United Nations
GENERAL ASSEMBLY
TENTH SESSION
Official Records

SIXTH COMMITTEE, 468th MEETING
Saturday, 3 December 1955, at 10.50 a.m.
New York

CONTENTS

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 (*continued*)

1. Mr. BROHI (Pakistan) said that, if the debate was not to get out of hand, it was essential to have a clear idea of what was really at stake. The International Law Commission had been strongly criticized for departing from the traditional concept of arbitration. The Commission, however, in its introduction to the draft (A/2456, para. 15 ff.) had made it clear that the object of the draft was not merely to codify existing provisions, as ascertainable from treaties and judgements, but also to promote the progressive development of the international law relating to arbitral procedure, and that its departures from traditional conceptions were quite deliberate. If, as many delegations appeared to assume, there really was a generally recognized and clear-cut system of arbitration, then it was clearly arguable that the Commission's draft was inconsistant therewith. Yet, after close study of the writings of learned jurists, he had been quite unable to discover any such rigid and sacrosanct system.

2. He would endeavour to show by reference to the leading authors that the draft convention in no way departed from the minimum requirements of arbitration procedure as defined by them.

3. According to Oppenheim, arbitration meant "the determination of a difference between States through a legal decision of one or more umpires or of a tribunal, other than the International Court of Justice, chosen by the parties."[1] The essence of that concept—the free consent of the parties to submit a justiciable issue to umpires or to a tribunal chosen by them for decision in accordance with a specified body of law—had been strictly preserved by the Commission. Yet various delegations, and the Indian delegation in particular, had regretted the Commission's alleged "departure from the principle of international law that the undertaking to arbitrate entered into by sovereign States was based on the autonomy of the will of the parties" and its "introduction of an element of obligation foreign to traditional concepts of arbitral procedure" (462nd meeting, para. 1). It was, however, stretching the argument too far to regard such autonomy of the will as extending throughout the entire arbitral procedure. To do so would be to authorize States to withdraw at any time, or to reject the award, and would defeat the whole purpose of arbitration. It was only in the initial stage of submitting a dispute to a forum that autonomy could be exercised.

4. What were the Commission's alleged innovations? Article 2 of the draft made it impossible for a party to a dispute to deny the existence of that dispute by unilateral interpretation. As the Commission had pointed out, the only innovation in that connexion was the establishment of machinery to resolve the doubt, the rest being a well-established element of international law. Secondly, there was the provision under which the International Court of Justice was to make the necessary appointments if the parties should fail to take steps to constitute the arbitral tribunal (art. 3, para. 2). Thirdly, articles 5 to 8 were designed to meet the situation when the withdrawal of an arbitrator would lead to the frustration of the original intention to arbitrate. Fourthly, article 10 included novel provisions for the drawing up of a *compromis* by the arbitral tribunal in cases where the parties had failed to reach agreement on the subject. In his opinion, article 10 was merely the logical conclusion of the premise underlying the concept of arbitral procedure. In any case, considerable limitation was placed on the power of the tribunal to decide whether sufficient agreement existed to enable it to proceed. Fifthly, the draft contained provisions for the obligatory jurisdiction of the tribunal with regard to counter-claims and empowered the tribunal to order provisional measures to protect the respective interests of the parties, to extend the period fixed in the *compromis* and to deliver *ex parte* decisions (art. 16, 17, 23 and 20, para. 2). Finally, the draft provided for revision and amendment of the award to secure the effectiveness of the undertaking to arbitrate. Such were the "innovations" which according to many speakers, constituted a minor revolution in international law.

5. However, in the *Eastern Carelia* Advisory Opinion, handed down on 23 July 1923, the Permanent Court of International Justice had said:

> "[the] consent [of States to submit their disputes to arbitration] can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, be also given in a special case apart from any existing obligation."[2]

[1] L. Oppenheim, *International Law—A Treatise*, 7th edition, edited by H. Lauterpacht, Longmans, Green and Co., London-New York-Toronto, 1952, vol. II. p. 22.

