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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) (*continued*)

GENERAL DEBATE (*continued*)

1. Mr. MIRAS (Turkey) joined in the tribute to the work accomplished by the International Law Commission. The draft it had prepared provided for an effective arbitral procedure, under the authority of the International Court of Justice. Its purpose was to ensure that every reference to arbitration led to an enforceable award. In order to achieve that purpose, however, the authors of the draft had introduced several innovations which departed from the classic concept of arbitration. The draft did not give due prominence to the sanctity of the will of the parties.

2. From a technical point of view, the draft was perfect. If it was accepted that effectiveness was more important than the autonomous will of the parties, the text was also very logical. Unfortunately, it tended to depart from realities. The term "arbitral procedure" had been interpreted so widely that the provisions clearly went beyond pure procedure and encroached upon the substance of arbitration. In so doing, and in restricting the essential flexibility, they constituted a threat to arbitration as an international institution.

3. Without being the only ones, the provisions with which the Turkish delegation was most concerned were articles 2, 3, 10, 11, 28, 29 and 31, which gave either the International Court of Justice or the arbitral tribunal itself unprecedented powers. Some of those provisions could doubtless be traced to earlier conventions; in their latest form, however, they were substantially more drastic. Furthermore, some of the prototype provisions had themselves been controversial; for example, articles 53 and 54 of The Hague Convention of 1907, which were the forerunners of draft article 10. A further defect of the draft was that there was no mention of the manner in which the proposed convention would be applied, or co-ordinated with various other existing bilateral and multilateral agreements. Another point

was the absence of any provision regarding the admissibility of reservations. Lastly, it was not clear how the proposed convention would be reconciled with the United Nations Charter and the Statute of the International Court. The Statute, in particular, had not been drafted on the assumption that the Court would, at some later stage, have to assume the functions of a *cour de cassation* for all arbitral issues.

4. The question of the role which a multilateral convention might be expected to play, alongside The Hague Conventions, the General Act of 1928 and the Statute of the International Court, was further obscured by the fact that the Court was already vested with compulsory jurisdiction. The draft might have been less open to criticism if its express purpose had been the formulation of rules for inclusion in a restatement of all the existing conventions on arbitration. That, however, had never been the declared purpose of the International Law Commission's work.

5. Although it was unsuitable for recommendation as a convention, the text represented a substantial achievement. Some of its provisions could be utilized in bilateral arrangements; the statements of some delegations indicated that it enjoyed a measure of support.

6. For that reason, the Turkish delegation considered that the joint draft resolution (A/C.6/L.369) submitted by Colombia, Cuba and the United States placed the International Law Commission's proposals in their proper perspective.

7. Mr. TABIBI (Afghanistan) agreed that the International Law Commission's draft (A/2456, para. 57) and the Secretariat's commentary (A/CN.4/92) constituted a valuable contribution to the development of international law.

8. The Afghan delegation adhered to the views which it had expressed at the Assembly's eighth session. The general principles of the draft convention were unexceptionable. Afghanistan had always supported any steps designed to give greater force to arbitral awards and had, on occasions, resorted to arbitration in order to resolve disputes with its neighbours. Nevertheless, it had long been an established principle of international law that a reference to arbitration was an expression of the free will of the parties, who alone could determine what law should be applied and what procedure followed. The Commission's draft, on the other hand, imposed certain restrictions. The very broad powers attributed to the International Court constituted a radical departure from the traditional concept of arbitration.

9. Arbitration was an institution of ancient origin, which had undergone a very gradual evolution. It would consequently be illogical to introduce such drastic changes. Moreover, the powers proposed to be conferred on the International Court seemed at variance with Article 92 of the United Nations Charter and Article 36 of the Court's Statute. Before the text could be recom-

mended as a draft multilateral convention, it was necessary to remedy those shortcomings and to bring its whole orientation into line with traditional concepts.

10. The question of what action the General Assembly should take now was of the utmost importance, in view of the part played by arbitration in civilized international life. The International Law Commission's draft represented a good start towards an effective and satisfactory solution. Since progress had been made, and much useful material was now available, it seemed hardly reasonable to suggest that the questions of arbitral procedure should be dropped altogether; such an action would be contrary to the spirit of Article 13, paragraph 1 of the Charter, under which the General Assembly was to encourage the progressive development of international law. It would, however, also seem premature to convene a conference of plenipotentiaries, as was suggested by some delegations.

