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CONTENTS

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, A/C.6/L.317) (*continued*)

[Item 53]*

Chapter II: Arbitral procedure (continued)

GENERAL DEBATE (*continued*)

1. Mr. SPIROPOULOS (Greece) explained that in his statement at the previous meeting he had not meant to imply that, if ratified, the draft convention on arbitral procedure would never have any legal effect. His point—which had given rise to some misunderstanding—had been merely that the act of ratification itself had no immediate legal consequences, and that the legal effects of the draft convention would be felt only when it was applied in connexion with an arbitration agreement.

2. Mr. FERRER VIEYRA (Argentina) said that his country was a staunch supporter of arbitral procedure and had on many occasions had recourse to it to settle disputes with other Latin American countries. In the light of such recognition of the practical value of arbitral procedure, he had no fear of being misunderstood when he said that his Government had found the draft convention unacceptable for a number of legal and political reasons.

3. Under chapter II of its Statute the International Law Commission was entitled, in certain circumstances, to prepare drafts representing a "progressive development of international law"; clearly, therefore, in preparing the draft under discussion the Commission had not exceeded its powers.

4. His objections were not to the Commission's course of action, but to the substance of the draft convention itself, which radically altered the very nature of arbitration as a means of pacific settlement of disputes. In that connexion, he took issue with the Commission's own statement, in paragraph 16 of its report (A/2456), that the draft convention was "no more than a codification of existing law".

5. Furthermore, the definition of arbitration, as given in the second sentence of that paragraph, was incomplete. The Charter, in Article 33, paragraph 1, which listed various means of pacific settlement of disputes, expressly differentiated between arbitration and judicial settlement—a distinction which tended to disappear in the draft convention. Arbitration presupposed a much slighter restriction of the autonomy of the will of the parties than did judicial settlement. The great advantage of arbitration was precisely that the will of the parties was respected at every stage of the proceedings; that was why it had given excellent results and was frequently used, in particular, in Latin America. Another important difference between arbitration and judicial settlement was that the latter applied only to legal disputes, whereas the former could be applied to all types of disputes. Articles 17 and 21 of the General Act of 26 September 1928 (as revised in 1949) clearly made that distinction.

6. No member of the International Law Commission or of the Sixth Committee had ever claimed that arbitral procedure was not applicable to non-legal disputes, while the Chairman of the Commission had expressly stated (383rd meeting) that article 1 of the draft convention meant that arbitral procedure could be applied to all disputes. His Government could not accept intervention by the International Court of Justice, such as was authorized in articles 2, 3, 8, 12, 28, 29, 31 and 32 of the draft convention, in non-legal disputes. The argument that the Court would intervene only in procedural matters was invalid, because the question with which it would deal under article 2—the arbitrability of a dispute—was certainly, as the Byelorussian representative had pointed out at the previous meeting, one of substance, as was the question of revision referred to in article 29, paragraph 4. Since, under article 92 of the Charter and under Articles 1 and 36 of its own Statute, the Court could deal only with legal matters, it could not properly be asked to intervene in arbitral procedure, which was applicable to non-legal as well as to legal disputes. If it was said that the Court could intervene in arbitration when legal disputes only were concerned, two types of arbitral procedure would have to be established, which the draft convention failed to do; if no such distinction was made, the result would be to endow the Court, by means of a multilateral convention, with functions not provided for in its Statute—plainly an unconstitutional procedure.

7. In reply to the Greek representative's remark he pointed out that States signatories of the draft convention would be bound by it as soon as they decided to submit to arbitration any dispute between them.

8. As the Argentine Government had pointed out in its note to the Secretary-General (A/2456, Annex I, 1), article 2 of the draft convention should establish the right of States to settle for themselves questions within their own domestic jurisdiction, a point covered in article 39 of the General Act of 26 September 1928 and in a number of regional agreements, to say nothing of Article 2, paragraph 7, of the Charter. In that connexion, he fully agreed with the Indian Government's

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

comment on article 2 of the draft convention (A/2456, Annex I, 5). That article was not acceptable to his Government, for the same reasons.

9. In its note to the Secretary-General his Government had also stated that arbitral procedure should apply only to future disputes, and not, as contemplated in article 1 of the draft convention, to disputes originating in circumstances anterior to the entry into force of an arbitration treaty. The General Act of 26 September 1928 (article 39) had an express provision to that effect, and he could not agree with the statement in the commentary prepared by the Secretariat (A/CN.4/L.40, chapter I) that a clause of that type had been customary in arbitration treaties in the nineteenth century; on the contrary, it was to be found in the majority of treaties concluded shortly before the Second World War. Strangely enough, the International Law Commission's summary records showed that it had given no consideration to the problem.

