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Arbitral Procedure – Comments by Governments on Draft on Arbitral Procedure

Topic:
Arbitral Procedure

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VI. DATE AND PLACE OF THE SIXTH SESSION
OF THE COMMISSION

173. The Commission decided, after consulting the Secretary-General in accordance with the terms of article 12 of its Statute and receiving the views of the latter, to hold its next session in Geneva, Switzerland, for a period of ten weeks beginning on 17 May 1954. The Commission is unanimously in favour of Geneva as a meeting-place in preference to New York, as general conditions in Geneva are more conducive to efficiency in the kind of work the members of the Commission have to perform. In particular, the library facilities in the European Office with material gathered and organized since the days of the League of Nations, have proved to be unsurpassed in the field of international law.

174. The Commission is aware that General Assembly resolution 694(VII) adopted on 20 December 1952, provides that the International Law Commission would meet in Geneva only when its session could be held there without overlapping with the summer session of the Economic and Social Council. Such overlapping as there might be if the Commission met in Geneva beginning on 17 May 1954 is, in the opinion of the Commission, hardly avoidable under present circumstances. There are grave objections to holding the session of the Commission after the session of the Economic and Social Council. The session would then overlap with the session of the General Assembly with the result that the report of the Commission could not be considered by the General Assembly, until its following session, that the Secretariat would have difficulties in assigning adequate staff to serve the Commission, and that certain members who are also members of delegations to the General Assembly might not be able to attend the session of the Commission.

175. On the other hand, a ten weeks' session to be held in its entirety before the summer session of the Economic and Social Council would also be open to objection. It would have to begin towards the end of April 1954, and those members of the Commission who are university professors would not be able to attend meetings before 1 June at the earliest. The Commission would therefore be deprived of their co-operation for more than a month. Under these circumstances, the opening date of 17 May was accepted in order to reduce to the minimum both the overlapping with the Council session and the period during which the Commission would have to be without the presence of some of its members.

176. As regards the length of the session, a period of ten weeks is considered as a minimum. Because of lack of time the Commission has been forced to postpone the consideration of two important subjects, namely, the law of treaties and the régime of the territorial sea. Essential aspects of the subject of nationality and of the régime of the high seas still remain to be studied. In the course of its next session the Commission will also have to re-examine the draft Code of Offences against the Peace and Security of Mankind. It is therefore imperative for the fulfilment of the task entrusted to the Commission that it shall be able to devote sufficient time to its work.

Annex I

Comments by Governments on the draft of arbitral procedure prepared by the International Law Commission at its fourth session in 1952¹⁹

1. ARGENTINA

*Letter from the permanent delegation
of Argentina to the United Nations*

[Original: Spanish]
[13 November 1952]

Without prejudice to any comments which the Argentine Government may wish to make when it has studied the articles of the draft in detail, I wish to point out that, in conformity with the principles upheld by my country at various international conferences, it considers that arbitral procedure should be established only for controversies which may arise in the future and which do not originate from or bear any relation to causes, situations or circumstances existing prior to the signature of a treaty on the subject.

Similarly, with regard to article 2, my Government considers that it should establish in unequivocal terms the right of States to settle for themselves questions which are within their own domestic jurisdiction.

Having made these two observations, which it considers fundamental, my Government will study with the greatest care the draft prepared by the International Law Commission, for it has always accorded its fullest support to arbitration as an institution of international law.

2. BELGIUM

*Letter from the permanent delegation
of Belgium to the United Nations*

[Original: French]
[13 March 1953]

In the Belgian Government's opinion the Commission appears to have gone outside its task of drawing up rules on arbitral procedure, since the proposed draft deals indiscriminately with concepts of arbitration and of international justice.

The last paragraph of the introduction states that two currents of opinion were represented in the Commission. "The first followed the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking."

This second conception seems hardly acceptable if it is hoped to secure the support of the majority of States for the draft on arbitral procedure.

The Commission's proposals do not seem acceptable in their present form and certainly do not correspond to the traditional conception of arbitration according to which the parties to a dispute have the right to decide on the arbitrability of the dispute, select the arbitrators and set the limits of the *compromis*.

On the contrary, the mere undertaking to comply with the new procedure would deprive States even of the right of deciding whether the dispute should be

¹⁹ See *Official Records of the General Assembly, Seventh Session, Supplement No. 9 (A/2163)*.

submitted to arbitration, since the International Court of Justice would pass final judgement on the question on the mere application of one of the parties.

It may be presumed that the parties will submit to the decisions of the Court or of the arbitral tribunal, as the case may be, once they have decided, of their own free will, that the dispute is arbitrable and have chosen the arbitrators.

We believe that the draft should be changed along these lines.

3. BRAZIL

Comments of the Government of Brazil transmitted by a note verbale dated 24 March 1953 from the permanent delegation of Brazil to the United Nations

[Original: Portuguese]

I

The Brazilian Government would prefer less emphasis in the draft on the legal character of arbitration.

Arbitration procedure need not be confined to settlements based on law. While in most cases arbitration is used to settle legal disputes, there is nothing to prevent its use, as numerous international instruments attest, to settle non-legal disputes where the arbitrators are empowered to base their decisions not only on law but also on equity or on special principles selected by the parties.

This being the case, certain articles of the draft might leave the parties greater latitude. For example, article 12 of the draft could be rendered more flexible by saying in general terms the arbitral tribunal should be guided by international law save where the parties have expressly agreed otherwise. Paragraph 2 of article 12 should be deleted since it lays down a rule that should be determined in special agreements, at the discretion of the parties.

Similarly in article 9, reference might be made to the principles and rules to be applied by the tribunal rather than to the "law to be applied by the tribunal".

To take another example, in article 22, the fact that the arbitral tribunal owes its existence to the will of the parties is apparently ignored.

II

Article 29 might fix a time limit for an application for the revision of the award. The period might be the same as that provided for the revision of judgements of the International Court of Justice (ten years, according to article 61, paragraph 5 of the Statute).

