, comments on drafts, or meetings of government experts, and finally during diplomatic conferences. Where the need arises, interested governmental and non-governmental organizations should have the opportunity to take part in such consultations. The possibility of arriving at a consensus by means of prior consultation within the various interested groups (e.g., regional) of States could be considered.

Specific reply[4]

12. The Netherlands Government underscores the importance, before embarking on the formulation of a particular treaty more extensive, of making efforts to:

(*a*) Collect legal and factual data relevant to the proposed treaty;

(*b*) Ascertain the potential interest of States in the proposed treaty;

(*c*) Consider the utility of some less binding instrument (e.g., a declaration). With respect to the preliminary formulation of the text of a treaty, the Netherlands Government wishes to refer to its above-mentioned earlier comments.

13. Rather than by reducing the number of treaty-making organs and procedures, which seems to be a difficult undertaking, a more effective and economical use of personnel and resources could already be achieved by better co-ordination of the treaty-making exercise within the United Nations system. In this respect, the recent initiative of UNCITRAL to co-ordinate its work with other international organizations in the field of international trade law may certainly be mentioned as a relevant example.

14. The question whether an effort should be made to achieve in some or all treaty-making organs and procedures a more structured approach is difficult to answer in a way which is equally valid in all circumstances. The effort as described may well be successful where it concerns an already existing organization but may well fail in case of an *ad hoc* established treaty-making organ. The success of such an effort seems also dependent upon the nature of the subject-matter of the treaty. Matters of a political nature are probably less apt for organizational structuring than those of a specialized nature.

Qatar (A/37/444, p. 16)

1. It is always desirable to undertake the tasks mentioned in (*a*) to (*c*) before embarking on the formulation of a particular treaty.

2. The preliminary drafting of the text of treaties should be entrusted to experts, as was the case in the past.

3. Only an insignificant reduction can be made in the number of treaty-making organs and procedures in the United Nations.

Republic of Korea (A/37/444, p. 19)

The mechanical application of a procedural model to any treaty is not advisable and therefore there is no need to set up any unilateral criteria. Indeed, the choice depends on the subject-matter of a treaty and the circumstances involved. It is a truism to say that experts are best for preparing treaties dealing with legal and technical matters, whereas government representatives are entitled to the formulation of treaties having political or economic importance. It is unrealistic to attempt to set time-limits for multilateral treaty-making organs since there will always be treaties as to which prediction of how much time will be needed for their preparation is impossible.

Spain (A/36/553/Add.1, p. 14)

1. (*a*) Yes.

(*b*) Yes, but to ascertain not only the potential interest of States in the treaty, but also their views on the basic contents of such a treaty.

(*c*) This possibility should not be ruled out in principle but, since the proliferation of this type of instrument creates confusion and further weakens international law, it should be used very judiciously.

2. We cannot give a clear-cut answer to this question since it would depend on each individual case. In principle, however, it would seem preferable for the preliminary formulation of a treaty to be entrusted to expert organs (technical and legal). The latter should act in accordance with political guidelines pre-established by representative organs and, before formulating the final draft, seek and, wherever possible, take into account comments and formal proposals from States. The secretariats of the various organizations should co-operate in the preparation of preliminary drafts and subsequent drafts but should not be responsible for their preparation unless the representative organ so instructs.

3. Yes, treaty-making organs within the United Nations should be concentrated and the work of such organs should in any case be co-ordinated.

4. Yes, to all fields, especially less politicized fields.

Switzerland (A/37/444, p. 22)

Les mesures préalables à la rédaction des traités, qui sont indiquées sous D.1, à savoir la réunion des données juridiques et de fait concernant le traité envisagé (*a*), la détermination d'un intérêt véritable des Etats à la conclusion du traité (*b*) et la possibilité d'adopter des instruments moins contraignants qu'un traité (*c*), sont intéressantes et méritent attention, même s'il apparaît que, des trois mesures suggérées, la première sera sans doute la plus facile à réaliser. Quant au point de savoir si la préparation des projets de traités devrait être confiée à un organe représentatif ou à un groupe d'experts indépendants, il faut observer que l'aspect politique qu'on pourrait déceler dans les problèmes à résoudre ou le fait que le traité projeté paraît relever plus du développement que de la codification du droit international ne devrait pas

conduire automatiquement à la désignation d'un organe composé de délégués gouvernementaux. Il reste à démontrer que des experts indépendants ne seraient pas non plus parvenus à élaborer les projets d'articles dont l'Assemblée générale avait confié la rédaction au comité des fonds marins en vue de la Troisième Conférence des Nations Unies sur le droit de la mer.

Ukrainian Soviet Socialist Republic (A/36/553, p. 39)

1. With regard to the improvement of the effectiveness of multilateral treaty-making, the role of the General Assembly in the co-ordination of multilateral treaties concluded within the United Nations should be highlighted. For treaties being formulated within other intergovernmental organizations, it would be desirable to restrict this role to the gathering and dissemination of data about the progress of the relevant negotiations through the Sixth Committee.

2. In the opinion of the Ukrainian SSR, the United Nations Secretariat should, when preparing for the conclusion of a multilateral treaty within the United Nations, pursue extensive efforts to collect legal and factual data relevant to the proposed treaty and to ascertain the potential interest of States in the elaboration of the text of the treaty. Depending on its existing tasks, the Secretariat could also prepare any material of an auxiliary nature which was considered necessary. However, States must retain the right to establish the utility of the Secretariat material.

3. As regards the preliminary formulation of the text of a treaty, it would seem advisable first to determine the organ to which this work should be entrusted, since this depends on the nature of the future agreement and on the very varied approaches adopted by States towards its subject-matter. An increase in the effectiveness of the work of the International Law Commission (ILC) will play an important role in this connection. It would not be appropriate also to expand the Sixth Committee's law-making role. It is quite unnecessary to convene *ad hoc* international conferences for the completion and adoption of draft treaties; this can also be done in the Sixth Committee. In this connection, it would not seem advisable to establish periods of time for the consideration of particular questions, this would be possible only on the basis of mutual agreement among all the plenipotentiaries participating in the work of the United Nations organ or conference.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

1. It should be emphasized that, when preparations are being made for the conclusion of a multilateral treaty within the United Nations, the Secretariat still has a mandate, where possible and when its existing tasks permit, to make extensive efforts to collect relevant data and to ascertain the interest of States in preparing the text of the treaty. It could also prepare any auxiliary material which would be considered useful. For their part, States retain the right to establish the usefulness of documents submitted by the Secretariat for the purposes of concluding a treaty.

2. The preliminary formulation of the text of a treaty depends on its nature, and, in view of the variety of approaches adopted by States to different treaties, it would not be desirable to lay down rules as to which body should

be entrusted with any particular treaty. In this connection, an important role should be played in particular by the International Law commission, which should increase the effectiveness of its work. It would also be desirable to strengthen the law-making role of the Sixth Committee, where draft treaties could be completed and adopted without the convening of *ad hoc* international conferences. In this connection, it would not seem advisable to limit the time for the consideration of particular questions. Such a time limit could be set only on the basis of mutual agreement among the plenipotentiaries participating in the work of the United Nations organ or of the conference.

United States of America (A/35/312/Add.1, pp. 31-33)

1. The United Nations has followed a variety of methods in preparing drafts of treaties. The two primary bodies that have been entrusted with the task are the International Law Commission, whose mandate is broad and fundamental, and the United Nations Commission on International Trade Law, whose mandate is much narrower but important in its sphere. Use has also been made of committees of the General Assembly and the Economic and Social Council and *ad hoc* committees of States and of individual experts. Each approach has had its successes. In the United Nations era, there have also been significant forums for multilateral treaty-making outside of the United Nations ambit, among them the Organization of American States, the Council of Europe and the conferences for the revision of the Geneva Conventions convened by the International Committee of the Red Cross and the Government of Switzerland.

2. While the United States recognizes the advantages of each forum in particular circumstances, experience appears to indicate that, as a rule, the preferred United Nations method is to have the initial drafting of treaty texts done by the International Law Commission (or UNCITRAL in the field of international trade and related commercial areas). The capacity of the International Law Commission is of course limited, though it may be capable of expansion; in any event, it should be exploited in full. (See also comments in Section V below on ILC.)

3. UNCITRAL has a record of substantial success. The initial decisions in UNCITRAL to restrict its efforts to legal issues of trade practice and to abstain from involvement in issues of trade policy have proven correct over the years and should be maintained. The working methods elaborated by UNCITRAL over the years, with the assistance of the secretariat, seem singularly well suited to its tasks. At some point, UNCITRAL may wish to consider the use of a special rapporteur on an experimental basis to ascertain whether that might expedite the early stages of its work. The United States is confident that the Government of Austria and the United Nations will take all necessary measures to ensure that the UNCITRAL secretariat will be able to continue to function as effectively in its new headquarters as it has in the past, including the provision of the necessary reference and research facilities.

4. It may be that the United Nations system at large should be made more fully aware of the potential of UNCITRAL as the agency for dealing with the legal aspects of a number of economic and trade issues. A recommendation of the twelfth session of UNCITRAL is pertinent to this perception.[5]

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 43)

1. (*a*) and (*b*) These two approaches are to some extent complementary and are already the practice of the Council of Europe. When the formulation of a treaty is envisaged, it must first be ascertained that the proposed treaty is likely to be of interest to States or, in other words, that States feel the need for a treaty in a given field. In order to do this, it is necessary to have legal and factual data concerning the field to which the proposed treaty relates.

(*c*) In many cases, the decision on the nature of the instrument to be adopted (convention, declaration, etc.) cannot be taken until the work has begun, in the light of the position of the parties and the interests involved. The Committee of Ministers has considered these issues and adopted a report on the subject, a copy of which is attached.

2. The usual practice of the Council of Europe is for an expert committee appointed by the Governments of member States to formulate draft texts, with the assistance of the secretariat; this applies from the very earliest stage. Only in very exceptional cases are preliminary drafts submitted to the expert committee responsible for formulating a convention; in that case, the drafts originate either with the Consultative Assembly or with the secretariat. Since different conditions naturally obtain in the United Nations, it is unlikely that an over-all universally applicable solution can be found. However, the procedure of entrusting the drafting of a treaty to a small expert group has some advantages: even when serving in their personal capacity (and not as representatives of their countries), the experts take into account the situation in their countries; the small membership makes it easier and quicker to reach a consensus. The disadvantage is that the small membership makes it impossible for all States to participate, so that their views will not be known until a late stage in the drafting of the text. The secretariat should be allowed a degree of initiative and should, as it were, represent the international public interest.

International Atomic Energy Agency (A/37/444, p. 27)

Extensive efforts along the lines of (*a*), (*b*) and (*c*) would seem desirable. In general, an expert body seems to be suited for the preliminary formulation of a draft text; however, such expert body can be given a representative character if composed of experts as designated by member Governments. The body would have to be composed in such a manner as to ensure equtable representation of all regional interests.

Organisation for Economic Co-operation and Development (A/36/553, p. 51)

1. (*a*) It is clear that before embarking on the formulation of a particular treaty all possible effort should be made to collect relevant legal and factual data.

(*b*) It is equally clear that before embarking on the formulation of a particular treaty every effort should be made to ascertain the potential interest of States in the proposed treaty.

(*c*) It would appear difficult to formulate an abstract reply as to the utility of considering some less binding instrument in a particular case since this will depend entirely on the desires of the States concerncd as they emerge in the course of preparation and negotiation.

2. (*a*), (*b*) and (*c*) Once again, it would appear very difficult to reply in an abstract manner to this question as it depends very much on the origin of the initiative, the subject matter and practices of the organizations concerned. The general practice within the OECD has been for thc secretariat to draft a preliminary text, based on guidance fiven to it by the approriate body of the Organization; subsequently the text is developed by an expert body or drafting group and at a later stage by a body witli full representation.

World Health Organization (A/36/553, p. 57)

1. Before embarking on the formulation of a particular treaty, efforts should be made, in general, to:

(*a*) Collect legal and factual data relevant to the proposed treaty;

(*b*) Ascertain tlie potential interest of States in the proposed treaty, and

(*c*) Consider the utility of some less-binding instrument (e.g., a declaration).

2. The preliminary formulation of the text of a treaty should generally be entrusted to the Secretariat, or where controversial issues are involved, to an expert organ.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee,* 1396th meeting, para. 20.

[3] See also comments by the Netherlands.

[4] A/36/553/Add.1, p. 6.

[5] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), chap. IX, sect. F, paras. 129-131. The General Assembly endorsed this position in its resolution 34/142 of 17 December 1979.

V. WORK OF THE INTERNATIONAL LAW COMMISSION

1. *Possible structural change*
   - (a) *Should the ILC be converted into a full-time organ, whose members would be appropriately remunerated?*
   - (b) *Should the honorarium or the per diem of ILC members be increased?*
   - (c) *Should the special rapporteurs work and be remunerated on a full-time basis?*
   - (d) *Should special rapporteurs occasionally be drawn from outside the Commission?*

(e) *Should the special rapporteurs be supported by experts working under their direction on a full-time basis?*

2. *Possible changes in agenda*
   (a) *Should certain questions not be referred to the ILC or should certain additional questions be referred to it?*
   (b) *Should the ILC have a heavier or a lighter agenda?*
   (c) *Should the ILC concentrate more on specific topics, restricted in scope, that may constitute only part of a larger subject area?*

3. *Possible procedural changes*
   (a) *Should the ILC make more of an attempt to complete all its work on each subject within the five-year term for which its members are elected?*
   (b) *Should Governments be consulted more or less frequently during the progress of work by the ILC on a particular draft?*
   (c) *Should there be working groups that meet intersessionally—with perhaps a reduction in the length of Commission sessions?*
   (d) *Should the ILC formulate preambles and final clauses for the draft articles it submits to the General Assembly?*
   (e) *Should the ILC prepare alternative texts of particularly controversial provisions?*
   (f) *Should the ILC consider the possibilty of "restating" areas of customary international law, as an alternative to codification?*
   (g) *Should the ILC consider drafting texts for instruments other than treaties?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. Several representatives expressed their satisfaction with the International Law Commission's contribution to the study of the multilateral treaty-making process (A/35/312/Add.2). While a number of representatives considered it inappropriate and untimely to examine the work of the Commission in the context of this review, some delegates proceeded to comment on questions in this regard posed in section IV of the Secretary-General's report.

2. Different views were expressed on the role of the Commission with respect to multilateral treaty-making. Some representatives held the view that the Commission, being an expert group, was best suited for treaty-making on selected topics such as treaties and State responsibility, but less suitable for dealing with issues of exclusively political character. Some other representatives went on to suggest certain ways for making better use of the Commission, for example by increasing the honorarium or the per diem of its members, converting the Commission to a full time body, making better use of special rapporteurs who might be supported, as appropriate, by outside experts. Some representatives suggested that the Commission's congested, general work programme and agenda should in the future be changed to more specific programmes. Some of them thought that this could be achieved by excluding the formulation of instruments other than those in treaty form or by limiting its task to codification and progressive development of new norms of international law.

3. It was stated by some that the techniques and procedures provided for in the statue of the Commission were well suited to the tasks entrusted to it by the General Assembly and had made a significant contribution to the codification and progressive devclopment of international law. Some representatives added that other techniqucs and procedures could however also be used, either because vital national interests required draft articles to be prepared by Governinent representatives as had been the case with the Third United Nations Conference on the Law of the Sea, or because the issues were more scientific and technical than legal. Some representatives maintained the view that the Commission's study of this topic was part of the rationalization effort now proceeding within the organization.

4. One representative expressed the view that the conclusion reached in the report that the techniques and procedures provided in the Commission's Statute, as they had evolved in practice, were well-suited to the tasks entrusted to the Commission by the General Assembly, seems to beg the question. He pointed out that though the report[2] had a list of important conventions concluded by the States on the basis of drafts prepared by the Commission, it did not proceed to examine their current status vis-à-vis the number of parties to them. Nor had the Commission attempted to find reasons why entirely new techniques had had to be evolved to deal with the question of the law of the sea, and the preparation of the Convention against the Taking of Hostages. He also expressed the view that the Commission's practice of concluding its work on a given topic by submitting draft articles which were intended to form the basis of a convention ought to be revised. In connection with this, he hoped that the Commission would explore other methods.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 8)

1. *Possible Structural changes*

(*a*) ILC properly performs its work in accordance with its statute, and has a broad and extremely important mandate.

(*b*) If ILC continued with its present functions, it would not be necessary to increase the honorarium of the *per diem* of its members.

(*c*) As stated previously, having a full-time Special Rapporteur would change the present structure of the Commission: as matters stand, therefore, it would not be appropriate to appoint one.

(*d*) On those occasions when highly specialized subjects originating from other organs are debated, it might be advantageous to draw a Special Rapporteur from outside the Commission.

(*e*) This is not necessary, except on very special occasions of the kind mentioned in (*d*) above.

2. *Possible changes in agenda*

(*a*) Inasmuch as the specific function of ILC is the progressive development and codification of international law, that implies the deletion of certain questions and the inclusion of new ones.

(*b*) The agenda of ILC varies according to demands at a particular time, which it is impossible to determine in advance.

(*c*) This does not appear necessary, in view of the fact that larger subject areas are normally subdivided.

3. *Possible procedural changes*

(*a*) This will depend on the subject. Some may require more than five years, others less; in any event, the Commission's system of re-election allows for some continuity.

(*b*) The frequency with which Governments are consulted at present is appropriate.

(*c*) This might be useful in urgent cases, but the length of sessions should remain the same.

(*d*) This is not *necessary*, but it might be appropriate in view of the nature of the Commission's work, especially in the case of preambles. If "final clauses" means those relating to the number of ratifications required, entry into force, and so on, that might overburden the Commission's already sizable workload.

(*e*) It would be preferable to prepare a text which reflected and attempted to reconcile the views of all States, even if the drafting of such a text required an additional effort on the part of the Commission.

(*f*) Since the Commission's function is essentially legal, it formulates legal rules on the subjects referred to it in the form of articles. Any other procedure would render the progressive development and codification of international law less flexible.

(*g*) This would be appropriate in cases in which, by reflecting the views of a group, it gave the Commission a better understanding of such interests or views.

Australia (A/37/444, p. 7)

1. *Possible structural changes*

(*a*) To convert the International Law Commission into a full-time organ raises a number of important issues which should be studied further. Other alternatives should also be examined, including the question of whether there should be more than one session of the Commission a year.

(*b*) The honorarium of ILC members would appear to be insufficient considering the length of sessions, and should be reviewed.

(*c*) The question of whether Special Rapporteurs should work and be remunerated on a full-time basis is, to some extent, tied up with question (*a*). Even if the ILC were to be converted into a full-time organ this would not necessarily mean that the Special Rapporteur would have to work on a full-time basis.

(*d*) Under the existing situation, Special Rapporteurs should be drawn only from members of the ILC so that they may participate as equals in the Commission's consideration of their work.

(*e*) The question of expert help for Special Rapporteurs, if not on a full-time basis then at least *ad hoc*, should be examined further.

2. *Possible changes in agenda*

It is not possible to provide a categorical answer to questions on the ILC agenda but, in general, the Commission should give priority to the progressive development and codification of important areas of international law where agreement among the Commission's members, as well as among States, may be possible. We consider that the agenda of the Commission is generally too heavy, and the Sixth Committee should carefully consider items placed upon it. While the ILC may have success in dealing with contentious matters it will make best use of its limited time, in current circumstances, if these are not numerous. The ILC should be pre-eminently able to take broad views of major topics.

3. *Possible procedural changes*

(*a*) It would be best if ILC members could carry a topic through to completion within their period of service.

(*b*) There would seem to be no need for Governments to be consulted more than once a year on the work of the Commission. Government representatives should, in addition, continue to have the opportunity of commenting on the work of the Commission in the Sixth Committee.

(*c*) There might be scope for intersessional working groups, subject to constraints on the time of Commission members, coupled with a reduction in the length of Commission sessions. This, however, may not be necessary if the agenda of the ILC is lighter. The matter should be examined further.

(*d*) The Commission should in general attempt to formulate preambles and final clauses of draft articles it submits to the General Assembly, if it considers these should contain special features. If the Commission finds it difficult to reach agreement on such provisions it should leave the responsibility for preambles and final clauses to the General Assembly.

(*e*) Alternative texts of particularly controversial provisions, and the reasoning behind them, could be helpful for those entrusted with the negotiation of treaties and could save the time of the ILC itself.

(*f*) The restatement and codification of areas of customary international law should be secondary to its progressive development, and undertaken only if there is scope for agreement among States on the rules of customary international law in question.

(*g*) We consider that in general the ILC should not draft texts for instruments other than treaties. To attempt to do that would detract from its main purpose, over-politicize the Commission and increase its workload. In cases where the Commission believes that a particular subject-matter referred to is not ripe for inclusion in a binding instrument it should say so, stating the reasons.

Brazil (A/36/553, p. 14)

The International Law Commission considers that "the techniques and procedures provided in its Statute, as they have evolved during a period of three decades, are well adapted for the object stated in article 2 and further defined in article 15, i.e. 'the progressive development of international law and

its codification'". The Brazilian Government shares this view and considers that any suggestions for modifications in the procedures followed by the Commission, as well as in its structure, should be made by the Commission itself, if and when the Commission feels they are needed.

Byelorussian Soviet Socialist Republic
(A/35/312/Add.1, p. 13, and A/36/553/Add.1, p. 3)

1. With regard to methods of perfecting and increasing the effectiveness of techniques and procedures for the elaboration of multilateral treaties of a universal character within the United Nations, it should be pointed out that the output of the International Law Commission continues to be inadequate.

2. In the view of the Byelorussian Soviet Socialist Republic, an investigation into the multilateral treaty-making process should, among other things, lead to an enhancement of the role and significance of the Sixth Committee of the General Assembly in promoting the codification and progressive development of international law, which is its main task under Article 13 of the United Nations Charter. In particular, draft multilateral treaties and conventions prepared by the International Law Commission should be finalized and adopted by the Sixth Committee rather than by special international conferences convened for that purpose, as occurs in a majority of cases at the present time. This would also give the representatives of all countries an opportunity to participate directly in the elaboration of multilateral treaties. The representatives of many Member States, including the Byelorussian Soviet Socialist Republic, have spoken out repeatedly at General Assembly sessions in favour of such a course.

3. Consideration of the process of elaborating multilateral treaties of a universal character within the United Nations system should also serve to draw the attention of Member States to the need to increase to the greatest possible extent the number of parties to existing multilateral treaties concluded under United Nations auspices.

4. The Byelorussian SSR considers that the International Law Commission can play a bigger role in drafting treaties and should increase the effectiveness of its work, and that the Sixth Committee should play a more active role in the process of establishing norms, without convening *ad hoc* international conferences for that purpose. There should also be no time-limit on the consideration of questions. A time-limit is acceptable only with the free consent of the plenipotentiaries of States participating in the work of a conference or a United Nations body.

5. The existing structure of the International Law Commission has proved itself in practice and it would be inadvisable to change it. The existing way of determining how full the agenda should be and in what order individual items should be considered at sessions of the Commission has also proved itself. At the same time the Commission should fulfil General Assembly instructions with respect to the period in which it should complete its consideration of a topic.

