



**CONTENTS**

	Page
Agenda item 52:	
Arbitral procedure: comments of Governments on the draft on arbitral procedure prepared by the International Law Commission ( <i>continued</i> ).....	127

*Chairman: Mr. Manfred LACHS (Poland).*

**AGENDA ITEM 52**

**Arbitral procedure: comments of Governments on the draft on arbitral procedure prepared by the International Law Commission (A/2456, para. 57, A/2899 and Corr.1 and A/2899/Add.1 and 2, A/CN.4/92, A/C.6/L.369/Rev.1) (*continued*)**

**GENERAL DEBATE (*concluded*)**

1. Mr. CARPIO (Philippines) wondered whether any useful purpose would be served by continuing the detailed analysis of the draft convention (A/2456, para. 57). Many representatives had already put forward all the possible legal, social and philosophical arguments for or against the adoption of the draft. The one established fact appeared to be that delegations were unable to reach agreement.
2. The Sixth Committee had a dual task to fulfil. It had first to study the merits and defects of the draft prepared by the International Law Commission and then, in the light of that study, to decide what action to take on it.
3. The draft convention contained important provisions of undeniable value. As its report indicated, the International Law Commission had deviated from the accepted concepts of arbitration in order to remedy the shortcomings of the traditional system and to ensure that arbitral procedures were effective. Although the Philippine Government had no frontier problems itself, it thought that the compulsory nature of arbitration should be recognized by evolving a system applicable to all States under which the parties would be prohibited from evading their obligations. While the Charter proclaimed the sovereign equality of States, the reality departed somewhat from that ideal, as might was too often right in international relations. The legal system adopted must therefore be universal and applicable to all States regardless of their status. The provisions of the draft conferring certain new powers on the arbitral tribunal, the International Court of Justice and its President were of unquestionable value and the Sixth Committee could not dismiss them simply because they were innovations.
4. Several delegations had contended that the draft impaired the free will of the parties. That argument

was unconvincing, as article 1 left the parties completely free to enter into an undertaking to arbitrate. It merely provided that, once such an undertaking had been entered into, the parties could not evade the obligation they had assumed nor decline to settle their disputes by means of arbitration. The adoption of a system applicable to all States was the only method of instituting the rule of law.

5. The Sixth Committee then had to decide what action to take on the draft convention. It could not lightly set aside a text which, despite certain real defects, presented many advantages. While the revised draft resolution (A/C.6/L.369/Rev.1) expressed appreciation of the International Law Commission's work, it gave the impression that the draft convention was being put aside for good. The Philippine delegation had no objection to that, but it thought that the clock could not be turned back and that it would be useful to convert the text prepared by the International Law Commission into a convention of universal scope.

6. The most satisfactory solution would therefore be to refer the whole text back to the International Law Commission for further study in the light of the comments of Governments and of the discussions in the Sixth Committee at the eighth and tenth sessions. The members of the International Law Commission were admittedly competent, but they were neither omniscient nor infallible and would certainly learn something from the comments of the members of the Sixth Committee. The Commission would then be in a position to submit an amended text, which might win the unanimous support of Member States.

7. The text proposed by Afghanistan, Mexico, Netherlands and Yugoslavia (A/C.6/L.370) did not seem to be entirely satisfactory, as it merely invited the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee. Since all delegations did not agree on the value of the draft convention, it would seem desirable for the International Law Commission to reconsider the whole proposal and his delegation would vote in favour of its doing so.

8. For the same reasons, he thought it would be inadvisable to call an international conference of plenipotentiaries at the present stage.

9. Mr. SURJOTJONDRO (Indonesia) congratulated the International Law Commission on having prepared yet another document whose undoubted value was due not only to the Commission's prestige in the sphere of international law, but also to its own intrinsic qualities, which made it a remarkable document of legal science.

