External Affairs
Supplementary Paper

No. 53/54 INTERNATIONAL ARBITRAL PROCEDURE
(Report of the International Law Commission)

Text of a statement made on November 16, 1953, by the Canadian Representative on the Sixth Committee of the eighth session of the United Nations General Assembly, Mr. Alan Macnaughton, Q.C., M.P., on the question of international arbitral procedure arising in connection with agenda item 53.

Note: The text of the resolution adopted on this question by the Sixth Committee on November 17, 1953, and the results of the voting are to be found at the end of this statement.

The Canadian Delegation would like to associate itself with those delegations which have expressed their appreciation to the International Law Commission for the excellent and progressive work it has accomplished in drafting the articles on arbitral procedure which are now before this Committee. In our view the Commission has performed a most useful work not only in codifying existing practices and procedures as they relate to international arbitration but also in attempting to fill existing gaps in customary international arbitral practice as we have known it up to the present time. We have observed that the basic idea followed by the Commission is that arbitration should lead to binding decisions and that steps should be taken to prevent further failures to fulfil the undertaking to arbitrate, thereby making future arbitration procedures more permanent and effective.

The Canadian Delegation, ... has been impressed with the sincere, intelligent and constructive debate that has taken place thus far on this important subject. We were particularly impressed with the very able speeches made by our distinguished colleagues, the representatives of Brazil, Greece and France. The combined effect of the statement from those representatives has been, I think, to convince this Committee of the great importance and also of the procedural difficulties involved in concluding a convention on international arbitral procedure. I do not think there is any disagreement or objection in principle, certainly not on the part of my Delegation, to a universally accepted and effective international arbitral procedure as a most desirable development in the field of international law and practice. My Government has always been a supporter of the principle of arbitration in international affairs. We consider it highly desirable that a uniform arbitral procedure should be established which would be followed by all states which undertake to have recourse to arbitration as a method for the peaceful and friendly settlement of disputes which might arise among them.

It seems that there is considerable doubt on the part of most delegations concerning the manner in which a draft convention of this kind is to come into force and the method by which states will become bound by its provisions. It seems that the principal issue in the debate thus far is one of procedure involving the method of applying the proposed new convention rather than one of substance relating to the principles in the new draft articles. On the one hand we had a suggestion from the distinguished delegate of Israel, which I think was supported by the distinguished representative of the United States, that instead of the Assembly recommending the conclusion of a convention, it should merely take note of the draft as a scientific study of considerable value and possibly refer it to member governments as a model to be applied as they see fit on a bilateral or multilateral basis. On the other hand, we had a suggestion from the representative of Cuba that the General Assembly should adopt the draft articles in their present form and recommend that governments sign and ratify these articles as a convention. We agree with the observation made by the United Kingdom delegation that it would not be possible either to sign or to ratify these draft articles in their present form and that provision would have to be made for testamentary and other appropriate clauses before governments could be expected to sign and ratify. We consider, ... that this whole question of how the new draft on arbitral procedure is to be applied, requires further study and clarification.

We listened attentively to the now familiar objection which has been raised by the distinguished representatives of Poland and Byelorussia, both of whom argued that a convention of this kind would violate the sovereign rights of states. My delegation considers that both these delegates were on very weak legal ground when they attempted to argue that the proposed convention on arbitral procedure would be another method of destroying the sovereign rights of member states. I fail to understand the logic and legal reasoning of those delegations when they contend states would be forced unwillingly to sacrifice part of their national sovereignty when it is perfectly clear that each state is free to participate or not to participate in such a convention. When states agree to participate in multilateral conventions, regardless of the subject matter, it is generally assumed that they voluntarily agree to restrict some aspect of their sovereign rights. This action on their part confirms rather than denies their rights as sovereign states. This is the whole purpose of international agreement and multilateral conventions which are designed to achieve international co-operation in many fields. What these delegations seem to overlook, and I think this is a factor we should all keep in mind when considering the present articles, is that each member state will be completely free to decide whether it wishes to become bound or not to become bound by a new international code on arbitral procedure. It has not been suggested by the International Law Commission or by any delegation on this Committee that member states are to be obliged against their wills to participate in a convention on arbitral procedure. This is a matter of free choice.

But once that free election is made then it is important that the parties carry out the undertaking it has voluntarily assumed. Consequently once a government has agreed to arbitrate a dispute, it should not be permitted, for reasons of its own, to unilaterally prevent the arbitration at a later stage. We therefore fail to understand the legal logic of the objection advanced by the Polish and Byelorussian delegations.

... at its Fourth Session in 1952, the International Law Commission adopted a draft on arbitral procedure which was accompanied by a commentary of the Commission. This draft was transmitted through the Secretary-General to all governments, members of the United Nations, with the request that they should submit their comments. When the Fifth Session of the International Law Commission commenced on June 1 of this year, comments had been received from only ten governments. In its last report the International Law Commission emphasized the value which it attached to those comments in the light of which considerable revision was made to the draft articles. The articles we are now considering, therefore, represent extensive revision and in some instances substantial changes from the articles on which governments were invited to comment in 1952. This is an important factor which my delegation feels should not be overlooked by this Committee. I think that all delegations will agree that a convention as important as one on international arbitral procedure, in order to be most effective, should be accepted by as many states in the world as possible and that anything which would militate against such universal acceptance should be avoided as much as possible.

