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Chairman: Mr. Jorge CASTAÑEDA (Mexico).

AGENDA ITEM 56

Report of the International Law Commission on the work of its tenth session (A/3859) (continued)

CONSIDERATION OF CHAPTER II: ARBITRAL PROCEDURE (continued)

1. Mr. YASSEEN (Iraq) said that he could not agree with the view of certain delegations that the Committee should recommend the model rules (A/3859, para.22) without discussing them article by article. It was true that such a procedure was sometimes followed in parliaments in the case of a bill of a technical character, such as a legal code, but it would be quite uncalled for in the Sixth Committee, which was a scientific as well as a representative body. The model rules should, in the view of his delegation, be subjected to careful study, even if that study had to be postponed to a later session.

2. The line of demarcation between rules of substance and rules of procedure was hard to draw, but the Commission had obviously exceeded matters of procedure by providing in paragraph 1 of the preamble to the model rules that any undertaking to have recourse to arbitration constituted a legal obligation which must be carried out in good faith. Traditional arbitration was based on the principle of the autonomy of the will of the parties, but the model rules sought to deduce from the undertaking to arbitrate a whole series of obligations which led inexorably to its final phase, the arbitral award. Examples of such obligations could be found in article 1, paragraph 1, concerning the existence of a dispute; in article 3, paragraphs 2 and 4, concerning the appointment of arbitrators by the President of the International Court of Justice; and particularly in article 4, paragraph 3, which provided that when arbitrators had been appointed they could not be changed even by agreement between the parties. That went too far, since if the agreement of the parties was necessary before they could resort to arbitration in the first place, it should, a fortiori, be sufficient for the purpose of changing an arbitrator once appointed, even if that appointment had been made by the President of the International Court of Justice.

3. The Commission had assumed the right to set up new rules of arbitral procedure, the result of which had been to confuse arbitration with judicial settlement.

He did not have to emphasize the necessity of preserving the real character of arbitration, especially in international affairs, in which the competence of the International Court of Justice was not based on the general law. The motive which inspired the draft would appear to be the desire to make good the deficiency of the international order as an institution. The distinguished Special Rapporteur, Mr. Georges Scelle, and the majority of his colleagues desired a coherent system of arbitral procedure, and the draft showed great technical progress. But, after all, as the representative of Brazil had pointed out (558th meeting, para. 24), international law was made by States and not by professors, and recourse to the model rules represented such a departure from present-day realities and involved so many risks that he did not think that States would make much use of them.

4. His delegation hoped that there would be a further study taking the reality of international affairs into more careful account, and regretted that it could not support the present draft but proposed that the General Assembly should merely take note of it.

5. Mr. LACHS (Poland) said that both the International Law Commission's report and the statements heard in the Sixth Committee showed how seriously the draft model rules departed from traditional arbitration practice. The question to be determined, therefore, was whether the line of demarcation between arbitration and international jurisdiction should be maintained, or whether the two institutions should be allowed to overlap. In the past, the central feature of arbitration had been the free will of the parties, both in the selection of the tribunal and in establishing its terms of reference. International judicial institutions had admittedly also come into being through contractual arrangement between States, but there the analogy ended. The machinery of the two processes was different, and so was their very basis. In fact, international judicial tribunals had been created not to replace but to supplement arbitration, and the only surviving link between the two institutions—apart from the fact that both the International Court of Justice and the Permanent Court of Arbitration had their seat at The Hague—was that established by Article 4 of the International Court's Statute in the matter of the election of judges.

6. The arbitral solution had been applied in the past to a variety of problems, some of which were not juridical in character and did not raise issues of law. Moreover, the role of equity in arbitration and in strictly judicial cases had often been very different. Arbitration was characterized frequently by the need for mutual accommodation, for an arrangement which would give offence to neither party. There had also been cases where arbitrators had recommended action by one of the parties as an act of grace, or had stated that the matter must be settled in a liberal spirit without regard to legal refinements and technicalities. In

other instances, as in the well-known arrangement between Chile and France, the umpire had been asked to act not only as arbitrator but also as "amigable componedor"; and the great arbitrator Max Huber had once referred to his functions as those of a rapporteur. All those examples showed how flexible was the institution of arbitration, and how fine the distinctions in the functions of those called upon to arbitrate. Particularly important, however, were the cases in which legal criteria were simply inapplicable. A glance at the many treaties relating to the pacific settlement of disputes showed that such cases were in fact the most frequent, and that in the overwhelming majority of disputes the mode of settlement envisaged had been arbitration or conciliation.

