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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 Add.2, A/CN.4/92) (*continued*)

GENERAL DEBATE (*continued*)

1. Mr. SEN (India) said that his first criticism of the International Law Commission's draft (A/2456, para. 57) was a general one. The Commission's departure from the principle of international law that the undertaking to arbitrate entered into by sovereign States was based on autonomy of the will of the parties, and the introduction of an element of obligation foreign to the traditional conception of arbitral procedure were to be regretted. Although the object of the Commission in so doing had no doubt been to safeguard the effectiveness of recourse to arbitration, in view of past cases in which parties had been unable to agree on the arbitrability of a dispute, such a consideration did not justify the inclusion of certain provisions which did violence to the intrinsic quality of arbitration. Indeed, the provisions in question might well defeat the whole purpose of the draft by deterring a large number of States from resorting to such a means of pacific settlement of international disputes. Explicit recognition of the need for the free consent of the parties as an essential element in arbitration was to be found in the Jay Treaty (concluded in 1794), as well as in all subsequent treaties on international arbitration.

2. Under nineteenth century municipal law in the United States and the United Kingdom, either party to a *compromis* was free at any time to withdraw and to take the dispute to court in the ordinary way. During the twentieth century, the House of Lords had often ruled that judicial proceedings could be instituted in any case in which it seemed wrong to compel the parties to submit to arbitration, though it was open to the courts to decline to give a decision. The law of India contained similar provisions. In the United States, with rare exceptions, either of the parties to a *compromis* was free at any time to denounce it and to take the matter to court. Thus the procedure of the *compromis* was governed, as a general rule, by the principle of

the free will of the parties. In some countries, however, an element of obligation had crept in, in commercial disputes, the object being prompt settlement. Such countries generally gave the courts wide powers as far as choice of arbitrator and annulment of awards were concerned.

3. The authors of the draft would therefore seem to have based themselves on certain practices in municipal law and commercial law in particular. That new and objectionable feature recurred in several articles of the draft. Article 2, paragraph 1, made the International Court of Justice responsible for determining whether or not a dispute should be submitted to arbitration, while paragraph 2 of the same article authorized it to prescribe provisional measures. The grant of such discretionary powers to the Court constituted a considerable departure from previous practice. Similarly, article 3 made it mandatory for the International Court of Justice to intervene, paragraph 2 of the article giving the Court the right, when one party failed to make the appointments to constitute the arbitral tribunal, to make the necessary appointments itself, at the request of the other party. Yet it should be clear when a party refused to make the necessary appointments that it did not wish to have recourse to arbitration. Other provisions, such as article 8, paragraph 2, article 28, paragraph 2, article 29, paragraph 4, and articles 31 and 32 were open to criticism on the same grounds. Arbitration, to be effective, must move swiftly towards a final award, but the procedure laid down in article 29, paragraph 4, might make it a rather protracted process. In any event, the sole authority competent to revise the award must be the arbitral tribunal which had heard the case. He might later comment more fully on the jurisdiction vested in the International Court of Justice under article 31. But, in all events, the attribution of such extraordinary jurisdiction to the Court, a jurisdiction which a party that had not disputed the validity of the award was bound to accept, could not fail to have the most deplorable repercussions on the use of arbitration in future as a means for the pacific settlement of international disputes. The Indian delegation was opposed to the articles in question, regarding them as a dangerous departure from the classic conception of arbitration.

4. In chapter II of its report covering the work of its fifth session (A/2456), the Commission explained that it had included in its draft new provisions calculated to safeguard the effectiveness of the obligation to arbitrate. It would seem preferable, nonetheless, to stand by the traditional rules, since the sole effect of the new elements was to impair the essential purpose of the draft.

5. Apart from the practical reasons in favour of the principle that the parties to the undertaking to arbitrate must enjoy autonomy of will, there were other serious objections to calling in the International Court of Justice. The Court was an organ set up under the Charter of the United Nations, with a jurisdiction neces-

sarily confined to matters mentioned in the Charter. Its terms of reference could not, therefore, be extended unless the Charter was amended. It was doubtful, however, whether the functions vested in the Court by the draft convention came within the definition of the Court's jurisdiction given in Article 36 of its Statute, which formed an integral part of the Charter. The phrase "treaties and conventions in force" used in paragraph 1 of Article 36 obviously referred only to treaties and conventions in force at the time when the Charter had been signed.

6. Lastly, the differences of opinion within the Sixth Committee and the fact that many representatives had expressed grave doubts as to the advisability of the element of obligation introduced into the draft clearly showed that the draft was not acceptable as it stood.