III

Failure to include a full statement of reasons, as required in article 24, might be made a ground for annulment of the award in article 30.

IV

The establishment of a time limit in article 31, paragraph 2, solely for the cases referred to in paragraphs (a) and (c) of the previous article hardly seem justified. In the interest of the public peace and in deference to the principle that legal situations should be permanently placed beyond doubt, a time limit should be adopted for any case arising under article 30, paragraph (b); but it might be a somewhat longer one since the circumstance envisaged will not always be as readily apparent as those referred to in the other two paragraphs.

4. CHILE

Letter from the permanent delegation of Chile to the United Nations

[Original: Spanish]
[2 February 1953]

. . .

The Government of Chile is in general agreement with the text of the above-mentioned draft and believes the following observations might be of value:

Article 1 provides that "an undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future".

The term "disputes" includes, on the one hand, questions or matters which have been legally formulated before a competent authority and, on the other hand, simple disputes or controversies which have not been, or cannot be, given adequate legal expression or form. The Government of Chile is therefore of the opinion that the term "dispute" should be defined, or that its scope or significance should be restricted, by establishing the principle that a matter already settled does not constitute a dispute.

The Pact of Bogotá on the pacific settlement of international disputes, expressly states that the various procedures to effect such settlement, including arbitration, "may not be applied to matters already settled by arrangement between the parties, or by arbitral award, or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty". (article VI.)

Taken in conjunction with an effort to seek the solution of disputes by pacific means, the text of the Pact of Bogotá provides a sound basis for international solutions, since it ensures that international treaties and judgements will be respected.

Article 1, paragraph 3, provides that the undertaking to have recourse to arbitration "constitutes a legal obligation which must be carried out in good faith, whatever the nature of the agreement from which it results". This last phrase seems to obscure the meaning which the text was intended to convey. The explanation accompanying the text says that the undertaking to have recourse to arbitration "may not be based on a mere verbal agreement", a statement which does not seem in keeping with the text of the article, which says that the undertaking must be carried out in good faith, whatever the nature of the agreement from which it results, thus also including mere verbal agreements.

Article 8 provides that "a party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal; it may propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show, etc. . . ." The Spanish word *sobrevenir* (English text: "arising") means "to happen after something else". The expression *sobrevenida enteriamente* (English text: "arising prior to") therefore represents a contradiction in terms which should be corrected in order to avoid possible difficulties of interpretation.

Article 16 says: "For the purpose of securing a complete settlement of the dispute, the tribunal shall decide on any counter-claims or additional or incidental claims arising out of the subject-matter of the dispute."

The Government of Chile considers that the meaning of "additional or incidental claims arising out of the subject-matter of the dispute" should be made clear so as to avoid the extension of the dispute to points only remotely related to the main issue, by the submission of a series of subsidiary petitions.

Such a clarification might be effected, for example, by laying down that the additional claims should be related either directly or indirectly to the principal subject submitted to arbitration, or that they should be of such a nature that if they were not resolved, any solution that might be adopted on the principal question would be ineffective or inoperative.

Article 26 provides that: "As long as the time-limit set in the *compromis* has not expired, the tribunal shall be entitled to rectify mere typographical errors or mistakes in calculation in the award."

The expression "typographical errors" only covers errors which are made in the process of reproducing or printing a given text, and would not include errors of fact, wrong dates or incorrect geographical or proper names appearing in the original text of the sentence or in the manuscripts or evidence which were available at the time when the text in question was drawn up.

The article says that the tribunal shall be entitled to correct such errors "as long as the time-limit set in the *compromis* has not expired". If the decision was given a long time before the date of expiry of the *compromis*, there would be plenty of time to examine the calculations and ascertain what corrections were necessary; but if the decision was given only a few days or hours before the expiry of the time limit, and if the point at issue was a complicated one, it might be impossible to correct the mistakes in time. In such circumstances there would have to be further proceedings between the parties in order to correct the erroneous facts, dates, names or calculations.

The Government of Chile is therefore of the opinion that the parties should be given an adequate period of time within which to make the appropriate observations, and that this period might begin as from notification of the decision without regard to the date of expiry of the *compromis*. This additional period subsequent to the decision might be the same as that allowed to the parties to exercise their right under article 28 to request clarification of any doubtful points to which the decision might give rise.

Article 27 provides that: "The award is binding upon the parties when it is rendered, and it must be carried out in good faith." We consider that the text of this provision may give rise to difficulties of application, since the party which has obtained a decision in its favour may require immediate compliance, while the other party may submit to the tribunal a question of interpretation which would delay compliance until the desired clarification had been obtained. A similar situation might arise if the decision contained important errors of calculation or fact, as, for example, a mistake in the date as from which interest or some other payment is due, etc.

Chile considers that the text of this provision should be brought into line with the provisions of articles 26 and 28, and that execution of the decision should not become compulsory until the questions to which those provisions relate had been settled.

5. INDIA

Letter from the Ministry for Foreign Affairs of India

[6 March 1953]

The Government of India are in general agreement with the draft prepared by the International Law Commission but some of the provisions of these draft articles depart to such an extent from recognized international practice in regard to arbitration, and even from the principles underlying that practice that the Government

of India find themselves unable to accept them in their present form without reservation.

They therefore suggest that the draft be modified as follows:

(a) Article 2 of the draft provides that if, prior to the constitution of an arbitral tribunal, the parties disagree over the existence of a dispute, or on whether an existing dispute is within the scope of the obligation to have recourse to arbitration, the question may be brought before the International Court of Justice on the application of either party without the consent of the other. The ruling principle of international arbitration is that there should be an agreement of both parties, at least in the initial stages of the procedure. Contrary to this principle, the effect of the draft article would be to confer a compulsory jurisdiction on the International Court without the consent of one party in regard to a vital question, namely, the arbitrability of an existing dispute or the existence of an alleged dispute. The article in its present form is unacceptable to India.

