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

[Item 53]*

Chapter II: Arbitral procedure (*continued*)

GENERAL DEBATE (*concluded*)

1. Mr. HERGEL (Denmark) wished to thank the International Law Commission for its thorough and conscientious work, which pointed the way for the future.

2. His delegation had considered submitting an amendment to the consolidated draft resolution (A/C.6/L.317) to the effect that the Commission should supplement its draft by a preamble and clarify the scope of the convention, in particular, making it clear that the draft would not infringe the sovereignty of States. In view of the statement made by the Commission's Chairman at the previous meeting it now felt that such an amendment would be superfluous.

3. His country was a consistent supporter of arbitration as a means of settling disputes. Hence, his delegation would have been prepared even now to vote in favour of the draft convention as a whole, and it hoped that, even though as yet only a few delegations had expressed support for the draft, the General Assembly would be able to open that important convention for signature and accession in 1955. As the Chairman of the Commission had stated at the 383rd meeting, the convention by its mere existence would be much more effective than a simple recommendation that might fall into oblivion.

4. He added that his delegation would vote in favour of the consolidated draft resolution.

5. Mr. MOROZOV (Union of Soviet Socialist Republics) noted with satisfaction that all the speakers in the debate had agreed that arbitration had been, was and would remain one of the most important means of settling international disputes. Arbitration, in the meaning accepted in international law, was a means of giving effect to the Charter's purpose of maintaining and strengthening international peace and security. He did not know of any controversial issue that could not be settled peacefully by negotiation between the parties.

6. Some of the provisions of the draft convention, such as article 1, paragraph 3, article 4 and article 9, were based on universally recognized principles of international law. So far as those provisions were concerned the draft contained nothing new and merely described the classic arbitration procedure.

7. In addition, however, as the representatives of Poland, Brazil, Byelorussian SSR, Czechoslovakia, Syria, Argentina, France and other countries had pointed out, the draft also included many other provisions that ran counter to those universally recognized principles.

8. Article 2 aimed a blow at the very foundation of arbitration—the principle that the parties must freely consent to refer a dispute to arbitration. It was highly undesirable for arbitration to involve the compulsory measures provided for in articles 2, 3, 6, 7, 8, 10, 11, 16, 17, 28 (paragraph 2), 29 and 31. Such measures were not calculated to promote settlement of disputes, because they infringed State sovereignty, the very basis of international law, and their inclusion in the draft, by doing away with the distinction between arbitration and judicial proceedings, erected arbitration proceedings into a sort of supra-national jurisdiction. On that point he agreed with the Byelorussian, Czechoslovak and Polish representatives. As the Syrian representative had also pointed out (386th meeting), the intervention of the International Court of Justice in the arbitration process, provided for in the draft, was contrary to the Charter and the Court's Statute.

9. The Canadian representative had argued (386th meeting), like some of the Commission's members, that the draft convention did not infringe State sovereignty, because it did not oblige any State to have recourse to arbitration. That argument, set out in paragraph 29 of the report (A/2456) had been disposed of by the Byelorussian representative at the 385th meeting. The Canadian representative had maintained that the provisions of the draft were merely intended to ensure that States carried out a general obligation to have recourse to arbitration that they had of their own free will undertaken. But that was no answer to the criticisms of the Polish representative (383rd meeting) and, in particular, of the representative of the Byelorussian SSR, who had pointed out that the authors of the draft were seeking, under the cloak of procedural guarantees of the effectiveness of arbitration, to impose provisions that dispensed with the consent of the parties.

10. The procedure for determining whether a dispute came within the scope of a State's general obligation to have recourse to arbitration was not, as the Canadian representative had contended, a procedural question. The Byelorussian representative had already shown that a State's general undertaking to submit particular disputes to arbitration only applied to disputes within those categories, and that the State could not delegate to anyone the power to decide whether a dispute fell

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

within them, for the decision was an exercise of its will as expressed in the undertaking.