7. After drawing attention to the conclusions of the United Kingdom Government (A/2899, Section II), he added that the Indian delegation would be prepared to study any suggestion which might lead to more exhaustive study of the question. For example, the Assembly might convene a conference, to which non-member States would also be invited, to prepare a convention in the light of the Commission's draft and the discussions in the Sixth Committee, or it might refer the question back to the International Law Commission for the purpose of consultations with Member States. It should be possible, he felt, to evolve a procedure acceptable to the vast majority of Members. Finally, he wished to congratulate the Commission on its excellent work.

8. Mr. SHELDON (Byelorussian Soviet Socialist Republic) said that Article 33 of the United Nations Charter provided that all disputes between States should be settled peacefully. The parties to any dispute should, first of all, seek a solution by negotiation, mediation, arbitration, etc. The Byelorussian Soviet Socialist Republic had always supported, and currently supported, that important provision of the Charter, as well as its other basic provisions.

9. All peoples of the world were eager to live in peace. That ardent desire on the part of all peoples had been assumed as a fundamental premise when the United Nations Organization was established ten years ago. And that desire should be borne in mind in considering the question of arbitral procedure, which was one of the means for the pacific settlement of disputes between States.

10. For those reasons, the Byelorussian delegation was in principle in favour of preparing an international convention on arbitral procedure which would serve as a guide to Governments. However, it believed that the established principles of international law and treaty practice should be respected when preparing such a convention. The first, and perhaps vital, principle was the voluntary agreement of all the parties to submit a dispute to arbitration. And States which decided to settle their disputes by arbitration should be prepared to accept the award of the arbitrators.

11. The principles in question had been enunciated in article 15 of The Hague Convention of 1899 and article 37 of the Convention of 1907, and were shared by learned authors; M. O. Hudson, for instance, in his *International Tribunals, Past and Future* and L. Oppenheim in his *International Law*, quoted an award by the Permanent Court of Arbitration in 1923 to the effect that no State might be compelled, without its consent, to submit a dispute to mediation, arbitration, etc.

12. That being so, he felt bound to point out that the draft prepared by the International Law Commission, while including some acceptable provisions, also contained innovations, to which his delegation had already drawn attention at the eighth session — innovations which departed considerably from traditional principles and tended to obliterate the distinction between arbitration and recourse to international judicial organs.

13. Article 2, paragraph 1, of the draft clashed directly with the principle of free will. The provisions for the intervention of the International Court of Justice or its President likewise conflicted with established principles. Instead of providing for arbitral tribunals, the draft, so to speak, created absolutely different organs which would be subsidiaries of the International Court of Justice and exercise compulsory jurisdiction.

14. The draft as it stood was therefore unacceptable as a whole. Besides, it had been much criticized by Governments, including those of India, Chile, Belgium and the United Kingdom (A/2899). One objection was that the draft vested the International Court of Justice with compulsory jurisdiction and with the right to interpret the award, the arbitral procedure being relegated to the rank of a lower court.

15. Accordingly, his delegation considered that before the draft was recommended to Governments, it should be revised in the light of all the comments and should be based on the principle of the free will of the parties, all external intervention being excluded.

16. Mr. VALOIS (Canada) congratulated the International Law Commission on its useful work in preparing a draft convention on arbitral procedure intended to guarantee the effectiveness of an undertaking to arbitrate. The draft before the Committee respected established principles on most points, but sought to prevent any attempt to evade the consequences of an undertaking to arbitrate, once that had been freely agreed upon.

17. In conformity with its statement at the eighth session of the General Assembly, and with the Canadian Government's comments submitted in response to General Assembly resolution 797 (VIII) (A/2899, section 4), the Canadian delegation hoped that there would be universal acceptance of a uniform arbitral procedure. It thought, however, that the Commission's draft should be amended in various respects.

18. Article 1 provided that an undertaking to have recourse to arbitration might apply to existing disputes or to disputes arising in the future. At the General Assembly's eighth session, the Chairman of the International Law Commission had told the Committee that, in the absence of express reservations made at the time of signature or accession, the draft was intended to apply even to prior undertakings to arbitrate (387th meeting, para. 20). So automatic an operation with retroactive effect might give rise to serious difficulties, and it would therefore be advisable to amend the article in question in order to avoid such difficulties.

19. The draft should not, he thought, be referred back to the International Law Commission, for it clearly reflected the considered views of the members of that Commission. It was now for the Member States of the United Nations to consider how the draft should be amended and to decide on future action. His delegation favoured the conclusion of an international convention which, even if it should not at first receive a large number of accessions, would be conducive to the future development of international law. However, the Committee had not the necessary time at its disposal for a

thorough study of the text at the current session, nor would the situation be very different at the eleventh session, since the agenda was already extremely heavy.