11. Perhaps the best course would be to refer the draft, together with the comments of Governments, back to the International Law Commission for further study and to invite those Member States which had not yet submitted their observations to do so. In that manner, the questions would be kept alive and could be studied further. If the Committee felt that no further improvement of the draft convention was possible, the Afghan delegation would support the joint draft resolution. In view of the importance of the question, however, it might be preferable to take a less negative action and give the International Law Commission further opportunity to devise a generally acceptable text.

12. Mr. COLLINS (Liberia) associated himself with the tributes of other delegations to the quality of the International Law Commission's draft.

13. It represented an honest effort to provide guidance and to introduce some order into methods for adjusting disputes. In view of that substantial contribution towards the establishment and maintenance of friendly international relations, the Liberian delegation fully supported the suggestion that Governments should be asked for additional observations which would be referred back to the International Law Commission. The Commission could then endeavour to improve the text.

14. Hitherto, the response from Governments invited to comment had not come up to expectations. The reason might have been lack of time or reluctance to comment. Some Member States realized that they were not yet in a position to contribute to the solution of the more complex problems of international law. Those States were at a serious disadvantage compared to others, which, on account of their experience, enjoyed the privileged position of being able to assess correctly the effect of present decisions on future events. That consideration applied to the question of arbitral procedure as it applied to other questions. Consequently, whatever decision was taken, adequate provision should be made to ensure that Member States, particularly those which were still in the process of development; did not suffer unfairly for their present limitations. They should be allowed, after the expiration of a specified number of years, to ask the International Court of Justice to remedy any wrong to which they might now inadvertently expose themselves. An appreciable portion of the world's public opinion had no real share in major international decisions; that evil undermined confidence in human relations and encouraged disregard of the law. A provision along the lines he suggested might restore a great deal of trust.

15. For those reasons, the Liberian delegation would support any proposal to the effect that the draft should be referred back to the International Law Commission with a request for further consideration in the light of additional information from Member States and with the further request that conditions in all regions should be taken into account.

16. Mr. CANAL RIVAS (Colombia) said that arbitration was one of the preferred modes of pacific settlement in Latin America. The history of Latin America, ever since the days of Bolívar, afforded numerous examples of arbitration treaties and of successful peaceful solutions which those treaties had facilitated.

17. The draft prepared by the International Law Commission was the fruit of long, careful study and had already been substantially endorsed by the General Assembly in resolution 797 (VIII). Colombia, faithful to its traditions, agreed with the spirit and general outline of that draft. The text safeguarded the essential features of arbitration. It provided for a binding settlement of disputes while respecting the sovereign will of the parties. Indeed, the binding force of the award was itself the consequence of the reciprocal undertaking freely entered into by the parties to accept the decision and to respect its terms. To that extent the draft was only a codification of the customary and positive law relating to arbitration. Such new provisions as had been introduced did not modify either the essential quality nor the object of the institution of arbitration. The purpose of those provisions was only to ensure the efficacy of arbitration, which would be of little value if it were exclusively subject to the will and whim of the parties.

18. Though satisfied on the points he had mentioned, his delegation did not accept all the provisions of the draft without reservation. It had not, therefore, submitted any detailed comments on the draft, limiting itself only to general observations; the Colombian Government would certainly have some comments to make on that subject.

19. Many representatives had argued that the draft disregarded the principle of State sovereignty because it introduced an element of compulsion; that feature was allegedly incompatible with the autonomous will of the parties, which was the cornerstone of arbitration in the classic sense. The Colombian delegation could not accept that argument. Under the modern concept of arbitration, it was imperative to give both parties an absolutely equal guarantee of a fair and enforceable award in the dispute which they had voluntarily referred to arbitration. The United Nations Charter itself enjoined the parties to any dispute to resort to peaceful means of settlement and expressly cited arbitration as a principal example; it was clear, therefore, that all Member States of the United Nations should accept certain compulsory features in arbitration. However, the United Nations Charter was not alone in advocating recourse to effective arbitration; the Charter of the Organization of American States and the American Treaty of Pacific Settlement, called the "Pact of Bogotá", likewise advised arbitration as a mode of pacific settlement. The detailed provisions of that Pact governing arbitration, which were couched in terms very similar to those used in the International Law Commission's draft, had only evoked reservations on the part of five States, although every single American State was a signatory. It seemed strange, therefore, that countries which had unreservedly subscribed to the Pact

of Bogotá should now oppose the principles of the draft before the Committee.