Cuba (A/36/553, p. 18)

1. *Possible structural changes*

(*a*) We do not consider this necessary.

(*b*) No.

(*c*) No.

(*d*) Yes, for subjects where the technieal questions to be regulated are beyond the scope of the legal knowledge of the members of the International Law Commission.

(*e*) Yes, for the same reasons as in 1 (*d*).

2. *Possible changes in agenda*

(*a*) There may be certain questions that can be dealt with by the Sixth Committee without needing to involve the International Law Commission: conversely, it may be necessary to refer to the Commission some topic which is not at present before it. The matter should be considered on a case-by-case basis.

(*b*) As stated above, the agenda should be based on a work programme designed to give priority to the most important subjects and to achieve concrete results without unnecessary delays.

(*c*) It would not be advantageous to divide the study of a subject among a number of organs, although it certainly is advisable to concentrate systematically on specific topics.

3. *Possible procedural changes*

(*a*) This could be attempted, but it would depend on the complexity of the subject under consideration. Changes of rapporteur can unquestionably contribute to delay in concluding an item, and so can the replacement of most of the members of the Commission who are already familiar with the subject.

(*b*) This would be beneficial, since it would show which aspeets were most controversial before the formulation of the draft was completed.

(*c*) If work is divided among a number of working groups within the Commission, the groups should meet intersessionally, which would expedite work during the session.

(*d*) Drafts formulated by the International Law Commission should include both a preamble and final clauses.

(*e*) If, as we suggest in (*b*) above, States are consulted during the formulation of a draft, it will be possible to identify the aspects on which there are problems and alternative texts could be prepared, provided that the objective pursued is not lost sight of.

(*f*) This is not necessary and would, moreover, be contrary to the purposes of the Commission and the provisions of Article 13, paragraph 1 (*a*), of the Charter of the United Nations.

(*g*) This must depend on the importance of the subject to be regulated.

Germany, Federal Republic of (A/36/553, p. 22)

1. The techniques and procedures provided for in the Statute of the International Law Commission, as they have evolved in practice, are well suited to the tasks entrusted to the Commission by the General Assembly, i.e. the progressive development of international law and its codification. The

quality of the Commission's work is well recognized by the United Nations members. The draft articles submitted by the Commission to the General Assembly constituted the extremely valuable basis for numerous conventions, elaborated and concluded under the auspices of the United Nations. The summary records of the Commission and the Commission's Report to the General Assembly as well as the reports and studies of the Special Rapporteurs play an important role in legal research and international practice, promoting knowledge of and interest in the process of the progressive development of international law and its codification.

2. Although the Commission is a permanent subsidiary body of the General Assembly, there is a continuous need for the General Assembly as well as for Member States individually to bear in mind the *sui generis* nature of the Commission and of its work. Any endeavour to review the possibility of improving the work of the Commission should respect this special status of the Commission, considering that the Commission itself keeps constantly under review the possibility of improving its procedure and methods of work.

1. *Possible structural changes*

3. The Federal Republic of Germany does not see a necessity to convert the International Law Commission into a full-time organ. For a full-time organ, it would be more difficult to find outstanding international lawyers willing to sit on the Commission as they would have to give up all other professional obligations. Regular attendance has been a problem for some members; it would be more so, if the Commission met on a permanent basis. The honoraria or the per diem of International Law Commission members should guarantee their financial independence. If Special Rapporteurs are expected to work on a full-time basis this would exclude those members of the Commission as Special Rapporteurs who are in no position to work full-time for the Commission. Remuneration should take account of the extra work-load for a Special Rapporteur.

4. Special Rapporteurs should be drawn from within the Commission. As the Commission is composed of persons of recognized competence in international law, all its members are qualified as Special Rapporteurs.

5. Considering the need for thorough legal research as well as the ever increasing amount of legal material being available from the different legal systems of the world, it may be feasible to support the Special Rapporteurs by experts working under their direction. It will depend on the circumstances of the research to be done whether such research should be done by experts working on a permanent full-time basis or on a temporary basis.

2. *Possible changes in agenda*

6. As in the past, questions which are primarily of a political or technical nature should not be referred to the International Law Commission. The work of the International Law Commission should continue to concentrate on those issues where Member States see a general need for codification and progressive development of international law and where general agreement among the Commission's members as well as among States may be possible.

3. *Possible procedural changes*

7. The authority of the International Law Commission drafts and of the Commentaries to these drafts is based on the quality of the work. Time-pressure exerted on the Commission could affect the quality of its work.

8. Governments should be consulted in such a manner as to guarantee the widest possible acceptance by States of a particular draft.

9. Whether the International Law Commission should formulate preambles and final clauses for draft articles is to be decided in specific cases on a pragmatic basis. A general decision on this question does neither seem necessary nor feasible.

10. The International Law Commission should strive to reach a consensus. If consensus cannot be reached, the International Law Commission may prepare either alternative texts or no text at all, depending on the circumstances.

11. "Restating" areas of international law should be considered only if there is complete agreement among States on rules of customary international law. Nevertheless by restating areas of international law the International Law Commission could expose its work and its authority to challanges by States.

12. The drafting of texts for instruments other than treaties should not be excluded, but in principle the International Law Commission will best fulfil the functions by drafting texts which may form the basis of an international treaty.

Indonesia (A/37/444, p. 14)

There are many agenda items which have been considered by the International Law Commission. Due to lack of time, the Commission could not consider them in detail and fulfil its duty. If the effectiveness of the Commission is to be improved, the Sixth Committee will have to designate the scale of priority.

Italy (A/36/553, p. 28)

1. It is the Italian Government's opinion that the role of the International Law Commission should be further enhanced, and that members of the Commission should be chosen exclusively on the basis of their competence in its field of work. It would be desirable for these experts, who should be independent of their Governments, to work in and for the Commission full-time, even if this might represent a greater financial burden for the United Nations. On the other hand it does not seem necessary, if the Commission members are selected on the basis of rigorous criteria, to entrust part of the work to outside experts or to assign assistants to the Special Rapporteurs of the Commission. Assisting the ILC is the task of the United Nations Secretariat.

2. If, however, the Commission's structure remains as it is, and if its sessions maintain their present duration, it seems impossible to entrust it with further tasks. The agenda of the last few years already seems extremely heavy, and to burden the Commission further would undermine the seriousness and

efficiency of its work. In fact, some thought should be given to lightening the agenda by not burdening the Commission with minor matters on which it could limit itself to expressing an opinion.

3. Regarding the procedure currently followed or to be followed by the Commission, subpoints (*e*), (*f*) and (*g*) of point 3 are worthy of attention. It would in fact be useful for the Commission to prepare alternative texts, explaining the motives and basis of each variant. Similarly, the idea of "restating" areas of customary international law as an alternative to codification should not be discarded. Finally, a greater recourse to texts not intended to become treaties—such as recommendations, model-rules, and so forth—might often facilitate the absorption of the Commission's findings into international practice.

Mali (A/36/553, p. 31)

1. It might be preferable to increase the honorarium or the per diem of members of the Commission.

2. Certain questions should not be referred to the International Law Commission, which already has a heavy agenda.

3. The International Law Commission should make more of an attempt to complete all its work on each subject within the five-year term for which its members are elected.

4. It should formulate preambles and final clauses for the draft articles it submits to the General Assembly. This would make it easier for the Assembly to follow the progress of a topic.

Mexico (A/36/553, p. 34)

1. The International Law Commission has proved to be a suitable organ for the preparation of draft multilateral agreements. Its efficiency is due to the high professional qualifications of its members and to the fact that, although they serve in their personal capacity, most of them are fully acquainted with the positions of their Governments and the Governments of other States. For that reason, converting the International Law Commission into a full-time organ, with members whose professional lives would be bound up entirely with the Commission, would mean converting it into an academic organ remote from reality.

2. The practice whereby the General Assembly of the United Nations is the organ which decides what topics are to be considered in the International Law Commission should be maintained, because there can be no organ more capable than the General Assembly of determining which topics merit priority; however, the International Law Commission should be left free to decide how much time is to be spent on each topic, in the light of the stage of maturity which, in the opinion of the Commission, has been reached in the process of formulating the draft treaty in question and of international circumstances. It is not advisable to impose time-limits on the International Law Commission, although the General Assembly should provide guidelines in order to avoid unjustified delays of the kind which have occurred in the case of the item on State responsibility.

Netherlands (A/36/553/Add.1, pp. 6-9)

1. Inasmuch as the questions posed under this heading do suggest that the contribution by the ILC to the multilateral treaty-making process in general could be enhanced by improvements of a procedural nature of it *modus operandi*, a note of caution is in order.

2. The topics dealt with by the ILC since its inception bear witness to the fact that its task has been understood to be the formulation of the classical rules of universal *ius inter potestates* and the adaption of these rules to the requirements of present-day international society. It is therefore submitted that subjects which do not primarily coucern inter-State relations at the government level, such as international economic relations (goods, services, monetary affairs) or the unification and harmonization of national legal systems in specific areas, do not fall within the scope of activities proper of the ILC.

3. The characteristics of the activities of the ILC, set out above, do have certain consequences for the pace of work of the Commission and its composition. The requirements of universality generally cause the Commission to spend considerable time in bridging gaps between different positions. At the same time the intergovernmental nature of its projects calls for a membership of persons combining a specialist knowledge of international law with extensive experience of day-to-day intergovernmental relations.

4. Turning now to the specific questions posed, the Netherlands Government would see no merit in either converting the ILC into a full-time organ or appointing full-time Special Rapporteurs. Apart from financial considerations, this attitude is inspired by the considerations set out above. Such a set-up would of necessity interfere with the requirement that the Commission be composed of members having practical experience. This requirement is even more relevant to Special Rapporteurs. At the same time, Special Rapporteurs can function effectively only if they are integrated into the over-all work of the Commission. The ILC should therefore continue to draw Special Rapporteurs from its membership. On the other hand, the Netherlands Government would welcome a more extensive staffing of Special Rapporteurs. Assistance (not necessarily full-time) of Special Rapporteurs would enable them to concentrate more on drafting texts and commentaries. Provision should then also be made in financial terms for the necessary intersessional contacts between a Special Rapporteur and his assistant. Such assistants would have to be selected by the Special Rapporteur (from any source he deems fit), and could be placed under the authority of the codification division of the United Nations Secretariat.

5. Even if the above-mentioned improvement would be effected, the items presently on the agenda of the ILC would still keep the Commission active for a considerable period of time. As the need arises, additional questions could be added, provided they fit in within the general parameters set out above.

6. In this connection, the Netherlands Government would see considerable merit in devising a procedure through which the General Assembly, presumably at the instigation of a Main Committee or subsidiary body, would thoroughly discuss subjects which are suggested for inclusion in a legal instrument before requesting the ILC to draft such an instrument. Such discussion might well indicate that, politically, there are various solutions to the problem.

The General Assembly might then request the ILC to "translate" these options into legal language. It is then up to the Assembly to choose between the alternatives presented to it. Thus, the political discussion will be held where it rightly belongs. Furthermore, it is quite conceivable that such a request pertains to an issue which forms part of a larger subject area. In any event it would be extremely useful if those portions of a subject, which clearly are within the competence of the ILC, such as state responsibility clauses, dispute settlement provisions, etc., would be referred to it, even if the subject as a whole were being dealt with in another legal forum (*ad hoc* or permanent).

7. The Netherlands Government would certainly support any suggestions which might enable the Commission to complete a topic within a shorter time span. Certain complicated topics, such as the law of treaties or state responsibility, however, would seem to require more time than a period of five years. In this connection, it is suggested that Governments, either when nominating their candidates for the Commission or when casting a vote during the elections, give consideration to the desirability of at least some permanence in the membership of the Commission (e.g., two consecutive terms of office).

8. A possible suggestion for speeding up the consideration of subjects might be for the ILC not to deal with all items on its agenda at the same time but to concentrate instead on one or two items. Experience teaches that discussion of *all* items during the 12-week session has various disadvantages. Special Rapporteurs can present only a few draft articles each year, whereas discussion of those articles is necessarily hampered by the lack of an over-all view. In retrospect a good many questions posed during such discussions are premature or even irrelevant in the light of articles which have been presented by the Special Rapporteurs later on. Discussion of the draft as a whole (or substantive part thereof) during a major part of the session would in the opinion of the Netherlands Government constitute a considerable improvement of the Commission's *modus operandi*. Such a procedure would at the same time allow for improvement of the system of consultation of Member States. For the same reasons as given above for discussion by the ILC itself, comments by Member States on only small portions of a draft are probably not as useful as they would be if the draft were to be submitted as a whole (or in parts suitable for scrutiny, independently of other parts).

9. The Netherlands Government is aware that such procedure might deprive the Commission of the necessary guidance by Member States. It is therefore submitted that all Special Rapporteurs should report to the Commission each year, even if their subject is not up for discussion. Through its report to the General Assembly, the Commission would keep Member States informed on all topics. To the extent feasible and necessary, Member States could then react during the debate on the ILC report in the Sixth Committee thus providing guidance for the Commission.

10. Intersessional meetings, even if combined with a reduction in the length of the Commission's session, will presumably be attended to by less than the full membership. Being less "representative" such meeting can hardly be expected to serve the objectives sought.

11. Most certainly the ILC must present as complete a text as possible (see A/35/312, E, 3 (*d*)). In the opinion of the Netherlands Government many provisions, usually referred to as final clauses, are of such importance that they

can rightly be considered as substantive. Thus dispute settlement provisions, which have to be tailor-made taking into account the text as a whole, would certainly qualify as substantive provisions. This is equally the case with provisions regarding the relationship to other treaties. Even final clauses of a more technical nature should be included in the draft before it is presented as a whole to the General Assembly. On the other hand it would seem to be within the province of the (political) forum which is to finalize the text to draft the preamble.

12. In accordance with its Statute (article 23), the Commission operates on the presumption that the drafts it prepares will eventually take the form of a convention. It would seem to be up to the General Assembly to decide on the final form once the draft articles have been presented to it. Depending on the nature of the topic which is suggested for inclusion in a legal instrument, however, it is conceivable that the Assembly would decide to request not the drafting of a convention but of model rules or guidelines.

13. This decision might also be prompted by indications during discussions of the subject that the time was not ripe for such a relatively final formulation of legal rules as would be implied by the form of a convention. This would seem to answer in the negative both questions posed in paragraphs (*f*) and (*g*).

Qatar (A/37/444, p. 16)

1. It would be appropriate to consider the possibility of increasing the honorarium or the *per diem* of ILC members.

2. Care should be taken to avoid referring too many questions to the International Law Commission so as not to overload its agenda.

3. The International Law Commission should make more of an attempt to complete all of its work on each subject within the five-year term for which its members are elected. It should formulate preambles and final clauses for the draft articles it submits to the General Assembly, so that the latter may follow up the progress of the topic.

Republic of Korea (A/37/444, p. 20)

The International Law Commission, being an expert group, has proved to be an efficient organ for the preparation of draft multilateral agreements. Therefore, there would be no particular need to convert the Commission into a full-time body which might distance itself from reality were it to be transformed into a kind of academic organ. Besides, it is widely recognized that the Commission is less suitable for purely political matters.

Spain (A/36/553/Add.1, pp. 15-16)

1. *Possible structural changes*

(*a*) Yes, especially if its workload is to be increased.

(*b*) Yes, in principle.

(*c*) The Rapporteurs should at least work on a full-time basis. They should in any case be properly remunerated.

(*d*) No.

(*e*) The Rapporteurs should be supported by experts, but it would not seem necessary for such experts to work on a full-time basis.

2. *Possible changes in agenda*

(*a*) The question is not very clear. The General Assembly decides where to refer items. The desirability or otherwise of referring a question to ILC would have to be considered in each individual case.

(*b*) Generally speaking, the agenda is all right as it is. It could be heavier if ILC members devoted more time to their work and States' absorptive capacity was increased.

(*c*) Depending on the case, it could agree to deal with a global topic exhaustively or to adopt a sectoral approach. This would also depend on the time available. In any case, it would not seem advisable to assign overly specific topics to ILC.

3. *Possible procedural changes*

(*a*) Yes, in principle.

(*b*) The present situation seems satisfactory. It would however, be desirable, for States to receive the text of the ILC report further in advance so that they can comment on it in the corresponding debate in the Sixth Committee.

(*c*) No.

(*d*) That might be desirable. Standard clauses could be included, leaving a blank for points which required a political decision, such as the admissibility or otherwise of reservations, the number of instruments needed for entry into force, etc.

(*e*) Yes. When controversial topics are at issue, ILC should prepare more than one alternative, especially when one or more States have made conflicting proposals.

(*f*) The question is not very clear. In general, the existing process of codification and development of interuational law appears to be adequate.

(*g*) No. The current process of politicization should not be allowed to affect ILC.

Ukrainian Soviet Socialist Republic (A/36/553, p. 39)

There is no need to introduce any structural changes in the International Law Commission, and it would also be undesirable to conduct an internal reorganization of its work. The correct system for determining the order of consideration by ILC of particular questions ensures that the agendas for its sessions are filled. In its attempts to activate the consideration of individual questions, ILC should be guided by the General Assembly recommendations determining the time-limits for completion of the consideration of those questions.

Union of Soviet Socialist Republics (A/36/553/Add.I, p. 2)

The present structure of the International Law Commission has justified itself and it would seem undesirable to change it. The existing way of

establishing the order of consideration by ILC of particular questions ensures that the agendas for its sessions are filled. Attempts by ILC to activate the consideration of individual questions should not run counter to the General Assembly recommendations on time limits for completion of the consideration of those questions. It would also be undesirable to make any new changes to the Commission's interual organization of work.

United Kingdom of Great Britain and Northern Ireland
(A/35/312/Add.1, pp. 29-30)

In this connection, the Goverument of the United Kingdom would like to take this opportunity of paying tribute to the work of the Interuational Law Commission. In the 30 years since its creation, the Commission has played a key role in the codification and progressive development of international law. The Governnient of the United Kingdom are conscious that the Conimission has under constant review improvements in its working niethods, and stand ready to consider sympathetically any proposals which the Conimission inay niake with a view to improving the efficiency of its procedures, as well as its working relationship with the Sixth Committee. In this context, the Governnient of the United Kingdom would suggest that, within the framework of this iteni, consideration might be given to an examination of the scope of topics placed or proposed to be placed on the active work programme of the Comnission. The scope of sonie of the topics currently on the active work programme of the Coinmission is so broad that it is hardly surprising that the Coinnission has had to devote many years to the elaboration of a first set of draft articles on only part of a particular topic. It is possible that concrete results could be achieved niore quickly if the Coinmission were to restrict itself, at least initially, to the consideration of specific aspects of a topic whose scope was generally acknowledged to be so broad as to preclude comprehensive treatment within a reasonable time-scale. The Government of the United Kingdoni would likewise suggest that consideration could be given to possible nieasures to ease the burden put upon special rapporteurs appointed by the Commission to work on a particular topic. The special rapporteur system is a central and valuable feature of the Commission's procedures, and the Government of the United Kingdom would not wish to see the role of the special rapporteur dimmished in any way. But conceivably the work of the special rapporteur on a particular topic could be speeded up if the Secretary-General were empowered to rccruit qualified experts from outside the ranks of the Commission who would be entrusted with the task of preparing preliminary studies on particular aspects of a topic entrusted to a special rapporteur and otherwise of assisting the special rapporteur in the preparation of his reports. Whether such an innovation would be of value would depend on the Commission's assessnient of its usefulness. The Governnient of the United Kingdoni would stress that these are simply suggestions that could warrant further consideration within the framework of this item. Their sole aim is to bring about inprovements in the functioning of the Commission as the body whose central task is to engage in studies directed towards the progressive developnient and codification of international law. It is self-evident that the views of the Commission on these and any other ideas that may be advanced for the enhancement and more effective discharge of the role entrusted to it would be of paraniount importance.

United States of America (A/35/312/Add.1, pp 32-37)

1. *General observations*

1. With the benefit of hindsight, it may well be that reference to the International Law Commission of the law of the sea issues in the late 1960s would have materially expedited matters. While certain basic political and economic issues might have had to have been thrashed out in a larger forum before remission of a draft treaty to a conference of plenipotentiaries, many problems might have been settled more expeditiously and the issues which needed political disposition clarified by the preparation of a basic, comprehensive text at an earlier stage than proved to be the case. The comparative experiences of the International Law Commission in the 1950s and of the First and Second United Nations Conferences of the Law of the Sea so suggest. Nor should the capacity of the International Law Commission to negotiate accommodation of differences of policy be underestimated, the process of codification inevitably demands that capacity, which is enhanced in the Commission's case by participation in its work of some members of political and diplomatic experience who hold or have held senior official positions.

2. To take another example of the professionalism and relative expeditiousness of the International Law Commission, it proved able to complete the draft articles on the prevention and punishment of crimes against diplomatic agents and other protected persons[3] in one session whereas the *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages has taken three sessions to bring a treaty draft almost to completion.[4] Again, a recent plenipotentiary conference on asylum which did not have the advantage of a draft convention prepared by the Commission did not succeed in elaborating a convention (it was provided with a draft prepared by a specially convened committee of experts, which, however, did not have the benefit of the Commission's ripening processes).[5] No criticism of the path actually followed in these or other cases is advanced; but it is suggested that, in the future, the unique professionalism and potential of the International Law Commission should be borne fully in mind in all cases. Where a subject has large legal content and is of broad interest to the international community, recourse to the Commission should be the first course to be considered.

3. At the same time, it is important that the current agenda of the International Law Commission not be overloaded, and that the Commission be afforded considerable discretion in the priority and pace which it attaches to various topics. The Commission—and the General Assembly in agenda advice to the Commission—should concentrate on subjects of substantial, practical importance. It is reassuring that the Commission has taken up the most substantial and practical subjects of the law of the non-navigational uses of international watercourses and the jurisdictional immunities of States and their property. By the same token, it is not reassuring that the Commission has devoted the time it has to the subject of treaties concluded between two or more international organizations. Nor is it clear that the Commission will do well to address the subject of the immunities of the officials of international secretariats, in view of the greater significance of other subjects. It is equally important that when the Commission is charged with subjects of large dimensions, it emphasizes those aspects that pose real problems in the conduct of

international affairs. It would, for example, be a most positive development if the continuing preoccupation of the Commission with the vital subject of State responsibility would focus on those aspects of it that are of moment in the affairs of States and their nationals.

4. As noted, it may not be assumed that the present international system as it is now fashioned and funded is capable of absorbing a markedly increased flow of draft conventions. It may be that, in order to do so, foreign ministries and national legislatures will have to devote larger resources to the international legislative process. That would require not a restructuring of the system but a model re-allocation of resources within it, a re-allocation that may be overdue. As it is, how many foreign ministries have lawyers functionally and primarily assigned to dealing with the processes and product of the codification and progressive development of international law? Nevertheless, it would seem appropriate to consider whether there are adaptations that could be made by or to existing institutions to the end of enlarging the production and ratification of draft conventions.

