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, sub-commissions 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 implemcnting 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