20. The question of arbitral procedure had been before the General Assembly and the International Law Commission for a number of years. Governments had had more than one chance to submit their comments. The Commission had now completed its duty and submitted a final draft to the Assembly. Consequently, yet another reference back to the Commission would be both unproductive and discourteous. It would be equally impractical, in the unanimous opinion of the Committee, to discuss the draft article by article, with a view to elaborating a convention acceptable to all States. Many delegations had indicated that they would not be disposed to accept that course, experience having taught them that it was not a practical step to take.

21. In those circumstances, a third solution had to be found. It would be completely senseless to shelve the draft. The only feasible solution was that proposed in the joint draft resolution, which the Colombian delegation had sponsored jointly with the delegations of Cuba and the United States. The recommendation in that proposal was in no way mandatory; it was merely a logical consequence of Assembly resolution 797 (VIII). The draft resolution was in fact more procedural than substantive and its approval by the Committee would not prejudice the position of any of its supporters.

22. Mr. MOROZOV (Union of Soviet Socialist Republics), after recalling his delegation's consistent support of arbitration as a mode of pacific settlement of disputes, said that the time had come for deciding what action should be taken with regard to the International Law Commission's draft.

23. The closely reasoned analyses of previous speakers, and, more particularly, of the representatives of the Ukrainian SSR (462nd meeting) and Byelorussian SSR (464th meeting) and of Brazil (462nd meeting), Egypt and Afghanistan had brought out with admirable clarity the conflict between certain provisions of the draft on arbitral procedure and the recognized principles of international law. It merely remained for him to endorse their conclusion that the draft, though containing a number of satisfactory provisions, was unacceptable as a whole.

24. Despite the affirmations of its sponsors to the contrary, he was still convinced that the joint draft resolution (A/C.6/L.369), by commending the draft on arbitral procedure to Member States as a guide, implied general approval of its provisions by the United Nations. The implication had been denied by the representatives of both Cuba and Colombia, the latter going so far as to claim that the draft resolution was quasi-procedural. Yet the force of the Colombian representative's argument had been largely vitiated by the disclosure in the main part of his statement that his delegation approved of the so-called "progressive development of international law" which the draft convention was said to reflect. The Soviet delegation of course, had no intention whatever of criticizing the attitude of those delegations who approved of the draft convention in its existing form. It merely wished to show that the joint draft resolution, far from being merely procedural, would, if adopted, convey the impression that the Committee approved of principles which the majority of its members was in fact, not prepared to endorse.

25. It had been said that a recommendation on the lines of that in the draft resolutions would be only in

the nature of advice. Actually, no decision of the General Assembly in any case ever constituted an instruction to Member States; but it was obvious that advice which had the backing of the United Nations would carry great moral weight.

26. There had already been some ambiguity with regard to the preamble to General Assembly resolution 797 (VIII), each delegation interpreting the phrase "the said draft includes certain important elements" as referring merely to those elements which it, itself regarded as important. In the case of the joint draft resolution, however, the confusion would be even greater. While the general public would have the impression that the whole of the draft was recommended, each delegation would be convinced that only the part of which it approved was actually offered as a guide. So equivocal a solution would hardly be worthy of the Legal Committee of the United Nations General Assembly.

27. Another course which had been suggested was for the General Assembly merely to take note of the draft on arbitral procedure. In the circumstances such action could only mean that the Assembly did not support the draft and took a negative stand on many of the provisions which it contained. It would be tantamount to burying the draft and abandoning all idea of drawing up rules of arbitral procedure. Thus to take the path of least resistance would hardly do justice to the importance of arbitration in international life.

