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CONTENTS

Page

Agenda item 52:
Arbitral procedure: comments of Governments on the draft on arbitral procedure prepared by the International Law Commission (*continued*) 99

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*)

1. Mr. RODIL MACHADO (Guatemala) said that since the middle of the nineteenth century arbitration had been frequently used by States as a means of settling international disputes. States had, however, rarely submitted to arbitration matters involving their more vital interests; arbitration had been chiefly successful as a means of settling minor disputes. Moreover, many wars had resulted from disputes which should have been settled by that means.

2. The object of the International Law Commission's draft (A/2456, para. 57) was the very commendable one of strengthening arbitration by the more effective observance of the *compromis*, a development which would represent an evolution in international justice. Legal systems had been drastically changed only at times of far-reaching revolutions; in the international order such an opportunity had occurred immediately after the two world wars, when the traditional concept of State sovereignty had been sufficiently weakened to open the way for substantial changes in international law. Consequently, international law had to develop progressively, lest some day an explosion should occur owing to the use of force.

3. The distinctive characteristic of arbitration was the fact that it enabled a dispute to be settled definitely by arbitrators chosen by the parties concerned. Other factors, such as, for example, whether arbitration was mandatory or open to the free choice of the parties, were not essential ingredients of the arbitration system. In any case, in its desire to make arbitration more effective, the Commission had gone beyond the scope of arbitral procedure even as conceived in municipal law, where the jurisdiction of the ordinary courts had become supreme; the provisions concerning interpretation, and still more those concerning arbitral awards, gave the International Court of Justice powers which were completely inconsistent with the nature of arbitration. Moreover, the powers given to that court and to the arbitral tribunal to order provisional measures were excessive, because unqualified.

4. There was a fundamental difference between arbitration in municipal law and arbitration in international law; in municipal law, arbitration was a mode of settlement open to the parties, but if either party did not wish to submit to arbitration, recourse to the law courts was possible; by contrast, in the international order, the International Court of Justice had no general compulsory jurisdiction. Under those circumstances, to include enforcement provisions in the draft on arbitral procedure might make States reluctant to have recourse to arbitration at a moment when it was called for.

5. In short, he agreed in principle with the International Law Commission's draft subject to certain reservations concerning particular clauses which he had mentioned earlier—for it pursued an ideal, but he considered its provisions sound and practicable only to the extent to which they supplemented a binding undertaking between States to arbitrate, or in cases in which States had accepted the compulsory jurisdiction of the International Court of Justice.

6. The Guatemalan delegation could not support the joint draft resolution submitted by Colombia, Cuba and the United States (A/C.6/L.369), because, in its operative paragraph 2, it commended the International Law Commission's draft in terms which suggested that the Committee was agreed on its merits, whereas in fact many delegations had objected to it. The draft could not be put forward as a model for arbitral procedure, although many of its provisions demonstrated the skill of its authors.

7. Mr. ADAMIYAT (Iran) said that the International Law Commission's draft was hardly likely to make arbitration more attractive to Governments and peoples.

8. Arbitration as a mode of peaceful settlement of international disputes was essentially based on the fulfilment of three conditions: the parties had to agree to submit to arbitration; they had to agree as to the existence of a dispute and its arbitrability; and they had to be absolutely free in the choice of the arbitrators. In departing from those essentials, the International Law Commission had produced a draft which, though theoretically interesting, had little practical value, because it would not be acceptable to the majority of States.

9. The draft convention went far beyond the scope of arbitral procedure: many of the articles concerned arbitration itself. It contained novel provisions concerning the appointment of arbitrators in certain cases by the President or the Vice-President of the International Court of Justice, innovations which introduced an element of compulsion. Moreover, it made it possible for a party to be ordered by the International Court to submit to arbitration in respect of a dispute which that party did not consider arbitrable.

10. That system of "judicial arbitration" proposed by the Commission would represent a change in the entire procedure of settlement of disputes, which would perhaps weaken the position of the International Court of Justice as the principal judicial organ of the United Nations. Governments which had not yet made the declaration with regard to compulsory jurisdiction under article 36, paragraph 3, of the Statute of the Court were unlikely to accept the extension of that compulsory jurisdiction to preliminary questions regarding arbitration.

11. The provision in the Commission's draft under which the International Court was to be empowered, on the application of one party only, to decide the preliminary question of the existence of an arbitrable dispute and the provision under which an arbitral tribunal could be set up by the President or Vice-President of the Court, likewise on the application of the parties, needed much closer study.