10. During the Sixth Committee's debate on the meeting place of the International Law Commission, the Indonesian delegation had pointed out that the Commission had not always followed the methods some representatives had expected. That statement appeared

to be corroborated by the draft convention, which bore the imprint of the personality of the Rapporteur who had prepared it. The Rapporteur had sought to embody certain concepts and ideals in a legal instrument, despite the fact that the development of the law had not, in practice, reached a correspondingly advanced stage. The draft convention was a work of art, each of its parts being skilfully balanced. Unless undertaken by its authors, any amendments might impair that balance and would inevitably detract from the value of the text. The defects of the draft resulted from its merits. The International Law Commission should therefore re-examine the concepts on which the codification was based, concepts which should be in complete conformity with the needs of the time. The procedure of codification differed in many respects from what it had been at the time of Justinian or even of Napoleon. Law was the reflection of a particular society, but it could scarcely be conceded at the present time that the nations constituted a universal society in the strict sense of the term.

11. In view of the controversies to which the draft had given rise, both in the International Law Commission and in the Sixth Committee, it would be better to adopt the solution proposed in the revised draft resolution (A/C.6/L.369/Rev.1), which was a considerable improvement on the original proposal.

12. Several delegations had suggested that an international conference of plenipotentiaries should be called; that would undoubtedly be useful, as all Member States would ultimately have to reach general agreement on the subject of arbitral procedure. The United Nations should, however, be satisfied with the role of observer. It should not consider calling a conference the outcome of which was doubtful and the scope of which would inevitably be limited.

13. Mr. RODIL MACHADO (Guatemala) said that the debate had served the purpose of enabling delegations to state their views on international law and sustain their various theses in connexion with the analysis of the draft convention prepared by the International Law Commission. Most delegations were of the opinion that it would not be desirable to adopt the text as a whole and had criticized it on two main grounds, the first being that it impaired the sovereignty of States and the second that it differed from the classic concept of international arbitration.

14. He acknowledged the truth of those points, but considered that they did not constitute valid objections to the text, for all international law involved a limitation of sovereignty and, moreover, the United Nations should not merely further the codification but should also encourage and foster the development of the institutions of international law. It was significant that Article 13 of the Charter referred first to the progressive development of international law and only secondly to its codification, which was of less importance. Only the progressive development of international law was capable of removing the serious obstacles which the United Nations had to face in endeavouring to achieve the most important purpose set forth in the Charter. The United Nations should, therefore, confine itself to codification in those areas to which the law was fully developed and, in its existing state, in keeping with practice and with the ideals of justice. In areas where that was not the case, however, the United Nations should play an active part if it wished to fulfil the purpose of saving "succeeding generations from the scourge of war".

15. The pattern of international law had been set, and the concept of sanctions to support it had been expressly formulated, first by the Covenant of the League of Nations and then, in more precise terms, by the United Nations Charter. It still remained, however, to achieve security based on law; that would not be possible until international courts had compulsory jurisdiction and could enforce their decisions by virtue of the control of force vested in the community. As political security was inherently precarious, humanity was confronted, so far as future centuries were concerned, with the following alternative: either security based on law, or war. Arbitration was a very valuable method of safeguarding peace but could not be regarded as perfect or as a panacea for international justice. A whole series of wars had been waged, even while arbitration had been in existence, and on all continents there existed situations that conflicted with the law. If those situations did not lead to war, the sole reason was the political equilibrium; but that equilibrium was not stable and was affected by many factors.

16. The draft prepared by the International Law Commission was inspired by the ideal of security based on law and hence should be viewed with respect; but he felt that it was premature. The authors had apparently forgotten the essential prerequisite of enforcement by judicial process, which had to rest on an obligation to resort to arbitration or on the existence of a universal compulsory jurisdiction. In domestic law, arbitration was an exception to ordinary judicial procedure and offered the parties a more expeditious and practical means of settling their differences than did litigation, with, in every case, the advantage that the parties might choose their own judges—the sole distinctive feature of arbitration. Accordingly, arbitral procedure represented an optional course, but one distinct from the ordinary judicial process. It was significant that in domestic law the procedure was absolutely compulsory in contentious cases dealt with by the courts but not in cases of voluntary jurisdiction. Voluntary jurisdiction and enforcement by judicial process seemed, in fact, to be mutually exclusive, or at any rate hardly reconcilable in one and the same context. The draft prepared by the International Law Commission would have practical meaning and value if it made recourse to arbitration mandatory in all cases, and would acquire practical value on the day when the International Court of Justice was invested with universal compulsory jurisdiction. For the time being those possibilities were excluded; hence the draft's main defect was not intrinsic but extrinsic.

