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?*