5. It is worth reiterating that the quality and quantity of output of the International Law Commission as well as its demonstrated ability to respond expeditiously in special circumstances are such as to require caution before taking any action which would adversely affect the functioning of its system. The process of progressive development and codification is a delicate one requiring the studied application of learning and judgement, as well as of political accommodation. It requires time for reflection both of experts and Governments. It requires opportunity for States to comment in the course of the process in order to maximize the likelihood that the final product will be generally acceptable and, indeed, in order for States to learn the intricacies of the subject matter as the process progresses so they do not face its subsequent phases with insufficient background to take the decisions required in a timely fashion. Accordingly, it may well be that the final conclusion of the examination of the multilateral treaty-making process, insofar as it concerns the International Law Commission, is that the International Law Commission substantially, as it stands and with its current methods of work, is the best system that can be devised at this juncture.

6. Before reaching that conclusion, however, it is believed that there are possibilities that might be examined which relate to such matters as the duration of the Commission's sessions and its methods of work.

2. *Duration of sessions*

7. It is believed that the current 12-week session is the longest time period that is consistent with the nature of the Commission as a part-time entity made up of members elected in their personal, expert capacities. Quite apart from other professional demands upon them, it is not reasonable to anticipate that the Commission's members could be expected to devote more time to a body which does not serve as a source of income (the current "honorarium" of $1,000 for participation in a 12-week session is so minor as to be discounted). There is indeed a strong case, within the current length of the Commission's sessions, for giving its members a larger per diem and compensating its special rapporteurs more adequately, perhaps under contractual

arrangements which are adjusted to the special rapporteur's charge and product.

8. Alternatively, there is room for considering whether the Commission should be converted into a full-time or quasi-full-time institution with adequate remuneration provided to the members, e.g., in the same manner and scale as Judges of the International Court of Justice. There can be no doubt that such a step would markedly facilitate the task of the Commission in producing a greater volume of work in a shorter period of time. It should be recalled that the report of the Committee on the Progressive Development of International Law and its Codification[6] which proposed the creation of the Commission recommended that it be a full-time body. In 1947, when the General Assembly decided in favour of the current system (resolution 174(II) of 21 November 1947) there was less certainty than there is today that the Commission was viable and could produce important work. In any re-examination of the desirability of such a step (which the United States raises rather than recommends) consideration should be given, in addition to the absorptive capacity of States, to the following questions that conversion of the Commission into a full-time body would pose: will there be a sufficient volume of work over a long period of time to justify such a step, can the quality of the membership of the Commission be maintained, and are States Members willing to absorb the costs in terms of salaries of the members and the increased secretariat staff that would be required to service a full-time Commission? Would the useful relations of many Commission members with their Governments be sustainable if members were to become full-time officials responsible only to the organization? For its part, the United States is not prepared at this juncture to take a position on the relative advantages and disadvantages of a full-time International Law Commission. It would note, however, that what might be a desirable compromise between the current status and that of a full-time Commission would be for selected special rapporteurs to work full-time for the Commission during part or possibly all of their service as special rapporteur. That would markedly expedite the work of the Commission and might exploit what practical margin there is for its improvement. Full-time rapporteurs would have to be compensated appropriately, if not at commercial levels then at those of Judges of the International Court of Justice or the most senior officials of international secretariats.

3. *Working methods*

9. The working methods which the Commission has evolved, and which are lucidly expounded in a Report of a Commission Working Group on Review of the Multilateral Treaty-Making Process of 23 July 1979 (see A/35/312/Add.2), appear to be admirably suited to the achievement of its purposes. Nevertheless, a few comments may be in order.

(*a*) The Codification Division of the Secretariat should continue to be strengthened, particularly with a view to its lending to special rapporteurs of the Commission the necessary specialized assistance.

(*b*) During a particular five-year term, the Commission should endeavor to concentrate upon and complete a few topics, rather than dissipating its efforts among several. Such concentration will permit the Commission to

accomplish more, and will reduce the impact which a succession of special rapporteurs produces.

(*c*) When the Commission undertakes a very large subject, it should consider from the outset whether it should be broken down into two or more components, to be addressed by two or more special rapporteurs.

(*d*) The Commission should consider establishing working groups for particular topics which might meet for two or three weeks between sessions. Sessions of the Commission itself might then be reduced in length. This pattern has worked well for UNCITRAL and perhaps is applicable to the Commission.

(*e*) Consideration should be given in appropriate cases to the use by the United Nations, at the initiative and with the concurrence of the Commission, of special rapporteurs drawn from outside the Commission's membership.

(*f*) Governments might increasingly be requested to submit written comments on draft articles prepared by the Commission in the course, and before the final completion, of a first reading of an entire set of draft articles.

(*g*) Questionnaires might more often be addressed by the Commission to Governments to elicit their views on the direction and content which Commission drafts should take.

(*h*) The Commission should give renewed consideration to the preparation of instruments other than articles designed to compose a treaty (as it did in its earlier years).

(*i*) The mode of adoption of the Commission's annual report might be adjusted. As it is, the whole of the report is adopted during the last week of a session of the Commission. Commission members often receive drafts of the passages proposed for adoption so shortly before they are moved that time is not always adequate for their consideration. Yet these commentaries can play an important role in the understanding and interpretation of the draft articles proposed, and can be given significant weight by Governments and other interpreters. It may be that the Commission could consider draft chapters of its report at various stages of a session rather than in its final week, or perhaps commentaries should be provisionally adopted at one session and subject to revision and final adoption at the succeeding session.

(*j*) There is some tendency for the Commission in its comments on draft articles to repeat *in extenso* the passages to be found in the pertinent report of its special rapporteur. The Commission should consider to what extent cross-referencing or other approaches might minimize this practice which, however understandable, is not economical.

(*k*) The content of the commentaries on draft articles to be found in the Commission's reports may require more rigorous and objective treatment than the Commission has always manifested, particularly in recent years, when it has occasionally permitted the adoption of passages which are of questionable relevance or which even are tendentious. The Commission also has appeared to assign legal weight to certain controverted and controversial resolutions of the General Assembly, despite the fact that the General Assembly generally lacks legislative authority and despite the fact that the resolutions in question cannot reasonably be evaluated as declaratory of international law. The International Law Commission is a subsidiary organ of the Assembly, but it does

not follow from that fact that the Commission is justified in treating as the law what a majority of the Assembly may believe or wish the law to be. Should the Commission include in its commentaries—and, *a fortiori* in its draft articles—passages and provisions which, however congenial to many States of the Assembly or to certain of its special rapporteurs, are not consonant with existing international law or with the progressive development of that law as the international community as a whole wishes it to be, it will risk prejudicing its authority.

(*l*) The report of the Commission should be drafted so as to focus the attention of the members of the Sixth Committee on the particular questions on which interim governmental comments are most desired. As it is, the report tends to be so long and distributed so late that it is difficult for the members of the Sixth Committee to assimilate it and comment upon it in a considered, and even less, instructed way. Thus misapprehension may arise in the Commission about what really are considered governmental reactions to its drafts.

4. *Character of the Commission*

10. The character of the Commission as an expert body composed of persons of recognized competence in international law has been accepted from the outset. The experience of three decades fully justified the continuation of the Commission as an expert body comprised of individuals serving in their personal capacity. Not only has this permitted the Commission to attract to its membership eminent scholars who might not otherwise have served, it also has promoted a valuable continuity of membership. Moreover, the members of the Commission serving in their expert capacities do not manifest the caucus consultations, bloc voting and ritualistic expressions of position that often characterize governmental bodies of the United Nations.

11. It is recognized that UNCITRAL, which is composed of representatives of Governments, has been successful in doing somewhat similar work. However, the nature of the work of UNCITRAL has been such that it is unlikely that many individuals would have sufficient expertise in all the specialized fields covered and, consequently, many members send different representatives to the various working groups, whose mandates are technical and specific. These considerations do not equally apply to the International Law Commission. It is believed that the work of various *ad hoc* and special committees within the United Nations system over the years demonstrates that, while there are often benefits in having governmental involvement at an early stage of work, there is some loss in that representatives may feel obligated to assert governmental views in a manner that is often not consistent with the expeditious examination of the legal issues. Indeed, pressures of representational responsibility may lead to compromises of the lowest common denominator with insufficient attention paid to the technical legal issues or, indeed, the interests of the international community as a whole. Bloc politics may impede the early processes of codification; they have sufficient (if not excessive) influence in later stages.

12. In sum, there appears no reason to change the Commission from a body of uninstructed experts to a body of governmental representatives.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 43)

1. While the idea of converting ILC into a full-time organ is attractive, it gives rise to certain problems, including, in particular, the danger of bureaucratizing the Commission.

2. Regarding possible procedural changes:

(*e*) No. In the Council of Europe, the Committee of Ministers usually has a final draft before it. In the view of the secretariat, proposals for alternative texts would result in a reopening of the whole debate and be conducive to a hardening of the positions of the various States. Such alternatives should be proposed only if the issue is so controversial that no majority can be discerned on either side.

(*f*) The idea of "restating" international law seems interesting and would certainly make genuine codification possible in the longer term. It might also provide a basis for regional action, even if action at the world level seems to be ruled out.

Organisation for Economic Co-operation and Development (A/36/553, p. 52)

1. The first two questions are not applicable.

2. With regard to possible procedural changes:

(*a*) The answer to this question will depend entirely on the subject matter and political context.

(*b*) The establishment of model rules of procedure for plenipotentiary conferences could be of interest to the extent sufficient flexibility were provided to allow adaptation to the type of subject, the context of the negotiation and the intergovernmental organization concerned.

(*c*) The utility of establishing negotiating committees would have to be left to the discretion of each conference.

(*d*) The utility of inter-sessional meetings of certain conference bodies must also be left to the discretion of each conference.

(*e*) Not applicable.

(*f*) Participation of intergovernmental and non-governmental organizations at plenipotentiary conferences is clearly very useful as they are often in a position to provide expertise on the subject at hand.

World Health Organization (A/36/553, p. 57)

With respect to possible procedural changes, it would be very much welcome if the ILC could make more of an attempt to complete all its work on each subject within the five-year term for which its members are elected, to formulate preambles and final clauses for the draft articles it submits to the General Assembly, and to consider the possibility of "restating" areas of customary international law, as an alternative to codification.

NOTES

[1] This is based on the summary records of the discussion on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] A/34/10, para. 195.

[3] *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 10* (A/8710/Rev.1), chap. III, sect. B.

[4] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 39* (A/34/39), sect. IV.

[5] See Report of the United Nations Conference on Territorial Asylum (A/CONF.78/12).

[6] *Official Records of the General Assembly, Second Session, Sixth Committee, annex I* (document A/331).

VI. FINAL NEGOTIATION AND ADOPTION OF MULTILATERAL TREATIES

1. *Should the negotiation of multilateral treaties of concern to the General Assembly, such as those emanating from the ILC or UNCITRAL, normally be completed in a Main Committee of the General Assembly, or is it preferable to convene* ad hoc *plenipotentiary conferences?*
2. *If negotiations are normally to be completed in the General Assembly:*
   (a) *Will it be necessary or desirable to extend the preliminary preparatory stage so as to submit to the Assembly more nearly completed texts?*
   (b) *Should special procedural rules be adopted to assist the Assembly in acting as a treaty-formulating organ, e.g., providing for the participation of non-member States, special voting procedures, the establishment of drafting committees, etc.?*
   (c) *Should the Sixth Committee normally be involved in such a process even if the substance of the treaty is considered by some other Main Committee (e.g., disarmament in the First Committee; economic relations in the Second, human rights in the Third):*
      (i) *Through joint meetings of the Sixth with other Main Committees?*
      (ii) *Through the consideration of all formal and legal clauses by the Sixth Committee?*
      (iii) *Through the review of the text as a whole by the Sixth Committee?*
3. *To the extent the completion of multilateral treaties is assigned to plenipotentiary conferences:*
   (a) *Should such conferences be scheduled for longer periods, to make it less likely that additional sessions would need to be convened, or does a series of successive sessions enable preparation of a better text supported by a broader consensus?*
   (b) *Should uniform or model rules of procedure be established for such conferences?*
   (c) *Should such rules provide for the establishment of negotiating committees?*
   (d) *Should there be intersessional meetings of certain conference bodies (negotiating or drafting committees)?*

(e) *Should formal debate at conferences be restricted as much as possible to group spokesmen?*

(f) *Should there be provision for more extensive participation of intergovernmental and non-governmental organizations at plenipotentiary conferences?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. Some representatives held the view that negotiation and adoption should be treated as two separate stages, the latter being limited to a ceremony after all negotiations had already been completed.

2. There were, however, divergent views as to whether negotiations should be conducted in the General Assembly or be referred to *ad hoc* plenipotentiary conferences. Some representatives preferred the General Assembly and suggested that in the future drafts prepared by the International Law Commission should be submitted for examination by the Sixth Committee without holding special international conferences. They also considered that the existing procedure for drafting agreements on important political matters (e.g., disarmament) had justified itself in practice and required no modification.

3. Several representatives suggested enhancing the role of the Sixth Committee in the negotiation and adoption of multilateral treaties. Special reference was made to a recommendation entitled "Methods and procedures of the General Assembly for dealing with legal and drafting questions" annexed to the rules of procedure of the General Assembly (A/520/Rev.13, annex II, part I) stating: "(*a*) that when a [Main Committee of the Assembly] considers the legal aspects of a question important, the Committee should refer it for legal advice to the Sixth Committee or propose that the question should be considered by a joint committee of itself and the Sixth Committee". It was emphasized that this recommendation should be better implemented so as to ensure rational progress, though this did not mean that only the Sixth Committee could draft treaties. Many speakers also believed that the Sixth Committee should play a more active role, particularly in drafting matters. In this regard, it was suggested that certain special procedural rules might become necessary (e.g., providing for participation of Non-Member States) if the General Assembly was to assume an effective role. Others, however, preferred that the Sixth Committee be involved primarily at the preparatory stage, through a working group.

4. On the other hand, some members of the Committee preferred to assign the final negotiations and adoption of multilateral treaties to plenipotentiary conferences, which they regarded as the appropriate forum for negotiations and for participation by non-members of the United Nations so as to increase the possibility of wider acceptance of a treaty.

5. The utility of informal consultations, as employed in the Third United Nations Conference on the Law of the Sea, was also referred to. The need for making proper preparations before convening a conference (e.g., the preparation of a draft treaty) was stressed by many members of the Committee. One representative thought that it would be helpful to have a checklist of procedural methods used in conferences, which might be prepared by the Secre-

tariat on the basis of observations submitted by Governments and international organizations.

6. In this connection many views were expressed on the advantages and disadvantages of applying the consensus formula at plenipotentiary conferences. Reaffirming sovereign equality, promoting wider acceptance of treaties and protecting minority interests were cited as factors in favour of this formula. However, it was also stressed that the application of this formula was time consuming and often resulted in ambiguous provisions.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, pp. 9-10)

1. It is not possible to lay down a single method for negotiating treaties. Subjects may, and in fact do, require different methods according to their technical or political nature. Specific questions of private international law, dealt with by UNCITRAL, would require the presence of specialized staff, as well as of its secretariat, and several weeks free from other matters in which to deal with the drafting work. Account should be taken of the conclusions reached by the Committees themselves, the importance of the Committees, the specific nature of the tasks within their competence and, most of all, the results of their work over the years, which provide a measure of their efficiency. Overburdening the Sixth Committee's programme of work could indefinitely prolong the consideration of subjects, many of which may be urgent, or force the Committee to remain almost permanently in session.

2. In cases where the nature of the question or the origin of the draft made it desirable for a multilateral treaty to be negotiated by the General Assembly, with regard to which resolution 35/100 will be borne in mind, it would be desirable that texts as complete as possible should be submitted to the Assembly. In the case referred to in the preceding paragraph, the Sixth Committee should normally be involved in the process, even if the substance of the treaty was considered by some other Main Committee. This would not only strengthen the role of the Sixth Committee in the treaty-making process by enabling it to play the active part envisaged for it at the time of its establishment, but would result in fuller compliance with annex II to the rules of procedure of the General Assembly (part I, para. 1(*d*)), which is usually followed by the other Main Committees. It would be appropriate, in this connection, to recommend that any draft convention formulated by the General Assembly might be referred to the Sixth Committee for its opinion. This would be done: If the treaty was being considered by another Main Committee, through joint meetings of the Sixth Committee and the Committee initially dealing with it; If the treaty did not emanate from another Main Committee of the General Assembly, through a review of the text as a whole by the Sixth Committee.

3. (*a*) When, for a particular subject, it is decided that the negotiation of a multilateral treaty should be entrusted to a plenipotentiary conference, it should be borne in mind that: If the subject and the extent to which it has been formulated allow—as in the case of technical subjects of the kind dealt with by UNCITRAL—conferences should be scheduled for periods sufficiently long to avoid convening a further conference. The savings for Governments

will be tremendous. The same will be true for the Organization, since it avoids a repetition of formal matters and of movements of staff and materials and ensures continuity in tempo and the identity of representatives of States. There is also clearly a need in this connection for specific approaches adapted to the special characteristics and difficulties of the subject, the purpose of the treaty and the practical problems involved. In some cases, this may make it desirable or necessary to hold, in advance of or during a conference, a series of successive sessions (e.g., the Conference on Asylum, the Conference on the Law of the Sea).

(*b*), (*c*), (*d*) It would be appropriate to draw up a set of rules allowing variations and providing for the establishment of negotiating committees, which could also hold intersessional meetings if necessary. These rules, which to some extent already exist, would provide a number of model clauses on points for which they are needed, so that they could be adapted to the special characteristics of the subject at the time of their adoption by the conference.

(*e*) If this refers to spokesmen for institutionalized groups, it would be entirely wrong to restrict formal debate to group spokesmen. Where the members of such a group have a common interest in the subject under consideration, and its spokesmen are genuine and are duly elected, such a restriction will occur automatically. This is a question involving State sovereignty and it should not be considered.

(*f*) In some cases the participation of such organizations, particularly non-governmental organizations, is already sufficiently extensive.

Australia (A/37/444, pp. 8-9)

1. As a general rule, multilateral treaties of concern to the General Assembly should be finally negotiated in *ad hoc* plenipotentiary conferences rather than in a Main Committee of the General Assembly. There is scope for greater flexibility in the timing of plenipotentiary conferences, in rules of procedure and in working methods to meet the requirements of the subject-matter than would be the case in a Main Committee of the General Assembly. Unless it is clear that consensus can be readily and quickly achieved, it is better to concentrate on the subject being negotiated in a plenipotentiary conference than to distort the focus of a Main Committee of the General Assembly, which is also burdened with other items on its agenda.

2. The duration of plenipotentiary conferences will vary according to the scope and importance of the subject-matter of the treaty. It is important that States should be free to organize such conferences in the way they believe most suitable for the subject-matter at hand and to ensure maximum efficiency in the consideration of the subject-matter. There is generally value in a serics of sessions allowing time for refiection and review. Governments participating in plenipotentiary conferences should have model rules of procedure to consider. The use of negotiating and intersessional committees can be valuable. It is generally most undesirable to have formal debates limited to group spokesmen. However, firm conclusions on all these matters, as well as on whether more extensive participation should be allowed at plenipotentiary conferences, will have to depend on the subject in question and the wishes of the States participating at the conference.

Austria (A/35/312/Add.1, pp. 6-10.
See also its comments under Section IV above)

1. *Choice of organ: diplomatic conference or United Nations organ*

1. *Prima facie*, it would seem rather attractive to suggest that all draft multilateral instruments originating within the United Nations should be negotiated in a Main Committee and adopted by the General Assembly. That suggestion would have the particular advantage of assuring the participation of all Members of the United Nations and thus nearly all States of the world in the treaty-making process, although it should not be overlooked that some States which in the past have regularly participated in treaty-making diplomatic conferences but which are not Members of the United Nations (e.g., Switzerland, Holy See) would thus find themselves excluded from participation.

2. But several important reasons confiict with this suggestion. The rules of procedure of the General Assembly are not particularly suited for the negotiation of complex texts. They do not provide for the establishment of indispensable subsidiary organs with a clearly defined role in the decision-making process, like drafting committees. Furthermore, experience shows that some rules (e.g., right of reply; explanation of vote; division of proposals and amendments; majority required) are not convenient for dealing with a text consisting of separate but still interrelated articles. It is for this reason that the rules of procedure of diplomatic conferences, which are otherwise modelled on the rules of procedure of the General Assembly, had to be modified in this respect. Other necessary rules (e.g., basic text) are altogether lacking. Though in theory the necessary changes could be introduced into the rules of procedure of the General Assembly and its Main Committees, such a course would hardly appear to be practical for organs which are primarily designed for other purposes.

3. In this context, consideration must also be given to the time factor. Diplomatic conferences, entrusted with the adoption of a complex draft instrument, need normally at least four weeks, frequently even more. In view of the usually very busy schedule of the General Assembly's Main Committees it seems hardly possible to reserve such a long period for a single task within a single session of the General Assembly. When multilateral agreements were directly negotiated in a Main Committee, indeed more than one session was usually needed for their adoption, even for a subject that presented as few difficulties as special missions (Sixth Committee, 1968-1969). Inevitable as it may be under the circumstances, such a division is not advisable, not only because of the problems created by changes in delegations but also because the impetus, generated at the first session, is lost and thus, taken together, more time is spent than is really necessary.

4. On balance it would appear that the General Assembly and its Main Committees are well suited for the adoption of multilateral legal instruments in all cases where the draft text has been thoroughly prepared by a committee composed of representatives of States and needs only little further negotiation before its final adoption. In cases, however, where extensive negotiations are necessary, preference should be given to a diplomatic conference.

2. *Organizational problems of diplomatic conferences*

(a) *Duration of a conference*

5. For many years, the General Assembly, when determining the duration of a diplomatic conference to be held under United Nations auspices, relied on the estimates submitted by the branch of the Secretariat dealing with the substance of the proposed treaty. Such estimates were based on experience and insight into the difficulties which might arise during the negotiating process. Usually those estimates proved correct.

6. In recent years, however, other bodies and branches of the Secretariat, applying primarily managerial and/or exclusively financial standards, unfamiliar with the substantive difficulties of the issue, have insisted on shortening the suggested period, and the Fifth Committee has followed their advice rather than that of the substantive department. In some cases, such as the Vienna Conference on Succession of States in Respect of Treaties, this has resulted in the necessity of convening a second session—originally not planned—and the two sessions, taken together, lasted longer than the single session originally suggested by the substantive department. In order to avoid such events, conferences have sometimes been given the power to extend, if necessary, their session within specified time limits. However, this device rarely leads to the desired result since delegations assume from the start that the conference will last through the extended period, make the necessary travel and hotel arrangements, and adopt their rhythm of work accordingly.

7. Both experiences seem to indicate that the substantive department of the Secretariat is best qualified to suggest the necessary length of a session, which should thereupon be definitely determined.

(b) *Loss of time*

8. During the debate of the present item in the Sixth Committee (A/C.6/32/SR.46-50), some speakers voiced doubt as to the economic and efficient use of time allotted in diplomatic conferences. In considering this problem it should be borne in mind that a diplomatic conference is not only legally but also practically the master of its own procedure. Hence it is primarily up to participating delegations and, thus, to the States which they represent, to see to it that no time is wasted. Presiding officers or prominent members of the Secretariat, trying to exert leadership, depend on the co-operation of delegations and no strengthening of the rules of procedure or their strict application can replace that co-operation.

