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**Chairman: Mr. Juliusz KATZ-SUCHY (Poland).**

**Report of the International Law Commission on the work of its fifth session (A/2456, A/C.6/L.311) (*continued*)**

[Item 53]\*

**Chapter II: Arbitral procedure (*continued*)**

**GENERAL DEBATE (*continued*)**

1. Mr. SPIROPOULOS (Greece) paid a tribute to Professor Georges Scelle, the International Law Commission's special Rapporteur on arbitral procedure, who had discharged his task in a manner greatly facilitating the Commission's work.
2. The General Assembly would now have to decide what to do with the draft convention prepared by the Commission. He agreed with other representatives that the draft was not, as the report (A/2456) claimed in paragraph 16, a codification of existing law. Arbitral procedure could not be codified, because it was not governed by any law, even customary law, except that arising out of agreements which depended entirely on acceptance by States.
3. The Brazilian representative had said at the 383rd meeting that the draft was a departure from present practice, in which arbitration was founded on the free will of the parties, and had criticised the phrase in the French text of article 11, "*maître de sa compétence*", which he said would give excessive powers to the arbitral tribunal. The Greek representative felt, on the contrary, that article 11 was not an innovation. The words used might, of course, be open to criticism, and in that respect the English and Spanish texts were better than the French. The words "the widest powers" were likewise confusing; and he recalled that before the Alabama case no arbitral tribunal had decided on its own competence.
4. At the previous meeting the Swedish representative had criticized the draft convention for not drawing a distinction between legal and political disputes, as did the General Act of 26 September 1928 for the pacific settlement of international disputes. The Greek representative did not consider the distinction necessary, as the parties could always make it themselves or apply any other law, as indicated in article 12 in the passage

beginning with the words "In the absence of any agreement between the parties".

5. As stated in paragraph 48 of the report, the draft convention was based on the autonomy of the will of the parties. Judicial settlement also depended on the will of the parties, the only difference being that there the will of the parties was expressed once and for all, whereas in arbitration it was exercised at all stages. The problem which the special Rapporteur and the International Law Commission had faced when considering texts relating to arbitration had been to fill the gaps in them. The draft convention, which was the product of their work, stood halfway between arbitration and judicial settlement.

6. Examples of the gaps the Commission had had to fill were provided by the constitution of the arbitral tribunal, the withdrawal of an arbitrator by one of the parties, and the Ambatielos case between Greece and Great Britain. Under the 1886 Protocol to the Treaty of Commerce and Navigation between Great Britain and Greece, any disagreements on the interpretation of the treaty were to be settled by arbitration. In 1926, when such a disagreement had arisen, Greece had proposed settlement by arbitration, which the United Kingdom had refused. As a new treaty on commerce and navigation, concluded in 1926, had maintained the 1886 Protocol in force, the case had finally been taken before the International Court of Justice to decide whether or not the dispute was arbitrable. That was the type of problem that article 2 of the International Law Commission's draft convention sought to resolve.

7. Replying to objections raised by the Polish representative at the 383rd meeting, he said that while the draft convention infringed the sovereignty of States, that was equally true of the General Act of 1928 and of every treaty under which States undertook to leave the settlement of a dispute to a third party. Besides, no State was obliged to accept the draft convention, any more than it was obliged to recognize the jurisdiction of the International Court of Justice. The only important question was the intrinsic value of the draft, and whether or not States were willing to accept it was no criterion for judging and rejecting it. It represented an absolutely logical whole and the International Law Commission had done admirable work.

8. Some delegations wished to adopt the draft convention at once, while others preferred to wait for the comments of governments before taking a decision. If the majority chose the latter course, the Greek delegation would not oppose it.

9. Mr. COLLIARD (France), after paying a tribute to the International Law Commission, Professor Scelle and the Secretariat, said that in his delegation's view the draft convention should be submitted to governments for comments.

10. Before explaining his reasons he emphasized that the drafting of several passages of the present text

\*Indicates the item number on the agenda of the General Assembly.

should be amended. In particular, the term "*déport*", used repeatedly in the French version, should be replaced by the proper legal term "*démission*". He deplored in passing that in many instances French texts were not used as a working basis, even when the original text had been drawn up in French.

11. The draft convention submitted by the International Law Commission was bound to alter profoundly, and perhaps even to do away with, arbitration within the meaning of classical international law—an admirable method of pacific settlement of disputes which had many successes to its credit.

12. The best way of estimating the scope of the draft was to consider to what it applied: first, to what disputes, and secondly, to what treaties and in what manner.