At this point, I should like to make a few comments on behalf of my Government concerning the principles contained in the draft articles before us. My Government, in accordance with existing international practice and on the basis of its own experience in international arbitration, accepts the legal power of an arbitral tribunal, once constituted, to decide any question concerning whether the dispute comes within the scope of the obligation to arbitrate. The proposed Article 2 of the final draft goes beyond existing customary law and practice by providing for the determination of this question in cases where there is not yet in existence a tribunal constituted by the parties. This is a progressive step since it would prevent any party to an undertaking to have recourse to arbitration, from claiming the right to decide unilaterally the question whether a dispute exists or whether the dispute is within the scope of the obligation to have recourse to arbitration. Canada acknowledges the jurisdiction of the International Court of Justice in legal disputes involving questions of international law and considers that reference of such questions for decision by the International Court is sound. Moreover, in the interim period pending the constitution of the tribunal, it is logical and necessary to vest the Court with power to prescribe the provisional measures to be taken to safeguard the interests of either or both parties.

With reference to the "compromis" mentioned in Chapter 2 of the final draft, my Government considers that in some cases it may be preferable to submit the matter in dispute, by a complaint on the part of one of the parties which would then be answered by the

other party, this being followed by other pleadings, written and oral. A number of arbitration conventions involving my country provide for such a procedure under which both parties in the arbitration exchange an initial statement of facts and supporting evidence, followed by a second pleading in the form of an answer to the other party's statement with any additional evidence relied upon. Consequently we believe that a similar provision in the final draft should be made for disputes to be handled in this manner, if the parties so desire.

On the question of the revision or annulment of the award, my delegation considers that the nature of an international arbitration might frequently render it desirable that the award should be final and binding and not be open to revision or annulment even on the part of the International Court of Justice. In other words, there may be disputes where the advantages of finality of the award outweigh advantages to be gained by the possibility of revision or annulment. Consequently, for these reasons, it may be desirable to permit the parties to an arbitration undertaking to agree on an alternative procedure, if they so desire, in respect to revision or annulment of the award.

In conclusion ... the Canadian Delegation takes the position that the draft articles on arbitral procedure which we are now considering require further study by the widest group of states before they are made the subject of a convention which might be applied on a bilateral or multilateral basis. As yet most governments have not had sufficient time to study the latest revision of these articles by the International Law Commission. Moreover, the observations by different delegations in this debate make it clear to us that it would be most undesirable and premature to open this convention for signature and ratification at the present time. We think that governments should at least be given the opportunity to make further comments in view of the considerable revision that has been made since they last commented, and particularly in the light of the observations made by member governments during the course of this debate. The new articles now have wide implication in the whole sphere of international arbitration and contain innovations which, desirable as many of them appear to be, require further consideration by governments.

It is for these reasons, ... that my delegation was pleased to join the other co-sponsors in the new revised resolution which will give member states the opportunity to study the latest revisions of the draft articles in the light of the record of the present debate because we consider that these observations will be most useful to governments and enable them to formulate more definitive and concrete views which, for lack of time or sufficient information, they may not have been able to do up to the present. The revised resolution will ask governments to submit comments before January 1, 1955. We consider this date to be more realistic than July 1, 1954 and will give governments adequate time to formulate constructive comments which they might feel they could not have done, if comments had to be in by July 1, 1954. The revised resolution will also ask the

Secretary-General to circulate these comments as soon as they are received and, finally, it will request him to include this item on the provisional agenda of the tenth, rather than the ninth, session of the General Assembly. We prefer the tenth session to the ninth session for two reasons: (a) it will give governments more time to devote the proper study to this important matter and (b) there are already two very important and lengthy items to be considered at our ninth session, namely, International Criminal Jurisdiction and the Question of Defining Aggression.

NOTE: The following is the text of the resolution adopted by the Sixth Committee on November 17, 1953 (U.N. Doc. A/C.6/L.321). It was approved by a vote of 42 in favour (including Canada), none against and nine abstentions. This eight-power resolution was sponsored by Canada in company with Argentina, Chile, Egypt, France, India, Sweden and Syria.

"The General Assembly,

Noting the draft on arbitral procedure prepared by the International Law Commission at its fifth session,

Considering that the said draft includes certain important elements with respect to the progressive development of international law on arbitral procedure,

Considering that, having regard to the importance of the topic, the Governments of Member States should have an opportunity of making known their views on that draft on arbitral procedure in the light of the discussion which has taken place at the current session of the General Assembly.

1. Decides to transmit to Member States the draft on arbitral procedure prepared by the International Law Commission together with the observations made thereon in the Sixth Committee at the current session of the General Assembly with a view to the submission by Governments of whatever comments they may deem appropriate, if possible, before 1 January, 1955;

2. Requests the Secretary-General to circulate to Member States any comments he may receive and to include the question in the provisional agenda of the tenth session."

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