12. A certain limitation was also necessary in the range of disputes subject to arbitration; an arbitration convention had to exclude from its scope matters exclusively reserved to domestic jurisdiction under municipal law and constitutional law.

13. Nor could his delegation approve the suggestion that a conference of plenipotentiaries should be convened, for the calling of such a conference presupposed a measure of general agreement on the broad lines of the Commission's draft—an agreement which did not in fact exist.

14. Commenting on the joint draft resolution (A/C.6/L.369), he said that the draft on arbitral procedure could, of course, be used as a guide by any State desiring to do so. But it was not desirable that the Committee should express approval of that draft by commending it, while knowing it to be a rather imperfect instrument.

15. The best course might be either to take note of the draft and to express appreciation for the work of the International Law Commission, or as an alternative an attempt should be made to have the draft on arbitral procedure revised in the light of the opinion expressed by the majority of the representatives in the Committee.

16. Mr. NINCIC (Yugoslavia) said he would add some general remarks to the comments submitted earlier by the Yugoslav Government on the International Law Commission's draft (A/2899, section 12).

17. The reference in Article 33 of the United Nations Charter to arbitration as one of the means for the pacific settlement of disputes showed that it had retained its importance in the more highly organized international community of which the United Nations was the expression.

18. The International Law Commission's draft consisted of two parts. The first dealt with generally accepted practices in arbitral procedure; in the second the Commission had endeavoured to improve upon existing practices by strengthening the powers of the arbitral tribunal (articles 11 and 12 of the draft). Up to that point the Commission's work would meet with a wide measure of approval. The Commission had, however, gone much farther; in a desire to fill existing loopholes it had proposed innovations of a controversial nature. In order to make arbitration more effective, it had introduced elements of automatism and rigidity which impaired the principle of the "autonomy of the will of the parties" which was one of the distinctive features of the whole system of arbitration. The draft seemed to be based on the assumption that that autonomy applied only to the undertaking to arbitrate, and that in the subsequent stages of the proceedings, which were concerned with implementation, decisions of the International Court of Justice or its President could be a substitute for it. That was the doctrine of "conditional delegation" as the Secretariat had aptly termed it in its commentary (A/CN.4/92); that doctrine would find its application in such essential phases of the procedure as the decision regarding the arbitrability of the dispute and the composition of the tribunal; many Governments, including that of Yugoslavia, would find it difficult to accept all the implications of the doctrine.

19. In giving the free will of the parties less prominence than it had enjoyed under the traditional system of arbitral procedure, the Commission had, it was felt, deprived arbitration of some of its essential features and tended to obliterate the all-important distinction between arbitration and judicial settlement; the usefulness of arbitration as an independent mode of pacific settlement of disputes might well be impaired thereby.

20. He shared the view expressed by the United Kingdom representative that the Commission's proposals implied the emergence of a complex system of international judicial settlement within which arbitration would become of purely secondary importance; the world seemed hardly prepared for such a great innovation.

21. In its desire to make arbitral procedure effective, the Commission had clearly gone beyond what Governments would be prepared to accept. The question now was how the draft could be made more acceptable to Governments without sacrificing some of its more valuable elements. A reservations clause, as suggested by certain Governments, including that of Yugoslavia, would, of course, offer a certain safeguard. Such a clause was essential, but it would not solve the whole problem. Many States would probably not accept an instrument with which they basically disagreed even if given the possibility of making reservations to some of its provisions. Besides, the reservations of some States would be so numerous and so far-reaching that not much of the original structure would be left.

22. The draft resolution submitted by Columbia, Cuba and the United States (A/C.6/L.369) implied a much greater measure of endorsement—although admittedly a qualified endorsement—than most delegations were prepared to give to the controversial draft convention before the Commission. The draft resolution had the further disadvantage of implying the abandonment of further efforts to work out a more generally acceptable text. On the other hand, there would be little purpose at that stage in discussing, article by article, a text which had been received with so little enthusiasm.

23. There remained the possibility of convening a diplomatic conference to examine the Commission's draft. If sufficient States were prepared to participate, such a conference might produce a satisfactory text for a convention, but its field of application would probably be narrow and the text not a very homogeneous one. Moreover, the danger existed that, because Governments objected to the text as it stood, the conference might never be held.

24. The only alternative for the Committee in the circumstances was to refer the draft back to the International Law Commission for further study in the

light of past or future comments by Government and of the views expressed in the current discussion.