7. By contrast, judicial proceedings were generally limited to strictly legal issues. In arriving at its decision an international court obviously had to apply certain sources of law, save in the exceptional circumstances envisaged in Article 38, paragraph 2, of the Statute of the International Court of Justice. That being so, it was scarcely possible—as Judge Kellogg had so aptly stressed in the *Case of the Free Zones of Upper Savoy and the District of Gex*^{1/}—that such a court should take jurisdiction of political questions. International claims tribunals, on the other hand, had been known to qualify an action as political and yet not refuse to pass judgement thereon and declare it justified. That in itself seemed to be a very essential difference.

8. The Committee's duty, therefore, was to decide whether the existing distinctions between the two institutions should be obscured, and whether the injection of strictly judicial features into the traditional notion of arbitration would be constructive and useful. Arbitration was an institution of ancient origin, which had undergone serious changes through the ages, and it was perhaps arguable that, in its classical form, it had outlived its purpose and that the new approach recommended by the International Law Commission was desirable. In his view, however, the establishment of judicial control over arbitration would deprive the latter of much of its attraction. An institution with so many possibilities could not be placed under the control of another, of a much more limited character, without losing some of its essential advantages. Arbitrators controlled by judges could no longer perform the same manifold functions as in the past, and there seemed to be no real justification for transforming arbitration into a judicial process when international jurisdiction already existed. Furthermore, classical arbitration had developed in an age when war had been regarded as a lawful instrument of international policy. Since then, international law—to its eternal credit—had outlawed the use of force, and there was therefore a greater need than ever to maintain a gradation and differentiation among the various modes of peaceful settlement, and to increase rather than reduce the possibilities open to States. That fact was adequately reflected in Article 33, paragraph 1, of the Charter, which enumerated seven possible means of peaceful settlement and ended with an *ejusdem generis* clause to show that the list was not exhaustive. In an age when States were becoming increasingly interdependent and the possibilities of disagreement were necessarily

greater, the assimilation of arbitration to judicial procedure would thus seem a retrograde step.

9. Leaving aside the substance of the draft, it was noteworthy that the Commission had presented it as a set of "model rules". The word "model" could have only one connotation, implying a perfect, or near-perfect, example by which States ought to be guided. Model rules or model draft treaties were not unknown in international practice, but they always had to fulfil special and even exceptional conditions to merit such a qualification. For example, the Convention on the Privileges and Immunities of the Specialized Agencies approved by General Assembly resolution 179 (II) contained a number of standard clauses which could properly be described as model. The terms of the resolution and of the Convention had been adopted with no Member States voting against them, and the clauses concerned met all the requirements which the word "model" or "standard" normally implied. Another example of a model could be found in Convention 96 concerning Fee-Charging Employment Agencies, adopted by the General Conference of the International Labour Organisation on 1 July 1949, which offered the members of the Organisation a choice between two distinct parts of its text. There again, the document had been approved almost unanimously. The rules recommended by the International Law Commission, on the other hand, had evoked very serious objections. The Iranian representative, for instance, had referred (556th meeting, para. 1) to the question of submitting to arbitration disputes which were not arbitrable, while the French representative had drawn attention (558th meeting, para. 10) to the possible need to revise certain provisions of the draft. In particular, the Committee would be well advised to heed the advice of some of the Latin American representatives, whose experience of arbitration was second to none. In view of their objections, it would clearly be impossible to regard the draft rules as a guide or model which States should follow in determining future action.

10. For those reasons, he thought that, despite certain good provisions in the draft, its philosophy made it unacceptable and it could not be recommended in the manner suggested by the Commission. On the other hand, since there was clearly insufficient time to discuss the draft, article by article, an immediate revision of the text was out of the question. The best course, therefore, would be to take note of the draft and to bring it to the attention of Governments, which would then be able to study it further in the light of the substantive elements involved and the views expressed in the Sixth Committee.

11. Mr. ZLITNI (Libya) said that his country was a firm believer in arbitration as a mode of settlement of international disputes. His delegation therefore attached great importance to the development of arbitration.