9. If, for instance, the "introduction of extraneous issues" is blamed as a major factor for delay, it should not be overlooked that such issues are introduced by sovereign States, and what may seem irrelevant to some parties may appear highly relevant to others. No presiding officer can or even should decide the issue. The only legitimate way of disposing of an issue which is challenged on the ground that it is "extraneous" is by a vote, which unfortunately is often preceded by a lengthy debate interrupting all other work of the conference. To urge more stringent measures against the introduction of "extraneous" issues into diplomatic conferences is, in reality, an appeal to the self-restraint of States.

10. The same holds true for the loss of time frequently encountered at the start of a conference or at the beginning of the consideration of a new

draft article. Meetings have to be adjourned prematurely because delegations are not prepared to address the issue under discussion. If their unpreparedness is the real reason for delegations' restraint then only the States which are sending them can remedy the situation.

(c) *Negotiating body*

11. There is, however, another cause for delay which merits consideration because it is of a different nature. When proposals and/or amendments concerning a particular point are numerous and contradictory and the conference wants to avoid the ordeal of a protracted debate and voting process, it quite often appeals to the sponsors or interested parties "to get together" and to present a consolidated proposal. It is not rare in such a situation that valuable time is lost because nobody takes the initiative to organize the necessary negotiations.

12. Since such negotiations are "private", the rules of procedure do not apply. When presiding officers or the Secretariat intervene by providing assistance, they do so on their own initiative and one has to reckon with the fact that presiding officers are primarily chosen on account of geographical or political consideration and not for the personal leadership they are able to provide. In some conferences it has been found convenient to use the drafting committee as a forum. But all these devices are improvised and fortuitous.

13. Consideration might, therefore, be given to the idea of providing for this sort of situation in the rules of procedure. One might think of a special negotiating committee, as exists in the General Conference of UNESCO or as was established in the recent United Nations Conference on the Establishment of the United Nations Industrial Development Organization as a Specialized Agency (A/CONF.90/8, rule 44). But it would probably be simpler to empower and instruct the presiding officer to convene in such circumstances without delay a meeting of the interested parties.

(d) *Composition of delegations*

14. From the point of view of efficiency, it would obviously be desirable for States to send to diplomatic conferences high-level delegates who are qualified experts and, at the same time, conversant with the intentions of their political authorities. Since such delegates would know precisely what their Government will or will not accept, they could negotiate without having to ask for instructions on every change of a comma and would, nevertheless, guarantee a high probability of acceptance by their Government.

15. Yet the very conditions of their efficiency require their constant contact with government and central administration. Their absence from their capital ought to be neither too frequent nor too long. If such a person has to attend too many conferences in a row, his efficiency in the aforementioned sense will obviously be reduced. Under present circumstances this fact presents a serious problem for States with a small legal staff.

16. Such States tend to respond with frequent rotations within their respective delegations, especially to conferences with more than one session, and by nominating junior (and thus in the aforementioned sense less effective) delegates. If this consequence was deplored in the General Assembly during its debate on the present item, it would seem up to that body to correct the situation by more rationally co-ordinating the convening of conferences and of *ad*

hoc or special committees, all involving the same but small group of qualified persons.

3. *Ratifications*

17. It is a truism that the number of ratifications of, and/or accessions to, some multilateral conventions adopted under the auspices of the United Nations has remained below expectation. The reasons for this deplorable fact are manifold. There may be practical reasons for convenience, limitation of staff resources, which in turn may lead to delayed action at the one stage of the treaty-making process that is not limited in time, i.e., the ratification process. But of the many conceivable reasons only those relating to the manner or procedure in which the text of a convention was prepared and adopted are properly within the framework of the present observations.

18. The question is, therefore, whether changes in the procedure followed so far in the formulation and adoption of multilateral instruments could improve the chance of wider acceptance of these instruments. It has been suggested in this connection that more attention should be paid to the views of important minorities in conferences and to building a broad base of agreement.

19. As a general proposition the implied criticism is difficult to accept and more difficult to translate into a change of procedure. It is very rare that the text of a multilateral convention is adopted against strong opposition, which in any case cannot go beyond one third of the States present and voting or else the convention would fail of adoption altogether. The 1963 Vienna Convention on Consular Relations was adopted unanimously by the United Nations Conference on Consular Relations but has in fact one of the weaker records of ratification and/or accession. If one were to conclude from that, that the Convention in question is refused by a majority of States, it would be difficult to understand why such refusal was not articulated at an earlier stage. Certainly that is not due to any lack of procedural means. Nor does it seem likely that individual provisions, adopted against the opposition of some States, could be the real reason for their reluctance to ratify, since reservations should provide an appropriate remedy.

20. Under these circumstances it appears reasonable to assume that with the possible exception of a few conventions (of which the Vienna Convention on the Representation of States in their Relations with International Organizations, adopted by 57 votes against one, with 15 abstentions, is a noteworthy example) the negotiating process and its procedural basis had no decisive influence on the final acceptance by States, or at least that, should there be hidden impediments, such impediments cannot be cured by a simple change of procedure.

Brazil (A/36/553, p. 14)

It is the view of the Brazilian Government that the present flexibility regarding final negotiation and adoption of multilateral treaties has been useful and should be maintained. The decision on whether to convene a plenipotentiary conference or to have the final negotiation and adoption of a treaty in the General Assembly should always be taken on an *ad hoc* basis, in each specific case. For technical reasons, however, in the General Assembly the Sixth Com-

mittee should have a larger role in the preparation of treaties, either through joint meetings with other Committees or through the review of the text as a whole within the Sixth Committee itself.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 3)

1. Delegates of the Byelorussian SSR have often pointed out at General Assembly sessions that the Main Committees, particularly the Sixth Committee, have an important role to play in formulating and adopting international legal instruments. Plenipotentiaries of States Members of the United Nations take part in the work of those Committees and, as a rule, a wider range of States is represented in a Main Committee than at *ad hoc* conferences.

2. At the same time, given the consent of States, the possibility of convening *ad hoc* plenipotentiary conferences in certain cases is not excluded, but the United Nations General Assembly should determine the duration and dates of such conferences and other necessary arrangements. With respect to the way a conference should go about its work, the rules of procedure should be adopted by the plenipotentiaries themselves at the conference, as has been the case in practice.

Canada (A/35/312/Add.1, pp. 17-19)

1. The negotiation and adoption phase of the treaty-making process is often closely related to, or in fact part of, the preparatory phase. Yet it has distinctive features which suggest it should be considered separately. It may take place in a diplomatic conference convened at the end of a long preparatory period, and may be of relatively short duration, such as the Conferences on the Law of Treaties, or on Diplomatic and Consular Relations and the 1958 Conference on the Law of the Sea, all of which were the culmination of work of the International Law Commission. Alternatively, the diplomatic conference itself may comprise the whole process and extend to many sessions over a number of years, as with the current Law of the Sea Conference.

2. An initial question that arises in respect of such negotiating conferences is whether they should be convened at all. There are instances where the lack of consensus during negotiations on major issues raises considerable doubt about the wisdom of convening the conference in the first place. This may be the result of inadequate preparatory work; it may be that the initial decision to embark upon the process leading to the conclusion of the treaty was taken with inadequate discussion; it may be that differences of view simply did not emerge until the final conference had commenced. It shows however, how essential the earlier phases are and it indicates a need for substantial flexibility in the way in which the conference or other negotiating body moves towards its objective or even alters its objectives.

3. This flexibility ought to be facilitated by appropriate conference procedures and it is here that a major area for consideration exists. Debates over the rules of procedure at multilateral treaty-making conferences have often been extended. Issues such as who may attend, who may occupy the position of Chairman, who may vote, and on what basis should decisions be taken, have occupied long hours of conference time. It may be that debates over the rules of procedure are inevitable and that little can be done to alter the matter.

However, before such a conclusion is reached the experience of all international organization multilateral treaty-making conferences should be examined. Are there uniform rules of procedure developing in certain areas? Is there scope for codifying some non-contentious rules for all multilateral treaty-making conferences convened by the United Nations? What contentious areas could be resolved in a forum outside the conference? What matters have to be left for each conference to resolve on its own?

4. A question related to the procedure to be adopted in a multilateral treaty-making conference is whether a diplomatic conference is in fact the only appropriate body to finalize and adopt a treaty. During the debates in the Sixth Committee, at the thirty-second session of the General Assembly, a number of States queried whether the Sixth Committee itself should not have a role. The Committee has provided a forum for debate of the draft articles prepared by the International Law Commission and has debated and adopted conventions, such as the 1969 Convention on Special Missions and the 1975 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, without reference to a diplomatic conference. Could this role of the Sixth Committee be expanded? One advantage of utilizing the Sixth Committee for the negotiation and adoption of multilateral treaties is that the sessions of the Committee attract a considerable pool of legal expertise from various States. However, to expand the Committee's role in this respect would raise questions about the fulfilment of the Committee's other responsibilities. It is also clear that certain subjects would more easily lend themselves to negotiation in the Sixth Committee than others.

5. In spite of an extended preparatory period, the length of time devoted to the final diplomatic conference may not always be sufficient to allow a detailed examination of the text under discussion. It may well be useful to hold a series of conferences at which the views of each Government may be fully developed. Such an approach obviously is not always feasible, yet in some cases a lack of time may discourage States from introducing amendments or new proposals that would require a substantial rethinking of the text. Is this always desirable? Again, once a conference has been convened it appears that it must usually result in the adoption of a text. More time might produce a more widely acceptable instrument.

6. The conduct of negotiations and the final adoption of a text provides substantial scope for investigation. In recent years the traditional approach of formal conference sessions with *ad hoc* consultations among interested groups of States outside of the formal sessions appears to have been supplanted. The importance of informal consultations has increased to the point that in some instances they have been formalized by the conference itself. The experience of the Third United Nations Law of the Sea Conference may well be instructive on this matter, for there the formal sessions of the Conference have all but disappeared and what were informal negotiating sessions have re-emerged as formal conference negotiating groups.

7. This practice, and the practice of other international conferences or organizations, deserves careful study to determine to what extent formal and informal procedures have been developed to expedite the process of reaching agreements and whether the experience of some conferences or organizations

may be applied in other contexts. It is the view of the Canadian authorities that this is an area that should receive major attention in any review of the multilateral treaty-making process.

8. An issue that goes beyond the techniques and procedures of the treaty-making process is the state of law making by multilateral treaty itself. An assessment might be made of the areas covered by multilateral treaties to determine whether there are major gaps, whether further activity is required in certain areas or whether other areas have received more attention than is perhaps warranted. In circumstances where multilateral treaties are being drafted under the auspices of a variety of different international organizations, it is inevitable that some co-ordination and reconciliation of the provisions of treaties emerging from different bodies will be necessary.

9. To a certain extent, the International Law Commission engages in this kind of enquiry. An assessment of the need for the codification and progressive development of international law is made each time the International Law Commission has undertaken a review of future projects, and was the subject of special consideration at the twenty-fifth Session of the ILC[2] and in the subsequent debates in the Sixth Committee.[3] What should be undertaken, however, is a broad ranging review covering the activities of all international organizations engaged in multilateral treaty-making.

Cuba (A/36/553, p. 19)

1. Preferably in, or in co-ordination with, the General Assembly (Sixth Committee). It should, however, be borne in mind that there are subjects of such complexity that the Assembly could not give them due attention and they would require a special conference.

2. (*a*) Yes, depending on the draft treaty.

(*b*) Yes, this would be useful and conducive to the negotiation and general understanding of the subject.

(*c*) (i) Even if the Sixth Committee is not normally involved in the whole process, it should be kept informed concerning the subject under consideration, for which purpose it could hold meetings with the Committee involved.

(ii) It should review in particular the legal aspects.

(iii) Once a text has been formulated, it should be reviewed by the Sixth Committee.

3. (*a*) Sessions should not be unduly long or too numerous, since both impose a financial burden on States, particularly under-developed countries.

If the organizational work is well done, States will have the information needed for an advance study and the proceedings will be expedited.

(*b*) Yes.

(*c*) We see no advantage in this, because it might happen that all the work would gradually be transferred to the negotiating committee.

(*d*) This might be appropriate in some cases, but it might also be detrimental, since it tends to remove the subject from the main arena of negotiation.

(*e*) No, because during the debate new points may emerge which affect a State member of the group and not the group as a whole, in which case the views of the spokesman would not be sufficiently representative.

(*f*) In our view, inter-governmental and non-governmental organizations should participate mainly as consultative organs in those cases where they deal with matters relevant to the subject under discussion. However, they could also participate as observers.

Germany, Federal Republic of (A/36/553, p. 24)

1. In principle, major and comprehensive treaties should be negotiated at *ad hoc* plenipotentiary conferences.

2. The involvement of the General Assembly will prove successful only if draft treaties are brought to it at an advanced stage of maturity, if there is reasonable ground for believing that agreement can be reached on their consent.

3. (*a*) The duration of plenipotentiary conferences should depend on the scope and importance of the subject in question. In general it is not possible to keep conferences on major treaties going more than six weeks because many States are not in a position to make experts available for longer periods.

(*b*)-(*f*) The model rules of procedure for such conferences already existing within the United Nations system should be adapted to the needs of the conference. Whether they should provide for the establishment of negotiating committees, restrict formal debate to group spokesmen or permit a more extensive participation of inter-governmental organizations depends on the subject in question.

Indonesia (A/37/444, p. 14)

Important treaties must principally be negotiated in the *Ad Hoc* Plenipotentiary Conference so that the deliberations in the General Assembly will succeed. Generally, if the Conference is held for more than 6 weeks, it would be difficult for several States to have their experts away for such a long duration.

Italy (A/36/553, p. 29)

1. In order both to rationalize the work of negotiation and to economize on financial resources, it is the Italian Government's opinion that the role of the Sixth Committee should be enhanced whenever a treaty is introduced, whether directly or indirectly, by the General Assembly, unless the treaty deals with a highly specialized matter. In this context, it is undoubtedly appropriate to submit to the General Assembly and to the Sixth Committee texts that have already been almost completed. It would also be desirable to study the possibility of *ad hoc* procedural rules for the adoption of treaty texts; the aim of this research should be to ensure that such texts receive a broad-based consensus in advance.

2. The same criteria should govern the elaboration of procedural rules for plenipotentiary conferences. Neither in general nor with regard to such conferences does negotiation by groups of countries always facilitate matters; it merely obscures, temporarily, the differences within groups, which ultimately

reappear at the moment of signature or ratification of the text, thereby extending drastically the time needed to complete the treaty-making process.

Mali (A/36/553, p. 31)

1. The negotiation of multilateral treaties of concern to the General Assembly, such as those emanating from the International Law Commission, and UNCITRAL, should be completed in a Main Committee of the General Assembly.

2. The Sixth Committee should be involved in such a process, and the consideration of all formal and legal clauses should be entrusted to it.

Mexico (A/36/553, p. 35)

1. The question whether the General Assembly or a special plenipotentiary conference will be the organ to study drafts produced by the International Law Commission and the United Nations Commission on International Trade Law should be decided on a case-by-case basis.

2. Practice has shown that, while using the United Nations General Assembly is less costly, Governments attach more importance to plenipotentiary conferences and normally send higher-level delegations to such conferences. For that reason, draft treaties of major importance should be referred to plenipotentiary conferences. There does not appear to be any need for the adoption of special rules to enable the General Assembly to study and approve draft conventions prepared by ILC, UNCITRAL or *ad hoc* committees. The participation in the General Assembly of States not Members of the United Nations when a treaty is being formulated has been no problem, and a decision by the Assembly to permit such participation is sufficient.

3. Nevertheless, the Sixth Committee cannot be expected to study all multilateral treaties formulated within the United Nations system, although it should be laid down in the rules of procedure of the Assembly that, whenever another Main Committee prepares such a draft, the Sixth Committee must be allowed to see it before it is opened for signature so that it can make a final review of the text.

4. Long sessions of plenipotentiary conferences are usually undesirable. It is better to break up a conference into a number of short sessions so that delegations can return to their capitals and hold the necessary consultations in order to continue the negotiation.

5. The tremendous variety of situations with which plenipotentiary conferences are faced makes it inadvisable to establish uniform rules of procedure.

6. Holding intersessional informal negotiating or drafting meetings is a useful practice. However, each conference must decide on that point.

7. The practice of having spokesmen for the various regional groups or common-interest groups at conferences is useful. As a rule, however, that practice cannot be substituted for the normal processes of a conference.

8. The participation of governmental and non-governmental organizations at conferences can be useful. However, the general practice whereby non-governmental organizations are not entitled to speak but only to circulate their views in the form of documents should be maintained.

Netherlands (A/35/312/Add.1, p. 23)

1. *The adoption of a text*

1. There are no fixed criteria to determine whether or not a certain proposal is ripe for consideration by a diplomatic conference. Consideration should however be given to the fact that it is during such a conference that differences of opinion must finally be resolved which may involve further mutual concessions.

2. The following points may be considered with a view to promoting the efficient running of such a conference. Since there has been ample opportunity for discussion of the broad lines and more or less detailed comment (written or otherwise) in the preceding stages, the conference could decide to dispense with a general debate or to limit it. If necessary, there could be a general debate exclusively for spokesmen for particular groups.

3. In the explanatory memorandum[4] the question is raised whether there ought to be some method of identifying and representing the various groups of interested States so as to reduce the scale of participation in the debate. In this respect one can think of the practice to admit only spokesmen of the particular groups to discussions and negotiations pertaining to the concrete text. Of course the suitability of such an approach would need to be investigated in advance. Furthermore, the satisfactory functioning of such a formula would have to be guaranteed, as has already been sufficiently demonstrated by difficulties arising on this point in the course of the North-South dialogue.

4. Experience has shown that representatives of groups have too little room for manoeuvre, and the negotiation process is held up. This might be prevented in particular if channels were created through which the negotiators could inform their respective "constituents" as to the course of the negotiations and in turn receive instructions. The infrastructure required by such a system (permanent representatives, etc.) would almost certainly mean that such negotiations would have to take place at United Nations Headquarters. Another disadvantage of the practice of a spokesman might be that in some cases after a compromise has been reached within a group, a further compromise with the other group might be necessary, or that a member of a group is more or less forced by the group to give up his point of view, which might have been acceptable to the other group.

5. In drafting the final text of a treaty, there is an increasing tendency to follow a consensus procedure, at least to a certain extent. This was actually formally included in the rules of procedure of the Third United Nations Conference on the Law of the Sea (A/CONF.62/30/Rev.2, rule 37 and appendix). It has the advantage that parts of the treaty which are unacceptable for some parties are not simply pushed through by a majority vote, which would endanger the over-all acceptability of the treaty for all parties. On the other hand, means should be available to end this procedure, since it carries with it the risk of protracted negotiations, and wordings capable of multifarious interpretation; in other words, clarity may be sacrificed to the desire for unanimity. Moreover, even if the consensus procedure in adopting a treaty is followed, the risk exists that States which did not object to the text of a treaty do not give their consent to be bound. Consequently, the treaty may well remain a dead letter.

2. *Final negotiation and adoption*[5]

6. In view of the often highly specialized nature of the treaties of concern to the General Assembly, notably those emanating from bodies such as UNCITRAL, the convening of an *ad hoc* body seems preferable, since it provides a better chance to gather the people with the necessary expertise for the subject. For other subjects of a less specialized nature better use could be made of the legal expertise of the Sixth Committee.

7. In general it may be said that texts should be submitted to the plenary organs for approval only when they are nearly completed. This would, however, not exclude the possibility of presentation to those organs of alternative texts, leaving them the choice between the options presented.

8. Consistent with earlier replies, it is the opinion of the Netherlands Government that the Sixth Committee should be involved in the process of treaty-making by a United Nations organ. This involvement should take the form of a review of the text as a whole. The rules of procedure applicable to the Sixth Committee must then be examined in order to determine whether they need to be modified to allow for such a review.

9. The establishment of uniform or model rules of procedure for plenipotentiary conferences is strongly supported, because it saves a lot of time. The organ convening the plenipotentiary conference could at the same time decide upon its rules of procedure.

10. The participation of non-governmental organizations should above all be ensured at the preparatory stage.

11. Inter-governmental organizations having competence in subject matter of the plenipotentiary conference must be allowed to participate. This is of special importance for those inter-governmental organizations to which their respective member States have transferred competence over matters dealt with by the conference. In this respect the Netherlands Government wishes to emphasize the importance of treating the latter category of inter-governmental organizations, to the extent possible, on a par with States. To do otherwise, e.g. by stressing notions of state sovereignty, would neglect practical realities.

Qatar (A/37/444, p. 16)

1. It is better to conduct the negotiation of treaties in the General Assembly (the Sixth Committee).

2. (*a*) Yes, in accordance with the draft treaty under consideration.

(*b*) Yes.

(*c*) Yes, through consideration of the formal and legal provisions.

3. (*a*) It is not easy to answer this question, especially as it is necessary to consider every case on its merits. Accordingly, it is necessary to allocate sufficient time to each conference so that it may be able to complete its work. Hence, the necessary preparatory work should be done, though we realize that this might impose a great burden on States, particularly third world States.

(*b*) Yes. Model rules of procedure could be established for such conferences.

(*c*) No. While every conference may set up committees according to its needs, we believe that a proliferation of committees can be counter-productive.

(*d*) No, unless there is a need for this.

(*e*) No. New elements may emerge that affect only one member of a group and not the group as a whole. States have the right to express their views when they wish to do so.

(*f*) No.

Republic of Korea (A/37/444, p. 20)

While there must not be a single method for negotiating and adopting treaties, so as to sustain the present flexibility needed for dealing with varied subjects, it is appropriate to recommend that the Sixth Committee should actively be involved in any treaty the negotiation of which, by its nature, is considered to fall within the competence of the General Assembly. Practice has shown that sovereign States often attaeh more importance to plenipotentiary conferenees than to the General Assembly, particularly in the case of treaties of major coneern to them. For this reason, draft treaties should be referred to plenipotentiary conferences. In brief, the question of whether to convene a plenipotentiary conference or to give the General Assembly the primary funetion with respect to final negotiation and adoption of multilateral treaties should be determined on a case-by-case basis.

Spain (A/36/553/Add.1, p. 16)

1. It would be preferable to convene *ad hoc* diplomatic conferences.

2. The question should not be put like this, because it appears to prejudge the reply to the previous question. The General Assembly would not seem to be the most appropriate organ for the adoption of treaties, for both substantive reasons (over-politicization) and procedural reasons (lack of time).

(*a*) Yes, in all cases.

(*b*) Yes.

(*c*) Yes, through the review of formal and legal clauses.

3. (*a*) We cannot give an over-all answer because it would depend on the circumstances of each case. In general, it would be desirable for conferences to be scheduled for a suffieiently long period to complete their work. Proper preparation would be needed to permit this.

(*b*) Not necessarily, although it would be desirable. Model rules of procedure could be established, with possible variants for more controversial topics.