11. As various representatives had observed, the provisions which enabled an arbitrator to be appointed without the parties' agreement, the *compromis* to be drawn up without the parties, and the award to be rendered in the absence of one party, far from being normal developments of traditional arbitration procedure, were a travesty of the rules of international law and completely foreign to the principle of arbitration. On those points the Canadian representative had preserved silence.

12. The Greek representative had appealed to the Committee at the 384th meeting to support the draft convention, on the grounds that the parties to it would not assume any legal obligations until they decided to apply the convention by signing an arbitration undertaking. His reason for employing such an argument must have been that he had realized that the draft was not consistent with the universally recognized principles of international law. In reality the parties to the convention would, by their signatures and ratifications, be indicating that they recognized the validity of the principles it contained, although it was quite true that they would not, by those acts alone, be giving it legal effect.

13. The draft convention as a whole was, for the reasons indicated, unacceptable to the USSR delegation. Its adoption would merely result in discouraging recourse to arbitration for the peaceful settlement of disputes, though that, he realized, had not been the International Law Commission's intention. The Chairman of the Commission had told the Committee at the previous meeting that the Commission had been sharply divided on the most vital points in the draft, so that, though the report as a whole had been adopted by a large majority, it did not represent a real consensus of opinion in the Commission. The USSR delegation agreed with the minority of the Commission which had considered that, in the main, the draft convention had the effect of altering the universally recognized principles of international law.

14. If the provisions to which he objected were struck from the draft there seemed no object in the General Assembly adopting the remainder, since it would thereby merely be endorsing principles and procedures that had long been accepted in international practice. It appeared premature, therefore, to decide to place the draft convention on the provisional agenda of the tenth session; it would be better to postpone the decision until governments had submitted their comments on the draft.

15. Consequently, though it was not opposed to the two paragraphs of the preamble and operative paragraph 1 of the consolidated draft resolution (A/C.6/L.317), the USSR delegation felt that the words "and to include the question in the provisional agenda of the tenth session" in operative paragraph 2 ought to be deleted.

16. Mr. MAURTUA (Peru) said that his country frequently resorted to arbitration and considered it a highly effective method of settling disputes between States. Arbitral procedure had evolved to the point of being a universally recognized means of pacific settlement of disputes, sanctioned in the Charter and in regional agreements, and the next step was for the competent technical organs to codify carefully the principles and practices which had crystallized in the course

of time. The material was scattered through numerous treaties, which should be searched for the elements of law common to all. If such a work were faithfully carried out, States could not reject the result, since it would be a recapitulation of existing law, which itself was the product of the will of States.

17. In that connexion, he noted that, while in paragraph 16 of its report (A/2456) the International Law Commission stated that basically the draft convention was "no more than a codification of existing law", in paragraph 18 it observed that the draft convention proceeded "by way of developing international law with regard to certain procedural safeguards for securing the effectiveness . . . of the undertaking to arbitrate". The draft convention thus represented a curious combination of generally accepted usages consecrated by long practice and of innovations opposed by many States on the grounds of sovereignty. The basic feature of arbitral procedure was the free will of the parties, particularly with regard to the choice of arbitrators and the drawing up of the *compromis*. That should have been a matter for codification.

18. Another subject which should have been dealt with was that of reservations to arbitration treaties. Although such reservations had been vague in the past, in recent years certain themes had recurred in them, such as that of exclusive jurisdiction, which was of outstanding importance for the effective operation of arbitral procedure. In Latin America, where arbitral procedure had become ordinary law, it had, under the General Treaty of Inter-American Arbitration of 1929, been applied only to legal disputes, but under the Pact of Bogotá had been extended to all types of disputes. Both instruments, however, contained an exclusive jurisdiction clause as a necessary safeguard of the rights of States, as did the United Nations Charter (article 2, paragraph 7), and the International Law Commission should therefore have regarded that clause as existing law.