25. Mr. CONTRERAS (Chile) recalled that Chile, throughout its existence as an independent State, had always favoured arbitration as well as other peaceful means of settling international disputes. It had always maintained, however, that arbitration should be voluntary and that an arbitration agreement should only cover disputes arising after the date of its conclusion.

26. Recent developments in international judicial practice did not seem to justify any departure from the classic form of arbitration followed in the past, which had the virtue of being adaptable to the special circumstances of particular cases and to the natural requirements of the parties. For that reason, the Chilean Government felt unable to accept the draft on arbitral procedure prepared by the International Law Commission. The draft did not represent merely a codification of existing law, which would have been useful and desirable; its authors had also introduced provisions going far beyond established practice and constituting a development which, regardless of its intrinsic merit, could not be accepted without mature reflection.

27. As the Chilean Government had pointed out in its comments on the draft convention (A/2899, section 5), the Commission's proposals deprived arbitral procedure of much of its essential flexibility, because so many clauses provided for the intervention of the International Court of Justice. The Court would even be empowered to make the final decision on such fundamental issues as disagreement between the parties as to the existence of a dispute or as to whether a dispute was subject to arbitration. Furthermore, article 3, paragraph 2 of the draft granted extremely broad powers to the President of the International Court in appointing arbitrators and filling vacancies. Article 11 of the draft was open to the same criticism, in that it expressly vested the tribunal with "widest powers". Moreover, it not only gave the arbitral tribunal powers greater than such bodies enjoyed under traditional law; it also purported to turn the International Court into a court of final instance. Such a situation was entirely incompatible with the concept of arbitration.

28. The International Law Commission, in its zeal to preclude any evasive tactics, had infringed the basic principle of the sanctity of the will of the parties. The Commission's draft consequently tended to defeat the very purpose of voluntary arbitration by imposing an unwarranted degree of rigidity. As the French representative had said at the General Assembly's eighth session (Sixth Committee, 384th meeting), the draft would alter profoundly, and perhaps even do away with, the classic concept of arbitration which had often proved successful in the past.

29. The Chilean delegation would be unable to join in any recommendation to the effect that Member States should take the Commission's draft as a guide, for the text lacked certain characteristics, both of form and of substance, which were indispensable prerequisites to a multilateral instrument. There was no mention, for instance, of reservations. Furthermore, the new text was supposed to govern all arbitration agreements, even those concluded before its entry into force. That stipulation might make it very difficult to reconcile its provisions with existing treaties, especially those governing relations between American States. For example, the American Treaty of Pacific Settlement (Pact of Bogotá), which mentioned a number of means for the pacific settlement of disputes, contained express provisions governing arbitral procedure which differed somewhat from those in the Commission's draft.

30. If the draft were to be accepted as a guide or model, its text had to represent the unanimous opinion of both the body responsible for drafting it and the General Assembly. In fact, however, as the Brazilian representative had pointed out at the preceding meeting, the International Law Commission had been far from unanimous on the subject; similarly, the discussions in the Sixth Committee had shown that there was much basic disagreement. The draft convention could, therefore, only be regarded as a remarkable academic effort, of real scholarly value.

31. Mr. GARCIA OLANO (Argentina) said that the Argentine Government and people had always favoured arbitration as a peaceful method of solving international disputes. His delegation consequently regretted all the more deeply that it could not support the draft prepared by the International Law Commission.

32. He would not dwell on the features which made the draft unacceptable, as his delegation's views had been explained at the General Assembly's eighth session and in its comments transmitted to the Secretary-General (A/2899, section 1). It was only unfortunate that the International Law Commission, which enjoyed the highest prestige, had not been more successful in that particular task.

33. In those circumstances, he agreed with the Brazilian representative that the solution proposed in the joint draft resolution before the Committee (A/C.6/L.369) also appeared unsatisfactory. A recommendation to Member States that they should regard the draft as a guide would admittedly be only a modest compromise; it would nevertheless imply some slight degree of approval of a document which appeared wholly misconceived. It might be better, therefore, merely to thank the International Law Commission for its efforts and to take note of the draft.

34. Mr. BUVAILIK (Ukrainian Soviet Socialist Republic) said that arbitration was recognized as a most valuable institution but, as previous speakers had emphasized, it was only acceptable in its traditional and voluntary form.