10. In addition, the draft convention was politically unwise. The International Law Commission had made the mistake of attempting to further the progressive development of international law along a line which differed from that followed in the past and which was unacceptable to States. If it had paid due heed to the wishes of States and to the comments which it had received, it might have produced a useful convention capable of replacing the forty or so bilateral treaties now in existence.

11. He would comment at a later stage on the draft resolution (A/C.6/L.317) co-sponsored by his delegation.

12. Mr. MACNAUGHTON (Canada) congratulated the International Law Commission on the draft convention, in which it had both codified existing arbitral practice and endeavoured to fill gaps in it, taking as guiding principle the desirability of ensuring that arbitration resulted in binding decisions and of preventing any failure to fulfil arbitration undertakings. The Canadian Government, a consistent supporter of the principle of arbitration, would welcome the establishment of a uniform arbitral procedure which would be both universally accepted and efficacious.

13. As yet the Committee had discussed mainly the procedural question how the draft convention was to be carried into effect; the proposals had ranged from Israel's suggestion (382nd meeting) that the draft should be noted as a valuable scientific study, to the Cuban proposal (382nd meeting) that the Assembly should adopt the draft as it stood and recommend its acceptance by governments. He agreed with the United Kingdom representative (385th meeting) that the draft convention could not be signed or ratified in its existing form, but would have to include testamentary and certain other clauses.

14. The Polish and Byelorussian representatives (383rd and 385th meetings) were hardly justified in maintaining that the draft convention would violate the sovereign rights of States. Its adoption would not oblige States to sacrifice part of their sovereignty, because they would not have to participate unless they wished. It was usual for States voluntarily to restrict some aspect of their sovereign rights when entering into multilateral conventions, and in so doing they confirmed those rights rather than denied them. When once States had chosen to participate in a convention it was of course important that they should not be permitted unilaterally to frustrate the arbitration at a later stage, but that did not constitute an infringement of their sovereignty.

15. It should be borne in mind that, whereas the effectiveness of the convention depended on its acceptance by as many States as possible, the draft only took into account the comments of ten governments which had submitted their views on the preliminary draft of 1952 (A/2456, Annex I).

16. His Government was in favour of article 2, paragraph 1, which went further than customary practice in that it empowered the International Court of Justice to decide, before the tribunal was constituted, whether a dispute existed and whether it came within the scope of the obligation to have recourse to arbitration; that provision prevented any party from deciding those preliminary questions unilaterally. It was also in favour of paragraph 2, which empowered the Court to protect the parties' interests before the tribunal's constitution.

17. In chapter III, dealing with the *compromis,* provision ought to be made for a procedure by which both parties would exchange an initial statement of facts and supporting evidence, followed by an answer to the statement made by the other party, on the model of various arbitration conventions involving Canada.

18. Since finality had special advantages in certain disputes, it might be desirable to allow the parties to an arbitration undertaking, should they so wish, to agree that the award would not be subject to revision or annulment.

19. The draft convention required further study by the widest possible group of States. Governments had not yet had sufficient time to study the new draft and, in view of the considerable alterations that had been made since certain of them had submitted their comments on the preliminary draft, they should have an opportunity to make further comments, particularly in the light of the discussions in the Committee.

20. For those reasons his delegation had associated itself with the other authors of the consolidated draft resolution (A/C.6/L.317), which allowed governments ample time—until 1 January 1955—to submit comments and to study the comments of other governments.

21. Mr. TARAZI (Syria) said that the International Law Commission had produced a most interesting draft convention. He agreed, however, with certain objections that had been raised to the draft. Indeed, the draft convention, however valuable as legal theory, reflecting the point of view of Mr. Scelle, its eminent author, that the community of States would only become an international community if it were governed by statutory international law, was completely unrealistic and out of line with existing international practice.