17. Furthermore, the draft contained some provisions which not only went beyond the requirements of security based on law but, paradoxically, conflicted therewith. That remark applied particularly to the provisions of article 2, paragraph 2, and article 17, which recognized, without any restriction or definition, the right of the International Court of Justice and the arbitral tribunal respectively, and even of the latter's president, to prescribe provisional measures; and to those of article 29, which left the award open to revision for ten years.

18. In brief, the Guatemalan delegation objected to the draft convention, not because it reduced the sovereignty of States or because it differed from the classic concept of arbitration, but because present international conditions prevented that text from providing an additional source of security and because it contained some provisions which, with due respect to the spirit which had inspired the draft as a whole, were unsuitable.

19. The Guatemalan delegation could not accept the revised three-Power draft resolution (A/C.6/L.369/Rev.1), even though it was better than the original text, for it meant dropping the item completely.
20. In his opinion, the four-Power amendments (A/C.6/L.370) would represent a very satisfactory solution for the time being if the last paragraph of the preamble was deleted and, more particularly, if the clause reading: "which is to be understood as a set of rules on arbitral procedure" was deleted from the new operative paragraph 2, since the only construction to which it was open ran counter to the development of international justice. He offered those amendments merely as suggestions and not as formal proposals.
21. Mr. CANAL RIVAS (Colombia) said that he wished to answer certain comments and to recall the fact that his delegation had agreed to join the authors of the joint draft resolution (A/C.6/L.369/Rev.1), because it was in general agreement with the principles the draft supported, though it did not perhaps entirely approve all the details. The proposal rightly did not embody a judgement on the substance of the problem, but to claim that it really amounted to a final rejection of the draft convention prepared by the International Law Commission (A/2456, para. 57) would be to distort its meaning. While it was true, as the representative of the Soviet Union had pointed out, that the draft convention had been adopted by only a small majority of the members of the International Law Commission, it should be remembered that that fact was of no practical importance, and that the decisions of the General Assembly were valid, whatever the majority by which they had been adopted. Far from aiming at a final rejection of the International Law Commission's text, the revised joint draft resolution was designed to secure the adoption of a solution based on the work done by that eminent body.
22. With regard to the amendments presented (A/C.6/L.370), he was of the opinion that the proposed changes had lost all their value after the text of the draft resolution had been revised. He thought the amendments should be withdrawn.
23. Mr. MOROZOV (Union of Soviet Socialist Republics) said he would explain the Soviet delegation's views on the three-Power revised draft resolution (A/C.6/L.369/Rev.1). He would attempt to bring out its underlying meaning by directing attention, not only to the text, but also to the comments of its authors, because when the first draft had been discussed he had noted serious discrepancies and even contradictions between the text of the draft and the comments.
24. In his opinion, the only differences between the two texts were differences of form and not fundamental differences such as would justify the conclusion that the authors had meant to meet the criticisms to which the first draft had rightly been subjected. The revised draft was only a diluted version of the original one, whose defects it had scarcely lessened.
25. In substance, paragraph 3 of the operative part of the new draft resolution was like paragraph 2 of the operative part of the old one. The authors had merely given up the idea of requesting States to use the draft on arbitral procedure "as a guide". That was an insignificant change and, like the original text, the new draft amounted to a scarcely disguised expression of approval of the International Law Commission's draft as a whole. But the draft was unacceptable, and any proposal recommending Member States to adopt it was therefore equally unacceptable.
26. The authors claimed to have met the criticisms of the majority by referring in their text to "the comments of Governments and the observations made at the eighth and tenth sessions of the General Assembly". That was only an apparent concession; it did not show any real desire for compromise. The draft did not specify what comments and observations should be brought to the attention of Governments, and consequently every Government could regard the phrase in question as expressing approval of its own point of view. What the authors of the draft resolution had been careful not to say was that the majority of States had been hostile to the draft on arbitral procedure. The authors of the revised proposal had intended that paragraph 3 should relate only to the comments and observations of Governments favourable to the International Law Commission's draft. In their opinion it was those comments and observations which must be brought to the attention of States, though they represented the opinion only of the minority.
27. The restrictive enumeration, in paragraph 3 of the operative part, of the States to which the resolution should be addressed was likewise unacceptable. While such restrictions might formerly have been justified, they now merely had the effect of hindering international co-operation by excluding some States. The mere removal of the restrictions would not, however, make the revised text acceptable. The real point was that the draft resolution represented an attempt to extract a modified approval of the draft on arbitral procedure from the majority.
28. He did not share the Philippine delegation's view that the members of the Committee had been unable to find any basis for agreement. The fact was that, faithful to the spirit of the Charter, all delegations had expressed themselves in favour of arbitration as a procedure for the peaceful settlement of disputes. It was on the preparation of an appropriate legal technique that they had been unable to reach agreement. Very few representatives had defended the draft submitted by the International Law Commission, and those which had done so, had done so with such reservations that their position was close to that of the opponents of the draft. The discussions had been useful, for they had confirmed the trends which had become apparent at the eighth session; they had proved that the majority's opposition to the draft was steady, rational and in accordance with the principles of international law and the traditional idea of arbitration.
29. Paragraph 1 of the operative part of the revised draft resolution, in which the Assembly would express its appreciation to the International Law Commission and the Secretary-General for the work they had done, was superfluous and even inadvisable. While the excellent documents the Secretariat had provided for delegations were of great value, there was no occasion to express appreciation to the Secretary-General, who had merely done his duty. Furthermore, any expression of appreciation addressed to the International Law Commission would naturally be applied to the seven members who represented the small majority by which the draft convention had been adopted. Since the Sixth Committee as a whole had supported the views of the minority, it was the Committee, and particularly Mr. Amado, who should be congratulated. Paragraph 1 was open to criticism not only for what it said but for its very