28. Another, more constructive, suggestion had been to set up a special committee which would revise the draft in the light of the Sixth Committee's observations and submit it to the next session of the Assembly. In view of the very large measure of agreement among those delegations which had spoken critically of the draft, such a committee might well perform useful work. However, considerations of courtesy to which the Colombian representative had already referred, prevented the adoption of such a proposal. Nothing would be more discourteous than to take the draft out of the hands of the International Law Commission, which had already spent so much time on it, and pass it to a special committee for recasting.

29. The only possible course, therefore, appeared to be the proposal made by Afghanistan at the present meeting that the draft should be returned to the International Law Commission for revision in the light of the Committee's observations. Contrary to the view of the Colombian representative, such action would imply no discourtesy. The fact that the draft had been adopted in the Commission by a majority of only one showed that practically half the members of the International Law Commission held views similar to those which had been voiced in the Committee. Furthermore, the membership of the Commission had changed to some extent and, by the time the draft came up for reconsideration, would probably have changed still further. There should, therefore be no fear of wounding the susceptibilities of its authors. There could, accordingly, be nothing offensive in requesting the Commission to redraft a document so as better to reflect the views of the majority of the Members of the United Nations. The delay entailed was immaterial. The fate of a draft which raised so many important juridical issues could not be settled, so to speak, *en passant*.

30. If the course advocated by the Afghan delegation were adopted, the draft would be neither pigeon-holed nor solemnly interred but would re-emerge as a faithful

codification of a branch of international law, enjoying the unqualified support of most Members of the United Nations and, hence, commanding far greater respect in the world at large.

31. Mr. PETREN (Sweden) announced his support for the proposal, which the United Kingdom and the Canadian delegations intended to put forward, that a diplomatic conference should be convened for the purpose of concluding a multilateral convention, taking as a basis for discussion the International Law Commission's text. That text was adequate for that purpose, although it was not acceptable to all States as it stood. The Swedish Government for its part had already made known its objections to a number of the draft articles. There was, however, a substantial nucleus of provisions in the draft which would be acceptable to a sufficiently large number of States; that justified the convening of a conference, in the course of which the text could be improved by eliminating its more controversial elements and introducing a reservations clause. In that manner, a more generally agreed text could be arrived at.

32. The draft resolution commending the International Law Commission's draft to Governments as a guide did not seem likely to receive sufficient support in the Committee. If adopted at all, it would probably be adopted by so narrow a majority that its moral effect would be almost negligible.

33. For those reasons, the only practical course for the Committee was to recommend the convening of a conference of plenipotentiaries to draft an international instrument.

Mr. Alfonsín (Uruguay), Vice-Chairman, took the Chair.

34. Mr. HSU (China) said his delegation would support any draft resolution which expressed approval of the International Law Commission's text.

35. Arbitration was based on a voluntary undertaking of the parties to a dispute; those parties freely determined the choice of arbitrators, the competence of the arbitral tribunal, the law to be applied and the procedure to be followed. Nevertheless, if the arbitration was to be effective and not to be frustrated by whim or caprice, the freedom of the will of the parties had to be hedged about with conditions.

36. With the establishment of the Permanent Court of International Justice after the First World War, a system had been created under which the parties to a dispute had no freedom at all with regard to the choice of the members of the Court (the members being chosen by the parties to the Statute and not by the parties to a particular dispute) and the Court itself had been empowered to decide on its own competence. Furthermore, the law to be applied and the procedure to be followed had been prescribed in the Statute of the Court. Still, the methods of judicial settlement, while useful in their proper place, could not be introduced into arbitral procedure, where the dominant element was the autonomy of the will of the parties.

37. Professor Georges Scelle, the International Law Commission's special Rapporteur on the subject of arbitration, had come to the conclusion that arbitral procedure needed strengthening in order to avoid frustration of the undertaking to arbitrate. For that purpose Professor Scelle had drafted provisions giving the International Court of Justice or the arbitral tribunal, as the case might be, certain judicial and extra-judicial functions to rule on such questions as the arbitrability of the dispute, the constitution of the arbitral tribunal

and the filling of vacancies, and also power to review or annul the award. After careful consideration, the Commission had accepted the proposals of Professor Scelle with some amendments, being satisfied that none of the safeguards provided against abuses had impaired the principle of free determination. The result had been a draft providing for an improved form of arbitration which deserved an appropriate place in the organization of the community of nations.