22. Article 33 of the Charter listed arbitration and judicial settlement as two separate means of pacific settlement of disputes. As conceived in the draft, however, arbitration approached judicial settlement, and provided machinery for that purpose. No country regulated arbitration in domestic law in the manner in which the draft convention attempted to do on the international scale. In domestic law, a court of arbitration had the power to enforce the award, but it could not annul or revise it, as the International Court of Justice could do under articles 29 and 31 of the draft. In that respect, the International Court would exercise powers similar to those of a court of appeal in ordinary domestic law. In giving the International Court such powers, the draft clearly conflicted with the Charter and the Statute of the Court. Surely the Court

could not be invested by a multilateral convention with powers which it did not hold under its own Statute. Although Article 95 of the Charter provided for the possible settlement of disputes by other international tribunals, the relationship of such tribunals to the International Court of Justice would be that of independent, parallel organs, similar to that of regional bodies—such as the Arab League or the Organization of American States—to the United Nations.

23. Even if it was argued that, under Article 36 of its Statute, the jurisdiction of the International Court of Justice comprised cases provided for in treaties and conventions in force, it was obvious that the article in question referred to conventions placing obligations on the parties thereto, and not to conventions giving new powers to the Court.

24. Contrary to the International Law Commission's claim in its report (A/2456, paragraphs 48 to 52) that the draft convention was based on the autonomy of the will of the parties, the draft convention authorized the arbitral tribunal and the International Court of Justice to override the will of the parties in many instances, and that was its chief fault. He quoted in that connexion, from the statement made by Mr. Kozhevnikov in the International Law Commission on 3 June 1953.[1]

25. He agreed with the Brazilian representative's analysis of the competence of the arbitral tribunal, as established in the draft (383rd meeting). It was accepted legal doctrine that a court was the judge of its competence, but that the master was a higher authority—in the last analysis, the people. Consequently, the Greek representative was wrong in saying (384th meeting) that the word "master" in that context had the same meaning as "judge".

26. Lastly, the French representative had—at the previous meeting—raised the question of the effect of the draft convention on existing arbitration agreements. Mr. Scelle, speaking in the International Law Commission,[2] had taken the view that, according to general practice, the draft convention would have retroactive effect and, after it had been signed other instruments on the subject would be modified accordingly. Yet the generally accepted principle was that procedural law was never retroactive.

27. For all those reasons, and the reasons given by the other speakers, the Syrian delegation felt that the draft convention required further consideration by governments before the General Assembly could take any action on it.

28. Accordingly, his delegation, together with several others, had submitted a draft resolution to that effect (A/C.6/L.317). He hoped that in future, the International Law Commission would be more realistic in its work and would pay greater attention to the views of governments.

29. Mr. TABIBI (Afghanistan) said that the International Law Commission's draft convention was a valuable source of law. Notwithstanding their different opinions on the subject, all Committee members seemed agreed on the importance of arbitration as a means of pacific settlement of disputes. Arbitration had been used for centuries by all countries of the world, including his own. He mentioned various disputes between Afghanistan and other countries which had been settled by arbitration in the nineteenth and twentieth centuries.

30. In view of Afghanistan's tradition, his delegation accepted the draft in principle, though not in detail, reserving the right to state its views more fully at a later stage.

31. For the moment, he merely wished to point out that the draft convention, in particular articles 2, 3, 28, 31 and 32, which gave special powers to the International Court of Justice, limited to some extent the autonomy of the will of the parties, on which, according to customary law, all arbitration must be based. In that connexion, the Brazilian representative's statement at the previous meeting that the draft convention turned the International Court of Justice into a court of appeal required careful consideration. Similarly, articles 11 and 17, which gave excessive powers to the arbitral tribunal, were open to serious objection.

32. For those reasons, his delegation supported the joint draft resolution (A/C.6/L.317). If, as appeared from paragraph 12 of its report, the International Law Commission had been able to make a number of substantial changes as a result of comments it had received from only ten governments, the observations of the other Members of the United Nations should result in further improvement of the draft.

33. The CHAIRMAN noted that it had been suggested by the Secretariat that the Committee should hold an additional meeting, not originally scheduled, the following morning. He called for a vote on the proposal to hold that additional meeting.

The proposal was adopted by 14 votes to 10, with 21 abstentions.

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

34. Mr. CASTAÑEDA (Mexico) congratulated Mr. Scelle, the special rapporteur on arbitral procedure, on the draft convention. Since the Mexican Government had not had time to study the draft thoroughly he would confine himself to some general remarks.