(b) Article 7, paragraph 3, provides that on the withdrawal of a member the award may be made by the remaining members of the tribunal. The vacancy caused by such withdrawal will presumably not come under article 6 and there is no other provision for filling the vacancy. This may not be fair to the party whose member has withdrawn, and it is desirable that even on such occasions, some provision should exist for filling the vacancy. A possible method may be to empower the International Court of Justice to fill the vacancy, if the parties do not agree to it within a fixed time.

(c) Article 8 appears to suffer from the same defect as the one just mentioned in regard to article 7, and requires to be suitably amended.

(d) Regarding the second sentence of paragraph 1 and paragraph 2 of article 8, it appears desirable that the International Court should be entrusted with making both these decisions. In international tribunals where antagonistic interests are represented, it is not advisable that the disqualification of one member of the tribunal should be left to the decision of the other members.

(e) Article 13, paragraph 2, which prohibits a finding of a *non liquet*, is not acceptable to India in the present stage of development of international law. It is true that according to most juridical systems a judge in a municipal court may not refuse judgement on the ground of the silence or obscurity of the law, but the extension of this principle to judicial arbitration in the international field appears to be fraught with grave risks.

(f) Article 16, in the opinion of the Government of India, goes too far. Even under municipal law, the courts do not admit "counter-claims" and "additional claims" without distinction. Before the International Court of Justice, a counter-claim is admitted only when it is directly connected with the subject-matter of the application and comes within the jurisdiction of the court (article 63 of the Rules of the International Court of Justice). There should be some such restriction on the powers of the tribunal in order to prevent an abuse of procedure.

(g) In article 23, paragraph 2, the significance of "may refrain" is not understood. If the parties do not agree to an extension of the period, under paragraph 1 of the article, the tribunal cannot but refrain from rendering an award. It is doubtful whether, with the permissive "may refrain", paragraph 2 serves any useful purpose at all.

(h) Under article 28, paragraph 2, a dispute about the meaning and scope of an award is made referable to the International Court of Justice at the request of

one party only. It is only the tribunal which has actually given a decision, that can furnish an authentic interpretation of that decision, should a dispute arise. If the tribunal is no longer available, a new dispute has clearly arisen which must be decided in accordance with the existing State practice in regard to arbitration, and not by the imposition of the International Court at the unilateral request of one of the parties. The Government of India are therefore not able to accept this paragraph of article 28.

(i) Similar considerations apply to the second sentence of paragraph 4 in article 29.

(j) Articles 30, 31 and 32 introduce the possibility of challenging the validity of an award on certain grounds. This is contrary to the existing practice under international law according to which the award settles the dispute definitely and without appeal (cf. article 81 of the Statute of the Permanent Court of Arbitration). Any other regulation would detract very considerably from the value of the award, as it is more than likely that the defeated party will attempt to challenge the award on any grounds, whether possible or impossible. There is the risk of introducing the International Court of Justice as a regular court of revision and thereby detracting from the efficacy of the arbitral procedure. These three articles are therefore entirely unacceptable to the Government of India.

6. NETHERLANDS

Letter from the permanent delegation of the Netherlands to the United Nations

[1 April 1953]

The Netherlands Government were very interested to study the draft convention on arbitral procedure of the International Law Commission of the United Nations. This Government welcome any possible contribution to the further development of an international legal order in which force will be eliminated as a method of settling disputes. For that very reason, the Netherlands Government believe the draft convention of the International Law Commission to be a valuable contribution. Nevertheless the draft is giving rise to the following observations.

Arbitration ranks among the oldest means of peacefully settling international disputes. In order to maintain its place beside more recent judicial means, arbitration should retain definite characteristics of its own by which to distinguish itself from judicial settlement. These special qualities should induce governments to keep arbitration in store as a helpful instrument. Amongst these characteristics the somewhat mediatory quality of the award should be first in our mind. Though arbitration must be kept on the "basis of respect for law" according to the First Convention of The Hague of 1899, the award, however, will always show a predisposition towards mediation and arbitrations are prone to adhere to the law in a less orthodox way than a judge is apt to do, as soon as they consider such deviation more in keeping with general principles of law and equity. The rule *dura lex sed lex* will be less resorted to by arbitrators than by judges.

Another highly important characteristic difference between the two institutions is to be found in the greater prerogatives of the parties allowed for in arbitration, in regard to both the composition of the tribunal as well as the course of the procedure. From this special characteristic of arbitration follows the undesired consequence that it is rather easy for an unwilling party to find an excuse for shirking its engagements. For that very reason, the barring of this way out has been under

study since the First Hague Conference, 1899. The draft convention of the International Law Commission has paid much attention to the same matter with a view to setting up some watertight rules rendering impossible any future attempt at invasion by a State which once accepted binding arbitration. However praiseworthy this ambition is, yet some doubt may arise whether in this way arbitration will not be divested of one of its specific characteristics and whether this may not entail the impossibility for arbitration to maintain itself beside international judicature. In other words: may not arbitration lose its attractiveness for the States?

This objection would not be very important, if the States would show willingness to turn to acceptance of compulsory international jurisdiction instead. But we should prevent a continued disuse of arbitration or, even worse, its complete losing ground, if this would not be compensated by an extension of international compulsory jurisdiction. Otherwise, our endeavours aimed at the perfection of arbitration would eventually have an adverse result.

The Netherlands Government are not sure that the International Law Commission has completely avoided this danger. This Government doubt whether a great number of States will not feel inclined to reject the draft because in their view it might restrict too much the lenient rules of arbitral procedure.

In order to further the acceptance of the convention as much as possible and to prevent petrification of arbitration resulting from aspirations towards perfection, the International Law Commission might consider a clause providing for an opportunity to accept the convention with reservations. This might be done either by allowing any reservations or by indicating which articles could be excepted from ratification. Even if extensive use would be made of the opportunity to make reservations the new obligations resulting from the acceptance of the other articles might be regarded again.

Even if the number of ratifications would remain small, the Netherlands Government would consider the draft important because it contains various regulations promoting a well-ordered arbitration and because it will therefore induce the States to insert them in future arbitration treaties or to supplement existing treaties.