[2] *Ibid.*

Commenting on that, Oppenheim added,

"While it seems desirable that the formal difference between the award of a tribunal of arbitration and the judgement of a court of justice should be clearly recognized by International Law, it is important not to attribute to that distinction any decisive importance beyond that inherent in the nature of the adjudicating body. The award of the arbitrator and the decision of the court are both based on law."[3]

Thus the distinction which the draft had been accused of obliterating was a purely formal one between an existing permanent body and one that was selected by the parties for a specific purpose. Again, according to Oppenheim:

"Many treaties lay down that in case of the failure of the parties to reach an agreement as to the appointment of arbitrators, the duty of appointing them shall devolve upon the President of the International Court of Justice.

"The treaty of arbitration usually stipulates the principles according to which the arbitrators have to give their award. These principles are normally the general rules of International Law, but if the parties so desire they may be the rules of equity, or other rules specially laid down in the treaty of arbitration for the special case. In default of any express provision, it must be presumed that the award is to be given according to principles of International Law. The treaty also frequently lays down rules of procedure to be followed by the arbitrators or empowers them to lay down the rules of procedure."[4]

And again:

"An arbitral award is final if the arbitration treaty does not stipulate the contrary, and is binding upon the parties. . . . Yet it is obvious that an arbitral award is only binding provided that the arbitrators have in every way fulfilled their duty as umpires, and have been able to arrive at their award in perfect independence."[5]

If there were any question of their having been coerced or corrupted, the award would have no binding force. Thus, no absolute finality attached to an award.

6. Furthermore, Oppenheim pointed out, with reference to the question of excess of jurisdiction, that arbitral tribunals had been exposed to the conflict of two principles: first, their jurisdiction was essentially grounded in the will of the parties as expressed in the *compromis,* and an award rendered in excess of the power conferred on them was null and void; and secondly, in case of doubt, they were entitled to interpret the *compromis* or treaty. The author then added, with reference to the dispute regarding the validity of the award rendered by the Romano-Hungarian Mixed Arbitral Tribunal in January 1927:

"The disturbing consequences of that dispute revealed the necessity of providing for some measure of appeal against awards of arbitral tribunals, in particular in cases of excess of jurisdiction. There is nothing inherent in the nature of arbitral awards to render them final beyond the possibility of appeal. Accordingly, it was suggested by some members of the League of Nations that the Permanent Court of International Justice should be given the power to hear appeals in such cases. The adoption of some such proposal would save International Law from much discredit."[6]

And finally:

"Originally the decision as to whether a difference was of a legal nature or not was left to the discretion of the parties . . . the arbitration treaties signed on August 3, 1911, between the United States of America and Great Britain and between the United States and France would have been epoch-making had they been ratified, since article 3 provided that, in cases where the parties disagreed as to whether or not a difference was subject to arbitration under the treaty concerned, the question should be submitted to a Joint High Commission of Inquiry."[7]

7. In view of the foregoing authoritative reflections on the theory and practice of international law, he ventured to suggest that the case against the International Law Commission's draft as making revolutionary changes that mutilated the traditional concept of arbitration had been somewhat overstated.

8. It was, however, possible to argue that, though the Commission might have completely vindicated its attitude in its introduction to the draft convention, considerations of political expediency made it inadvisable to adopt the draft, mankind not being ripe for so ideal a solution. In that connexion, he would draw attention to the dictum of the eminent sociologist, Sidney Hook, that if all nations were freely to accept a common method of legally and peacefully resolving conflicts of interests, the ideological differences, no matter how extreme, would have little or no effect on the political shape of things. Identity of ideology would never be achieved but nations could agree on common procedures. The menace of the hydrogen bomb made it high time for such courageous thinking to be done in international law.

9. There were many views as to the true nature of law. Roscoe Pound[8] had enumerated twelve conceptions of the law, the fourth in his list being the view that law was a philosophically discovered system of principles expressing the nature of things, to which, therefore, man ought to conform his conduct, and the twelfth, that law was made up of dictates of economic or social laws with respect to the conduct of men in society, discovered by observation and expressed in precepts worked out through human experience. In his (Mr. Brohi's) own view, the empirical approach embodied in the twelfth concept was the only possible one in an age which recognized society as being in a constant process of development and governed by economic and social laws.

10. Although he agreed with much that had been said regarding the need to respect tradition, he could not countenance slavish submission to traditional concepts. Mankind had suffered too much in the past from the dead hand of tradition. The existing fabric of international law should be overhauled by a progressive system of rules.