13. On the first point, the text did not specify what type of disputes it covered, and Mr. J. P. A. François, Chairman of the International Law Commission, had explained at the previous meeting that it applied to all disputes, whether legal or not. That abandonment of the classic distinction between legal and other disputes was not in line with the general evolution of the institution of arbitration. That distinction had been used as a dividing line between procedures in article 38 of the 1907 Hague Convention, in the League of Nations system and, transported into an entirely different domain, in the 1928 Geneva General Act. Under the Act arbitration because a link between legal procedures, which could be used only for legal disputes, and conciliation, which was applied to other disputes. The abandonment in the present draft of the distinction between the various types of dispute—a distinction regarded as salutary and essential in the past—might be dangerous in two respects. Where legal disputes were concerned, there was a danger of divesting the International Court of Justice of some of its competence in favour of a system of arbitration assimilated to legal procedure. Under Article 36, paragraph 3, of the Charter legal disputes were considered to be within the sole competence of the Court. Where non-legal disputes were concerned, there was the danger that States would not accept the draft convention precisely because no distinction was made between the two types of dispute, and also that the Court would go outside the legal domain defined in Article 36 of its Statute. He doubted whether the Court's jurisdiction could be thus extended. There was every reason to fear that the abandonment of the classic distinction between legal and political disputes might cause States to take a more reserved and a negative attitude towards the draft convention.

14. The draft convention also failed to distinguish between disputes which could be and those which ought not to be submitted to arbitral procedure. He wondered how that would affect the theory of exclusive jurisdiction, respected by the Covenant of the League of Nations in Article 15, paragraph 8, by the General Act of 1928 in article 39, and expressly by the Charter itself in Article 2, paragraph 7. It was true that, according to Article 103 of the Charter, in the event of a conflict the obligations contracted under the Charter prevailed over those assumed under any other international agreement. It might, however, be better to provide for the case explicitly rather than to allow the problem to arise.

15. He then turned to the question of the treaties to which the draft convention would apply, and in what

manner. The draft did not cover the entire system of arbitration, but only one of its aspects, namely arbitral procedure. Within that field the International Law Commission had intended to introduce innovations and to fill the gaps in existing arbitral procedures. Those procedural provisions would in the end form part of arbitration. Since it was obviously impossible to recast all the texts dealing with arbitration, the problem was how to fit that new and perfect engine into the classic chassis of arbitration. In the first place, there were various known types of arbitral agreements: bilateral treaties, which differed from one another, and multilateral agreements. The new text, which did not clarify that point, would therefore be another treaty on arbitration. On the other hand, a number of treaties dealt with both arbitration and conciliation, while some treaties relating to arbitration alone might lay down the procedure to be followed. The problem of fitting thus became rather difficult. In the case of a treaty which related to arbitration alone and which contained procedural provisions, the question arose whether those provisions would become inoperative or continue to be applied. The draft should make that point clear in order to avoid the disadvantages of uncertainty regarding existing law. Where a treaty provided for various methods of peaceful settlement, the problem of replacing procedures might be insoluble, and conflicts of substance rather than of procedure might arise. All those questions should be settled. Even though in itself the draft might be perfect, thought must be given to its function within the general machinery of international law.

16. States had a real choice. They could change the entire procedure of pacific settlement of disputes, and the basic role of the International Court of Justice. Under the classic procedure, the Court was the highest instance for legal disputes. That form of judicial settlement of such cases was surely better than the arbitration assimilated to legal procedure which occupied first place in the draft. For non-legal disputes arbitration which operated automatically and was assimilated to legal procedure might seem too severe. According to a well-known expression, the draft was strong where it should be weak and weak where it should be strong. The International Court of Justice, which must be "the principal judicial organ of the United Nations", might as a result be reduced to a kind of secretariat of arbitration and a court of appeal.

17. The report represented a revision of all existing conceptions and perhaps indirectly of the Charter. That serious problem must be referred to governments by communicating to them the report and the views expressed in the Sixth Committee. After States had presented their observations, the General Assembly, at its ninth session, could study the draft in substance with full knowledge of the situation.

18. Mr. ADAMIYAT (Iran), after paying a tribute to the efforts of the International Law Commission said that Iran, which attached great importance to arbitral procedure, was one of the many countries that had been unable, because of the late date at which the Commission's report had been circulated, to submit comments on the draft convention prepared by the Commission. He was therefore inclined to support the Swedish representative's suggestion (383rd meeting) to postpone detailed examination of the draft until governments had studied it carefully and presented comments on it.

19. At the present juncture he would merely make some general remarks, reserving the final attitude of his Government.

20. In examining the draft convention on arbitral procedure it must be borne constantly in mind that the purpose of the International Law Commission had been to codify the principles of international law relating to arbitration, and that any codification must be limited to established principles. Arbitration as a means of peaceful settlement of international disputes was essentially based on the agreement of the parties to submit their dispute to arbitration, on their agreement regarding the existence of a dispute and its arbitrability, and on their completely free choice of arbitrators. Any departure from those principles, however slight, in a codification of arbitral procedure, would result in a document which, although possibly very interesting from a theoretical point of view, would have no practical value, because it would be accepted by only a small minority of the States which formed the international community. Apparently the International Law Commission, in the draft it had prepared—which incidentally was not confined to arbitral procedure but frequently related to arbitration itself—had not adhered strictly to those principles.