38. Referring to particular suggestions made in debate, he said it was pointless to discuss the draft convention article by article. The joint draft resolution (A/C.6/L.369) did not propose a multilateral convention open to signature by the members; if it had done so, such a discussion might have been useful, but the draft resolution merely recommended the text as a model. A discussion article by article would even be mischievous, because it might lead to the utter mutilation of the International Law Commission's text. If the Commission's draft had really been inadequate, the Committee should have voted against it as a whole.

39. It had been suggested that the International Court of Justice was not bound to accept the extra-judicial functions which the draft sought to confer upon it. In that connexion, it was pertinent to refer to certain passages in the *Yearbook* of the International Court of Justice,¹ 1954-1955, (on pages 44-45), in which it was stated that the President of the Court was frequently requested to appoint arbitrators or members of conciliation commissions and to undertake certain other extra-judicial tasks. As a rule, States consulted the President before conferring such functions on him; almost invariably the President had been willing to accept those functions. Since 1946, 178 international instruments had conferred extra-judicial functions upon the Court and in the numerous cases in which the need had arisen, the Court had, in fact, exercised those functions.

40. If any doubts still remained regarding the International Court's acceptance of the functions mentioned in the draft on arbitral procedure, the solution was to lay down substitute provisions to cover that possibility.

41. It had been said that the International Law Commission should have consulted the International Court before drafting provisions which might affect the Court. That implied criticism was not justified. The Commission's recommendations were for the Assembly; if, eventually, any of the Member States signed an arbitration convention providing for the intervention of the International Court of Justice, it was for those States to consult the Court. It would have been premature for the Commission to consult the International Court at the drafting stage.

42. There existed at the moment two modes of settlement of international disputes on the basis of law: judicial settlement, which ensured effectiveness of the decision at the expense of free determination, and arbitration, which safeguarded the free will of the parties at the expense of the effectiveness of the undertaking to arbitrate. If the needs of the community of nations were to be fully satisfied, it was time for a third type of settlement to be evolved, which would not only ensure effectiveness but would also safeguard the free will of the parties. Such a third type of settlement was that devised in the Commission's draft.

43. Some delegations objected to the draft on grounds of principle and had criticized it as a far-reaching in-

¹ *International Court of Justice, Yearbook 1954-55*, A. W. Sijthoff's Publishing Co., Leyden, 1955, pp. 44-45.

novation. He differed from their views. Arbitration had for long been the only mode of peaceful settlement of international disputes. Then, with the advent of judicial settlement effectiveness of the undertaking to be bound by a judicial decision had supplanted the autonomy of the will of the parties. That had been a drastic innovation; yet, it had not been considered a violation of principles. It was therefore difficult to see how the newer mode of settlement recommended by the Commission could possibly violate any principles; it ensured the effectiveness of the undertaking to arbitrate without affecting the principle of the autonomy of the will of the parties, merely limiting it to the extent necessary to protect the international community.

44. Mr. EL ERIAN (Egypt) recalled that, when the International Law Commission's draft on arbitral procedure had been discussed at the eighth session of the General Assembly, his delegation had expressed its reservations, particularly concerning articles 2, 28, 29 and 31 of the draft. The Egyptian delegation had then proposed postponing further action, so that Governments could study certain far-reaching provisions of the draft.

45. The draft now before the Committee needed further clarification with regard to a number of important points: the type of disputes to be submitted to arbitration; the retroactive effect of the draft on existing arbitration agreements; the nature and the extent of the powers vested in the President of the International Court of Justice; the relationship between the draft and existing arbitration treaties; and, finally, the effect of the draft on the long-standing institution of arbitration.

46. It was clear that the draft would have to be heavily revised before Governments could accept it. The International Law Commission had considered the subject of arbitral procedure twice and had said its final word on the matter.

47. For those reasons, the best course would be to convene a conference of plenipotentiaries, as suggested by the United Kingdom representative, to draft a more generally acceptable instrument. Alternatively, a special committee might be appointed to draft a convention. The International Law Commission's draft and the Secretariat's commentary would be invaluable aids in the work of preparing such a text.

The meeting rose at 12.55 p.m.