20. In the circumstances, the Canadian delegation was willing to support the idea of an international conference, provided that a sufficient number of States, say twenty, were prepared to attend. In the meantime, the draft might be recommended to States as a model for bilateral or multilateral arbitration agreements.

21. Mr. LOPEZ-VILLAMIL (Honduras) developed some of the comments made by the Honduran Commission on Territorial Questions (A/2899/Add.2). Honduras was a party to many arbitration conventions, and attached particular importance to international arbitration. In particular, its frontiers had been delimited by the process of arbitration. The International Law Commission was to be congratulated on its attempt to ensure the efficacy of arbitral procedure, for differences of opinion among States should not be allowed to result in disputes or conflicts which might endanger peace. Still, the Commission's draft was vague in some respects, and if it were adopted, its application might give rise to difficulties.

22. The attempts to codify international law were very useful, because it was desirable that treaties of general scope should be concluded. The American States attached great importance to that point, and it was noteworthy that the Commission had contemplated sending an observer to the Inter-American Council of Jurists. The Member States of the United Nations or the Organization of American States should study existing treaties more closely with a view to removing whatever obscurities were attributable to the multiplicity of agreements dissimilar both in form and in substance. The draft did not specify what was to become of existing treaties: yet one could not ignore the obligations undertaken, for example, by the States which had ratified the American Treaty of Pacific Settlement (Pact of Bogotá) or which were parties to the General Treaty of Inter-American Arbitration of 1929.

23. The text of article 1 of the draft was unacceptable, because as the Honduran Commission on Territorial Questions had pointed out, it lent itself to various constructions. The word "dispute" had a specific meaning. There was no dispute unless one of the parties lodged a claim and the other contested it. If the latter acquiesced, there was no dispute. The draft should have made it clear what kind of dispute was meant, as article VI of the Pact of Bogotá had done. In that matter, his delegation shared the views of Argentina, Chile and Yugoslavia as expressed in the comments they had communicated to the Secretary-General.

24. The notion of retroactivity could not be introduced into international law, as the Israel representative had pointed out at the 461st meeting. Nor could the draft deal with disputes which had already been settled by agreement between the parties or with disputes which, under the provisions of the United Nations Charter, were to be settled by regional bodies. Two distinct treaties could not govern one and the same situation, and it would be difficult to say which of them should apply in preference to the other. Conceivably, then, a dispute might engender uncertainty concerning competence. The draft contained no answer to any of those questions.

25. Article 2 was unacceptable, because it might lead to serious complications if one party interpreted it in

bad faith or in its own favour, so as to exploit a *de facto* situation. It represented a retrograde step in international law, because as drafted it infringed the principles on which arbitration was based. The autonomy of the will of the parties was the very basis of the *compromis* by which the parties bound themselves to arbitrate. Several authors had emphasized that point, explaining that arbitration was a solution halfway between settlement by direct negotiation between the parties and judicial settlement. The conditions governing the validity of a *compromis* were comparable to those governing any international treaty. A party resorted to arbitration because it wished to have the law applied.

26. The International Law Commission had overstressed the compulsory character of arbitral procedure and underestimated the dangers implicit therein. Existing disputes should certainly be excluded. Without prejudice to his earlier remarks, he thought that article 4, paragraph 1, might be deleted, and that paragraph 2 might be included in article 3.

27. The Commission on Territorial Questions had suggested that article 26 might be supplemented by a new paragraph based on the provisions of Article 94, paragraph 2 of the Charter and providing that if one of the parties to a dispute failed to comply with its obligations under an award, the other party might apply to the Security Council, which might, if it considered it necessary, make recommendations or decide upon measures to be taken to give effect to the award. That amendment was necessary if the institution of arbitration was to be strengthened. Furthermore, an arbitral award would have to be recognized as possessing the force of *res judicata*. He referred to a number of treaties in which the rule of *uti possidetis* had been recognized.

28. The Secretariat's commentary (A/CN.4/92), discussing article 29 of the draft, referred to article 55 of The Hague Convention of 1899 and to article 83 of The Hague Convention of 1907 which gave the parties a measure of protection. Under the draft before the Committee, the award carried little weight, inasmuch as it could be revised or annulled by a body not previously concerned in the proceedings. Article 29 was open to misapplication and possibly enabled the losing party to bring unjustified appeals. True, the tribunal could rule on the admissibility of the application for revision but that provision of article 29 was not sufficient, for the finality of the award should remain the cornerstone of international arbitration. It would always be a simple matter for the losing party to allege the discovery of a new fact. The award, once rendered, should be treated as final; applications for revision or nullity should not be admissible for they might in effect tend to reopen a case that had been disposed of.