In addition to these more general observations on the character of the draft convention the Netherlands Government would like to make the following remarks as to the proposed articles.

Article 3

In drafting this article account should be taken of the possibility that by some preceding arbitration treaty a competent tribunal may already have been established between the parties. If in the absence of any agreement between the parties on the composition of the tribunal it must be composed in accordance with the convention, one has to take into consideration the regulations on the choice of the arbitrators given in a treaty already in existence between the parties. Especially when the parties to the dispute are both parties to The Hague Convention on the Pacific Settlement of Disputes, due account should be taken of its rules in the appointment of arbitrators.

Article 7

This article gives some rules which, in the opinion of this Government, defeat their object. They result from emphasizing too much the case of arbitrators withdrawing under pressure of their governments. Thereby the possibility of withdrawing for respectable motives has been pushed far too much into the background. The

Netherlands Government judge it inadmissible that an arbitrator, realizing that his former associations with the case impel him to withdraw, could be forced by the other members of the tribunal to stay on. No more could the Netherlands Government see why, "if any doubt arises in this connexion within the tribunal" the replacement could only be asked by unanimity. It seems undesirable that one member only could impede the withdrawal of an arbitrator, whose impartiality is doubted by a majority.

The Government think it no more right to have the procedure continuing before the other arbitrators after the withdrawal referred to in this article. The Government hold it necessary to supplement the tribunal. The Netherlands Government realize that such modifications might be abused. However, they deem unjustifiable the way suggested by article 7 of the proposed draft.

In their opinion it is moreover not clear whether a judge withdrawing after the opening of the proceedings for reasons of ill-health would have to be treated according to article 6 or to article 7, paragraph 2.

Article 8

The relation between articles 7 and 8 is not altogether clear. The Government understand that the parties may only invoke article 8, and not article 7, and that article 8 also applies "once the proceedings before the tribunal have begun".

In the case provided for by article 8, the Netherlands Government do not think it right to ask for a unanimous decision of the other members of the tribunal. Without doubt the recusation of a judge is a grave matter, which ought to be decided upon with caution. On the other hand, the confidence to be placed in the absolute integrity and impartiality of arbitrators is of such paramount importance that we must exclude the possibility of a judge staying on in spite of the fact that he has lost the confidence of the majority of the tribunal. It seems unwarranted that such doubt about the presence of grounds for recusation be precluded from causing this recusation, whenever one member of the tribunal appears willing to cover the accused against the three other members who have lost their confidence in him.

Article 9

The Government wonder whether experience has not taught the desirability of inserting a new paragraph — perhaps after article 9 (d) — reading: "The nature and the way of administering evidence to be offered to the tribunal" ("*la nature et le mode d'administration des preuves présentées au Tribunal*"). Originally such a proposal seems to have been put forward by the Commission. This Government do not know why this proposition was eventually dropped.

In paragraph (f) "a decision" should be substituted for "an award".

Article 11

The Netherlands Government feel some doubt about the necessity of giving the tribunal power to interpret the *compromis* in deviation from the interpretation on which the parties themselves agree. This power seems undesirable, and this Government propose to add to article 11 the words: "if the parties are at variance in this respect" ("*si les parties ne sont pas d'accord à ce sujet*").

Article 13

The Netherlands Government are of the opinion that this rule, which according to the wording of the article refers exclusively to disagreement on procedure, should

be extended to any subject that according to article 9 must be included in the *compromis*.

Article 14

In the opinion of the Netherlands Government this article is redundant. The Government do not deny the correctness of the principle expressed in this article, but they realize that other principles — like the absolute impartiality of the arbitrators — are as well a requisite for every tribunal without their being expressly laid down in the convention. By inserting a special article on the equality of the parties in the proceedings before the tribunal, one might cause some doubt whether other principles of arbitral procedure are considered of less significance.

Moreover, it should be noted that the requirement of equality, expressly laid down here, could by its very vagueness afford an opportunity for abuse in applying for the annulment of the award, as mentioned in the comment on article 14.

Article 15

The wording that the parties should "co-operate with one another . . . in the production of evidence" gives the impression that every party must collaborate in the gathering of evidence to be used against itself, which no doubt cannot have been intended.

One might consider giving the tribunal power to "visit the scene" (provided that the interested party offers to pay the costs) even if the other party is not willing to co-operate.

Article 16

The words "for the purpose of securing a complete settlement of the dispute" might be taken to constitute a restrictive qualification on the right of the tribunal to decide on any additional claim. This implication apparently not being meant, a different wording might be chosen.

Article 28

The French text "*sauf accord entre les parties*" seems preferable to the English text "unless the parties agree otherwise", because the first indicates clearly that this agreement may have been arrived at in an earlier treaty.

Article 29

In paragraph 2 it should be indicated that the term of six months starts at the moment of the "discovery of the new fact" by the party applying for revision.

The wording of the third paragraph should also be altered. One cannot conceive of the proceedings for revision to be opened by a judgement of the tribunal recording the existence of an alleged new fact, because this judgement can only be contradictorily arrived at. Therefore, the proceedings leading towards this judgement are part of the "proceedings for revision".

7. NORWAY

Letter from the permanent delegation of Norway to the United Nations (received 25 February 1953)

. . .

The Norwegian Government is in agreement with the principles upon which the draft is based and . . . Norway could adhere to a convention embodying in the main the provisions contained in the draft. It is suggested, however, that the situation with regard to already existing bilateral or multilateral treaties concerning international

arbitral procedure be clarified, when the draft is reconsidered by the Commission at its next session. In the opinion of the Norwegian Government it is not clear from the present draft whether the convention resulting from the draft would replace older bilateral or multilateral treaties on international arbitral procedure, as for instance The Hague Convention of 1907 regarding pacific settlement of international disputes 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.