35. The proposed draft was a totally new departure. Most of the members of the International Law Commission had evidently realized that their proposals constituted an encroachment on the sovereignty of States; the wording of paragraphs 16 and 17 of the Commission's report (A/2456) suggested as much. Those paragraphs had apparently been inserted as an apologia to explain how it was that, side by side with some established principles of international law, the draft contained a number of other provisions which immediately nullified its value as a work of codification. Thus, article 1 purported to confirm the accepted principle of voluntary reference to arbitration, but article 2 immediately introduced an element of compulsion. Similarly, article 11 gave the tribunal the widest powers to interpret the *compromis,* although such interpretation was a matter strictly for the parties. Article 3 first said that the parties themselves would appoint the arbitral tribunal and then, immediately afterwards, cancelled that statement by allowing the International Court of Justice to make an appointment even if the parties did not agree thereto. Article 31 gave the International Court the unprecedented right to annul an award. Such a

provision would undermine the very foundations of arbitration, as usually understood.

36. Those provisions, and many others, clearly showed that the Commission had attempted to provide for compulsory enforcement. The Commission had, for instance, ignored the demarcation line between judicial process and arbitral procedure and, in breach of all principles of international law, had vested in the International Court the widest powers of final review.

37. Some delegations, notably those of Canada and the Netherlands, nevertheless felt that the draft convention should serve as a guide. In fact, however, the document could only cause confusion, as it introduced completely unprecedented notions into the accepted process of arbitration. Similarly, it was impossible to contend that approval of the joint draft resolution (A/C.6/L.369) would not be tantamount to approval of the draft convention. The wording of the draft resolution presupposed agreement, at least in principle, and inferences would be drawn from the resolution itself and not from the *obiter dicta* of its sponsors. Even the expression of "appreciation" seemed unwarranted. The text had been adopted in the International Law Commission by a majority of one vote; the "appreciation" would consequently extend only to seven of the Commission's members and imply disapproval of the rest.

38. In view of all those considerations, the joint draft resolution could not be put to the vote without a detailed discussion of every article of the draft convention on arbitral procedure. Since, however, many delegations opposed that draft in principle, even such a course would serve no useful purpose.

39. Mr. ALFONSIN (Uruguay) said that the two points to determine were, first, the value of the draft on arbitral procedure and, secondly, what action the Committee should take. The Uruguayan delegation had stated before, in 1953, that it fully supported the former in principle. States submitted to arbitration by voluntary agreement; it could not be argued, however, that in a specific case fresh agreement was required on every procedural act and detail; if that were so, the possibility of evading the initial obligation to submit to arbitration would be eliminated. The Commission's draft did not introduce any substantive innovation. Its general purport was only a consequence of the universally accepted rule that all international treaties, including those involving arbitration, should be carried out in good faith.

40. Despite its acceptance of the basic principles of the draft, the Uruguayan delegation nevertheless considered that certain specific provisions were unsatisfactory. For instance, article 3, paragraph 2, suggested that the fact of being a national of one of the parties should be the only disqualification debarring the President or Vice-President of the International Court of Justice from making appointments to the arbitral tribunal; in fact, however, other factors might be equally important in making impartial appointments. The provision in article 22 was also open to criticism, in that it seemed contrary to the accepted principles of judicial arbitration. Articles 29 *et seq.*, dealing with revision and annulment, were also somewhat problematic. It was thus clear that, however acceptable its basic principles, the text was still imperfect.

41. There were two alternatives, if, as some delegations appeared to wish, the spirit of the draft convention was to produce the best practical results: either to elaborate a special convention on the basis of the draft, or else to commend the draft as a guide for the use of States in drawing up arbitration treaties and agreements. His delegation, for the moment, was unable to side with those in favour of the first course. In the first place, it was not in entire agreement with the text of the draft and he feared that the number of reservations to a convention, if it materialized, would be so large as to render it ineffective. It was not clear, however, how the provisions of the draft were to be reconciled with the different provisions of other arbitration treaties and, in particular, the Pact of Bogotá of 1948, which Uruguay had recently ratified. It was unlikely, in any case, that many countries would ratify a convention similar to the draft. His delegation was accordingly in favour of offering the draft, not as a standard model convention, but simply as an example of what an arbitration convention based on the principles of judicial arbitration might be. It also felt that the Committee should refrain from expressing approval of the text of the draft, and should submit it not for the sake of the text itself but the principles it contained.

42. To place greater emphasis on those principles, he suggested that the second paragraph of the preamble to the joint draft resolution (A/C.6/L.369), recalling General Assembly resolution 797 (VIII), should be amended to read:

> "*Considering* that this draft was prepared on the basis of important principles constituting a substantial contribution to the development of international law on arbitral procedure,".