11. There was the further consideration that the establishment of a system of arbitral procedure which provided an effective remedy in case of disputes would encourage many States to resort to a procedure in which at the moment they had little faith. As far as the disputes between his own country and India arising out of the partition of the Indian sub-continent were con-

[3] *Ibid.*, p. 23.

[4] *Ibid.*, pp. 24 and 25.

[5] *Ibid.*, pp. 26 and 27.

[6] *Ibid.*, p. 29.

[7] *Ibid.*, p. 31.

[8] *An Introduction to the Philosophy of Law,* Yale University Press, 1922, chap. II.

cerned, he was convinced that the present impasse would never have come into being if the arbitral procedure outlined in the International Law Commission's draft had existed at the time. Furthermore, as the principle of self-determination was implemented, there would be an increasing number of partitions of territory, and consequently of disputes arising out of those partitions.

12. There were a few points in the draft convention which his delegation would like to see rectified. One such point was the apparent clash between article 11 and article 30 of the draft. If the tribunal was to possess the widest powers to interpret the *compromis,* it was difficult to see how its award could be challenged on the grounds that it had exceeded its powers, or that there had been a serious departure from a fundamental rule of procedure. To remedy that difficulty, the Canadian representative had suggested that article 11 should be drafted as being subject to the provisions of article 30 (A/2899, section 4). A provision might also be inserted to enable the aggrieved party to appeal to the International Court against the tribunal's interpretation of its powers without waiting for the arbitral process to be completed. A time-limit of three months could be laid down after which article 30 could not be invoked in such connexion. But that was a minor point, and as far as its substance was concerned, Pakistan was prepared to sign the draft convention forthwith.

13. After tracing the process of consideration and reconsideration which the question had undergone since first selected as a topic for codification in 1949 (A/925, para. 16), he said that since lasting peace could be grounded only on universally accepted principles of international law, it would be a disaster if the politician prevailed over the lawyer in the counsels of Governments with regard to the draft on arbitral procedure.

14. Mrs. BASTID (France) said that international arbitration was one of the most important and the most interesting subjects ever to have come before the Sixth Committee. The commentary prepared by the Secretariat (A/CN.4/92) was of invaluable help for the research work necessary in studying it.

15. Dealing in the first place with the nature of the draft before the Committee, she pointed out that the title "Draft on Arbitral Procedure" was not very appropriate and had led to some misunderstanding. The draft did not deal with arbitral procedure so much as with the observance of international agreements to arbitrate.

16. The draft dealt chiefly with problems which might arise out of and subsequently to the signing of an agreement to arbitrate. It did not enumerate the questions which were capable of being submitted to arbitration. It was concerned more with the application of the undertaking to arbitrate than with the substance of the law of arbitration.

17. The International Law Commission, seeking a certain line of development of international law, had devised rather complex machinery which relied heavily on the existence of the International Court of Justice. The provisions relating to the intervention of the Court recalled the role of a doctor or a surgeon who was called only when a person was ill. The Court was called upon to perform certain tasks if difficulties occurred in the application of the undertaking to arbitrate.

18. Precedents dating from the time of the League of Nations showed that since the establishment of an international political organization and of a permanent international judicial body, this machinery had been called upon to play a part in arbitral procedure. It had been quite common to entrust to it the solution of certain difficulties arising in connexion with arbitration; the International Law Commission had considered those precedents as valid, had developed them and evolved a system from them.

19. Numerous arbitration treaties concluded since the Second World War certain functions in connexion with arbitration were vested either in the Secretary-General of the United Nations or in the President of the International Court. It could hardly be said, therefore, that the Commission's draft was absolutely original; it did not innovate as much as had been suggested.

20. Going on to discuss the very dissimilar stands taken on the International Law Commission's draft by the various delegations, she discerned four trends:

(1) A small number of States had expressed approval, without reservation, of the International Law Commission's draft and had even suggested that they were prepared to sign an international instrument on those lines;

(2) Certain delegations had stated that the draft was acceptable provided that some of its articles were amended. The main question raised by them concerned the way in which the draft was to be reconciled with existing arbitration conventions;

(3) A number of delegations had claimed that the draft served no useful purpose in that it added nothing to arbitration as a living institution of international law—an institution which, they said, could in no way be improved by the provisions of the draft;

(4) Some delegations had gone so far as to suggest that the draft was incompatible with State sovereignty and therefore mischievous; it might lead to the destruction of arbitration. It had even been suggested that the draft represented a kind of heresy.