8. SWEDEN

*Letter from the Ministry for Foreign Affairs
of Sweden*

[Original: French]
[19 March 1953]

The text prepared by the Commission contains some parts which its authors regard as the codification of existing international law and other parts which are not of this nature but constitute suggestions for future legislation. The presence of the latter suggests that the draft is intended as the forerunner of an international convention in which its various articles would be reproduced. Without going into the details of the draft, the Swedish Government considers it suitable to serve as a basis for such an undertaking.

Nevertheless, the Swedish Government wishes to emphasize that the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly on 28 April 1949 already seems to cover part of the same ground as the Commission's draft. Thus, chapter III of the General Act deals with the arbitration of non-legal disputes, while the Commission's draft seems to apply to both legal and non-legal disputes. The Swedish Government doubts the advisability of establishing identical rules for the arbitration of these two types of disputes. It might be preferable to draw some distinctions, in particular with regard to the legal and other rules on the basis of which the arbitral tribunal will give its awards. The Swedish Government reserves its position on this particular point as well as on the more general question of the relation between the General Act and a possible future convention.

9. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Letter from the permanent delegation of the
United Kingdom to the United Nations*

[27 February 1953]

The United Kingdom Government have studied with interest the draft code on arbitral procedure prepared by the International Law Commission at its fourth session in 1952, and wish to congratulate the Commission on the results achieved. The United Kingdom Government find themselves in very general agreement with the provisions of the draft code, subject to the comments made below on articles 9 and 29 to 32.

The United Kingdom Government approve in particular the attitude taken up by the Commission in the paragraphs of the report which were numbered 17 to 20 in the form in which the draft code appeared in the report of the Commission covering the work of its fourth session (A/2163).

The United Kingdom Government also strongly support the line taken by the Commission in basing itself on the second of the two conceptions set out in the paragraph of the report numbered 24 in the same document — that is to say, that judicial arbitration is based on the necessity of provision being made for safeguarding the efficacy of

the obligation to submit the case to arbitration in all cases in which it may happen that, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking.

As regards article 9 of the draft code, and while the United Kingdom Government have no objection whatever to the terms of this article, it appears to them to be based on the assumption that the natural method of submitting a dispute to arbitration where there are no prior provisions which suffice for the purpose, is by means of a *compromis*. Generally speaking, however, the method of submission by means of a *compromis* is only employed where no prior obligation to submit the dispute to arbitration exists and the obligation is created by an agreement to that effect which at the same time defines the dispute to be submitted to arbitration. In many cases, however, the obligation to arbitrate arises from the fact that a treaty or convention, either a general multilateral one or a bilateral one, on some subject or other, contains a provision for arbitration of any disputes that may arise concerning the interpretation or application of the treaty or convention. In such cases, the usual, and in many ways the preferable, method of submitting the matter to the tribunal would be by a complaint on the part of one of the parties which would then be answered by the other party, this being followed by further pleadings, written and oral, as might be ordered by the tribunal, and no question of any *compromis* would arise. This is also the normal method of procedure in disputes brought before the International Court of Justice except in those cases where the parties, not being bound by an acceptance of the Court's compulsory jurisdiction under article 36 of the Statute, go before the Court by agreement, or where, although they are so bound, they prefer to submit the dispute in the form of a *compromis*. In all other, and in the great majority of cases, the proceedings are begun by a written application addressed to the Registrar by one of the parties.

It would seem that article 9 might be modified to take account of this position.

The United Kingdom Government also have some doubts as to the wisdom of articles 29 to 32 of the draft code. Generally speaking, it is highly desirable that an award once given should be final, and should not be open to revision or annulment even on the part of the International Court of Justice. These articles would undoubtedly offer great encouragement to the losing party to attempt to get the case reopened in one way or another. As regards article 29, since cases are seldom taken to arbitration except with full knowledge of all the facts, it is rare indeed that any material fact comes to light subsequent to the award, but it would nevertheless be a comparatively simple matter to allege the discovery of such a fact and to seek a revision.

As regards the grounds given for challenging the validity of an award under article 30, these seem to be dangerously wide. For instance, (a) "that the tribunal has exceeded its powers" will enable any decision of the tribunal as to its competence or jurisdiction to be automatically reopened. Again, (c) "that there has been a serious departure from a fundamental rule of procedure" raises the question what is a "fundamental" rule of procedure and what constitutes a "serious" departure from it. Finally, as regards (b), "that there was corruption on the part of a member of the tribunal", the position is that members of international tribunals are chosen with such care that it seems scarcely necessary to provide specially for the unlikely event of a lack of integrity on the part of one of them.

For these reasons, the United Kingdom Government do not consider that the advantages to be gained by the possibility of revision or annulment can outweigh those

to be gained from finality, and they consider that any provision for revision or annulment might well lead to an intolerable extension of arbitral proceedings which in any event tend to take up a good deal of time.

10. UNITED STATES OF AMERICA

Comments of the Government of the United States of America transmitted by a note verbale dated 11 March 1953 from the permanent delegation of the United States to the United Nations

As the Commission states in the last paragraph of the Introduction to the draft, the basic philosophy underlying the draft is that an agreement to arbitrate will be made subject to judicial enforcement. In view of practices generally followed by States up to the present time, the draft prepared by the Commission represents an effort in the progressive development of international law. In instances where frustrations of an agreement to arbitrate have proved impossible, that result has been due to special clauses of a compulsory nature having been included in the original agreement. Because of the history and practice in the field of international arbitration, there may be a wide reluctance on the part of States at this time to enter into a convention along the lines of the one drafted by the International Law Commission, intended to cover all types of cases. However, in any event the work of the International Law Commission will have positive value as a statement of desired goals in the field of arbitration, giving added emphasis to the settlement of disputes by arbitration rather than by coercive means.

The draft may also have immediate value for States not willing to accept it *in toto* at this time, e.g., as a model from which certain articles could be taken for inclusion in future arbitration agreements in which it is felt desirable to make an agreement to arbitrate effectively binding. In working over the draft in preparation for its presentation to the General Assembly, the International Law Commission may wish to bear this in mind. It might wish to modify the present draft in certain respects. It might wish also to draft a set of shorter and simpler articles which could serve as models for inclusion in future arbitration agreements where the parties desired that the agreement should be subject to judicial enforcement.