21. The provisions of article 2 of the draft, which disregarded the principle of the necessary agreement of the parties on the existence of a dispute or on whether the dispute came within the obligation to arbitrate, were unacceptable because they tended to make arbitration compulsory.

22. Further, the International Law Commission had neglected to establish explicitly the right of States to settle for themselves questions within their domestic jurisdiction. Yet the Argentine Government had drawn its attention to that point (A/2456, annex I, 1).

23. Article 3, paragraph 2, not only violated the principle of free choice of arbitrators by the parties to the dispute, but also raised the question whether it would be wise to empower a person, however great his integrity and legal qualifications, to appoint arbitrators as he chose. The objections to that paragraph were based on principle and did not reflect on the particular qualifications of the person called upon to make the necessary appointments.

24. Article 11 of the draft gave the arbitral tribunal discretion which might sometimes go beyond any power of interpretation which the parties might be willing to concede. Article 17 also gave rise to objection, for it authorized the arbitral tribunal or the chairman to prescribe any provisional measures for the protection of those very interests of the parties which were the subject of their dispute.

25. The Iranian delegation recognized that some provisions of the draft convention were reasonable and likely to encourage the conclusion of treaties on arbitration between States. Its criticism was inspired by its desire to improve the draft so that the great majority of States would accept it.

26. The Iranian Government was in favour of an international legal system in which recourse to force would be eliminated as a means of settling disputes and which would ensure international peace, and welcomed any contribution to that end.

*Mr. Tabibi (Afghanistan), Vice-President, took the Chair.*

27. Mr. SAFDAR (Pakistan) associated himself with the tribute paid by other representatives to the members

of the International Law Commission and its special Rapporteur on arbitral procedure.

28. Pakistan firmly believed that all disputes, whatever their nature, could be settled by pacific means, and regarded arbitration as one of the most useful means to that end. His delegation was glad to note that the International Law Commission had codified in its draft convention the basic, universally-recognized principles of law on arbitration.

29. A number of delegations had expressed the fear that a convention based on the draft prepared by the International Law Commission would commit the signatory States to submit present or future disputes to arbitration. Those fears should have been dispelled by the statement made by the Chairman of the International Law Commission at the 383rd meeting. It was clear from article 1 of the draft that the obligation to submit a given dispute to arbitration could only result from an undertaking voluntarily entered into by the parties to the dispute, and the procedure provided in the draft obviously applied only where the parties voluntarily undertook by treaty to refer present or future disputes, or certain categories of disputes, to arbitration.

30. Paragraph 1 of article 3, and article 4, embodied the principle that the parties to a dispute should be free to appoint the arbitrators themselves. It was only in the event of one of them failing to make the necessary appointments that the procedure provided for in paragraph 2 of article 3 became applicable, in order to prevent an undertaking which a State had freely entered into being subsequently nullified by its refusal to appoint arbitrators. Again, the draft recognized that the parties were free to choose the law to be applied and the procedure to be followed by the tribunal. In that case it had provided for similar measures simply to prevent the parties' joint decision to have recourse to arbitration from remaining inoperative.

31. The draft convention contained certain innovations about which, however, there was nothing revolutionary. The Commission had introduced them in an endeavour to ensure respect for agreements freely entered into. The Pakistan delegation was in general agreement with the principles laid down in the draft, but reserved the right to give its views on individual provisions at a later stage.

32. At the 383rd meeting the Polish representative had criticized the draft convention on the grounds that it forced arbitration upon sovereign States. The Pakistani delegation considered that the draft merely clarified and where necessary supplemented the existing law with a view to making international arbitration as workable and effective as possible and safeguarding it from the danger of frustration by unilateral action. It in no way forced a sovereign State to enter into an undertaking to submit a dispute to arbitration but, when such an undertaking had been freely entered into, it endeavoured to ensure that the obligation to settle the dispute by an arbitral award based on law and having binding force was respected.

33. Similarly, article 2 presupposed a prior agreement by which the parties had undertaken to have recourse to arbitration, and it was only when the parties disagreed as to the existence of a dispute, or as to whether an existing dispute was within the scope of the obligation to have recourse to arbitration, that the article provided for intervention by the International Court of Justice,



upon application by one of the parties. There was no question whatever of compulsory arbitration.