19. The two systems of codifiable law—the United Nations and the Pan-American system—should be considered side by side, so that the resulting codification should have universal value instead of being an academic effort unrelated to reality.

20. His Government took the view that codification should begin with the statement of permanent principles which were not affected by the circumstances of international life. Those principles should, however, be flexible enough to be readily adjustable to subsequent developments of international law. The subject matter to be codified should be carefully chosen; it should comprise principles and practices which were universally accepted by the community of nations. Furthermore, in any work of codification, the will of States and their current orientation must always be taken into account. Such work could either clarify and consolidate existing law or formulate new law, provided that the formulation was in line with the progress of international law as determined by the will of States. Law thus formulated would be authoritative, not because States would be prepared to accept it, but because it would embody the imperative requirements of States and their desire for justice. Any attempt to formulate rules on subjects which were not within the domain of international law but within the exclusive jurisdiction of States was, however, doomed to failure, and rightly so. It was equally imprudent to codify rules which were still subject to different interpretations or the effective

application of which was uncertain, since doubt might be cast thereby on the very usefulness of codification.

21. He hoped that the International Law Commission would take those considerations into account in its future work.

CONSIDERATION OF THE DRAFT RESOLUTION SUBMITTED BY ARGENTINA, CANADA, CHILE, EGYPT, FRANCE, INDIA, SWEDEN AND SYRIA (A/C.6/L.317)

22. The CHAIRMAN stated that the general debate was completed and invited the Committee to consider the consolidated draft resolution (A/C.6/L.317).

23. Mr. GARCIA AMADOR (Cuba) recalled that when the consolidated draft resolution had been prepared, the first paragraph of the Swedish draft resolution (A/C.6/L.315) had been omitted. He asked the sponsors whether they would accept the insertion of a similar paragraph between the first and second paragraphs of the consolidated draft resolution.

24. After a brief discussion, Mr. GARCIA AMADOR (Cuba) proposed the following drafting for that paragraph:

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

25. Mr. FERRER VIEYRA (Argentina), Mr. OLAVARRIA (Chile) and Mr. BURBRIDGE (Canada) saw no objection to including that paragraph in the consolidated draft resolution.

26. Mr. AMADO (Brazil) said that he would be unable to vote for the paragraph proposed by the Cuban representative, because in his opinion the progressive development of international law on arbitral procedure was not proceeding along the lines indicated in the draft convention.

27. Mr. MAURTUA (Peru) also opposed the inclusion of the paragraph; it might be interpreted as an attempt to influence governments in favour of the draft convention, whereas the Committee had no such intention.

28. Mr. LOUTFI (Egypt) and Mr. TARAZI (Syria) said that, as co-sponsors of the consolidated draft resolution, they were unable to accept the Cuban proposal, in view of the objections raised to it.

29. After a further exchange of views, Mr. GARCIA AMADOR (Cuba) stated that the International Law Commission was entitled to some recognition of the high quality of its work. No delegation had denied that the draft convention contained some important elements of progressive development of international law, and to say so in an entirely non-committal paragraph would be a justified concession to the large group of delegations which would have preferred the Committee to take action on the draft convention at the present session.

30. He therefore moved his text as an amendment to the consolidated draft resolution.

31. Mr. FERRER VIEYRA (Argentina) said that, since other sponsors had refused to accept the Cuban amendment, he would be compelled to abstain on it.

32. Mr. MENDEZ (Philippines) and Mr. VALLAT (United Kingdom) observed that the Cuban amendment was true to fact and therefore acceptable.

33. Mr. MENDEZ (Philippines) proposed the deletion of the word "final" in the first paragraph of the preamble to the consolidated draft resolution, since work on the draft convention was by no means finished.

34. Mr. MOROZOV (Union of Soviet Socialist Republics) asked that the consolidated draft resolution should be put to the vote paragraph by paragraph.

35. The CHAIRMAN announced that, in that case, he would put the Cuban amendment to the vote after the first paragraph of the preamble to the consolidated draft resolution since, if adopted, the amendment would be inserted after that paragraph.