(*c*) No. The conference is sovereign and should be able to establish whatever committees it deems neeessary.

(*d*) In general, no, although this cannot be ruled out in certain cases if the conference deems it necessary.

(*e*) No. If certain geographical groups or interest groups wish to express their views through a single spokesman, there is nothing to prevent them from doing so. Such a practice should not, however, be imposed, for it would conflict with the sovereign rights of each State participating in the conference.

(*f*) In general, no.

Switzerland (A/37/44, pp. 22-23)

L'examen et l'adoption des projets de traités intéressant l'Assemblée générale, comme ceux émanant de la CDI et de la CNUDCI, devraient revenir à une conférence de plénipotentiaires convoquée à ces fins, plutôt qu'à une grande commission de l'Assemblée générale, afin d'assurer la participation pleine et entière de tous les Etats sans distinction. De plus, comme l'a démontré la Troisième Conférence sur le droit de la mer, une conférence *ad hoc* est à même d'élaborer de manière très souple des méthodes de négociation adaptées à la nature de la matière à régir, ainsi que de modifier ses procédures et ses structures en fonction des obstacles pouvant surgir au cours des négociations. Aussi les diverses suggestions énoncées sous F.3 ne peuvent-elles être considérées que comme des moyens susceptibles d'être mis en œuvre, alternativement ou globalement, par chaque conférence, au gré des besoins.

Ukrainian Soviet Socialist Republic (A/36/553, p. 40)

1. At the concluding stage of the negotiation and adoption of multilateral treaties, it is important to strengthen the role of the Sixth Committee and of the other Main Committees of the General Assembly, in whose work States' plenipotentiaries participate. In this connection, as has already been stated, the Sixth Committee should participate in the completion of the legal provisions of treaties.

2. If the need should arise to convene an *ad hoc* plenipotentiary conference, depending on the nature of the question being considered, the duration of its work and, if necessary, other arrangements should be determined by a resolution of the General Assembly. The internal procedure for this work should be determined by the plenipotentiaries themselves.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

1. When multilateral treaties are being negotiated and adopted, the Sixth Committee and other Main Committees of the General Assembly, in whose work States' plenipotentiaries participate, are extremely important.

2. Where it is considered necessary to convene an *ad hoc* plenipotentiary conference, in accordance with established practice and depending on the nature of the question being considered, there should be a General Assembly resolution concerning the duration and dates of the work of the plenipotentiaries and, if need be, other arrangements. The internal procedure for this work should be determined by the plenipotentiaries themselves.

United States of America (A/35/312/Add.1, pp. 38-39)

1. The process by which draft treaties are concluded and opened for signature may be termed the legislative phase. In large measure, work at this stage has been conducted by plenipotentiary conferences convened for the express purpose of concluding a treaty. On the whole, this process has worked fairly well and should not be abandoned, at any rate in the absence of a better recourse. The plenipotentiary conference provides an opportunity for delegates with relevant expertise to come together in an atmosphere of minimal distrac-

tion for the sole purpose of concluding a treaty. The achievements of such conferences in the United Nations era have been considerable.

2. There also have been accomplishments in the treaty field which have resulted from the General Assembly acting in lieu of a conference of plenipotentiaries. The conservation of fiscal and human resources requires that, to the extent appropriate, consideration be given to the conclusion of treaties in the Legal (Sixth) Committee of the General Assembly, in accordance with the practice utilized for the conventions on special missions and the protection of diplomats. In this connection, the sound recommendation contained in paragraph 14, annex I, of the Rules of Procedure of the General Assembly should be recalled, namely, that consideration be given to determining whether one of the Main Committees, especially the Legal Committee, would be able to undertake the treaty-making task (preferably working through *ad hoc* committees and small drafting committees), and paragraph 1 of annex II to the effect that, when there are important legal aspects to a question, the matter should be referred for legal advice to the Sixth Committee. The concentration of legal work in the Legal Committee is in the interests of all concerned, both because the requisite treaty-making expertise is found in the Legal Committee and because it, compared to other Main Committees, has an agenda which typically is less charged.

3. Final clauses of treaties have generally been left to conferences of plenipotentiaries or to the General Assembly to draft. While it has been the common practice for the International Law Commission to draft substantive articles and to omit proposed texts for preambles and final clauses, there would be some advantage in the Commission preparing a complete draft. Final clauses may be difficult and controversial, particularly if matters such as dispute settlement procedures are addressed. Complete draft texts, or alternative draft texts on especially difficult issues, will permit delegates to the conference of plenipotentiaries (or, as the case may be, the Assembly) to concentrate on substance and to avoid hasty drafting exercises of the preamble and final clauses.

4. As a general proposition, the International Law Commission or any body of experts involved in the initial preparation of a treaty text should make an effort to anticipate the major controversial issues likely to arise at the conference and to draft texts, in the alternative if necessary, in response to them. As it is, too many important provisions are drafted at conferences, sometimes hurriedly and with scant opportunity for study by the Conference. The process can and should be improved by developing a practice of expert elaboration of complete treaty texts.

5. While each conference will need to adopt methods suited to its particular problems, consideration should be given to the establishment of small working groups to work on particularly difficult problems. In those rare cases where the conference will require more than one session, it might be desirable to have such a group or groups meet intersessionally.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 44)

1. Plenipotentiary conferences.

2. Not applicable. If, however, negotiations are to be completed in the General Assembly.

(*c*) Yes. Involving the Sixth Committee in the process would ensure the requisite uniformity and consistency in the treaty practices of the United Nations.

3. (*a*) Successive sessions would have some advantages, provided that they were properly prepared, *inter alia*, through exchanges of views, at an appropriate level, among the States concerned. The practice of the Council of Europe has shown the value of allowing States the time needed for reflection and consultation at the national level, at every stage of the procedure.

(*f*) In principle, yes. In particular, organizations having recognized experience in the field covered by the conference or representing regional interests should be called upon. Such involvement should take place at a stage in the proceedings which would allow active and effective collaboration.

International Atomic Energy Agency (A/37/44, p. 27)

1. There would be a variety of multilateral treaties that may be of concern to the United Nations General Assembly. Where it is a multilateral treaty of a highly technical nature such as a nuclear treaty, a Main Committee of the General Assembly would and could not normally be considered an appropriate forum for the negotiation and adoption of the treaty; in this case an *ad hoc* plenipotentiary conference or the equivalent appears to be more suitable, and the organization of the United Nations system whose statutory functions are directly relevant to the subject matter dealt with in the treaty may well be called upon to provide secretariat services.

2. The formulation of model rules of procedure for *ad hoc* plenipotentiary conferences would be useful, but it may be noted that where the negotiations of a treaty are to be completed in a forum provided by an inter-governmental organization, the existing rules of procedure for the representative organ of that organization can often be utilized with necessary modifications.

3. The establishment of a negotiating committee may be useful for certain categories of multilateral treaties. In many cases, however, informal consultations, intersessional or otherwise, can play a useful role in achieving a consensus on difficult issues involved.

International Telecommunication Union (A/37/444, p. 30)

No comments, as this section again deals primarily with the United Nations proper, including the "plenipotentiary conferences" mentioned in sub-section 3 of this section, which has nothing to do with the ITU Plenipotentiary Conference and also does not apply to the ITU administrative conferences, for both of which the ITU Convention already provides specific provisions. (See Part Four, B, ITU's contribution.)

World Health Organization (A/36/553, p. 58)

To the extent that the completion of multilateral treaties is assigned to plenipotentiary conferences, it would seem helpful for their expeditious and fruitful conduct if:

—uniform or model rules of procedure were established for such conferences;

—formal debate at conferences were restricted as much as possible to group spokesmen; and

—provision were made for more extensive participation of intergovernmental and non-governmental organizations at plenipotentiary conferences.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] *Yearbook of the International Law Commission, 1973*, vol. I, 1233rd to 1237th meetings and *ibid.*, vol. II, document A/9010, paras. 151-169.

[3] *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1396th to 1408th meetings.

[4] See Part One, para 14.

[5] A/36/553/Add.1, p. 9.

VII. DRAFTING AND LANGUAGES

1. *Should an international legislative drafting bureau be created?*
2. *Should drafting committees generally be given more extensive functions?*
3. *Should treaties continue to be formulated simultaneously in all languages in which their text is to be authentic, or should they originally be formulated in only one or two languages, with additional versions established by a special procedure later?*
4. *If negotiation in multiple languages is to continue, should the example of the Third United Nations Conference on the Law of the Sea be followed, of establishing a subgroup for each language, whose co-ordinators meet from time to time to resolve any interlingual and general questions about the text?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. There was some support for the establishment of an international language drafting bureau, but many representatives preferred either to increase the role of the Sixth Committee or to create a drafting committee within each plenipotentiary conference. As for the languages to be used in formulating treaty provisions, the need was stressed to continue the current practice of formulating treaties simultaneously in all the languages in which their texts had to be authentic. Reference was made to the example of the Third United Nations Conference on the Law of the Sea, in which a sub-group was established for each language, with the co-ordinators of all the language groups meeting from time to time to resolve any interlingual and general questions about the text.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 11)

1. It does not appear necessary to create a new international legislative drafting bureau.

2. The present functions of drafting committees are generally adequate—giving advice on the drafting, preparing drafts and co-ordinating, reviewing and polishing adopted texts without reopening discussion of fundamental points or altering the substance of the texts.

3. Treaties should continue to be formulated simultaneously in all languages, in order to preserve the equal rights of the various language groups and their right to monitor in their mother tongue the texts which they help to draft.

Australia (A/37/444, p. 9)

1. It is not clear what is envisaged by the term "international legislative drafting bureau" and what the powers and functions of such a bureau would be. While it might be appropriate to establish a bureau to train officials in drafting techniques, etc., it would be undesirable and unrealistic to refer texts of draft treaties that are being negotiated to an outside body composed of persons who had not participated in the negotiations.

A first step in improving the drafting of treaties might be to explore ways of achieving consistency of drafting practices to distinguish treaties from instruments which are not of treaty status, and instruments which are intended to be legally binding from those which are not so intended.

2. The functions of drafting committees and the handling of language problems depend on the subject-matter of the treaty being negotiated and the wishes of the Governments involved in the negotiations.

3. While the simultaneous formulation of treaties in all languages in which their text is to be authentic is desirable, the use of one or two languages initially would be more convenient and would facilitate the future examination of the *travaux préparatoires* for the purposes of interpreting the treaty in question.

4. The practice adopted at the United Nations Conference on the Law of the Sea is cumbersome but is probably the most practicable model for major conferences which themselves engage in significant drafting exercises.

Brazil (A/36/553, p. 15)

The creation of an international legislative drafting bureau does not seem to be a very practical suggestion. The extent of functions to be assigned to drafting committees, as well as the procedures they should follow, should be decided in each specific case, taking into account the nature of the subject being dealt with and the peculiarities of the negotiating process.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 3)

1. The Byelorussian SSR considers that there is no need to establish an international legislative drafting bureau or to give the drafting committees more extensive functions.

2. The Organization has a proven practice of formulating treaties in the official and working languages of the United Nations.

Canada (A/35/312/Add.1, p. 6)

1. A technical aspect of the preparatory work for the conclusion of a multilateral treaty is the formal drafting of articles for inclusion in the text of the treaty. The need for technical drafting skills can arise during the preparatory period or during the subsequent negotiating stage. The current practice is for drafting to be done by the negotiators with the assistance of members of secretariats of international organizations. Obviously, many individuals within Governments and within international organizations have developed substantial skills in the field of treaty drafting, but there is not within the United Nations a body with expertise devoting itself solely to this matter. Moreover, there is a degree of unevenness in the drafting of international treaties, and few Governments have the resources to include in each delegation to a multilateral treaty-making conference an expert on international legal drafting. Thus, most Governments have probably come across defective drafting in treaties.

2. It may be that this matter could be dealt with by the creation of an international legislative drafting bureau. During the Sixth Committee debates on the question of a review of the multilateral treaty-making process (A/C.6/32/SR.46-50), it was also suggested that a compilation of a handbook on the drafting of treaties might also be undertaken. The Canadian authorities support such an approach provided that the mandate given to those compiling the handbook is suitably precise. These suggestions are made in the interests of simplifying, as far as is practicable, the treaty-making process. If the process could become more streamlined and efficient, it would benefit in particular smaller States which do not always have adequate material and personnel resources to meet the demands placed on them.

Cuba (A/36/553, p. 20)

1. No.

2. No.

3. They should be drawn up in the working languages of the United Nations, since the establishment of additional versions might result in unofficial translations which altered the meaning in some respect.

4. This could help to ensure the linguistic uniformity of texts, but should not serve any other purpose.

Germany, Federal Republic of (A/36/553, p. 25)

The functions of drafting committees and the handling of language problems (the early formulation of treaties in all authentic versions is desirable)

depends on the merits of each individual treaty. The Law of the Sea Conference can be used as a model only in cases of similar nature.

Indonesia (A/37/444, p. 14)

The function of the drafting committee with regard to the language that should be used depends upon the importance and kinds of treaties. The method used for the United Nations Conference on the Law of the Sea could be applied only in the same categorical case.

Italy (A/36/553, p. 29)

It seems difficult to improve to any great extent the present situation, although the method followed by the Third Law of the Sea Conference with regard to linguistic co-ordination seems to have produced praiseworthy results so far.

Mali (A/36/553, p. 31)

1. Treaties should be formulated simultaneously in all languages in which their text is to be authentic.

2. For certain types of treaties, a subgroup may be established for each language, as in the case of the Third United Nations Conference on the Law of the Sea.

Mexico (A/36/553, p. 36)

1. In some cases, drafting committees can exercise negotiating functions. However, as a general rule, drafting committees should be limited to improving the presentation of texts and harmonizing the various language versions.

2. The practice of adopting multilateral treaties in the six working languages of the United Nations General Assembly should be continued, since that practice serves the interest of avoiding cultural hegemonies.

3. The establishment of language groups within drafting committees, as in the case of the Third United Nations Conference on the Law of the Sea, should be avoided. The establishment at that Conference of such groups, open to the participation of all States, was necessary as a special arrangement, which should not set a precedent.

4. The establishment of those language groups delayed the work of the Drafting Committee, because some of their work was carried out without regard to the work of other similar groups. In short, the groups were an unnecessary additional forum within the Drafting Committee of the Conference.

Netherlands (A/36/553/Add.1, p. 10)

1. It is not considered necessary to give drafting committees more extensive functions. However, drafting committees should be allowed to function normally and their work should not be frustrated by calling each drafting change a change of substance.

2. The smaller the number of authentic texts there are, the better it is. In the case of several authentic texts it is recommendable to provide that among divergencies between the various authentic texts one should be decisive.

3. The language of the decisive authentic text should be the one in which the treaty is formulated. If need be, other language versions could be made later. Experience shows that negotiations often continue to the last moment, leaving no time to adjust the various texts to decisions then taken. Such a procedure could also bring about considerable savings in expenditures.

4. Subject to the above, where negotiations are held in multiple languages, the establishment of sub-groups for each language, whose co-ordinators meet from time to time to resolve any interlingual and general questions, is preferable.

Qatar (A/37/444, p. 17)

Treaties should be formulated simultaneously in all languages of the United Nations.

In some cases, a sub-group may be set up for each language, as is the case at the Third United Nations Conference on the Law of the Sea.

Republic of Korea (A/37/444, p. 20)

The Government of the Republic of Korea has no objection either to an increase in the role of the Sixth Committee or to creation of a drafting committee within each plenipotentiary conference. As regards the languages to be used, it would be advisable to continue the current practice.

Spain (A/36/553/Add.I, p. 17)

1. This might be appropriate, as long as it performed a purely advisory function.

2. In general, no.

3. We must try to negotiate and formulate treaties in the languages in which their text is to be authentic, at least in the most widely used languages such as Spanish, French and English. We must prevent one language (generally English) from gradually monopolizing such work, especially in the negotiating stage. The increasing informality of negotiations, the use of small negotiating groups and the logistical difficulties of holding several meetings at once . . . are leading to the artificial imposition of a single language, placing non-English-speaking delegations at a disadvantage. There are cases in which, for instance, a proposal made formally in Spanish is translated into English and then back into Spanish. The final text sometimes differs considerably from the original proposal. Even when, in practice, English is imposed as the vehicle for informal negotiations, we must try to give an equal opportunity to the other official languages, especially when texts come to be published and hasty, imprecise and inaccurate translations of the English are sometimes produced.

4. The practice of establishing language subgroups within drafting groups would seem useful, but such groups would have to be given enough time for

their reports to be examined and discussed by the drafting group. We would have to ensure that the different language groups worked at the same speed and did not simply follow the English language group. Language group co-ordinators are useful in helping to solve problems of co-ordination between the different texts, but they cannot become super-members of the drafting group with decision-making powers.

Switzerland (A/37/444, p. 23)

En ce qui concerne la rédaction des traités, il ne paraît pas opportun d'attribuer aux comités de rédaction des fonctions allant au-delà de la mise au point formelle des textes. D'autre part, il convient de maintenir la pratique consistant à rédiger simultanément les traités dans toutes les langues dans lesquelles ils feront foi, seule manière d'assurer l'égalité des langages décrétés authentiques. Même si la création de six groupes linguistiques (correspondant à chacune des six langues faisant foi) par le comité de rédaction de la troisième Conférence sur le droit de la mer s'est révélée très utile, vu l'ampleur et la complexité de la tâche dévolue au comité, cette mesure ne devrait pas nécessairement s'appliquer désormais uniformément à toutes les conférences.

Ukrainian Soviet Socialist Republic (A/36/553, p. 40)

There are at present no grounds for creating an international treaty drafting bureau or for giving drafting committees more extensive functions. Nor are there any grounds for changing the existing effective practice of the United Nations regarding the language formulation of treaties.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

There are no grounds for creating an international treaty drafting bureau or for giving drafting committees more extensive functions. As for the formulation of treaties in a number of languages, the United Nations has an existing and sufficiently effective practice of using its official and working languages.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 44)

The Council of Europe has no particular problems in this respect. Its official languages are English and French. In view of the relatively small number of member States, legal drafting does not raise any particular problem. It is done in expert committees, with the assistance of the Secretariat (which is also responsible for the final polishing of the text before its adoption by the Committee of Ministers).

International Atomic Energy Agency (A/37/444, p. 27)

There seem to be no specific needs to create a centralized drafting body such as an "international legislative drafting bureau".

It seems appropriate that treaties should continue to be formulated simultaneously in all languages in which their text is to be authentic.

International Telecommunication Union (A/37/444, p. 30)

1. The usefulness of the creation of an international legislative drafting bureau might depend a good deal on the functions envisaged to be given to that bureau. If they were of a general nature limited to elaborating recommendations on drafting multilateral treaties without being involved in the practical drafting of any particular treaty, such a bureau might serve a useful purpose.

2 to 4. No comments, as the matter is already dealt with satisfactorily, as far as the ITU is concerned, by the provisions of the ITU Convention (see I.1 and 2 above).

Organisation for Economic Co-operation and Development (A/36/553, p. 52)

1. The OECD Secretariat has no view on this matter.

2. The extension of the functions of a drafting committee in the preparation of any given multilateral treaty is entirely dependent on the circumstances of a particular negotiation.

3. The Secretariat of OECD has no view on this subject.

4. Not applicable.

World Health Organization (A/36/553, p. 58)

The drafting process might be facilitated if treaties, rather than being formulated simultaneously in all languages in which their text is to be authentic, were originally to be formulated in only one or two languages, with additional versions being established by a special procedure later.

NOTE

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

VIII. RECORDS, REPORTS AND COMMENTARIES

1. *To what extent should verbatim or summary records be maintained by organs formulating multilateral treaties:*
   - (a) *Expert groups?*
   - (b) *Restricted representative groups?*
   - (c) *Various organs of plenipotentiary conferences:*
     - (i) *Main Committees?*
     - (ii) *Negotiating committees?*
     - (iii) *Drafting committees?*
2. *Whether verbatim or summary records are kept, and especially if they are not, should certain organs and conferences prepare more complete records*

of their negotiations, indicating various positions taken and the reasons for changes in the text? Who should prepare such reports?

3. *Should commentaries normally be prepared on draft treaty texts formulated*:
   (a) *By expert groups?*
   (b) *By representative organs?*
4. *Should a systematic effort be made to prepare and publish the* travaux préparatoires *of most or all multilateral treaties? If so, should this primarily be done by*:
   (a) *The secretariat unit concerned?*
   (b) *UNITAR?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. Those representatives who commented on this subject preferred that adequate records and reports should be maintained by all organs and conferences formulating multilateral treaties. However, the preparation of commentaries was regarded as an extremely difficult task because even objective analyses might sometimes become a source of confusion, and when provisions were adopted by consensus States might prefer to adhere to their own interpretations.

2. The view was expressed that *travaux préparatoires* represented an important source in understanding the considerations underlying the various clauses of a treaty and would help particularly those developing countries that did not have the resources to collect and maintain extensive records in their archives. Some representatives considered that the *travaux* should be prepared and published by the United Nations Secretariat or the conference formulating multilateral treaties, and that UNITAR should be encouraged to continue its work in respect of the *travaux* of treaties promulgated by the United Nations. One representative suggested that the Secretariat should be asked to prepare a detailed report on how to determine what kind of conference (e.g., all diplomatic conferences or only conferences dealing with legal topics) should prepare and publish official records, and what should be included in them.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 11)

1. Verbatim records should be kept at least for the main committees of plenipotentiary conferences and for as many as possible of the organs normally engaged in the formulation of treaties.

2. A full report should be prepared of the discussions on every treaty that is adopted, indicating various positions taken, the arguments on which they are based, the reasons for changes in the texts and other points of interest.

3. Commentaries on draft treaty texts formulated by expert groups or by representative organs provide additional documentation relating to the pre-

conference phase and, together with commentaries on the texts of treaties already drafted, are of particular importance, when incorporated in the *travaux préparatoires*, in helping those legal organs of States that are responsible for ratification.

4. A systematic effort to prepare and publish the *travaux préparatoires* of most or all multilateral treaties would make an extremely valuable contribution to the full understanding of conventional international law on conventions, the progressive development of which is the responsibility of the United Nations.

Australia (A/37/444, p. 10)

1. As a general rule, summary records should be maintained only for plenary sessions of a conference and sessions of Main Committees or Committees of the Whole. Records of negotiations provide a means for the interpretation of treaties. There is, therefore, value in records of negotiations, including documents formally circulated during negotiations, being as complete as possible.

2. This question is not entirely clear. The official reporting of various positions taken and the reasons for changes in the text are a sensitive matter. If it is to be undertaken at all, the report should be examined, and made subject to adoption, by the conference which negotiated the text.

3. Commentaries on draft treaty texts of the type prepared by the International Law Commission are of great assistance for treaties which purport to modify or build upon customary international law. The preparation of systematic commentaries on texts is a task best undertaken by expert groups.

4. A systematic effort should be made to prepare and publish the *travaux préparatoires* of multilateral treaties. A secretariat unit can play an important role in collecting much of the relevant documentation during the negotiations. However, because the work of preparing a full account of the *travaux préparatoires* will continue after the conclusion of the treaty, it would be useful to have an expert prepare and publish the *travaux préparatoires* of all major multilateral treaties.

