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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.315, A/C.6/L.316) (*continued*)

[Item 53]*

Chapter II: Arbitral procedure (continued)

GENERAL DEBATE (*continued*)

1. Mr. VALLAT (United Kingdom) said that the International Law Commission had produced an important document; however, his delegation was not yet prepared to commit itself to any course of action on the draft convention. Although it agreed with the basic purpose of the draft, as set forth in article 1, on first sight it had some reservations regarding a number of provisions, in particular those contained in articles 29 to 32, which his Government had dealt with in its comments (A/2456, annex I, 9). For those reasons his delegation believed that the various questions arising in connexion with the draft, including those mentioned by the French representative at the previous meeting regarding the relation of the draft to existing obligations to arbitrate, required further study by governments.

2. He welcomed therefore the draft resolutions submitted respectively by Sweden (A/C.6/L.315) and by Argentina, Egypt, France, India and Syria (A/C.6/L.316), both of which provided for study by governments. He could accept either of those two drafts, which seemed to overlap to some extent, and, in particular, he supported the provision commending the International Law Commission for its work, which appeared only in the Swedish draft resolution (A/C.6/L.315). He noted that there seemed to be a slight discrepancy between the dates mentioned in paragraphs 2 and 3 respectively of the joint draft resolution (A/C.6/L.316).

3. Mr. FERRER VIEYRA (Argentina), speaking on a point of order, said that the authors of the joint draft resolution and the Swedish delegation had agreed to consult together with a view to working out a single draft resolution.

4. Mr. LOUTFI (Egypt) said that the International Law Commission's draft convention was based on an earlier text which the Commission had revised in the light of the comments received from a few governments. Those changes, as pointed out in paragraph 12 of the Commission's report, were substantial and it was obvious that in a legal text such as that under discussion a delegation's attitude towards it might be affected by the slightest change. For that reason, and also in view of the fact that the Commission's report had been issued only very recently, his delegation felt that it would be premature to take any action on the draft at the current session such as that recommended in paragraph 55 of the Commission's report. The best course would be to circulate the draft to governments for further study and comment.

5. In endeavouring to fill certain existing gaps in arbitral procedure with a view to rendering the obligation to arbitrate more effective, the Commission had in its draft repeatedly departed from recognized principles of international law. While the draft marked definite progress, some of the proposed changes in prevailing practice were too far-reaching and might therefore not be acceptable to a number of governments. For example, the text disregarded to a large extent the autonomy of the will of the parties concerned, as in article 2, which gave the International Court of Justice in certain cases the power to decide on the existence of a dispute and on its arbitrability, contrary to the principle, which was at the root of arbitration, of the voluntary agreement of the parties.

6. Articles 28, 29 and 31 gave still other powers to the court. In that respect his delegation agreed with the views expressed by Mr. Zourek in the International Law Commission.[1]

7. Further, as the Brazilian representative had pointed out at the previous meeting, according to the French text of article 11, at any rate, the arbitral tribunal would be the master rather than, as in current practice, the judge of its own competence.

8. In view of the various problems to which the draft gave rise, including those mentioned by the French representative at the previous meeting, his delegation was unable to take a stand on the draft at the current session, and would support any proposal for postponing action on it, pending further study by governments.

9. Mr. SHAH (India) said that the Constitution of India required that the encouragement of arbitration as a means of settling international disputes should be one of the guiding principles of State policy. His Government therefore welcomed the draft convention. In its written comments (A/2456, annex I, 5) the Indian Government had, however, pointed out that while it was in general agreement with the draft it was unable to accept without reservation certain of its provisions in their existing form because they departed so widely from international practice and the principles underlying that practice.

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

[1] See document A/CN.4/SR.192, paras. 2 to 4.

10. In particular, article 2 was unacceptable because it conferred compulsory jurisdiction on the International Court of Justice—without the consent of one of the parties—regarding the arbitrability of an existing dispute and the existence of an alleged dispute.

11. Articles 30, 31 and 32 were also unacceptable because they introduced the possibility of the validity of an award being challenged on certain grounds, which was contrary to existing practice and would seriously detract from the award's value.

12. He supported the proposal that further consideration of chapter II of the report should be postponed till the ninth session, so that governments would have time to examine the draft convention in the light of the explanations the Commission had provided and of the discussions that had taken place in the Committee. The Commission's explanations might cause some governments which had submitted comments to reconsider their views on those of their suggestions which the Commission had decided not to incorporate in the draft.

13. Mr. POVETYEV (Byelorussian Soviet Socialist Republic) noted that opinion in the International Law Commission had been by no means unanimous on the draft convention and the important questions raised therein. Quoting from paragraph 28 of the Commission's report, he agreed with the views of some of the Commission's members regarding the various shortcomings of the draft. As the Polish and Brazilian representatives had pointed out at the 383rd meeting, some of its provisions were clearly contrary to generally accepted principles of international law.