21. All the delegations had, however, stressed their attachment in principle to arbitration as a means of settling international disputes.

22. The conflicting opinions of the delegations concerning the draft were a consequence of the dissimilarity in the experience of their Governments with arbitration—an experience which varied with the region where it had been practised. Latin America, for example, was the region in which international arbitration had flourished most. It was a historical fact that in that region the number of disputes which had been submitted to arbitration, and the importance of the subjects of those disputes, were immeasurably greater than elsewhere. In view of their considerable experience of international arbitration, which to Latin American Governments constituted a normal means of settling their differences, it was understandable that the representatives of many of them should feel that the draft prepared by the International Law Commission was not necessary: they had a certain legal conception of arbitration, an institution which had long been practised by them and which had made possible the agreement which existed between them on a great many important legal principles peculiar to Latin America, particularly with regard to boundary delimitation. The subject of arbitration was continually being discussed at inter-American conferences.

23. Other States (particularly in Europe) which had often had recourse to arbitration for the settlement of their international disputes, had learned from experience

that difficulties could arise when they set in motion the machinery of arbitration. Those States had become somewhat chary of arbitration as known hitherto. Their representatives had voiced the opinion that the International Law Commission's formulation might serve as a means of overcoming the difficulties which they had encountered in the past in connexion with the carrying out of undertakings to arbitrate.

24. Some of those States had shown great readiness to submit their disputes to the International Court of Justice; they therefore naturally approved of the provisions in the International Law Commission's draft which extended the competence of that Court with respect to arbitral procedure.

25. Lastly, other States had resorted to arbitration mostly in internal matters and had much less experience of international arbitration. The point of view of those States was naturally quite different from that of the others.

26. The immediate question was what action the Sixth Committee should take. The International Law Commission had adopted the draft with only two adverse votes and one abstention: the majority in favour of it had therefore been substantial. The Commission was a group of experts and not a mere drafting committee: it would, therefore, be wrong to refer the draft back to the Commission. Even though its membership had changed since the adoption of the draft, the Commission would almost certainly uphold its text. The most reasonable and courteous course for the Committee would be simply to thank the Commission for the valuable work which it had performed.

27. The excellent suggestion had been made that the draft should be brought to the attention of States. Arbitration agreements were extremely difficult to draft and the International Law Commission's text could serve as a guide even to parties that intended to amend its provisions in a manner inconsistent with the spirit in which they had been drafted.

28. Referring to the suggestion that a conference of plenipotentiaries should be convened, she said that any such conference should be conducted along the traditional lines of a diplomatic conference. It would use the International Law Commission's draft as a basis of discussion. The representatives attending the conference would have instructions from their Governments and would be authorized to propose amendments. It was distinctly possible that the text worked out by the conference might be acceptable to more than a few States. She had considered whether perhaps the Council of Europe, most of whose members were favourably inclined to the draft as a basis for discussion, might be prepared to sponsor a convention based on the draft. But the objection to that course would be that it would deprive the United Nations of the credit for the extensive work which had gone into the International Law Commission's draft. Furthermore, it would not serve such States as Pakistan, whose representative had just made a remarkable and scholarly speech in support of the draft.

29. In view of the foregoing considerations, she suggested that the Secretary-General might be asked to consult Governments and to report on their response to the suggestion for an international conference of plenipotentiaries. In the light of the replies received, the Sixth Committee would decide at the eleventh session of the Assembly whether a conference was to be convened. Such a conference would take place under the auspices of the United Nations, but with the participation of only those States which were prepared to discuss the question of arbitration on the basis of the International Law Commission's draft.

30. The Secretary-General might also be invited to make a detailed analysis of the position of the various Governments as reflected not only in their comments but more particularly in the debates in the Sixth Committee. Such an analysis would be of great value to the Committee when discussing whether an international conference should be convened.