The following comments relate to specific articles of the draft:

Article 2, paragraph 1

If States which are not parties to the Statute of the International Court of Justice will be invited to adhere to the final draft on arbitral procedure, provision will have to be made to meet the requirements of paragraph 2 of article 35 of the Statute of the Court. This could be accomplished by adding the following penultimate sentence to paragraph 1 of article 2 of the draft: "If a party to the dispute is not a party to the Statute of the Court, such party shall comply with the conditions laid down by the Security Council in pursuance of paragraph 2 of article 35 of the Statute."

Article 3

The procedure contemplated for the selection of arbitrators may be unnecessarily complex. The steps contemplated by paragraphs 2 and 3 might perhaps be eliminated. Such a revision would also entail changing the fourth paragraph by making the first clause read: "If either party fails to make the necessary appointments under the preceding paragraph," and by eliminating the clause that reads: "or if the governments of the two

States designated fail to reach an agreement within three months".

In the Commission's draft it is not entirely clear that each of the three-month periods are used in paragraphs 1, 3 and 4 is cumulative. Note should also be taken of the fact that the draft does not contain provision for the contingency wherein States are under the obligation to pursue other procedures, or have previously invoked other procedures.

Article 4, paragraph 1

It is provided that "The parties having recourse to arbitration may act in whatever manner they deem most appropriate." It is felt that this proposition either is not descriptive of the desired result or is too broad. At best, its language is vague. In order to link this provision with the provision which follows, namely, "they may refer the dispute to a tribunal consisting of a sole arbitrator or of two or more arbitrators as they think fit", it is suggested that a colon be substituted for the semi-colon, now separating the two provisions, or that the first quoted provision be deleted as surplusage.

Article 4, paragraph 2

It is suggested that the word "however" is unnecessary and should be eliminated.

Article 5

In providing that a party may not, after the "proceedings" have begun, replace an arbitrator designated by it, the article seems unnecessarily restrictive. For example, the arbitrators might convene merely for the purpose of organizing and adopting rules of procedure and then adjourn for a considerable period to enable the parties to prepare their pleadings and briefs in accordance with the rules. No reason is perceived why an arbitrator might not be replaced during such a period. It would seem sufficient to provide that a replacement may not be made after the completion of the written pleadings and the beginning of oral arguments, if any, except by agreement of the parties. A change of this nature in article 5 would also necessitate a slight change in the wording of paragraph 1 of article 7.

Article 7, paragraph 2

It is suggested that the following sentence be added at the end of the paragraph: "Appointment of a replacement shall be subject to the provisions of article 3."

Article 7, paragraph 3

It is believed that the words "over the objection of a member of the tribunal" are implied, but should be made explicit, after the phrase "should the withdrawal take place".

Article 8

It is suggested that after the word "decision" in both paragraphs 1 and 2 of article 8 the words "as to disqualification" be added. This would avoid any ambiguity as to whether "decision" might be construed to mean "decision in the dispute", rather than "decision as to disqualification".

The Commission might also wish to consider the addition of a third paragraph to the article: "The replacement of disqualified arbitrators shall be subject to the provisions of article 3."

Article 9 (h)

It may be impractical in many instances for the parties to fix in advance a period within which awards must be rendered. This is particularly true with respect to the general arbitration of a large number of pecuniary claims accumulated over a long period of years.

Article 16

It is felt that the jurisdiction sought to be conferred on the arbitral tribunal under the proposed draft is too broad. There should be some limitation to prevent the tribunal from deciding issues that neither party may desire to have decided, e.g., issues which have previously been determined.

The Commission might wish to consider the following wording for article 16: "For the purpose of securing a complete settlement of a particular dispute, the tribunal may decide on any counter-claim arising out of the immediate subject-matter of the dispute."

Article 28, paragraph 2

It is suggested that a provision be included making the decision of the International Court of Justice binding on the parties.

Article 29, paragraph 4

The comment regarding article 28, paragraph 2, is also applicable here.

11. URUGUAY

*Letter from the Ministry for External Relations
of Uruguay*

[Original: Spanish]
[8 July 1953]

I have the honour to send you herewith, . . . the comments of the Faculty of Law and Social Sciences and of the Uruguayan Institute of International Law, concerning the "Draft on arbitral procedure".

Although the final date fixed for receiving opinions has expired, it was considered that the reports of those bodies might usefully be communicated.

I

Report by Dr. Eduardo Jiménez de Aréchaga, Professor of Public International Law, Faculty of Law and Social Sciences

Montevideo, 23 March 1953

On 17 March last, the Council over which you preside requested me to report on the draft on arbitral procedure prepared by the International Law Commission of the United Nations, concerning which the Ministry for External Affairs has asked for the official opinion of the Faculty of Law and Social Sciences.

In my opinion, the Faculty of Law should advise the Government of the Republic to give this draft its strongest approval and support.

By historical vocation and constitutional precept (article 6 of the Constitution) Uruguay is a resolute supporter of arbitration for the settlement of international disputes.

Nevertheless, the provisions of the arbitration treaties concluded by our country have serious technical and legal defects. They are, in fact, true promises to contract (pacts *de contrahendo*), since although the parties agree to submit any dispute which may arise to arbitration, the treaties do nothing to facilitate the constitution of the tribunal and the determination of the concrete points to be decided, after the dispute has arisen. The parties must again reach agreement in two instances: first, on the determination of the points in dispute which will be the subject of the award and, secondly, on the choice and constitution of the tribunal.

The bilateral treaties which have been ratified do not establish or prescribe any means of overcoming obstinate

opposition by one of the parties, either to the determination of the points to be settled or to the choice or constitution of the tribunal. It is to be feared that after the dispute has arisen, a party desirous of preventing the arbitration agreed upon will interpose every kind of obstacle; this assumption has been borne out by recent experience.