Austria (A/35/312/Add.1, pp. 4-5)

1. *Records*

1. It is not felt that serious problems are caused by the practice of some of the committees, sub-committees or working groups, etc., composed by representatives of States and entrusted with the preparation of a draft text, to dispense with records. Although it may be true that official records are helpful for delegations whose membership might change between sessions, private records of the delegation or at least the delegation's interval reports to its authorities would normally provide a remedy. A remedy surely could also be found in somewhat more extensive committee reports reflecting the main trends of the discussion. The problem is, therefore, rather one of internal administrative organization. The minor and subsidiary role which the Vienna Convention on the Law of Treaties in article 32 assigns to the preparatory work of a treaty would not seem either to justify an extension of records.

2. It would rather seem that stringent reasons militate in favour of maintaining the present practice. Crucial negotiations might be seriously impaired—if not made impossible—when everything that is said risks to become part of a record and thus part of the public domain. If proof is needed, such proof is provided by the growing number of anonymous working papers in already confidential negotiations, a clear indication of the necessity to facilitate the submission of new ideas during the negotiating process without officially committing the negotiators. An exercise outside the United Nations—i.e. the Conference on Security and Co-operation in Europe—provides an additional pertinent example. It seems that, for the sake of achieving a result, some sacrifice has to be made in respect of the historic record.

3. Moreover, many negotiating committees have already adopted the practice of enlarging their reports in such a manner as to include a summary of all relevant positions expressed during negotiations with a view to satisfying the legitimate interests of non-participating States.

2. *Commentary*

4. A commentary on draft articles which are to be submitted for adoption to a diplomatic conference or a United Nations organ is obviously of great value since it permits a better understanding of the text, elucidates the history of formulations and explains the reasons which led to them. But for the very same reasons, a commentary of such nature can be established only on a draft text which has been arrived at in an open—one might say rational—way. This will normally be the case if the text emanates from a committee of experts.

5. In a committee composed of representatives of States, the real reasons for which a particular formulation may be chosen are not necessarily indicated. Moreover, the text, whether achieved by a vote or by consensus, is not only the result of a meeting of wills but also of a meeting of various motives and reasons. Thus, the negotiating or decision-making process, determined as it is by the necessity to accommodate different interests, is not a process which can be termed logical from a legal point of view and cannot, therefore, be explained in a rational commentary. Hence, it seems useless to burden committees composed of representatives of States by insisting on their adopting a commentary on any draft text on which they agree, since that commentary would be of little value.

3. *Commentary on the text of a convention*

6. It has been suggested that a diplomatic conference or an organ of the United Nations should, when adopting the text of a multilateral instrument, also adopt a commentary on it. Such a commentary seems both unnecessary and impossible to achieve. The commentary is unnecessary because it would not be ratified and would thus be only a supplementary means of interpretation under article 32 of the Vienna Convention on the Law of Treaties. Moreover, if a commentary really clarified an otherwise obscure text and commanded general support, it should rather be incorporated into the text than remain separate as a commentary. The commentary seems impossible to achieve because the motives for which States prefer a particular formulation over another may differ as widely as their understanding of it. It is precisely because those motives or understandings are not publicly voiced that an agree-

ment on the text is often achieved. This could, obviously, not happen were a commentary to explain the variety of motives and understandings, and even less if it were to favour one motive or understanding over the other. There is also a great difference between the declaration by a State, made to a conference, that it accepts a text on a particular understanding, and the conference taking note or even approving such a declaration.

7. It is a further misunderstanding to refer in this respect to the explanatory memoranda "which in some States accompany legislation". Such memoranda, where they exist, accompany draft legislation and are submitted by the authority that introduces the draft (in most cases the Government). Their function is comparable to that of the commentaries of the International Law Commission, in that they are an aid to the decision-making process of the legislative body, but are not adopted by it and do not acquire a specific legal status.

Brazil (A/36/553, p. 15)

1. Verbatim or summary records are always useful for future reference, as they may be helpful in clarifying the meaning of certain provisions of a treaty. Whenever possible they should be kept and published. Reports with indication of positions taken and reasons for changes in texts do not provide the same degree of information and are not easy to prepare. Only in very special cases, when the preparation of summary records would be too onerous from the administrative or financial point of view, would it be advisable to rely on such reports.

2. A systematic effort to prepare and publish the *travaux préparatoires* of most or all multilateral treaties would seem too ambitious a task. The Secretariat or UNITAR could, however, with approval of the General Assembly, undertake the task of publication of such *travaux* on a selective basis.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 3)

There is no need to make rules concerning the extent of and need for verbatim and summary records and commentaries to draft treaties. As can be seen from existing practice, the matter may be dealt with in a way appropriate to each specific case.

Canada (A/35/312/Add.1, p. 19)

The Canadian authorities also consider that a review of the multilateral treaty-making process should include an examination of the adequacy of the *travaux préparatoires* with a view to achieving, in so far as is possible, consistency in the quality of the documentation so that a complete and accurate record of the negotiations is available in all cases.

Cuba (A/36/553, p. 20)

1. (*a*) Summary records.
(*b*) Summary records.
(c) (i) Verbatim records.

(ii) Verbatim records.
(iii) Summary records.

2. Any explanatory summary should be produced by the organ formulating the text. Such a summary could assist in analysis, especially in cases where decisions have been taken on contentious points and there are no records, or where certain matters are to be submitted to another organ for a decision.

3. (*a*) Yes.
(*b*) Yes.
4. (*a*) Yes.
(*b*) No.

Germany, Federal Republic of (A/36/553, p. 25)

1. Verbatim or summary records should in principle be maintained for plenary sessions and sessions of the Committee of the Whole. Whether they are necessary for meetings of other committees as well depends on the nature of the subject under negotiation.

2. Records of negotiations are a useful means of indicating the meaning and purpose of a treaty that has been adopted. However, the importance of such preliminary work for the interpretation of treaties should not be overrated.

Indonesia (A/37/444, p. 14)

Principally, the verbatim and summary records are necessary only in the sessions of the plenary and whole committees which are based upon consensus. The need for the proceedings of the committee to be recorded will depend upon the nature of the problem. The reports should be formulated by an expert or small group.

Italy (A/36/553, p. 29)

1. It should not be forgotten that while the recourse to preparatory work is a useful means for interpreting treaties, it is not the basic criterion followed by the Vienna Convention of 1969. In this context it is not always necessary to have analytical summaries or verbatim records of all the activity of international negotiating bodies. This is worth while only with regard to main committees of international conferences and, in the interest of co-ordinating texts in several languages, to drafting committees. For the rest, it is preferable to decide case by case, while leaving to the discretion of individual States participant to a negotiation the decision of whether or not to make their decisions public (i.e. by setting them forth in an official document). The decision to elaborate comments to draft conventions should similarly be taken case by case, although in most cases the affirmative solution will be self-imposed.

2. When a decision is made to publish the preparatory work of a treaty, UNITAR might play a role if it is endowed with experts of obvious renown and guaranteed impartiality.

Mali (A/36/553, p. 31)

1. In connection with the formulation of multilateral treaties, summary or verbatim records should be maintained for expert groups and restricted representative groups.

2. Commentaries should normally be prepared on drafts formulated by expert groups.

Mexico (A/36/553, p. 36)

1. With respect to verbatim or summary records, the ideal would be for every organ participating in the formulation of a multilateral treaty, except those informal negotiating bodies in which records would be an impediment to the work, to have records that would chronicle the entire negotiating process for the purposes of article 32 of the Vienna Convention on the Law of Treaties. With regard to the question of more complete records, however, since for budgetary purposes it is uneconomic to keep verbatim or summary records for all such organs, they should be kept at least for the plenary and the main committees of a plenipotentiary conference.

2. The absence of records in other organs can be successfully compensated for with *in extenso* reports by the Rapporteur or Chairman, as the case may be. Since, in the United Nations, the Secretariat normally prepares draft reports for the rapporteurs, experienced officials of the Secretariat should make an effort to rationalize such reports and make them more systematic, subject, of course, to the responsibility of the rapporteur for the final wording of his report.

3. The International Law Commission's practice of preparing commentaries on its draft articles has proved to be of value. Any collective body or any Government submitting preliminary drafts for a treaty should follow that good practice.

4. A systematic effort to compile and publish the *travaux préparatoires* of most multilateral treaties would be especially useful for all students of international law and for the purposes of article 32 of the Vienna Convention on the Law of Treaties.

5. Since such work would not require research but merely compilation and publication, it should be entrusted to the Secretariat of the United Nations, leaving the research work to UNITAR.

Netherlands (A/36/553/Add.1, p. 10)

1. In general, documentation which clarifies the results of negotiations is very useful. However, records, reports etc. are to be used cautiously, because they often provoke "speeches for the record" and tend to fix the positions of delegations. One should also bear in mind that sometimes results can be achieved only in smaller groups and that those results are possible only because the negotiating process as in such small groups remains unknown to the outside world.

2. Commentaries should preferably be prepared by expert groups. A systematic effort to prepare and publish the *travaux préparatoires* should indeed be made, primarily by the Secretariat unit concerned.

3.[2] In the regional context (e.g., the Council of Europe), non-binding explanatory notes are customarily attached to an established treaty. Whether such a formula is also desirable for universal treaties will have to be considered in each individual case. Accompanying comments/explanatory notes can fulfil a useful function if differences arise over the interpretation or application of the treaty in question. On the other hand, such explanatory notes can impede the treaty-making progress by limiting the margin for interpretation, which some States might desire. Explanatory notes should in any case make clear the extent to which the attitudes of the Member States have converged.

Qatar (A/37/444, p. 17)

Summary records must be maintained for meetings of the main committees. As a general rule, commentaries should be prepared on drafts formulated by expert groups.

Republic of Korea (A/37/444, p. 20)

One cannot overemphasize the importance of maintaining adequate records and reports in all relevant bodies, and the need for publication of *travaux préparatoires* is undoubtedly great.

Spain (A/36/553/Add.I, p. 17)

1. There should be summary records only for meetings of Main Committees.

2. In the preparatory stage, there should be reports on the meetings of expert groups, especially when such groups submit preliminary draft or draft treaties. These reports should be drawn up by the corresponding groups with the help of the Secretariat.

3. As we have already indicated, only by expert groups.

4. Yes, wherever possible. This should be done by the secretariat unit concerned.

Switzerland (A/37/444, p. 23)

Les comptes rendus analytiques ou sténographiques devraient être maintenus pour les séances plénières des conférences, ainsi que pour les réunions des grandes commissions. S'il est utile, voire indispensable, de pouvoir déterminer quelle a été la position respective des Etats au cours de la discussion d'un traité, cette exigence ne s'étend pas aux travaux des groupes restreints et autres comités de négociation pour lesquels l'absence de publicité est souvent une condition de succès. Etant donné que les travaux préparatoires doivent permettre d'éclairer après coup les choix opérés par les auteurs des projets de traités, ceux-ci devraient être assortis d'un commentaire lorsqu'ils sont établis par des experts. L'élaboration et la publication des travaux préparatoires devraient être confiées aux secrétariats intéressés, normalement mieux équipés à ces fins que l'UNITAR.

Ukrainian Soviet Socialist Republic (A/36/553, p. 40)

There is no need to regulate the arrangements regarding verbatim or summary records or commentaries on draft treaties. In making arrangements, attention should be paid to the existing practice whereby an individual approach is adopted towards specific draft multilateral treaties.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

There is no need to regulate the arrangements regarding verbatim or summary records, or commentaries on draft treaties. The relevant arrangements should be made, as is the case in existing practice, not on the basis of a standard model but in a way appropriate to individual draft multilateral treaties.

United Kingdom of Great Britain and Northern Ireland
(A/35/312/Add.1, p. 32)

The present review provides an occasion for looking again at the question of the records of the preparatory work of treaties. It is considered that more could usefully be done to prepare analytical collections of records. Such collections do exist for certain multilateral treaties, such as the Vienna Conventions on Diplomatic and Consular Relations and the Law of Treaties, which have been concluded at diplomatic conferences. However, this is not the case with many other important treaties, including the Human Rights Covenants, which have been drawn up within the United Nations framework. It is recalled that it is the practice in some regional organizations to draw up explanatory reports on Conventions, and that a commentary was prepared on the Single Convention on Narcotic Drugs.[3] These explanatory reports and commentaries may provide guidance to the records of the preparatory work, and will in any event shed light on the meaning of particular provisions in the text of the Convention. Without making any firm proposal, consideration should be given as part of the present review to this and other possible means of improving knowledge of and access to the records of preparatory work of treaties.

United States of America (A/35/312/Add.1, p. 39)

1. The final report prepared by a conference that adopts a treaty text should be comprehensive. The reports should provide a summary of the negotiations, and information on any articles where the opinion of the conference or a significant number of delegates differs from that of any body of experts, such as the International Law Commission, that initially drafted the treaty text. The report should emphasize any changes in the treaty structure made by the conference, whether amendments to or deletions of particular articles, or new articles. A rapporteur of some skill would be required to draft a detailed report of this kind, in which extensive assistance of the secretariat is vital.

2. Closely related is the importance of records of committees and working groups. It is not essential to have a verbatim or even summary text of the debate in such groups—indeed, its preparation could inhibit supple and productive negotiation of differences—but it is important to have a history of their negotiations, and a record of the intention of the members concerning the meaning of the final text proposed by them, at any rate where its members

agree that a revelation of their intentions will be constructive. It may be that such records should not identify particular States as taking specific positions.

3. Plenipotentiary conferences need not only be carefully prepared but well organized if they are to be successful. The selection of key officers of the conference is a vital factor in maximizing the chances of success. Capacity and experience must be the paramount consideration, with due regard being paid to geographic distribution. The President, Chairmen of Committees of the Whole and Chairman of the Drafting Committee should if possible be selected well before the opening of the session.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 45)

1 and 2. In the Council of Europe, the documents made available in connection with the formulation and negotiation of European treaties are the following:

(i) Working papers: papers submitted by delegations and notes prepared by the Secretariat;

(ii) Reports of meetings of the expert committee, not always containing detailed descriptions of the positions of the various delegations;

(iii) The final report of the work of the expert committee, containing the final draft of the convention and the commentary thereon;

(iv) Conclusions of meetings of the Committee of Ministers, which is responsible for adopting the text and opening the convention for signature by member States.

3 and 4. The practice in the Council of Europe is to produce a commentary on each convention or agreement. It is normally prepared by the Secretariat and approved by the expert committee responsible for drafting the convention or agreement. The Committee of Ministers must authorize its publication.

4. Yes. Such a publication would be useful, at least with respect to the most important treaties; see, for instance, the publication of the *travaux préparatoires* of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

International Atomic Energy Agency (A/37/444, p. 27)

1. It would be necessary to maintain summary records of discussions at the bodies listed in paragraph 1(*a*) and (*b*). As for the bodies described in paragraph 1(*c*), at least summary records should be prepared to cover discussion at the main committees of plenipotentiary conferences, whereas reports indicating the outcome of discussion may be sufficient or even more desirable than summary records in case of negotiating and drafting committees. Summary records should always be prepared in such a manner as to indicate various positions taken and proposals made by delegates, explanatory notes given by the drafter (e.g. the secretariat, delegates) of the text and the reasons for changes in the wording of the text.

2. With the exception of certain types of treaties such as those emanating from the ILC, it would not be very practicable or necessary to prepare commentaries on the provisions of treaties.

3. The preparation and publication of the *travaux préparatoires* could normally be best done by the secretariat unit concerned.

International Telecommunication Union (A/37/444, p. 30)

1 and 2. No comments, as the present practice followed by the ITU with regard to records and reports (see the ITU's first contribution referred to until I.1. above) gives full satisfaction.

3. The preparation of commentaries on draft treaty texts appears to be of little use and a possible waste of time and man-power. On the other hand, it may be quite useful to elaborate commentaries on the final texts of a treaty adopted. The mandate for such a work should certainly come from the competent policy-making or "representative organ" of the organization concerned, but it seems to be quite difficult, if not impossible, to imagine that such an organ prepares itself any such commentaries. The preparation itself might be entrusted either to a small expert group or the secretariat of the organization concerned. After their elaboration, such commentaries might need the approval of the organ having given the mandate therefor.

4. The preparation and publication of the *travaux préparatoires* of any multilateral treaty appear to be quite useful. This work should, however, be entrusted not to UNITAR, but to the secretariat of the organization concerned.

Organisation for Economic Co-operation and Development (A/36/553, p. 53)

1. (*a*) and (*b*) The maintenance of secretariat records of the proceedings of expert groups or restricted representation groups can often be of considerable use. Practice at OECD is to prepare summary records.

(*c*) (i) The maintenance of summary records of the proceedings of main committees of plenipotentiary conferences is equally useful.

(ii) and (iii) The maintenance of verbatim or summary records of negotiating committees or drafting committees can have the disadvantage of inhibiting flexibility and compromise.

2. See answer in paragraph 4.

3. The preparation by the OECD Secretariat of commentaries on draft treaty texts prepared by expert groups or representative organs is often used and has proved to be very helpful in the course of negotiation.

4. To the extent that financial means are available to do so, the preparation and publication of *travaux préparatoires* could undoubtedly be of great use. The OECD Secretariat is not in a position to reply to the specific question of who should prepare such *travaux préparatoires* within the United Nations Organization or Organizations of the United Nations system.

World Health Organization (A/36/553, p. 58)

1. No comments.

2. Whether verbatim or summary records are kept and especially if they are not, the secretariat of certain organs and conferences should prepare more complete records of their negotiations, indicating various positions taken and the reasons for changes in the text.

3. Commentaries that go beyond the mere recording of the *travaux préparatoires* should normally be prepared on draft treaty texts and should be formulated by expert groups.

4. A systematic effort should be made, by the secretariat unit concerned, to prepare and publish the *travaux préparatoires* of most or all multilateral treaties.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] A/35/312/Add.1, p. 23.

[3] *Commentary on the Single Convention on Narcotic Drugs, 1961* (Sales No. E.73.XI.1). Two similar studies were prepared on related instruments: *Commentary on the Convention on Psychotropic Substances* (E/CN.7/589; Sales No. E.76.XI.5) and *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961* (E/CN.7/588; Sales No. E.76.XI.6).

IX. POST-ADOPTION PROCEDURES

1. *Should the United Nations consider and take any action in respect of the procedures by individual States to ratify and bring into force multilateral treaties formulated under its auspices?*
2. *Should a questionnaire be addressed to States as to why they fail to become parties to multilateral treaties?*
3. *Should the United Nations seek to establish a legal régime, following the example of some inter-governmental organizations, under which it could require:*
   (a) *A commitment from each Member State that it will submit treaties to the appropriate domestic organs with a view to authorizing ratification?*
   (b) *Periodic reports concerning the steps taken towards ratification?*
4. *Should special rapporteurs or other experts who helped in negotiating a treaty be made available to assist States with their internal ratification procedure?*
5. *Should an attempt be made, in respect of certain categories of treaties to provide for their automatic entry into force except in respect of States that voted against adoption or that submit an opting-out notice?*
6. *Should treaties or certain categories of treaties normally provide for provisional entry into force, at least among those States that voted for their adoption and that do not submit an opting-out notice?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. It was stressed by some that the signature of a State to a treaty did not create, as a matter of law, an obligation as to its ratification. With respect to measures to promote the ratification of treaties, several representatives felt quite strongly that this question was governed by the internal law of each State and it was therefore for States themselves to decide whether they wished to accept a treaty; any measures to promote ratification of treaties might be construed as constituting external intervention and as such should not be allowed. Some other representatives, however, cautioned that there were certain limits to this view because delays in ratifications were often due to a wide variety of factors other than conscious political choice, and that there was therefore room to look into those issues raised in section IV.I of the Secretary-General's report. The view was expressed that a balance should be maintained between the desirability of attaining universal accession to treaties and the sovereign right of Governments to make their own decisions on treaty ratification. One representative suggested that a reporting procedure on ratification activities of States and on relevant national legislation would be useful.

2. Some representatives referred to various means that, in their view, could increase or improve wide acceptance of treaties, e.g.: (i) conducting studies on the correlation, if any, between the procedure chosen in adopting a treaty and the acceptability of a treaty, or on possible effects of a new treaty on existing national laws and treaties; (ii) incorporating a provisional entry into force clause into certain categories of treaties dealing with technical matters; (iii) setting a specific time period for States to submit adopted treaties to their national legislatures; (iv) adopting flexible clauses for entry into force so as to allow each State to choose the manner in which its consent to be bound be expressed (e.g., ratification, acceptance or approval) on the basis of its constitutional requirements. However, none of these suggestions gained general support.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, pp. 11-12)

1. Without prejudice to the sovereignty of States—a point made in UNCITRAL when this subject was considered in connection with conventions adopted in its field of competence—the United Nations should consider this matter and take action which fully respects State sovereignty. This will help to achieve the sound objective of ensuring that the tremendous efforts exerted to bring about the codification of international law are not wasted, because the texts formulated remain indefinitely as instruments not legally binding on States.

2. There is no apparent objection to this kind of action, namely, addressing a questionnaire to States as to why they fail to become parties to a particular multilateral treaty.

Such a procedure would have the merit of causing States gradually to look into the question, how many existing treaties they are parties to and systematically update their position towards such treaties; the fact that they themselves

had created the obligation, through the organization to which they belong, would provide an incentive.

The obligation to opt out, as an act of sovereignty, will indicate which treaties have becomc inoperative because there is no prospect whatever of their being ratified in the medium term. In addition, whcre the prospect of ratification is almost totally lacking, it will give the few States which have become parties an opportunity to consider whcther in those circumstances, there is any point in remaining tied to a treaty or whether they should denounce it and conclude bilateral treaties among themselves. This is obviously one way of tidying up international law on conventions.

3. There would appear to be no objection to the establishment of a legal régime under which States would be required to submit treaties to the appropriate domestic organs with a view to possible ratification and to report on the steps taken later.

The requirements would involve nothing more than a report on whether ratification was in prospect or not.

4. The Organization could, as a form of technical assistance, make available to States which so requested special rapporteurs or other experts to assist them with their internal ratification procedure.

5 and 6. Automatic or provisional entry into force is not desirable for any category of treaty. In view of the difficulties encountered by Governments in obtaining the ratification of international legislation, such a list of opposition does not appear salutary.

Australia (A/37/444, pp. 10-11)

1. Many of the procedures listed under this heading may, if implemented, have the effect of interfering in an unacceptable way with a State's freedom to decide whether to ratify a particular treaty, at what stage and in what manner. On the other hand, some forms of encouragement of State activity in this area may be acceptable. The automatic entry into force of certain categories of treaties would raise constitutional problems in legal systems where those categories of treatics first have to be implemented in domestic legislation before the State concerned can become a party to them.

2. There would be advantage in having expert assistance available of which a State could avail itself for advicc to it whcn considering becoming a party to a multilateral treaty. This is particularly important in the case of a State considcring becoming a party to a multilateral treaty before the *travaux préparatoires* have been fully collated and published. It may also be of use to consider the preparation by an expert, on request of the State concerned, of a brief general document on the implementation of the treaty concerned.