31. Her delegation's suggestions combined in some measure the ideas embodied in the various draft resolutions before the Committee. She hoped that they would prove useful to the Committee in deciding upon the course to be adopted.

32. Mr. GABRE-EGZY (Ethiopia) expressed his delegation's appreciation of the International Law Commission's draft (A/2456, para. 57) and of the commentary prepared by the Secretariat (A/CN.4/92).

33. The question before the Committee was what should become of the draft in the light of the observations which had been made. The draft could be approved and recommended to Member States as a guide or model, or else it could simply be circulated for further consideration. Another possibility would be to recommend the draft as a working document for a diplomatic conference which might, at some stage, be convened for the purpose of concluding a convention on arbitral procedure. Finally, the Committee could refer the draft back to the International Law Commission for further clarification of the details which remained controversial.

34. In considering those various possibilities, many delegations had discussed the draft at length; that discussion had been both inevitable and beneficial. The Ethiopian delegation, however, did not propose to indicate its position regarding every controversial provision, as it felt that the draft should be re-examined by the International Law Commission before Governments were requested to make a final decision. The Commission should examine every provision which had been the subject of criticism, either in the written comments from Governments or in the Committee debate, and state its views on those points in the light of customary international law. Such a statement would help Member States to determine what steps they would have to take in order to make the draft a practical and living instrument.

35. In conclusion, the Ethiopian delegation was unable to support the revised joint draft resolution (A/C.6/L.369/Rev.1). The draft amendments submitted by Afghanistan, Mexico, Netherlands and Yugoslavia (A/C.6/L.370), on the other hand, were basically acceptable, although certain changes might usefully be made in the wording.

36. Mr. BROKENBURR (United States of America), speaking for the sponsors of the original joint draft resolution (A/C.6/L.369), said that the many helpful observations made during the debate had led them to revise the text in order to clarify the original intention and to dispel the misgivings expressed by some delegations.

37. The revised proposal (A/C.6/L.369/Rev.1) introduced several changes. The first paragraph of the preamble was now a slightly revised version of the original third paragraph. The second paragraph of the preamble and operative paragraph 1 were in substantially the same language as the corresponding parts

of the original draft. Operative paragraph 2 was based on the introductory paragraph in the earlier proposal. Finally, the last operative paragraph had been amplified and revised; the troublesome words "commends" and "as a guide" had been dropped.

38. The Committee was deeply divided on many issues regarding the substance of the Commission's draft. By contrast, the differences of opinion on the best course to adopt were mostly questions of degree rather than of principle. Nobody seriously contended that the Commission lacked the right to return to the question when its work-load permitted; few would argue, on the other hand, that it should do so at the expense of projects which might deserve priority. Similarly, no delegation wished actively to prevent any diplomatic conference for the purpose of concluding an arbitration convention, such a conference might well even be held under United Nations auspices, provided that a substantial number of States desired such a course. Furthermore, most delegations probably welcomed the suggestion that States should consider the merits and demerits of the draft, as well as the comments thereon, and assess its adaptability to individual arbitral arrangements. While every delegation doubtless had its own opinion as to which of those various approaches was the most likely to lead to fruitful results, it might be erroneous to take a decision suggesting that any one of them was necessarily bound to prove valueless. It was the purpose of the revised draft resolution to leave all those approaches open, while respecting the existing differences of view regarding the International Law Commission's draft.

39. In view of what he had just said, the United States delegation obviously had no objection in principle to the basic idea underlying the draft amendments submitted by four delegations (A/C.6/L.370). It felt, however, that the amendments were unacceptable in their present form. Whatever revisions the Commission might make in order to present "a set of rules on arbitral procedure" for final consideration at the General Assembly's twelfth session, the problem would be substantially the same in 1957 or 1958 as at present. It seemed unlikely that the Commission would be able to reconcile the conflicting views. The "set of rules" so produced might consequently meet with no more general acceptance than the existing draft and it was very doubtful whether any really important or new elements would be introduced that might be of significant assistance to Governments. Moreover, the most unhappy feature of the draft amendments was the rigid timetable which they proposed.

The meeting rose at 12.45 p.m.

Printed in U.S.A. S—77601—January 1956—1,800