In the disputes which arose concerning the violation of human rights in Hungary, Romania and Bulgaria (case of Cardinal Mindzenty) these States evaded the undertaking to arbitrate included in the respective peace treaties, by the relatively simple expedient of refusing to appoint their representative on the tribunal. The United States, France and the United Kingdom asked that the tribunal should be composed of their representatives, the neutral third member to be appointed by the Secretary-General of the United Nations.

The International Court of Justice gave an advisory opinion against this claim, however, based on an excessively literal interpretation of the word "third", in its ordinal and chronological sense; it held that the appointments of the two representatives of the parties must take place before the third representative could be appointed. This interpretation is certainly incorrect, since the word "third" is here used in its legal, not in its ordinal or chronological acceptance. The meaning is that of "third party" in the law of procedure, as opposed to a "party": one who is disinterested or neutral in the dispute, not one who takes third place or comes third in order. This opinion of the Court was tantamount to stating that, failing an express provision in the text of the arbitration treaty itself, the tribunal could not be constituted and the undertaking to arbitrate would therefore fall to the ground if one of the parties to the treaty merely refused to appoint its representative on the tribunal or to co-operate in constituting it. It will be understood that this view raised most serious problems concerning the future of the whole system of arbitration treaties and, in general, of pacific settlement of disputes now in force. This opinion of the Court could lead directly to an attempt to give an optional character (*si voluero*) to most of the treaties in force on conciliation, arbitration and other means of pacific settlement, including those of vital interest to our country.

Fortunately, the reaction against this tendency has found expression in the magnificent draft of the International Law Commission, the main author of which was Mr. Scelle, the eminent French internationalist.

The provisions of this draft transform treaties into something more than promises to contract: they provide for automatic constitution of the tribunal, the *quasi-compromis* and "unilateral citation" by application, so that further agreement after a specific dispute has arisen, which is always difficult, is rendered unnecessary. Our country has, on various occasions, advocated formulas of this kind, such as those included in the Pact of Bogotá, which may possibly but come into force. In my opinion, the Government should not only support the formula under consideration against the attacks and objections to which it is sure to give rise, but should also uphold the view that some of its provisions are already in force as rules codifying positive international law and are therefore applicable even without any express stipulation to that effect in existing treaties.

For instance, the above-mentioned case of one of the parties failing to appoint its representative on the conciliation commission or arbitral tribunal is not provided for in most of the existing treaties on pacific settlement of disputes, because it is a phenomenon that had not previously appeared. This *ex parte* appointment is a right or privilege and, as such, its exercise is optional and may therefore be waived. A study of comparative law

would seem to show that the domestic legislation of most civilized countries contains legal rules or maxims corresponding to article 538 of our Code of Civil Procedure which lays down that when arbitration is prescribed, the arbitrators shall be appointed by the judge in the event of failure or refusal of the parties to do so. If this is so, this rule constitutes a general principle of law recognized by civilized nations and can be applied in accordance with Article 38 of the Statute of the International Court of Justice as an existing rule to supplement or interpret a treaty.

In short, the draft under consideration should be supported, because it is based on the thesis that a State which has entered into an undertaking to submit disputes to arbitration cannot evade that undertaking by the simple expedient of refusing to perform the acts stipulated which are necessary for fulfilment of the main obligation. It is a rule of good faith between individuals as between States, that anyone who has undertaken to follow a certain line of conduct is also bound to carry out the subsidiary acts essential for that purpose.

A report on the draft in question issued by the Uruguayan Institute of International Law, which was drawn up by Dr. Juan Andrés Ramírez, expresses similar views in support of the proposed rules, with which I entirely agree, subject to two minor reservations. In this report it is considered preferable, in the event of withdrawal of an arbitrator after the proceedings have begun, for the vacancy to be filled in the same way as normal vacancies. It should be remembered, however, that the history of arbitration shows that withdrawal of an arbitrator is always due to the fact that the party which appointed him has discovered that he is going to rule against it. His replacement as for normal vacancies would favour that State, by making it necessary to start the proceedings again and delaying and obstructing the award. On this point, I prefer the formula recommended in the draft, by which the remaining members render the award. In any case, the consent of the neutral member would always be required before an award could be rendered, and this provides sufficient safeguards.

The report of the Institute of International Law also raises the objection that no time limit is set for challenging the validity of an award on the ground of corruption of a member of the tribunal so that the award remains open to annulment indefinitely.

Further recent events, however, show the wisdom of this provision, under which an award may be challenged at any time on the basis of facts which, by their very nature, usually come to light many years afterwards.

For instance, as recently as July 1949, it became possible to publish the revelations of the United States lawyer Otto Schoenrich about the way in which the award was rendered in the frontier dispute between Venezuela and British Guiana, fifty years previously. These revelations are based on the confidential notes left by the lawyer Severo Mallet-Prevost, with the request that they should not be published until after his death. He was convinced that the President of the tribunal and the neutral arbitrator, the famous Russian internationalist F. de Martens, was induced to rule in favour of Great Britain as the result of an understanding between the two European Powers.

II

Report by Dr. Juan Andrés Ramírez, Vice-President of the Uruguayan Institute of International Law

Montevideo, 9 March 1953

I am returning to your Ministry the draft rules on international arbitration formulated by the International

Law Commission of the United Nations, concerning which the opinion of our Institute has been requested.

The Institute considered this question at one of its recent sessions and approved the following report:

"Having examined the draft on arbitral procedure prepared by the International Law Commission of the United Nations, I consider it worthy of approval, subject to the proposal of a few amendments.

"There is no doubt that the determination of the procedure to be followed by tribunals for arbitration between nations may, and should, be regarded as an essential condition for effective arbitration. It may well be affirmed that in this respect the saying of Benjamin Constant that forms are the guardian angels of the law still holds good and it is clear that, if the forms governing the operation of arbitral tribunals are not clearly laid down, a party accepting arbitration in bad faith or becoming dubious of the result during the proceedings could make an award impossible by repeated procedural incidents.