3. The provisional entry into force of some treaties (e.g. some commodity agreements) has proved a useful and constructive device. Provisional entry into force may serve several purposes such as enabling States to become bound by a treaty which establishes an interim régime pending a decision by other States also to become a party. It may also enable a State to become a party without first having fully implemented all obligations under the treaty in its domestic law. The device of provisional application should be encouraged as a means of obtaining maximum adherence to certain treaties which call for a

wide adherence within a limited time. The treaties should lay down clear circumstances or time limits within which the provisional application must be made definitive.

Brazil (A/36/553, p. 15)

1. The Report of the Secretary-General states that "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 substantial 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". The Brazilian Government is of the view that the rule should not be changed.

2. Each State being the only judge of its interest in becoming a party to an international treaty, any attempt to influence that decision would be an improper interference in a matter essentially within the domestic jurisdiction of thc State. International organizations should not therefore engage in any action aimed at encouraging States to ratify treaties, nor should States be required to give any information as to the reasons why they have not ratifled a treaty.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 3)

1. Matters relating to the ratification procedure for international treaties, the acceptance of any obligations concerning the establishment of régimes and, in general, the adoption of a position on any international treaty are the sovereign right of every State and no one may interfere in such matters.

2. Provisions relating to the provisional application of a treaty are considered when the treaty is adopted by the plenipotentiaries and fall fully within their competence.

Cuba (A/36/553, p. 20)

1. The ratification procedures of States are governed by domestic law and should not, therefore, be reviewcd by the United Nations. What the Organization can do is to review treaties which have not entered into force and urge States that have not signed and ratifled them to do so, especially in cases where the subject which the treaty is intended to regulate is of benefit to the international community.

2. This could result in a kind of interference in the internal affairs of a State and is therefore not advisable. However, States could be urged to participate more fully in treaties, especially those of major international interest.

3. (*a*) Any requirement of this kind has overtones of interference and an obligation to submit treaties to the domestic organs does not mean that they will be automatically ratified.

(*b*) This would involve a degree of compulsion that might affect the ratification of some treaties.

4. This is not necessary, since States which do not ratify or become parties to a treaty are motivated by domestic reasons and no solution can be provided by an expert from the Organization.

5. This procedure would not be appropriate because, even if the treaty in question entered into force, as long as States did not ratify it or become parties to it they would not be obliged to comply with its provisions, at least where that is required by the various national legal systems.

6. This would not be appropriate, for the same reasons as are stated in the preceding paragraph.

Germany, Federal Republic of (A/36/553, p. 25)

1 and 2. Experience has shown that attempts by international organizations to encourage their member States or other countries involved in the negotiations to ratify and bring into force treaties formulated under their auspices have had little effect. It is hardly likely, therefore, that questionnaires inviting sovereign States to state the reasons why they are delaying adherence to multilateral treaties will produce any better results.

3 and 4. The possibility of requiring a commitment from member States to submit treaties to their domestic legislative organs or to submit periodic reports concerning the steps taken towards ratification, could at best be considered in connection with the adoption of specific treaties but not as a general rule. Similarly, experts who have helped in negotiating a particular treaty could only be asked to assist in internal ratification procedures in exceptional cases. The initiative for such assistance would have to come from the States concerned.

5. The automatic entry into force of treaties without their specific acceptance by contracting parties raises constitutional problems, where they are subject to ratification by Parliament or other national organs. Consequently, simplified entry into force procedure shall be restricted to certain categories of treaties where the governments of contracting States have competence in the subject-matter concerned.

6. The provisional application of treaties (one should perhaps avoid the expression "provisional entry into force") creates problems for many States on constitutional grounds.

Indonesia (A/37/444, p. 14)

It is difficult for the United Nations to exert Member States to ratify a treaty because that process involves national laws. In such a situation the maximum that the United Nations could do is to urge the Member States which have not ratified the treaty to do so soon, and at the same time submit periodical reports concerning the number of Member States that have ratified it.

Italy (A/36/553, p. 29)

The Italian Government observes that many of the proposals contained therein risk limiting the freedom of States in the phase subsequent to the adoption of a treaty, thus violating the Vienna Convention of 1969. These proposals would make much more sense if all treaties were adopted on a broad and detailed consensus basis, which is not always the case today. In particular, proposals 5 and 6 seem highly inadvisable, in that the suggestions contained

therein might be applied only rarely, on the basis of a specific consensus expressed from time to time in the negotiating forum.

Mali (A/36/553, p. 32)

1. A questionnaire should be addressed to States as to why they fail to become parties to multilateral treaties.

2. An attempt should be made, in respect of certain categories of treaties, to provide for their automatic entry into force except in respect of States that voted against adoption or that submit an opting-out notice.

3. Certain important treaties should provide for provisional entry into force among those States that voted for their adoption.

Mexico (A/36/553, p. 37)

1. Matters relating to the process of ratifying an agreement are within the exclusive competence of sovereign States. For that reason, except in the case of those agreements or instruments establishing international organizations under which States have agreed internationally on a system whereby a specific organ promotes and collaborates with States in the ratification or accession process, that process must remain within the exclusive competence of State sovereignty.

2. The foregoing should not prevent the continuation of the practice whereby the United Nations General Assembly and other governmental organizations regularly send appeals and reminders to States with a view to obtaining their consent to be bound by multilateral treaties.

3. When a multilateral treaty is being formulated, a systematic study should be made of whether it is desirable to include in the text clauses requiring States to submit reports on the steps they have taken in compliance with the treaty.

4. There is nothing to prevent the Secretariat of the United Nations or the secretariats of other international organizations from offering States the assistance of experts to clarify doubts on the scope of a treaty, during the process leading up to ratification or accession. However, the acceptance of such assistance is also a prerogative of State sovereignty.

5. Where the "automatic" entry into force of certain treaties is concerned, it should be underscored that such entry into force is not provided for in the Vienna Convention on the Law of Treaties and is undoubtedly unconstitutional, or at least illegal, for all those States whose systems for the ratification of or accession to a treaty require the participation of the executive and legislative branches.

6. With regard to provisional application, the expression "provisional entry into force", used in some conventions drawn up within the United Nations Conference on Trade and Development (UNCTAD) and in the questionnaire contained in document A/35/312 (but not used in the Vienna Convention on the Law of Treaties), should be avoided because it is a contradiction in terms. The reference should be to "provisional application" pending entry into force (see art. 25 of the Vienna Convention).

7. A provisional application clause should be included in some treaties, always provided that it is optional. Some Governments would be unable, for constitutional reasons, to undertake to apply certain agreements provisionally.

Netherlands (A/36/553/Add.1, p. 11)

1. *Post-adoption procedures*

1. As regards this item, reference is made to the comment by the Netherlands and the intervention by the Netherlands representative in the Sixth Committee on 25 November 1980 (see A/C.6/35/SR.62), which contain various suggestions to encourage States to become a party to a treaty and to promote its entry into force.[2]

2. As to the suggestion of addressing questionnaires to States, such action (as other actions) should necessarily be based on a treaty provision. If provided for, it would be up to the depositary to send out such questionnaires.

2. *Entry into force*[3]

3. Account should be taken as early as the drafting stages of the problems which may arise in implementation. The actual implementation of a treaty is still to a great extent a task for national governments, with all the risks this entails in terms of disparities in interpretation and application. These risks are naturally diminished in proportion to the extent to which the degree of uniformity in interpretation and application is secured by the involvement of a single judicial or arbitral body. The Government of the Netherlands would thus also like to see the adoption of a clause concerning the referral to the International Court of Justice of disagreements over interpretation or application at least in the case of treaties established under the auspices of the United Nations or the specialized agencies. In treaties having such a clause, and even more in treaties without one, the risks mentioned above may moreover be further reduced by the inclusion of rules, which should be as detailed as possible, so that national authorities have as little undesirable margin for manoeuvre in implementation as possible. If a treaty, in order to realize its objectives, prescribes particular measures, for example, making certain actions or omissions a punishable offence, then these obligations should be clearly defined.

4. The delay between the establishment and entry into force of a multilateral treaty can be attributed not only to the large number of States whose acceptance is often essential to the entry into force, but equally to the acceptability of the treaty for each individual State. For this reason it is important that already in the preparatory stage sufficient attention is given to whether or not to allow reservations, and to the relationship with other treaties. Furthermore, one needs to recognize that even if the provisions of a treaty are acceptable, delay may still result from the need to adapt domestic regulations before the consent to be bound by the treaty can be given. Where no statutory instruments are necessary, lack of time and personnel can impede an early decision: the treaty must be explained to parliament and assessed for its likely effects on the State in question.

5. On this point there are measures which could be taken at the international level. First there is the possibility of bringing the role of the "rappor-

teur" into greater relief. He, having been entrusted with special duties during the preparatory phase, owing to his expertise in the matter under consideration, may still be able to play an extremely important part in the introduction and explanation of the draft treaty during the diplomatic conference, for he has become not only the special expert on the treaty as a result of his work, but also a person with a certain independent supra-national view of it. It is conceivable that he could subsequently write explanatory comments, on his own authority, on the final text, for the convenience of domestic administrations which have to consider accepting and implementing the treaty. Finally—and this would by no means be his least important contribution—the rapporteur could be made available for a time to provide information for Governments which were considering becoming parties to the treaty. His participation could at least speed up the decision-making, and might also have a positive influence on it. In the regional context these methods are already being applied in connection with the individual members of the Afro-Asian Legal Consultative Committee.

6. It would further be possible to consider the introduction of final clauses which stipulate the entry into force of the treaty at a set date for all States represented at the diplomatic conference except for those which before that date declare that they cannot accept the provisions of the treaty. However, these States and also States not represented at the conference should have the possibility to become parties to the treaty at a later date. Thus, the opting-out procedure does not exclude certain States from treaties, but becomes an effective means of ensuring the entry into force of a treaty. Once a treaty has entered into force, it often gains importance and other States feel obliged to become a party. One possible objection may be that some States may tacitly accept the treaty but do nothing in practice to implement its provisions. This is not a particularly weighty objection, however, for implementation at national level is not the most important aspect of many treaties; it is rather the creation of legal relations between States that is important. Furthermore, the problem of non-implementation occurs independently of the opting-out procedure. Domestic implementation may also be a problem with international consequences, but nonetheless one which is not connected with the question of improving procedures for establishing international legislation.

7. If this negative procedure is deemed too drastic a measure, there are other means whereby pressure can be brought to bear on Governments. First, the obligation to present the treaty to the competent domestic authorities (in particular the parliament) to obtain a decision on whether or not the State should become a party. Second, the obligation to report at international level on the progress of the preparations for ratification.

8. Various possibilities have been discussed above with regard to shortening the period between establishment and entry into force of a multilateral treaty of a legislative nature. A separate idea would be to increase the commitment of States to the treaty, not yet in force, during this period. One might envisage for example making the obligation of good faith separate from the signing of the treaty. Such obligation would therefore have to have its starting point in the collective decision to establish the text of a treaty or in the decision to label the treaty as urgent. Such a facility for "semi-commitment" does not apply to States which voted against the relevant decision. In this respect it

should be noted that the provisions of article 18 of the Vienna Convention on the Law of Treaties ("until it shall have made its intention clear not to become a party to the treaty") offer sufficient room for manoeuvre.

9. Another means of bridging the gap between establishment and entry into effect could be found in the concept of provisional application (article 25 of the Vienna Convention). Various forms of this are known in practice, both in the treaty itself (see art. 21, para. 2, of the 1976 Convention Establishing the World Intellectual Property Organization) and in a separate document (see the 1964 Protocol of Provisional Application of the Fisheries Convention of 9 March 1964[4]). It should be noted here that the General Agreement on Tariffs and Trade of 1947 has now been operating for more than 30 years exclusively on the basis of a Protocol of Provisional Application of the General Agreement on Tariffs and Trade.[5]

10. The possibilities outlined above require a collective decision, either of the conference establishing the treaty or by an organ of one or the other international organization adopting the treaty.

Qatar (A/37/444, p. 17)

1. No ratification of treaties is regulated by the domestic law of each State. All that the United Nations can do is to send notes periodically to inform States about the status of treaties. The United Nations can request States to adhere to such treaties.

2. No.

3. No.

4. It would be better to provide assistance to States that requested it.

5. No.

6. No. In specific cases, treaties can provide for provisional entry into force, when particular conditions apply. The position a State takes at the time of adoption of the treaty does not constitute a sufficient element in this respect.

Republic of Korea (A/37/444, p. 26)

In the light of the sovereign right of States to make their own decisions on treaty ratification, the United Nations should bear in mind the reality of international legislation. However, the United Nations should spare no efforts of persuasion with a view to attaining broad accession to treaties.

Spain (A/36/553/Add.1, p. 18)

1. No. At most, it should periodically remind States of the status of treaties and urge them to become parties thereto.

2. No.

3. No.

4. This kind of assistance should be provided to States who request it.

5. No.

6. In some cases, they could provide for the provisional application of treaties as long as certain conditions were fulfilled. How a State voted when the treaty was adopted would not be a sufficient condition.

Ukrainian Soviet Socialist Republic (A/36/553, p. 40)

1. The United Nations should not consider, and should definitely not take any action in respect of, the procedures by individual States to ratify and bring into force multilateral treaties. States should not be asked to explain their reasons for opting out of a multilateral treaty, there should be no establishment of any compulsory legal régime, and no attempt should be made to provide for automatic entry into force of treaties in States which did not express agreement to be bound by the treaty. All these actions would be illegal, because they violate the principles of States sovereignty and non-interference in the internal affairs of States.

2. The question of the inclusion in a treaty of clauses concerning the provisional application should be decided by the plenipotentiaries themselves who are participating in the elaboration of the treaty.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

1. It is quite unacceptable for the United Nations to consider, and still less to take any action in respect of, the procedures employed by individual States to ratify treaties. Such actions as asking States to explain their reasons for opting out of a treaty or to undertake any obligations in the interests of establishing any régime, or attempting to provide for the automatic entry into force of treaties in States which did not express agreement to be bound by the treaty, would be illegal since they would violate the basic principles of States sovereignty and non-interference in the internal affairs of States.

2. The question of the inclusion in a treaty of clauses providing for provisional application fall entirely within the competence of the plenipotentiaries who are participating in the elaboration of the treaty.

United States of America (A/35/312/Add.1, pp. 39-41)

1. Whether a State becomes a party to a treaty is a decision that each State must take as an exercise of its sovereign will. Nevertheless, the entire process of drafting and adopting treaty texts becomes fruitless if the resulting treaties are not ratified, and a less effective process if ratifications do not come about with sufficient reach and rapidity that treaties come into force within a reasonable period of time after their completion. It may be that there is room for an exchange of views and analysis, perhaps based on a questionnaire to States, designed to illuminate the reasons for the failure of treaties adopted by large majorities to attract sufficient parties to come into force within a reasonable period of time. Such a questionnaire might also ask States whether they would be prepared to accept practices such as those of the International Labour Organisation to encourage treaty ratification.

2. It is possible that the problem of non-ratification is in part attributable to the increase in the volume of international legal work with which foreign and other Government ministries are burdened. To the extent that this is a causal factor, the problem will only be exacerbated by an increase in the volume of treaties produced. In part, the problem may be due to shortages of trained personnel who are available to do the necessary work involved in positioning a State to deposit its instrument of ratification. To the extent that this is a causal factor the most that can be done is to urge States to undertake the

necessary steps to make sufficient manpower available and to provide additional opportunities for the training of enough qualified international lawyers.

3. As suggested above, the United Nations system has not been sufficiently selective in determining in what areas treaties should be prepared. It may be presumed that when the General Assembly proliferates special international committees which require the attention of government lawyers, time and energy may in some cases be drained away that could be devoted to work which would lead to the ratification of a treaty. Moreover, it may be that from time to time the system has produced texts which have failed to deal fully with the relevant aspects of the subject, thus necessitating the elaboration of subsequent treaties to fill the gaps, which, however, of themselves seem insufficiently important to attract ratification. While this process may have expedited the completion and adoption of the initial treaty, the resultant need for yet another treaty and the effect of this accumulation upon the ratification process has perhaps not been sufficiently considered. The failure of the Vienna Convention on the Law of Treaties to deal with treaties by and between international organizations, presumably because the International Law Commission had not included the requisite provisions in its draft articles, may be an example of immediate gains which in the long run create more problems for the system than is proportionate.

4. Still another problem may be that minorities of States believe that their positions received inadequate consideration in the treaty text adopted. Most fundamentally, the problem of non-ratification may stem from the fact that a State, or its legislature, does not favour the substance of the treaty or important provisions of it, an opposition which may not always be reflected in a vote at the conference against the text as a whole, or that it may not find the treaty important enough to its interests to merit pressing it through the processes of ratification.

5. The magnitude of the problem of unratified treaties is considerable. Among the questions it raises is that of alternative means of contributing to the progressive development and codification of international law. In this connection thought should be given to requesting the International Law Commission to consider the viability of restatements of the law as one of the alternative approaches to codification. That the Commission has been empowered to prepare products other than treaties has been abundantly clear from the outset when the General Assembly rejected an amendment to its Statute that would have restricted it to the production of draft treaties.[6] The Commission in its earlier years did not so restrict itself, and it may well be that some of the topics currently before the Commission would lend themselves to this approach. At the same time, if the Commission and the Assembly were to implement this approach, the Commission producing and the Assembly adopting or taking note of such restatements, both the Commission and the Assembly could only do so upon the basis of genuine consensus of all of their membership.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 45)

1 and 2. The question of the ratification of conventions by member States is also among the subjects at present engaging the attention of the Council of Europe. Two resolutions on it were adopted in the past (see 3 below), but the whole question is currently under study by the organization.

Any system for monitoring the status of ratification and, to the extent possible, speeding up the deposit of further ratifications should be very flexible and entail a minimum amount of extra work for national civil services; otherwise, it is doomed to failure. For this reason, while the idea of a questionnaire addressed to States as to why they fail to become parties to multilateral treaties is acceptable in principle, it would seem necessary to apply it selectively (one or two treaties at a time) and at suitable intervals (e.g., once a year or every two years), that being the system which some governing bodies have been using for several years.

3 and 4. (*a*) In the Council of Europe, such a régime is provided for in resolution (51) 30 B (adopted on 3 May 1951). The resolution has never been implemented. It must be said that such a régime is not very realistic from either the political or the legal standpoint, since it rather exceeds the scope of ordinary international law, under which ratification is a discretionary act for which States are not required to give commitments restrictive of their freedom.

The reservations expressed by a number of Governments as to the compatibility of such a régime with the basic principles of the law of treaties are entirely pertinent.

(*b*) In the Council of Europe, such a régime is provided for in resolution (61) 6 (adopted on 27 February 1961), in which member States undertake to submit annual reports on treaties ratified during the previous year, on action taken with a view to the ratification of other treaties and, to the extent that they deem it possible and appropriate, on the reasons why treaties have not been submitted for ratification within 18 months from the date of signature. This resolution is now disregarded. It has not been implemented since 1970, partly because of the over-frequency of reporting (every year) and the extra work it entailed for national civil services.

5. At the present stage of international law, this solution cannot be recommended as a general rule. The expression of consent to be bound by a treaty *by deed or by positive conduct* must remain the rule and *tacit* consent the exception. On the other hand, the system of an "opting-out notice" could be developed where the adoption of amendments to earlier treaties is concerned, provided that the proposed amendments do not entail any substantial change in the material commitments assumed under the treaty. Such a solution is at present under study by the Council of Europe in three specific cases.

6. No. As a general rule, this should not be the case. However, in individual cases, this solution might be envisaged as an exception.

International Atomic Energy Agency (A/37/444, p. 30)

The Agency is directed by Article III.D of its Statute:

"Subject to the provisions of this Statute and to the terms of agreements concluded between a State or a group of States and the Agency which shall be in accordance with the provisions of the Statute, the activities of the Agency shall be carried out with due observance of the sovereign rights of States."

International Telecommunication Union (A/37/444, p. 30)

No specific comments on the various sub-sections of this section, because of the general idea that any steps in the post-adoption procedure should be left to each organization concerned and because of the specific practice established in this respect by the ITU. In the latter respect, it should be noted that the Convention of the ITU enters into force "between members in respect of which an instrument of ratification or accession has been deposited before" the date of entry into force which is fixed in the Convention itself with a precise calendar date. Any signatory Government not having deposited an instrument of ratification after the end of a period of two years from the date of entry into force of the Convention shall not be entitled to vote at any conference of the Union, or at any session of the Administrative Council, or at any meeting of any of the permanent organs of the Union, or during consultation by correspondence conducted in accordance with the provisions of the Convention until it has so deposited such an instrument.

World Health Organization (A/36/553, p. 58)

1. No comments.

2. No comments.

3. The United Nations should seek to establish a legal régime, following the example of some inter-governmental organizations, under which it could require:

(*a*) a commitment from each member State that it will submit treaties to the appropriate domestic organs with a view to authorizing ratification, and

(*b*) periodic reports concerning the steps taken towards ratification.

4. No comments.

5. An attempt should be made, in respect of certain categories of treaties, to provide for their automatic entry into force except of States that voted against adoption or that submit an opting-out notice.

6. Treaties, or certain categories of treaties, should normally provide for provisional entry into force, at least among those States that voted for their adoption and that do not submit an opting-out notice.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] See also below paras. 4 to 10.

[3] A/35/312/Add.1, pp. 26-27.

[4] United Nations, *Treaty Series*, vol. 581, p. 76.

[5] *Ibid.*, vol. 55, p. 308.

[6] *Official Records of the General Assembly, Second Session, Sixth Committee*, 58th meeting, pp. 151-152; annex 1 (*g*) (document A/C.6/193), para. 15 (para. 7); and annex 1 (*i*) (A/C.6/199), para. 4.

X. TREATY-AMENDING PROCEDURES

1. *Should certain categories of treaties provide for simplified forms of amendments?*
2. *Should certain categories of treaties provide for automatic supersession in respect of States parties that later become parties to other treaties in respect of the same subject?*
3. *Should greater use be made of framework treaties, whose substantive provisions are set out in separate annexes that may be adopted or changed by an organ established by the treaty or by the organization that promulgated it?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

Regarding treaty-amending procedures, some representatives held the view that this issue touched upon some very sensitive political questions and could usefully be examined only in concrete, individual cases. Others, however, saw the desirability of introducing simplified or flexible treaty-amending procedures (e.g., the procedure of the Universal Postal Union) into certain treaties.[2]

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 12)

1. Subject to the possibility that a more detailed study of the question within the Organization may suggest the contrary, as things stand at present it would not appear advisable to provide for automatic supersession in respect of States parties which later become parties to other treaties in respect of the same subject. Apart from the fact that the States parties to the two treaties may be different, their approach may be dissimilar.

2. There is a recognized recent trend towards the ever-greater use of framework treaties, and this practice may be useful when the nature of the subject-matter and the problems it presents require it.