43. Mr. STABELL (Norway) said that the draft on arbitral procedure had an intrinsic value which no action or inaction on the part of the Committee could diminish. The Secretariat's Commentary on the draft (A/CN.4/92), too, represented an extremely valuable contribution to legal knowledge.

44. While favourable to the draft in principle, his delegation entertained serious doubts concerning some of its provisions or implications, in particular its retroactive force. During the discussion in Committee at the Assembly's eighth session, it had been said by the then Chairman of the International Law Commission that the "new convention could apply to all arbitration undertakings, whether prior or subsequent to the entry into force of the convention, in the absence of express reservations made at the time of signature or accession" (387th meeting, para. 20). From the drafting standpoint, his delegation regarded it as a serious defect that the text failed to make that point quite clear and, from the standpoint of substance, it shared the view of the Canadian and certain other delegations that it was undesirable for the proposed convention to have retroactive force.

45. Nor did the draft state with sufficient precision to what extent its provisions were mandatory—a question to which his Government tended to attach ever increasing importance. The Commission, in section IV, chapter II, of its report (A/2456), had admittedly specified that the inclusion of the proviso, "unless otherwise agreed by the parties", did not imply that all the provisions which were not so qualified were mandatory, and had also (in paragraph 48) formulated two basic principles as the sole limitations on the freedom of the parties. It would have been better, however, to state explicitly in each case whether a clause was optional or not, the two considerations not being clear enough in themselves to rule out all possibility of doubt and controversy.

46. But the fundamental question was that raised by the Netherlands in its communication (A/2899/Add.1) as to whether mandatory force could be attributed to the provisions of the draft if it became a multilateral instrument. What, for instance, would be the position if, after two States had agreed that the arbitrator in their dispute should not have power to give judgement by default, one State failed to appear and the other invoked article 20, paragraph 1, of the draft? Should the provision of the draft override the explicit provision in the agreement to arbitrate? Though it might be argued that the two States in question were under an obligation to the other parties to the multilateral instrument, it was difficult to see what legitimate interest such third States would have in a dispute in which they were not involved.

47. From what he had just said it would be clear that his delegation was not in favour of recommending the draft to the Member States with a view to the conclusion of a convention.

48. In regard to the proposal made by the United Kingdom and Canadian delegations at the 462nd meeting to hold an international conference with a view to concluding a convention on the basis of the draft, he pointed to the fact that this proposal had been made contingent upon the willingness of at least twenty States to attend. As far as he could judge, the proposal did not have sufficient support. Nor did he favour the proposal for referring the draft back for further study. Such a course would hardly be relished by the Commission and would serve no useful purpose.

49. His delegation was far more inclined to the Netherlands suggestion (A/2899/Add.1, first part, para. 2, (*b*)) that the draft should be recommended to States as a model, its excellent and watertight procedural rules being supplemented by provisions relating to specific disputes or classes of dispute. In that case, article I and the provisos concerning the optional nature of clauses would not be required and many of the objections he had raised would cease to apply. There would, for instance, be no objection to giving mandatory force to the procedural rules, once they had been incorporated in an agreement.

50. His delegation would accordingly support the joint draft resolution proposed by Colombia, Cuba and the United States of America (A/C.6/L.369).

51. Mr. TARAZI (Syria) observed that most speakers appeared to be sceptical as to the value of the draft prepared by the International Law Commission.

52. He fully concurred with the criticisms of the Soviet Union, Guatemalan and Norwegian delegations. No authority could be found in the United Nations Charter for converting arbitral procedure into a compact and rigid system, and to do so would be to rob that procedure of some of its essential features. In proposing to give the International Court of Justice power to review and annul arbitral awards, the Commission appeared to be confusing the Court's functions with those of a supreme court in a federal State and was going well beyond existing international law.

53. He entirely agreed with the Byelorussian representative on the essentially contractual character of arbitration. It was to be noted that domestic civil codes dealt briefly with arbitration, leaving the matter largely to the discretion of the parties to disputes. Incidentally, the provision in article 12, paragraph 2, of the draft that it was not admissible for the arbitral tribunal to bring in a finding of *non liquet* was reminiscent of article 4 of the French Civil Code. The latter, however, applied only to French courts dealing with disputes between persons.

54. In describing the arbitral tribunal as *maître de sa compétence,* article 11 of the French text of the draft, went further than similar provisions in municipal law, where courts were described as merely *juges de leur compétence.*

55. He would give his delegation's views on the action to be taken on the draft convention at a later stage.

The meeting rose at 12.55 p.m.

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