"Nevertheless, the draft — and in my opinion this is one of its merits — in most cases leaves the parties to agree on the procedure and it is only when they fail to reach agreement on this subject that it lays down compulsory rules.

"These rules are comprehensive, since they cover the procedure from the time when doubt or disagreement arises as to the existence of a dispute or as to whether it is within the scope of the obligation to have recourse to arbitration, up to application for revision or annulment of the award and the consequences of the judgment declaring it invalid (articles 29 to 32); and throughout this procedure, which is laid down in considerable detail, whenever an obstacle arises which might impede the regular course of arbitration, the solution applied is compulsory submission of the matter to the International Court of Justice.

"The rest of the draft pays due attention to the appointment of the arbitrator or arbitrators, giving priority to agreement between the parties and providing additional procedure in the event of failure to reach agreement.

"I do not agree with the provision contained in article 3 since, in my opinion, the matters dealt with are too important to be entrusted to a member of the International Court of Justice and not to that institution as such.

"I consider particularly wise, however, the precautions taken in the draft (articles 5 to 18) to ensure the immutability of the arbitral tribunal and prevent a party to a dispute, which foresees or expects that the tribunal will rule against its claims, from being able to change the composition of the tribunal by exerting influence or provoking incidents to complicate the proceedings.

"For this reason, the replacement of arbitrators is permitted only in exceptional cases specifically mentioned in the text.

"The draft provides for a case in which an arbitrator who has been withdrawn is not replaced and lays down (article 7, paragraph 3) that upon the request of one of the parties, the remaining members of the tribunal shall have power to render the award; I consider this system unsatisfactory and prefer replacement in the manner prescribed for other cases of vacancy.

"With regard to the annulment of the award (articles 30-32), I consider it open to objection that a time limit of sixty days is fixed for applications based on the tribunal exceeding its powers or a serious departure from a fundamental rule of procedure, while no such limit is fixed for applications based on corruption of a

member of the tribunal. I think that a longer period should be allowed than the sixty days prescribed for the other cases, since an arbitral award on matters which must be presumed to be of capital importance cannot be left open to annulment indefinitely.

“Such is my opinion on the draft submitted for comment.”

I repeat that the Institute approved this report, but it made one amendment. With regard to the withdrawal of an arbitrator, it took a stand between that of the draft and that of my report, preferring that the party which appointed the arbitrator should be allowed a certain period of time to replace him and that the remaining members of the tribunal should be empowered to act only if the replacement is not effected within that period.

It was also agreed that if any member of the Institute present at the meeting subsequently had any suggestion to make, he would forward it to the Ministry.

Annex II

Comments by Governments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951²⁰

1. BELGIUM

Comments of the Government of Belgium transmitted by a note dated 1 March 1953 from the permanent delegation of Belgium to the United Nations

[Original: French]

The fact that a considerable number of countries have taken unilateral measures to regulate the exploration and exploitation of the submarine platform and of the epicontinental waters above that platform shows the desirability of determining the law of nations with regard to such exploitation.

The same importance attaches to the régime of territorial waters, the consideration of which was given priority by the International Law Commission.

The two problems have certain aspects in common.

A study of the International Law Commission's preliminary draft on the continental shelf and related subjects (A/1858) calls for the following comments:

The Belgian Government attaches great importance to articles 3, 4 and 5 of part I of the draft, because their purpose is to safeguard the freedom of the high seas.

It admits that this freedom cannot be absolute and that internationally accepted measures should be taken, both with regard to the exploitation of submarine wealth and with regard to fishing outside territorial waters.

It considers that international bodies should be appointed to delimit both submarine continental shelves and fishing zones in the high seas. These bodies should be advisory only and should endeavour to promote international agreements on the régimes to be set up. The Belgian Government is opposed to the proposal in part II, article 2, notes 3 and 5, of the draft. The bodies concerned cannot exercise legislative powers over States, which can be bound only by international conventions accepted by them.

The following further comments may be made with regard to the draft.

PART I

Article 1

Since the term “continental shelf” is rightly not used in its geological sense, it would seem better not to use it at all and to describe this zone by the term “submarine areas”.

This gives a better definition of the scope of the article, for it does not apply to the waters which cover these areas and over which no State can exercise an exclusive right.

If these areas are delimited with reference to the depth at which the exploitation of the natural resources of the sea-bed and the subsoil is possible, up to a maximum depth of 200 metres, the nature of the submarine areas will be adequately defined.

Article 2

It is essential to maintain the definition of the control and jurisdiction exercised by the riparian State, namely, that such control and jurisdiction should be exercised exclusively with a view to the exploration and exploitation of the submarine areas. Any idea of sovereignty must be rejected.

Articles 3, 4 and 5

These articles, which lay down freedom of navigation, fisheries, airspace and the establishment of submarine cables, must be retained, otherwise, the principle of control and jurisdiction over submarine areas will not be acceptable.

Article 6

The meaning of the words “must not result in substantial interference with navigation or fishing” should be defined. Although the exploitation of the subsoil might not interfere with fishing, or with the activities of fishermen, it might reduce or even completely destroy certain species of fish in the localities concerned.

The International Law Commission's proposal might be taken as a basis for discussion. It seems to mean that exploitation would be permitted only if it did not interfere with navigation and fishing, obstruct the traffic on maritime routes, and pollute or disturb fisheries.

As at present worded, article 6 may give the impression that no previous notification is required from the State which begins exploration or exploitation. This question should be clarified and some authority should be designated with power to decide whether the conditions of article 6 have been observed and to refuse permission if necessary.

The safety zones (article 6, paragraph 2) should be delimited in the article itself, to avoid any infringement of freedom of navigation and fishing.

Article 7

Legal provisions should be laid down as a basis for arbitration and for possible recourse to the International Court of Justice in connexion with disputes on the delimitation of the respective submarine areas of two neighbouring countries.

In the absence of an agreement on delimitation between the countries concerned, the submarine areas of two neighbouring States might be delimited by the prolongation of the line separating their territorial waters, and those of two States separated by water, by the median line between the two coasts.

²⁰ See *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*.