position in the draft; for it stressed that part of the resolution which seemed to convey approval of the draft convention.

30. The best solution would be to adopt the amendments presented by Afghanistan, Mexico, the Netherlands and Yugoslavia (A/C.6/L.370). Despite the revision of the draft resolution, which was not an improvement, they had lost nothing of their validity. The Soviet delegation would vote for the amendments if, as was to be hoped, their authors maintained them.

31. If the majority did not approve the amendments, the Soviet delegation would vote against paragraphs 1 and 3 of the revised draft; it would on the other hand, vote for paragraph 2, which, though not all that could be desired, was better than paragraph 3. If the authors of the draft resolution agreed to delete paragraphs 1 and 3 of the operative part, the Soviet delegation would vote for the draft.

32. For the time being, the USSR delegation was opposed to calling a conference of plenipotentiaries. The question of how many States would be required to consent to such a conference was immaterial. What was important was the quality of the text which would serve as a basis of discussion. The present draft was bad, and a text judged unsuitable for use by the Organization as a whole could not be recommended to fifteen or twenty States.

33. It had also been suggested that the question should first be referred to the International Law Commission, and then to determine whether it should be submitted to a conference of plenipotentiaries. He could not agree to that solution, for it would be equivalent to giving the International Law Commission a blank cheque. Admittedly, provision was also made for intervention by the International Law Commission in operative paragraph 2 of the four-Power proposal (A/C.6/L.370, para. 2), but with the important difference that the General Assembly would have the last word. Consideration of the question as to whether a conference of plenipotentiaries should be called could only be justified if there was a sound basic document. If, as the Soviet delegation hoped, the four-Power amendments were adopted, it would be for the General Assembly to consider the draft which had been reviewed by the International Law Commission. Perhaps at that stage the Assembly would consider it possible to call a conference, but the issue must not be prejudged. One thing only was certain: for the present any such conference was out of the question.

34. Mr. TAMMES (Netherlands) did not share the Colombian representative's view that the amendments proposed by the four Powers (A/C.6/L.370) had become pointless since the revision of the joint draft resolution (A/C.6/L.369/Rev.1). As a co-sponsor of the amendments, he had already stated at the 467th meeting that they applied to the revised text of the draft resolution as they had done to the original version, on the understanding, however, that paragraph 2 of the amendments would now begin: "replace operative paragraphs 2 and 3 by the following paragraphs:".

35. The sponsors of the amendments proposed that in operative paragraphs 2 and 3 the words "twelfth session" should be replaced by "thirteenth session", because the agenda of the International Law Commission at its next two sessions and that of the Sixth Committee at the eleventh and twelfth sessions were likely to prove very heavy.