36. He put to the vote the Philippine representative's amendment to delete the word "final" in the first paragraph of the preamble.

The amendment was adopted by 23 votes to 13, with 10 abstentions.

The first paragraph of the preamble, as amended, was adopted by 50 votes to none, with one abstention.

At the request of the representative of Cuba, a vote was taken by roll-call on the Cuban amendment.

Poland, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Sweden, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia, Afghanistan, Australia, Bolivia, Burma, Canada, Chile, China, Costa Rica, Cuba, Denmark, Ecuador, El Salvador, France, Greece, Guatemala, Iceland, Indonesia, Israel, Liberia, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Philippines.

Against: Poland, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yemen, Brazil, Byelorussian Soviet Socialist Republic, Czechoslovakia.

Abstaining: Saudi Arabia, Argentina, Belgium, Egypt, India, Iraq, Peru.

The amendment was adopted by 35 votes to 8, with 7 abstentions.

The second paragraph of the preamble was adopted by 48 votes to none, with 2 abstentions.

Operative paragraph 1 was adopted by 48 votes to none, with 3 abstentions.

Operative paragraph 2 was adopted by 43 votes to 5, with 3 abstentions.

37. The CHAIRMAN put to the vote the consolidated draft resolution as a whole, as amended.

The draft resolution, as amended, was adopted by 42 votes to none, with 9 abstentions.

38. Mr. AMADO (Brazil) explaining his vote, said that his delegation admired the work done by the International Law Commission on the draft convention on arbitral procedure, and had the highest esteem for the erudition and intellectual integrity of Mr. Scelle, the Commission's special rapporteur. The draft reflected Mr. Scelle's conception of arbitration as part of the judicial system established for the International Court of Justice. Yet that conception was purely theoretical and altogether contrary to the traditional form of arbitration from which States had derived great benefits.

39. In establishing, in article 29, the principle of the revision of arbitral awards—a principle which had never been recognized by States save in a few exceptional cases specifically provided for in a *compromis*—the draft threatened to destroy the principle of the finality of the award, one of the cornerstones of arbitration which had led States to resort to that unexcelled method of peaceful settlement.

40. As the Chairman of the International Law Commission had pointed out at the previous meeting, the Commission had been divided on the question, half of its members having agreed with him (Mr. Amado) on the danger of making the award subject to revision.

41. Similarly, to permit, as article 31 did, the annulment of the award by the International Court of Justice tended to reduce the arbitral tribunal to the status of a court of lower instance under the International Court and to undermine the faith of States in arbitration.

42. The will of States was all-important in international law and, in disregarding that will, the draft could hardly be said to contribute to the development of international law. Having taken that stand as a jurist in the Commission and as a representative of his Government in the Sixth Committee, it had not been possible for him to vote for the Cuban amendment.

43. Mr. MOROZOV (Union of Soviet Socialist Republics) explained that he had voted against the Cuban amendment and against operative paragraph 2 of the draft resolution and in favour of the other paragraphs, and had abstained on the draft resolution as a whole.

44. The text of the Cuban amendment was meaningless and ambiguous in view of the discussion that had taken place in the Committee. Indeed, it was not clear whether the amendment referred to the non-controversial principles contained in the draft convention or to those which, as had been pointed out during the general debate, were clearly contrary to established principles of international law. The Committee, being the legal committee of the General Assembly, should be particularly careful not to adopt ambiguous texts.

45. Lastly, for the reasons which he had explained earlier, he thought it inadvisable and premature for the General Assembly to decide beforehand that the question should be included in the provisional agenda of its tenth session, as stipulated in operative paragraph 2 of the draft resolution.

46. The CHAIRMAN announced that at the plenary meeting on 23 November the General Assembly would examine the draft resolution adopted by the Sixth Committee at its 380th meeting under the title "Publication of documents concerning the drafting and application of the Charter".

The meeting rose at 6 p.m.