29. Apparently a majority of the Member States could not accept the relevant provisions. If, however, the draft should be adopted, his Government would be obliged to formulate express reservations. Even Roman law had never admitted appeals against arbitral awards and some modern authors had ascribed to arbitral awards the same binding force as that of statute law. A body that had not heard the case could not consider an application for revision. States which had been parties to arbitration proceedings and had not entered objections could not subsequently apply for the revision or annulment of the award, for otherwise abuses and bad faith would be encouraged. The validity of the arbitral award did not depend on the tribunal making the award but on the *compromis* that had led to the award.

30. He reserved the right to speak on the suggestion that an international conference should be called.

31. Mr. GARCIA AMADOR (Cuba) said that the debate was straying from the substantive question, which was whether the draft prepared by the International Law Commission could serve as the basis for a convention on arbitral procedure.

32. Some Member States had said that the draft conflicted with established practice in that it did not respect the voluntary and contractual nature of arbitration. He pointed out, however, that the draft subordinated arbitration to the will of the States. It offered the parties the opportunity of reaching agreement on the arbitrability of a dispute, the composition of the tribunal and the terms of the *compromis*. Hence, on those points it merely confirmed the traditional practice, under which the parties were free at any time to withdraw from the obligation they had undertaken. But the Commission's draft sought to remedy the drawbacks of that arrangement and to ensure the efficacy of arbitral procedure. Its provisions to that effect could not be described as an innovation in international law; he referred to precedents in the General Act for the Pacific Settlement of International Disputes in the Pact of Bogotá and in many other more recent instruments. Accordingly, States which agreed to submit their legal disputes to arbitration could not consider those provisions unacceptable. A State which undertook to submit to arbitration surely realized that, in so doing, it was contracting other obligations with respect to the composition of the tribunal or the arbitrability of the dispute. Hence, it could not demur against guarantees the object of which was to ensure fulfilment of the original commitment.

33. Arbitration was an old tradition in the history of the American States. Following the Conference of International American States, held at Mexico City, in 1901-1902, the American States had signed conventions providing for the compulsory arbitration of disputes relating to financial claims. They had recourse to arbitration for the purpose of dealing with the possible misuse of diplomatic immunities in cases in which a State had allegedly failed to comply with its international obligations. By article 1 of the General Treaty of Inter-American Arbitration (1929), the American States had pledged themselves to submit all their disputes to arbitration. For the American nations and for countries in the same position, the apparently novel provisions of the draft were actually only a further guarantee in respect of the peaceful settlement of disputes.

34. The draft convention, if examined in the abstract, introduced a rigid system whereas disputes varied greatly both in nature and according to their attendant political or other circumstances. The draft, which was certainly a valuable document, could obviously not be applied to each particular case, for that was not its purpose. Hence, the General Assembly should recom-

mend it as a model or guide. The Member States would thus preserve their freedom of action. They would be guided in their international agreements by the principles laid down in the draft and would apply them in specific cases.

35. His delegation intended to submit a draft resolution to that effect.

36. Mr. VALLAT (United Kingdom) said that the draft on arbitral procedure was the most important item on the Committee's agenda; the International Law Commission, in preparing the text, had made a very useful contribution to the cause of international law.

37. On two occasions, in 1953 and in 1955, his Government had transmitted its comments to the Secretary-General (A/2456, Annex I, section 9, and A/2899, section 11). It was regrettable that the Commission had not accepted the suggestions made in 1953 by the United Kingdom and other Governments concerning articles 29 to 32, which, as drafted, might impair the finality of the arbitral award and prolong the process of arbitration unduly.

38. The draft could also be improved in other respects, and it could be converted into a convention which might be acceptable to a substantial number of Member States. His delegation thought that it would be better to convene a special conference to draw up a convention based on the Commission's draft. The Committee did not have time enough to examine the draft article by article. Nor would it serve any useful purpose to refer the text back to the Commission which had already revised its initial draft, in the light of the comments transmitted by Governments in 1953.

39. Most of the Governments that had commented on the new draft seemed to be in favour of its main provisions. True, some of the proposed amendments were far-reaching, but an international conference could examine those specific proposals and take them into account in drawing up the convention. The conference could iron out differences of view, for while some Governments might object to the draft as a whole many other Governments ought to be able to come to terms. The Commission's reports, the comments of Governments and the Secretariat's commentary provided sufficient documentation. The conference could draft the final clauses and, if necessary, also provisions concerning reservations and reciprocity.

40. The draft as it stood could not be considered as a perfect model, but its usefulness was not open to question and it could serve as the basis for a new convention on arbitral procedure. His delegation was prepared to propose, in conjunction with others, a draft resolution authorizing the Secretary-General, at the request of, say, twenty Members, to convene a conference to draw up a convention.

The meeting rose at 1 p.m.