35. The Greek representative had been right in pointing out the distinction betwen the convention's legal validity and its legal effect. Signature of the convention would make it valid for a signatory State, but the convention would be without legal effect for that State until it had signed a second instrument, the undertaking referred to in article 1, paragraph 2. Only that undertaking would oblige it to have recourse to arbitration, and it would not be bound, by becoming a party to the convention, to enter into such undertakings.

36. In that respect the draft convention differed from the General Act of 1928 and the Pact of Bogotá of 1948, which were arbitration treaties in the proper sense of the term, and effective *per se*. The parties to them were bound to submit the disputes therein defined to arbitration.

37. The text of the draft as it stood however might, as the French representative had pointed out at the previous meeting, give rise to difficulties in so far as it left undefined the status of previous arbitration acts and conventions. Under article 1, paragraph 1: "An undertaking to have recourse to arbitration may apply to existing disputes . . ." the convention might conceivably be applicable to disputes which had their origin in the past, an undesirable state of affairs, as had been pointed out by the Argentine Government in its comment (A/2456, Annex I, 1). Thus States which had previously concluded bilateral treaties undertaking to submit disputes to arbitration might, on becoming parties to the convention, find themselves

[1] See document A/CN.4/SR.185, para. 81.
[2] *Ibid.*, para. 42.

in the anomalous position of being bound both by the old instruments and by the different and more stringent provisions of the International Law Commission's convention. In the first place, therefore, the draft convention should be supplemented by a provision stipulating that it only applied to future disputes. Secondly, the text should contain a provision similar to article 29, paragraph 1, of the General Act of 1928, enabling States parties to the convention to avail themselves of the earlier instruments. Thirdly, it should require parties wishing to avail themselves of the procedure provided by the convention to state the fact expressly in the instrument by which they assumed the obligation to seek arbitration. Alternatively, a clause on the lines of article 58 of the Pact of Bogotá might be introduced, providing that States becoming parties would cease to be bound by certain specified agreements; that, however, might be less desirable, since the Pact of Bogotá covered the whole field of peaceful settlement of disputes whereas the draft convention only had a limited application. The three changes mentioned would probably dispose of the difficulties the French representative had in mind.

38. The draft convention departed substantially from the traditional arbitral procedure and constituted in important respects a development of international law. It established a type of procedure *sui generis* which was judicial, in that it rested on the idea of compulsion, while differing from the proceedings in courts of law in its flexibility, in admitting non-legal criteria, and in permitting non-jurists to be members of the tribunal—which would be a great advantage in the case of disputes concerning non-legal matters. At the same time its provisions were of a concrete nature and placed great difficulties in the way of evasion of arbitration obligations.

39. In so far, therefore, as the draft convention did not replace traditional arbitration but merely provided a special alternative type of arbitration, it made a valuable contribution by filling certain gaps, and was unexceptionable.

40. In considering what action should be taken regarding the draft, the General Assembly had to take into account not only its intrinsic value but the likelihood of its acceptance by the majority of States. The discussion had shown that many States, owing to their particular political circumstances, were not as yet prepared to accept the limitation of sovereignty imposed by such a rigid and severe system.

41. His own delegation, always a staunch upholder of the principle of State sovereignty, was at the moment, after the short amount of study it had had time to give the draft, not certain that it would be able to support it. The fate of the Pact of Bogotá, which had been similarly stringent and had consequently given rise to a number of reservations that had weakened its effectiveness, showed the dangers of an instrument which was not generally acceptable.

42. His delegation would, however, have no objection if the General Assembly recognized the draft convention as suitable for application in certain cases—the traditional procedure to remain applicable to others—or as a model for future conventions.

43. What the immediate situation required was that States should give the draft convention further study, and he was accordingly in favour of the proposals contained in the consolidated draft resolution (A/C.6/L.317).

44. Mr. RIVERA REYES (Panama) stated that, as it appeared that the draft convention on arbitral procedure and the records of the Committee's debate on it would be sent to governments for comment, he wished to record the position of his delgation.

45. In article 4, paragraph 2, of the draft convention the words "Subject to the circumstances of the case" should be deleted, and the words "and of unimpeachable integrity" should be added at the end.

46. In article 30 (*b*), the word "corruption" should be replaced by some such expression as "unethical conduct", since it was inconceivable that persons chosen as arbitrators because of their high probity should be open to corruption.

47. Lastly, contrary to some delegations, his delegation saw no conflict between article 20 of the draft convention and Article 53 of the Statute of the International Court.

The meeting rose at 6 p.m.

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