12. In the opinion of his delegation, the undertaking to arbitrate should be based on the autonomy of the will of the parties to the dispute. The element of obligation introduced into the model rules was foreign to the traditional notion of arbitral procedure. The same was true of those provisions of the model rules which departed from the fundamental principle of the freedom of the parties to choose their own arbitrators.

13. Many delegations had appeared reluctant to approve the model rules because those rules did not

^{1/} Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 24, p. 29.

differ substantially from the 1953 draft (A/2456, para. 57). The International Law Commission itself did not recommend that its draft articles on arbitral procedure should be embodied in a convention. In the circumstances, and in the absence of a more thorough examination of the model rules, the Libyan delegation felt that the General Assembly should be recommended to take note of the Commission's report and commend it to the continuing attention of States and jurists.

14. Mr. PERERA (Ceylon) said that even those delegations which saw much merit in the International Law Commission's draft were not prepared to go any further than to take note of it, while the opponents of that draft had even suggested that it was inconsistent with the sovereignty of States.

15. The main theory of the draft was to be found in the preamble, namely that the undertaking to arbitrate constituted "a legal obligation which must be carried out in good faith".

16. Experience had shown that nations were prepared to accept judicial decisions in questions affecting their honour and vital interests, provided that an appropriate judicial procedure existed, and that the question at issue could be put to the tribunal in a legal form. Yet, the wording of the preamble of the Commission's draft suggested making arbitration obligatory as a principle, but voluntary with respect to the details. The Commission appeared to advocate treaties which as a principle would bind nations to accept arbitration in all cases, but would in every case leave open the question of the constitution of the arbitral body. His delegation, however, doubted the wisdom of nations binding themselves to accept arbitration in all cases, even as a principle.

17. On the whole, the Commission's draft was acceptable as a basis of discussion for a set of rules. It was, however, unfortunate that the term "model" had been used, because the Commission's draft, like all human achievements, was necessarily imperfect. It had, in particular, two undesirable features. The first was that it included provisions both on the substance of the law of arbitration and on arbitral procedure as such. The second undesirable feature of the draft was the role which the International Court of Justice and its President would be called upon to play.

18. The International Law Commission had apparently lost sight of the fact that States had shown a marked reluctance to submit their disputes to the International Court of Justice, in contrast with their greater willingness in the past to submit their disputes to the Permanent Court of International Justice.

19. The main defect of the Commission's draft, however, was its rigidity. In article 10, it reproduced the provisions of Article 38 of the Statute of the International Court of Justice with regard to the law to be applied. However appropriate those provisions might be for the Court, it was desirable, in the case of an arbitral tribunal, to give it wider powers in the search for precedents.

20. In conclusion, he urged the Committee to adopt a resolution which would make it possible for the draft to be revised and/or amended, so that it could be ultimately recommended to States. The object should be a text which would be used; there was no point in recommending a draft which would be shelved.

21. His delegation reserved the right to speak on any draft resolutions which might be submitted.

22. Mr. JOHNSON (Liberia) said that in the opinion of his delegation the model rules constituted a valuable guide to States in concluding agreements for the settlement of disputes and ought not to be rejected. It was clear from the preamble that the procedures suggested to States parties to a dispute would not be compulsory unless the States concerned had agreed, either in the compromis or in some other undertaking, to have recourse thereto. The question of infringement of sovereignty, therefore, did not arise. Moreover, the model rules were fully consistent with the spirit of Article 33 of the Charter, concerning the pacific settlement of disputes, and Articles 52 and 53, concerning regional arrangements for the maintenance of international peace and security. In the present state of world tension, it would be unfortunate if the Assembly failed at least to take note of the draft prepared by the International Law Commission.

23. Mr. BURR (Chile) said that his Government had always been a strong supporter of classical arbitration, based on the freely expressed will of the parties. The adoption of the model rules would replace the sovereign will of States by decisions taken by the President of the International Court of Justice, thus removing the distinction between arbitral procedure and judicial settlement. His delegation thought, therefore, that the General Assembly should limit itself to taking note of the model rules in their present form, and that it should request the International Law Commission to modify its draft, in the light of the views expressed by the majority of Member States in the Sixth Committee, for submission to the General Assembly at an early session.

The meeting rose at 12.30 p.m.