14. Thus, under article 2 the existence of a dispute or the question of its arbitrability could be decided by the International Court of Justice at the unilateral request of one of the parties and over the opposition of the other. Such a provision was unprecedented in the history of arbitration, for the basic principle of arbitration was the voluntary undertaking of the parties to arbitrate. The authors of the draft must have been well aware that the draft represented a radical departure from that basic principle, since they had included in it many other provisions for bringing the machinery of arbitration into operation in the absence of the agreement of one of the parties. Articles 3, 10, 11, 16 and 20 granted the arbitral tribunal or the International Court of Justice various powers to that end. Moreover, under articles 29, 31 and 32 the arbitral tribunal became a court of first instance and the International Court a court of appeal, so that the essential difference between arbitral and judicial procedure was destroyed.

15. The Commission was therefore not justified in stating, as it did in paragraph 29 of its report, that the draft was in conformity with the general principles of arbitration. With reference to the same paragraph he wished to make clear that the members of the Commission who had opposed the draft had done so, not because they considered any measure designed to strengthen the obligation to arbitrate to be contrary to the principle of the sovereignty of States, but because, under the pretext of providing procedural guarantees, the draft included various provisions relating to matters of substance, such as the arbitrability of disputes, which violated the basic principle of the free will of the parties.

16. The undertaking entered into by a State to resort to arbitration in the case of a specified category of disputes must not deprive that State of the right to determine, in the exercise of its autonomous will, whether a matter came within that category of arbitrable questions. Where a question did not fall within that category, the State could not be compelled to submit the dispute to arbitration, although it could agree to do so. Any disagreement on the question of the arbitrability of a dispute had to be settled by negotiation between the governments concerned and could not be left to be decided by an outside organ as part of the States' original undertaking to arbitrate.

17. Lastly, he wished to draw attention to a political question. As many speakers had noted, the Charter considered arbitration as one of the means of the proper settlement of disputes. In examining the draft the Committee should bear in mind that a departure from the basic principles of arbitration, or the destruction of the difference between arbitral and judicial procedure, would deprive the Members of the United Nations of one of the means of the pacific settlement of disputes.

18. In view of the above considerations, he could not accept the draft convention, and reserved the right to speak on the draft resolutions before the Committee at a later time.

19. Mr. CAREY (United States of America) said that his Government had been a consistent advocate of arbitration as a means of the pacific settlement of international disputes, and the International Law Commission was to be commended on the draft convention, which was a text well calculated to achieve the Commission's object of ensuring that obligations to submit to arbitration, freely undertaken, were effective.

20. The draft convention contained a number of far-reaching innovations, which governments would have to consider carefully before adopting them. Foremost among them were the provision empowering the President of the International Court of Justice to appoint the members of the tribunal in the event of either of the parties failing to do so within a certain time, and the provision empowering the tribunal itself, in certain circumstances, to draw up the *compromis,* both of which had the effect of substituting, after a certain time had elapsed, the will of third persons for the consent of the parties. The traditional type of undertaking to have recourse to arbitration frequently left the composition of the tribunal and the *compromis* to be decided upon later, and there was a presumption in such cases that the obligation to submit to arbitration was contingent on agreement on those points between the parties; unless governments were satisfied that their obligation was contingent on such agreement, they might not always be willing to assume the obligation in advance.

21. His Government felt, therefore, that it might not be desirable for the draft convention to be made applicable to all undertakings to have recourse to arbitration; for the time being the draft convention should perhaps rather be regarded as a model for use, in whole or part, in future arbitration agreements that the parties were particularly anxious to make effective.

22. His Government was not prepared for the moment either to become a party to a convention on the lines of the draft, or to participate in a conference convened to conclude such a convention. The best course would be for the General Assembly to take note of the draft convention and to refer it to governments with a view to their making use of its provisions in any arbitration agreement which they might decide to enter into.

23. He was sympathetic to the proposal that, since there had been so little time to examine the draft convention, it should be submitted to governments for their comments, but wondered what procedure was to be adopted concerning the comments received. Certain delegations had indicated that they meant the comments to be discussed together with the draft convention at the ninth session. It ought to be made clear what the purpose of that discussion would be. It was certainly undesirable for the Sixth Committee to attempt to redraft the convention, since it was not the body best suited to the task. Was it the intention that, after discussion in the Sixth Committee, the draft would be referred back to the International Law Commission for reconsideration in the light of the comments to be received from governments?

24. Mr. SPIROPOULOS (Greece) observed that the French representative's argument—advanced at the previous meeting—that it would be difficult to reconcile existing arbitration procedure with the draft convention applied equally to the General Act of 1928 (as revised in 1949); nevertheless, the difficulty had not stood in the way of that instrument's adoption. In the case of the draft convention there was no conflict with existing procedures. It was a text without legal value or binding force; by adopting it States would not pledge themselves to submit disputes to arbitration. It was only when States decided to have recourse to arbitration that its content became important. Then they could, if they wished, exclude certain of its provisions or, for example, stipulate that political disputes were not arbitrable. The convention would simply be a model procedure to be applied if the parties so desired, as an alternative to the traditional procedure. The Hague Convention for the Pacific Settlement of International Disputes of 1907 would continue in force.