34. At the previous meeting the Brazilian representative had criticized article 31 of the draft convention as being incompatible with the nature of arbitral procedure, and for turning the International Court of Justice into a kind of court of appeal with power to annul arbitral awards on the grounds set forth in article 30. Regarding the first of those grounds—that the tribunal had exceeded its powers—it was a fundamental principle of jurisprudence that an award rendered by an arbitral tribunal in excess of its powers was null and void. Moreover, the Brazilian representative himself, when describing his misgivings concerning the provisions of article 11, had wondered what would happen if the arbitral tribunal, which was the judge and not the master of its own competence, were to go beyond its powers in rendering an award. There was no agency better suited than the International Court of Justice for preventing an arbitral tribunal from arrogating to itself powers which the parties had not meant to give it. Similarly, in the case of corruption of a member of the tribunal or serious departure from a rule of procedure, it was necessary to provide redress, as in article 31, for the aggrieved party; there could be no objection to empowering the International Court of Justice to provide it.

35. The Pakistan delegation fully approved the view the International Law Commission had taken of the nature of arbitral procedure, as expounded in the first sentence of paragraph 37 of the report.

36. In the interests of the peaceful settlement of international disputes, and therefore of world peace, the draft should be recommended to Member States with a view to the conclusion of a convention.

37. Mr. RIVERA REYES (Panama) also congratulated the International Law Commission on its admirable work and on having devoted special attention to the progressive development of international law.

38. The Commission had been criticized for having in some respects gone outside the subject it was dealing with and for having, in certain articles of the draft, departed from the sphere of procedure and laid down principles regarding arbitration itself. It was impossible however, when establishing the procedure which a body was to follow in practice, to pass over the nature of that body and to refrain from referring to the principles upon which it rested, since a close and indissoluble link existed between procedure and substance.

39. It was a difficult matter to reach general agreement on arbitration. As early as 1907, when the Hague Convention had been concluded, two trends had been in evidence: the desire of the Latin-American States to universalize arbitration and make it compulsory—which would be ideal—and the tendency of the Anglo-Saxon States and the European countries to emphasize the optional character of arbitration and its exclusive application to certain well-defined types of dispute. Appeal had invariably been made to sovereignty as grounds for limiting the use of that peaceful means of settling international disputes. The same argument had been successfully applied to the judicial settlement of disputes between States.

40. The draft convention prepared by the International Law Commission was based on the principle of the autonomy of the parties, but it very reasonably laid

upon the parties the obligation of carrying out as agreed the undertakings which they had made. Some delegations were proposing that governments should be asked once again for their comments on the draft convention, while other were advocating the conclusion of bilateral treaties modelled on the draft. His own delegation did not believe that a large number of bilateral agreements was preferable to a single convention signed by all Member States.

41. The Norwegian Government, in the comments which it had sent the International Law Commission (A/2456, annex I, 7), had asked whether the convention resulting from the Commission's draft would replace older bilateral or multilateral treaties on arbitral procedure, such as the Hague Convention of 1907 or the General Act of 1928 (as revised in 1949), or whether it would be supplementary to such treaties as between States parties to them. It was important to make it quite clear whether the convention in question was to replace all previous agreements—general agreements and bilateral and multilateral treaties alike—or whether it was merely to serve as a model for agreements that might be concluded in the future.

42. Arbitration was not receiving all the support it deserved in a community of States pledged to maintain peace and to guarantee the security of all nations. Nor, unfortunately, was it an isolated case. The Universal Declaration of Human Rights was only being applied in part: when a nation aspired to freedom and wanted to set up an autonomous government, the only way it could achieve its ends was by force of arms. The Genocide Convention had only been ratified by a few States. There were legitimate grounds for anxiety about the fate of the draft convention on arbitral procedure.

43. Arbitration protected weak States and was an effective means of preventing war between the great Powers. The small nations ought to give a warm welcome to anything liable to promote recourse to that means of settling disputes, particularly in a case such as the present one when it was a matter of an advance in the sphere of procedure.

44. The Panama delegation would support the draft convention submitted by the International Law Commission.

45. It would have some further remarks to make when the provisions of the draft were considered.

46. Mr. AMADO (Brazil), replying to what the Greek representative had said about him, observed that his delegation could not agree that the expression "*maître de sa compétence*" (master of its competence), particularly in a legal text, meant the same thing as "*juge de sa compétence*" (judge of its competence). If it was true, as the Greek representative seemed to think that the special Rapporteur on arbitral procedure, Professor Scelle, had used the word "*maître*" to mean "*juge*", it was a curious thing that another professor of law, Professor Rousseau, should at about the same time have contrasted the two terms with one another and written: "Though judge of its competence, the arbitrator is not the master of it".

47. Mr. PETREN (Sweden) said that he would not reply to the Greek representative's comments on his criticism of the draft convention, since the French representative had done so already.

The meeting rose at 5.30 p.m.