Australia (A/37/444, pp. 11-12)

1. Certain categories of treaties, particularly those of a technical character, should provide for simplified forms of amendments. Often details which may require frequent change can be isolated in Annexures with special amendment procedures. It would be useful to publish existing models.

2. The relationship between a proposed treaty and earlier treaties on the same subject matter should receive greater attention when drafting the new

treaty, particularly when the series of treaties attempts to lay down rules which require wide adherence for their effectiveness (such as those establishing procedures for compensation, limits of liability and other matters affecting international commerce). The possibility exists of a series of treaties (including treaties amending earlier ones) creating a complex web of legal régimes which might not all be compatible. It would in these circumstances be desirable specifically to address the interrelationship between the particular treaties. The proposal to include in treaties provisions for automatic supersession should be considered as part of this more general question.

3. There would be value in making greater use of framework treaties, whose substantive provisions are set out in separate annexes that may be adopted or changed by an organ established by the treaty or by the organization that promulgated it. The decision-making power of the organ concerned would have to be clearly circumscribed and consideration should be given to the protection of the interests of minorities. Decisions by such organs (for which there are precedents in the area of health and civil aviation) would avoid the time-consuming procedures required for approval of treaty action under municipal laws of various countries party to the framework treaty.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 4)

There is an established practice concerning amendments to international instruments and there is no need to change it.

Cuba (A/36/553, p. 21)

1. Yes, provided that the form adopted still allows for the approval in due form of the amendment by the parties.

2. This might serve as a simplified procedure.

3. This would depend on the type of treaty and the powers of the organ. It is impossible to generalize. It might be useful in the case of some treaties where the provisions adopted quickly become obsolete owing to technological developments.

Germany, Federal Republic of (A/36/553, p. 26)

1. The amendment of certain categories of treaties, that is to say, certain sections of treaties (technical details of implementation) can and should be simplified, as is indeed already the case with many treaties. It would be desirable and useful to select and publish existing models.

2 and 3. Whether it would be appropriate to regulate the relationship between a certain treaty and subsequent treaties on the same subject along the lines of question 2, and whether the conclusion of framework treaties whose substantive provisions (annexes) can be more easily modified, and whether the delegation of this work to a subordinate organ would facilitate the conclusion and adoption of treaties, depends on the merits of each individual case.

Indonesia (A/37/444, p. 14)

It could be done as an amendment concerning technical matters, and would require a comprehensive study to establish certain categories.

Italy (A/36/553, p. 30)

The Italian Government expressed reservations similar to those regarding the question of post-adoption procedures. The proposals listed here seem based on a centralized notion of the international community which is not likely to emerge today.

Mali (A/36/553, p. 32)

Certain categories of treaties should provide for simplified forms of amendments.

Mexico (A/36/553, p. 38)

1. Simplified forms of amendments not requiring a process of ratification or accession identical to that required for the entry into force of the agreement which is being amended—for example, when it is laid down that acceptance of an amendment by a conference or an organ is sufficient to bring the amendment into force—should be the exception to the rule and should be used only for technical annexes to a so-called "framework treaty".

2. The consideration of a proposed amendment to a treaty should not be carried out by plenary or subsidiary organs of international organizations whose members are not also parties to the instrument in question.

Netherlands (A/36/553/Add.1, p. 11)

1. The acceptability of treaties will become more and more dependent upon the possibility of adapting them to changing circumstances. It is, therefore, advisable to devise various amendment procedures. It would also be possible in a particular treaty to provide that certain parts could be changed by a simplified procedure.

2. Another alternative may be the greater use of framework treaties. It is essential, however, not to create amendment procedures which might lead to conflicting treaty régimes.

Qatar (A/37/444, p. 17)

1. Yes. Certain categories of treaties should provide for simplified forms of amendments.

2. This may lead to some simplification.

3. This is possible, especially as it depends on the treaty. One should not generalize.

Republic of Korea (A/37/444, p. 21)

Conceding desirability of introducing flexible treaty-amending procedures into certain treaties, the whole matter should be assessed on an *ad hoc* basis according to the nature of individual cases.

Spain (A/36/553/Add.1, p. 18)

1. Yes, in general. Lately, there has been a tendency to abuse this practice, creating situations of confusion. If treaties are to be properly implemented, States must know what obligations they are assuming. Abuse of simplified forms of amendments, recourse to tacit agreement with reduced time limits, the adoption of amendments in forums other than those which adopted the treaty, the proliferation of amendment proposals (even before the treaty or earlier amendments on the same subject have entered into force) . . . can upset the normal process of States' implementation of treaties.

2. The question is unclear.

3. This would have to be determined case by case. The excesses to which we drew attention in our reply to paragraph 1 of this section must be avoided.

Switzerland (A/37/444, p. 23)

Il conviendrait de laisser aux Etats participant à la négociation des traités le soin de décider dans chaque cas et en fonction du but à atteindre si l'un ou plusieurs des moyens mentionnés sous la section I du questionnaire à propos des procédures à suivre après l'adoption du traité devraient être mis en œuvre. Il en va de même des suggestions relatives aux procédures d'amendement des traités indiquées sous la section J du questionnaire.

Ukrainian Soviet Socialist Republic (A/36/553, p. 40)

Treaty-making procedures are established in the United Nations organs or at the conferences considering the draft treaty, in accordance with existing practice.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

In the question of treaty-making procedures, which are also established in United Nations bodies and at the conferences considering the draft treaty, existing practice should also be followed.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, pp. 46-47)

1. The practice of the Council of Europe with respect to treaty-amending procedures falls essentially into two categories:

(i) Some treaties contain a clause providing for the amendment of their *annexes* or accompanying *protocols*. In accordance with the provisions of these treaties, the annexes are amended by agreement between the parties, with the Secretary-General verifying that such agreement exists and then notifying the content of the agreed amendments;

(ii) For the amendment of treaty provisions other than those contained in annexes or protocols accompanying the treaty, the procedure of an amend-

ing protocol has been used, whether or not the original instrument contained a clause relating to its amendment.

Simplified amendment procedures, including the "opting-out notice", can be envisaged only for minor amendments entailing no (substantial) change in the commitments assumed under the original treaty (see I.5 above).

2. No.

3. Yes. The possibility of making greater use of the framework treaty techniques should be considered, particularly for technical subjects. The details of how the treaty would be given effect could be governed by one of the following:

(i) The drafting of more detailed provisions would be entrusted to a body established by the treaty. The system could include "contracting-out" procedures;

(ii) Detailed provisions would be annexed to the treaty, but a special body established by the treaty would be responsible for amending or broadening the scope of those provisions whenever necessary.

The adoption of these methods for a framework treaty should help to solve the problems created by the difficulty of amending a treaty once it has entered into force.

International Atomic Energy Agency (A/37/444, p. 28)

Automatic supersession does not, in principle, seem desirable since necessary steps should be taken by the State concerned to denounce or otherwise give effect to such supersession in respect of the treaty thus superseded.

Framework treaties with annexes as indicated in paragraph 3 would be useful for certain categories of treaties such as those setting out technical standards.

International Telecommunication Union (A/37/444, p. 31)

Such procedures should, again, be left to the specific requirements of the Organization under the auspices of which a treaty has been concluded, as they may differ considerably from one organization to another depending on the subject covered by the treaty. With regard to the ITU, both the ITU Convention, as the basic instrument of the Union, and the Administrative Regulations as annexes to the Convention are constantly revised and updated, as necessary in view of new developments in the field of telecommunications, by the ITU Plenipotentiary Conference and the ITU Administrative Conferences respectively, in accordance with the detailed provisions contained in the ITU Convention.

Organisation for Economic Co-operation and Development (A/36/553, p. 53)

1. Experience shows, particularly in regard to treaties covering technical matters, that provision for simplified forms of amendment is virtually indispensable.

2. The OECD secretariat is not in a position to reply to this question.

3. In line with the reply to question 1 under this heading, the secretariat finds that the use of a framework treaty is of considerable utility in many areas. In giving this response the secretariat assumes that reference to "substantial provisions . . . set out in separate annexes that may be adopted or changed by an organ established by the treaty or by the organization that promulgated it" is meant to refer to detailed technical matters of substance rather than the fundamental provisions of the treaty.

World Health Organization (A/36/553, p. 59)

1. Certain categories of treaties should provide for simplified forms of amendments.

2. No comments.

3. Greater use should be made of framework treaties, whose substantive provisions are set out in separate annexes that may be adopted or changed by an organ established by the treaty or by the organization that promulgated it.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] See part two, para. 62 (*d*).

XI. ADDITIONAL STUDIES

1. *Should an attempt be made to solicit additional responses from inter-governmental organizations that did not respond or that did not respond in sufficient detail to the Secretary-General's first request?*
2. *Should the responses of inter-governmental organizations be published in some form, perhaps in a separate volume of the* Legislative Series *(in which other documentation relevant to this item might also be included)?*
3. *Should the Secretariat prepare a detailed description of all significant multilateral treaty-making techniques, perhaps in the form of an annotated manual?*
4. *Should the Secretariat assist in the formulation of the formal clauses of multilateral treaties by:*
   (a) *Updating the* Handbook of Final Clauses *and extending it to additional categories of formal clauses?*
   (b) *Formulating sets of model clauses?*

A. SUMMARY OF GENERAL VIEWS EXPRESSED DURING THE DEBATE[1]

1. It was noted that a very limited number of Governments had submitted observations in response to the relevant General Assembly resolutions and that it was desirable to solicit Governments and the international organizations concerned to comment on the report of the Secretary-General, taking into account the specific questions contained in section IV of the report, or on any other aspect of the subject, as they considered desirable.

2. The materials gathered for the purpose of the present review (i.e. the Secretary-General's report and the responses submitted by Governments, by international organizations and by the International Law Commission) were considered extremely valuable. There was wide support for their publication and the Secretary-General was requested to explore this possibility.

3. A sizeable number of representatives also emphasized the desirability of updating the *Handbook of Final Clauses*[2] and the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*,[3] which have been out of print for well over a decade. Their republication in updated form would provide references and could assist States in formulating treaties.

4. Limited interest was also expressed in requesting the Secretary-General to prepare sets of model final clauses or a detailed description of significant multilateral treaty-making techniques in the form of an annotated manual. Many representatives emphasized that no single, fixed procedure should be laid down for the making of multilateral treaties and that flexibility was required in view of the divergent subjects of proposed treaties and the different circumstances under which they had to be formulated and negotiated.

B. WRITTEN COMMENTS AND OBSERVATIONS BY GOVERNMENTS

Argentina (A/36/553, p. 5)

1. Bearing in mind that the subject should not be approached too hastily, since it is important to adopt a methodical, long-term approach, an attempt might be made to solicit additional detailed responses from intergovernmental organizations, both on the questions already raised and on any others which may arise from the discussions on the subject in the Sixth Committee.

2. In view of the specific nature of the questions generally dealt with by each intergovernmental organization, it would be preferable to publish the responses in a separate volume.

3. It would be useful to reissue the *Handbook of Final Clauses*, updated and extended as indicated, and to devise a system for continual updating at the lowest cost (e.g., loose leaves).

Australia (A/37/444, p. 5)

1. It should be for the working group to make a recommendation to the Sixth Committee on whether additional responses from inter-governmental organizations should be sought, in the light of the information then available.

2. These matters have already been dealt with in resolution 36/112 adopted on 10 December 1981.

3 and 4. We believe that the delegations of States negotiating treaties would be greatly assisted by having a detailed description of all significant multilateral treaty-making techniques in the form of an annotated manual, and by having sets of model clauses. To this end, the Working Group may wish to consider whether the Secretariat should be requested to prepare a comprehensive collation of these significant techniques.

Brazil (A/36/553, p. 13)

Although the usefulness of additional studies on the subject is not disputed, it is doubtful whether the practical results that could be obtained would justify the effort and expense involved. The updating of the *Handbook on Final Clauses*, with its extension to additional categories of formal clauses, however, seems an acceptable suggestion.

Byelorussian Soviet Socialist Republic (A/36/553/Add.1, p. 2)

When the United Nations Secretariat, in providing legal assistance, prepares auxiliary material, such documents should, in the opinion of the Byelorussian SSR, only be for reference.

Canada (A/35/312/Add.1, p. 19)

In this connection one example which could be considered is the preparation of a handbook on treaties, dealing with such matters as model preliminary and final clauses. On the basis of specific suggestions such as this, the Sixth Committee will be able to determine how this matter should be pursued in order to bring about productive results.

Cuba (A/36/553, p. 16)

1. We think that this should be done, since a more complete analysis will be possible with a great number of opinions in hand.

2. This would be useful.

3. In our view, such an approach would help to determine in advance how a treaty should be formulated and make it possible to choose the most appropriate method for the subject in question.

4. (*a*) Yes.

(*b*) Yes, but (*a*) would be more comprehensive. In any event, those model clauses under (*b*) that are relevant to the intended purpose could be included in (*a*).

Germany, Federal Republic of (A/36/553, p. 22)

1. It would seem appropriate to solicit additional responses from inter-governmental organizations. In this connection reference is made to the current work of the International Law Commission on the preparation of draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations. The responses of inter-governmental organizations should be made accessible to the public in suitable form.

2. The Secretary-General should prepare a detailed description of the procedures leading to the conclusion of multilateral treaties in the form of a manual and at the same time update the *Handbook of Final Clauses*.

Indonesia (A/37/444, p. 13)

1. Agrees to seek supplementary answers from inter-governmental organizations which have not submitted comments requested by the Secretary-

General, and those answers should be published as part of the Legislative Series. On the existing answers which are available now, it is to be hoped that these will be systematized in order to be commented upon.

2. The United Nations Secretariat could prepare a detailed description regarding the technique of multilateral treaty-making process, and Indonesia will support the Secretariat in its efforts as follows:

(*a*) To renew the guidelines concerning the *Handbook of Final Clauses.*

(*b*) To establish model as a manual to prepare or formulate a United Nations multilateral treaty.

Italy (A/36/553, p. 27)

1. Questions 3 and 4 deserve a rather positive answer. In effect, the drafting of an annotated manual of all the techniques utilized so far for multilateral treaty-making may be useful, if it is done objectively by independent experts, selected on the basis of rigorous criteria of competence, who could work under the auspices of the legal department of the United Nations Secretariat or of UNITAR. Similarly, the revision of the *Handbook of Final Clauses*, published in a limited edition in 1957 and practically unavailable today, seems most advisable, given the significant growth of practice over the last 25 years. The handbook should be extended to deal with every kind of final clause, including those regarding territorial application of treaties and those relating to participation in a treaty of "groups" of States or international bodies. A work of this kind would greatly assist the consolidation and co-ordination of treaty-making practice, thereby reducing the possibility of sterile polemics.

2. On the other hand, it does not appear appropriate, for reasons stated at the beginning of this commentary, to draft "model clauses" (point 4(*b*)), the subject of which—*inter alia*—the questionnaire does not specify; nor does it seem useful to respond in the affirmative to questions 1 and 2.

Mali (A/36/553, p. 30)

1. The Secretariat should prepare a detailed description of all significant multilateral treaty-making techniques, perhaps in the form of an annotated manual.

2. It should assist in the formulation of formal clauses by formulating sets of model clauses and by updating the *Handbook of Final Clauses.*

Mexico (A/36/553, p. 33)

1. Any effort to obtain the information needed to carry out a general review of the situation seems highly advisable. Furthermore, discussions by the United Nations General Assembly with the aim of formulating suggestions on the multilateral treaty-making process can have an impact on the rationalization of that process and on a more appropriate selection of subjects suitable for incorporation in multilateral treaties prepared each year, with a view to adapting such activity to the real capacity of Governments.

2. The preparation by the Secretariat of the United Nations, as a result of such discussions, of a manual on the most significant multilateral treaty-

making system or techniques would also be useful; that work could be supplemented by updating the *Handbook of Final Clauses* and extending it to additional categories of clauses, for example those relating to peaceful settlement of disputes.

Netherlands (A/36/553/Add.1, p. 5)

A publication of the responses received from inter-governmental organizations and of other relevant documentation is welcomed. A detailed, descriptive analysis of all significant multilateral treaty-making techniques is also considered very useful. The formulation of sets of model clauses, for instance by abstracting the most common ones from the final clauses of various treaties, would be very useful. At the same time one might think of an updating of the *Handbook of Final Clauses.*

Qatar (A/37/444, p. 15)

1. Yes, this should be done, as additional responses will make it possible to make a thorough analysis.

2. No. Perhaps it would be better to publish a summary of the responses which present the best results. If such a summary is published it should not be published within the framework of the *Legislative Series.*

3. Yes. We believe that it would be useful if the Secretariat prepared a detailed description of all significant multilateral treaty-making techniques.

4. (*a*) Yes.

(*b*) Yes. However, the *Handbook of Final Clauses* mentioned in paragraph (*a*) could be more complete, and in all cases paragraph (*a*) could embody the sets of model clauses mentioned in paragraph (*b*) which could be of assistance in formulating formal clauses.

Republic of Korea (A/37/444, p. 18)

With respect to questions involving inter-governmental organizations, there would be further need for such solicitation, and in view of the specific nature of the questions dealt with by individual inter-governmental organizations, it would be preferable to publish a separate volume containing significant multilateral treaty-making techniques. Insofar as the practical results that could be achieved from the formulation of relevant clauses are worthy of the efforts and expenses involved, no one could dispute its usefulness. The updating of the *Handbook of Final Clauses, inter alia,* seems a desirable task.

Spain (A/36/553/Add.1, p. 14)

1. Yes, especially when no response is received from specialized agencies having considerable experience in the elaboration of international treaties, for example IMCO and ICAO.

2. No. Perhaps a summary of the responses, containing the most important conclusions, might be published. It should not be published in the *Legislative Series.*

3. This would be useful, but not essential.

4. It would be useful, if the Secretariat updated and extended the *Handbook of Final Clauses*. The formulation of model clauses would also be useful; they could be prepared by the International Law Commission or, at least, under its supervision.

Switzerland (A/37/444, p. 22)

La mise à jour du Recueil des clauses finales et du Précis de la pratique du Secrétaire général dépositaire d'accords multilatéraux répondrait à un besoin indiscutable et devrait dès lors être envisagée. La rédaction de séries de clauses types pourrait d'autre part se révéler utile.

Ukrainian Soviet Socialist Republic (A/36/553, p. 38)

With regard to the possibility of additional studies, at this stage there is no need to go beyond the results which have already been published; it is apparent from document A/35/312/Add.1 of 28 August 1980 that the majority of States do not express any interest in further broad studies on this problem.

Union of Soviet Socialist Republics (A/36/553/Add.2, p. 2)

With regard to the provision by the United Nations Secretariat of legal assistance on multilateral treaty-making questions within the United Nations, the auxiliary material which it prepares should not be anything more than reference aids.

C. WRITTEN COMMENTS AND OBSERVATIONS BY INTERNATIONAL ORGANIZATIONS

Council of Europe (A/36/553, p. 41)

1. –

2. Yes. Publication of these responses would provide an important source of information on the procedures followed by the various international organizations with respect to the multilateral treaty-making process and would thus constitute a valuable tool for both theoreticians and practitioners involved in that process.

3. Yes, for the same reasons. Consideration might be given to a two-part publication (manual): part one dealing systematically with multilateral treaty-making techniques in general, and part two analysing the techniques used by various inter-governmental organizations.

4. (*a*) Not applicable (see resolution 35/162, para. 5).

(*b*) Such a practice does not exist in the Council of Europe, except in the case of final clauses, for which a model has been approved by the Committee of Ministers.

International Atomic Energy Agency (A/37/444, p. 26)

The compilation of all significant multilateral treaty-making techniques and the formulation of sets of model clauses as generally used in multilateral

treaties in recent years would be very useful. It is suggested, however, that they should be exemplary, rather than prescriptive.

International Labour Organisation (A/36/553, p. 48)

The General Assembly has already taken decisions in resolution 35/162 on many of the questions raised under this head. However, it is not clear whether it gave preference to the type of publication envisaged in question 2 or to the type envisaged in question 3. A detailed analytical study of the kind envisaged in question 3 would no doubt be particularly useful.

International Telecommunication Union (ITU) (A/37/444, p. 29)

1. Yes.

2. The publication of the responses of inter-governmental organizations in a separate volume of the *Legislative Series* might indeed be useful, in particular if the contributions describing each organization's specific techniques and procedures in respect of the overall subject is included, so as to give an idea of the multiplicity of the existing treaty-making practices from which all concerned could benefit.

3. A detailed description of all significant multilateral treaty-making techniques in a form of an annotated manual to be issued by the Secretariat might indeed be very helpful, but would certainly represent a rather cumbersome and time and man-power consuming undertaking.

4. (*a*) The updating of the *Handbook of Final Clauses* by extending it to an additional category of formal clauses would be very welcome.

(*b*) The usefulness of formulating "sets of model clauses" appears, however, to be doubtful. A lot would depend on what should be understood by "model clauses" and on whether there might be many such clauses other than "Final Clauses", which could be of use to all concerned.

Organisation for Economic Co-operation and Development (A/36/553, p. 50)

1. Not applicable.

2. It would appear to be most useful that the responses of inter-governmental organizations be published in an appropriate form.

3. The preparation by the United Nations Secretariat of a detailed description of significant multilateral treaty-making techniques would be of interest but it is not within the competence of the OECD secretariat to take a position in this matter.

4. Updating by the United Nations Secretariat of the *Handbook of Final Clauses* would clearly be useful. The formulation of sets of model clauses by the Secretariat would appear to be of a more limited application in that the circumstances of the elaboration and the conclusion of multilateral treaties differ according to the subject and the requirements of the Organization concerned.

World Health Organization (A/36/553, p. 56)

1. It appears doubtful whether much might be gained from an attempt to solicit additional responses from inter-governmental organizations that did not respond, or that did not respond in sufficient detail, to the Secretary-General's first request. The organizations were given ample time to respond to that request, and *lacunae* in the responses may even be intentional, because the organizations felt unable to give detailed and definite indications, due to the complexity of, and heterogeneity of approaches to, the multilateral treaty-making process.

2. In these circumstances, there may also be hesitations regarding the proposal that the responses of inter-governmental organizations should be published in some form. Much further effort would be required to obtain the necessary precisions, revisions and additions, that would be necessary to permit a meaningful form of publication of the organizations' responses. It is understood that the General Assembly has not, so far, decided definitely in favour of such publication (cf. "possible publication" in paragraph 4 of resolution 35/162) and that your request of 5 May 1981 for any revision or addition does not imply that these and the initial responses of the organizations would be published in their original form.

3. It would seem preferable that the Secretariat prepare a detailed analytical description of all significant multilateral treaty-making techniques, perhaps in the form of an annotated manual.

4. WHO would welcome it if the United Nations Secretariat could assist in the formulation of the final clauses of multilateral treaties by:

(*a*) Updating the *Handbook of Final Clauses* and extending it to additional categories of final clauses, in particular the question of conflict with other treaties, and by

(*b*) Formulating sets of model clauses.

NOTES

[1] This is based on the summary records of the discussions on this subject at the thirty-second, thirty-fifth and thirty-sixth sessions of the General Assembly.

[2] ST/LEG/6, published in 1957.

[3] ST/LEG/7, published in 1959.