25. He was prepared to vote in favour of the joint draft resolution (A/C.6/L.316). Only a few governments, however, had replied to the invitation to submit comments on the preliminary draft, and it seemed unlikely that the invitation contained in the draft resolution would meet with a better response. The International Law Commission would only be able to prepare a draft likely to be adopted by the General Assembly if every government submitted comments on every article.

26. The statement in article 11 that the tribunal was the judge of its own competence, to which the Byelorussian representative had taken exception, did not mean that the tribunal had absolute power in the matter. That was made clear by article 30, which provided that an award could be challenged on the grounds that the tribunal had exceeded its competence. The wording of article 11 could, if necessary, be altered to express the drafters' intention more suitably.

27. It was not correct to say that the power to annul awards, conferred on the International Court of Justice, made the tribunal a subsidiary organ of the Court. The Court would be given power only to annul in the event of the tribunal having exceeded its jurisdiction—a new provision necessary to break a possible impasse.

28. Mr. COLLIARD (France) noted with satisfaction that the Greek representative was prepared to accept the draft resolution co-sponsored by France.

29. He had been surprised to hear that representative say that the draft convention, even if ratified, would have no legal value and could be used only if and as desired. He was radically at variance with that view. Moreover, he still felt that clarification was needed on three points.

30. First, unlike the General Act of 1928 (as revised in 1949), the draft convention regrettably failed to stipulate the different types of disputes to which it applied and the procedure to be followed with regard to each type, and to indicate clearly in what cases earlier texts rather than its own provisions should apply. If, for example, as the Greek representative maintained, after ratification of the draft convention, the Hague Convention of 1907 would remain in force, the question arose whether its procedural provisions or those contained in the draft convention—and the two were clearly at variance—should apply. He had too much respect for the International Law Commission to think that it had prepared the draft convention merely as a matter of academic interest; the test had been meant to have legal force, and in that case it should be made clear whether or not it would supersede existing texts.

31. Secondly, the Greek representative had said that States could, when resorting to arbitration, adopt some form of arbitral procedure other than that laid down in the draft convention. The inference was that the draft convention would apply only to future undertakings to arbitrate. If that was so, it should contain an article to that effect.

32. Lastly, he was glad that the Greek representative had drawn a distinction between political and legal disputes, but that distinction was not expressly made in the draft convention itself. On the contrary, it was conceivable that a State, after entering into an undertaking to arbitrate which excluded political questions, might refuse arbitration on what it regarded as a political question, and that the other party to the undertaking might disagree and bring the matter before the International Court of Justice. The inexorable machinery provided for in articles 2 and 3 of the draft convention would then come into play, and if the Court were to declare that the question was arbitrable, a State would be compelled to arbitrate against its own will, in direct contravention of Article 2, paragraph 7, of the Charter.

33. The draft convention was a most important document which would, in fact, revolutionize arbitral procedure as well as many basic tenets of international law. It should therefore be given careful thought.

34. Mr. PETREN (Sweden) agreed with the French representative. Article 12 of the draft convention suggested that the instrument applied only to legal questions, but any attempt to exclude political questions would certainly lead to the difficulties described by the French representative.

35. Mr. SOEBEKTI (Indonesia) commended the International Law Commission for its admirable report.

36. His Government had not had sufficient time to study the draft convention on arbitral procedure as it deserved and for that reason it was not prepared to take a decision on that text at the current session; he would therefore support the joint draft resolution (A/C.6/L.316).

37. Mr. AMADO (Brazil) could not conceive that the International Law Commission, composed of the most eminent jurists the General Assembly had been able to find, would have produced a draft convention which, if duly ratified, would have no legal value. He therefore emphatically rejected that view.

38. It had been the practice of States which resorted to arbitration to regard the award as final; having rendered the award, the arbitral tribunal ceased to exist, the States being free to comply or not to comply with the awards, though in most cases awards had been faithfully carried out. The draft convention introduced two entirely new possibilities: revision and annulment of the award. As Professor Charles Rousseau had pointed out, while the Statute of the International Court of Justice provided for such revision (article 61), very sparing use of it had been made in international relations. The introduction of those two principles in fact amounted to the creation of positive law. It could not be said that the draft convention was of slight importance; on the contrary, in it the International Law Commission had taken a strong stand. He differed with the Commission on a number of points, particularly on the two provisions he had just mentioned, which represented innovations not asked for by any State, and the result of which would be to transform the International Court of Justice into a court of appeal.

39. The words in article 11 of the draft convention (French text), *"maître de sa compétence"*, to which he had objected at both the 383rd and 384th meetings, had certainly been inserted in a deliberate attempt to develop the law of arbitral procedure along lines very different from those which it had followed in the past.

40. Mr. VALLAT (United Kingdom) remarked that the draft convention as it stood had no preamble, formal articles or testimonium; presumably its exact legal effect would depend on such formal clauses as were later added to it. Even if the clauses were to apply only to the draft convention's entry into force, at first sight article 1—to go no further—appeared to create an immediately effective obligation applicable to existing undertakings. That point, like many others, required further study and clarification. He was therefore unable to agree that the draft convention would be an instrument without any legal effect.

The meeting rose at 1 p.m.

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