36. The CHAIRMAN said that it was clear from the debate that the Committee did not intend to hold a detailed discussion on the draft convention prepared by the International Law Commission (A/2456, para. 57). He therefore proposed that, as soon as the general debate was closed, the Committee should proceed to consider the draft resolutions and the amendments.

*It was so decided.*

37. Mr. MAURTUA (Peru) thought that the amendments submitted by the four Powers (A/C.6/L.370) should not be withdrawn, if only because they reflected the attitude adopted during the debate by some delegations.

38. Despite statements to the contrary, the International Law Commission had not simply been engaged in a work of editing. In accordance with its terms of reference, it had endeavoured to define the principal tendencies and to co-ordinate and reconcile views. It was obliged to continue on that path, since its function was not to impose its own views, but rather to adjust its work to all the observations made.

39. Consequently, in the operative paragraph 2 proposed by the four Powers (A/C.6/L.370, para. 2), the phrase beginning "in so far as . . ." and ending "on arbitral procedure" should be deleted; as it stood, that passage appeared to pronounce unfavourably upon a draft the Committee had not yet studied in detail. Likewise, operative paragraph 3 of the revised draft resolution (A/C.6/L.369/Rev.1) should be rejected because it tended to finalize a text which could not be considered an improvement on the earlier draft. The adoption, without proper discussion, of a text generally recognized as introducing new and almost revolutionary aspects into arbitral procedure would be tantamount to regarding the International Law Commission as a legislative body, which was not the case.

40. It should be possible to reach a compromise solution by combining the draft resolution and the amendments. In the revised joint draft resolution, the first paragraph of the preamble could be completed by adding that the viewpoints expressed in the Sixth Committee at the tenth session had been taken into consideration. The second paragraph of the preamble would be acceptable as recognizing that some progress had been made. A third paragraph should then be added, which would reproduce the second part suggested for paragraph I of the draft amendments. That addition was essential, since it would leave the door open for other measures, while expressing no opinion on the value of the International Law Commission's draft.

41. He did not think that paragraphs 1 and 2 of the draft resolution should be retained if a compromise text were adopted, since they appeared to him to be pointless. For the reasons he had already given, he considered that operative paragraph 3 of the same draft should also be rejected. On the other hand, the proposals in paragraph 2 of the draft amendments might well be adopted, with the changes he had already proposed.

42. Unlike the USSR representative, he did not think that it would be expedient to call an international conference before the question had been studied again.

43. Mr. MOROZOV (Union of Soviet Socialist Republics), replying to the Peruvian representative, said that he thought there had been a misunderstanding. He had not yet made up his mind about the calling of a conference of plenipotentiaries later. What he had said was that the Committee could not decide to call such a conference for the purpose of submitting the

International Law Commission's present draft to it. On that point he thought that he was in agreement with Mr. Maúrtua.

44. Mr. SERRANO GARCIA (El Salvador) recalled that his country, like the other Latin American States, was a convinced supporter of arbitration as a method of settling disputes.

45. The International Law Commission's draft was the outcome of praiseworthy efforts. Not only did it codify traditional rules, but it formulated new principles and in doing so paid due regard to the constant development of law. Nevertheless, while some of its innovations were sound, others were undoubtedly less so.

46. Changes in existing practice, if decided upon, must be undertaken circumspectly and it might be felt that the draft, because it was breaking new ground, should be the subject of further detailed study. That task might be entrusted to a special committee.

47. He did not agree that the Committee should merely take note of the draft, which would be equivalent to removing it from the agenda of its future debates. Nor

was he in favour of calling an international conference, since in this field he preferred bilateral agreements.

48. The amendments (A/C.6/L.370) to the draft resolution were acceptable, but in the text suggested for operative paragraph 3 the words "for final consideration"—which prejudged future action—should be replaced by the words "for further consideration".

49. Mr. ROBINSON (Israel), speaking on a point of order, proposed that a time-limit should be set for tabling draft resolutions and amendments. It sometimes happened that speakers referred to drafts which were not to be distributed until later, and that practice was liable to result in fresh speeches and an undue prolongation of the debate.

50. The CHAIRMAN said that he shared Mr. Robinson's apprehensions and proposed that the relevant time-limit should be the end of the 470th meeting, except for proposals on points of drafting, which could always be presented orally at a later stage.

*It was so decided.*

The meeting rose at 1 p.m.