

GENERAL ASSEMBLY

THIRTEENTH SESSION

Official Records

Tuesday, 7 October 1958,
at 3.10 p.m.

NEW YORK

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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. ADAMIYAT (Iran) recalled that the draft convention on arbitral procedure prepared by the International Law Commission in 1953 (A/2456, para. 57) had been submitted to the General Assembly with the suggestion that it should be recommended to Member States for adoption as an international instrument. The debate in the Sixth Committee had clearly shown, however, that the draft convention could in no way be regarded as final. It had been stressed that some of its provisions greatly exceeded the recognized scope of arbitral procedure and introduced an element of compulsion. Had it been adopted, States could have been obliged to submit to arbitration disputes which were not arbitrable under their own law.

2. In its new text (A/3859, para. 22), the Commission had made little attempt to revise the previous draft in order to meet those fundamental objections. It had merely revised its approach, by recommending the draft for adoption not as a convention but as a set of model draft articles. Thus—apart from the question whether an imperfect document could be accepted as a set of model rules—all the original objections remained valid.

3. In those circumstances, the General Assembly might confine itself to taking note of the draft articles. States would then have at their disposal a set of rules, some or all of which they could include, if they so desired, in bilateral or multilateral agreements. Experience alone would then show whether the draft articles would in time acquire persuasive force or merely remain an interesting academic phenomenon.

4. Mr. MONACO (Italy) said that it was fashionable to speak of a crisis in international justice, and to stress the fact that States were with increasing frequency compelled to seek a political solution of their differences rather than have recourse to juridical procedures. Nevertheless, arbitral procedure retained much of its appeal. Even if in the present

era, which was in many respects an era of transition, international arbitration was no longer as successful an institution as it had been at the end of the nineteenth century and at the beginning of the twentieth, the very fact that it remained the mode of settling disputes most frequently envisaged in bilateral and multilateral agreements spoke for itself.

5. In the opinion of those who were decidedly in favour of the rapid development of international justice, the arbitral system should be speedily superseded by organs of compulsory and permanent jurisdiction such as the International Court of Justice. The practice of States showed, however, that it was imperative to retain, alongside such organs, some simpler and more flexible procedure, to which States could have recourse whenever it became necessary to adapt the character of the tribunal to the particular circumstances of the dispute. The progress of compulsory and permanent jurisdiction could not therefore be artificially hastened by de-emphasizing arbitration. Even in domestic law, the establishment of permanent tribunals had never halted the development of arbitral justice; in fact, arbitration clauses in contracts and other undertakings were becoming more frequent than ever, for they often afforded a means of compensating for the imperfections of ordinary justice. In view of those essential qualities of arbitration, it was clearly necessary to deduce from the complex variety of rules governing the subject a set of principles of general international law, as the International Law Commission had endeavoured to do in the model rules.

6. It was an established fact that in fairly frequent instances, despite the initial wish of the States concerned to arrive at an arbitral solution, the procedure had failed because of the difficulties encountered in agreeing on the form and contents of the compromis, or because the search for relevant rules of procedure had required too much time and patience of the arbitrators or even of the States themselves. Furthermore, the Commission's report showed that there were many means to which States could resort if they wished to nullify their initial consent to submit a dispute to arbitration. In several cases, States had not hesitated to paralyse the procedure when in sight of a solution. If the text were considered with that in mind, it would be realized that too lofty juridical concepts should not be called upon when considering the practical problems which the Commission was proposing to solve in its draft. References had been made to violations of sovereignty, encroachment on the exclusive jurisdiction of States and the attribution of new powers to the International Court of Justice.

7. So far as the first of those was concerned, the Italian delegation failed to see how the text could prejudice State sovereignty when it was expressly stated in paragraph 4 of the preamble that the procedures suggested to States parties to a dispute by the model rules would not be compulsory unless the States

concerned had agreed, either in the compromis or in some other undertaking, to have recourse thereto. If the rules could only be accepted by States in explicit form, the very act of agreeing to adopt all or some of them would be an exercise of unfettered sovereignty. Moreover, it seemed impossible to refer "freely" to any given rules and yet to remain equally "free" not to apply them. Nor was the suggestion implicit in paragraph 4 of the preamble in any way an innovation, for it was already often stipulated that matters not expressly covered by a special arrangement would be governed by the procedure envisaged in The Hague Convention for the Pacific Settlement of International Disputes.

8. Turning to the argument that article 1, by authorizing the International Court of Justice to decide whether a dispute was arbitrable, touched upon a matter within the exclusive jurisdiction of States, he pointed out that the Court's power applied only to the undertaking to arbitrate and could never exceed the scope of the obligation to go to arbitration; and as the undertaking to arbitrate would necessarily result from a document, by reason of the preamble, the Court would only have to determine the scope of an international agreement. It would in fact merely have to apply an international convention, which was one of the functions expressly envisaged in Article 38 of its Statute.

9. With reference to the objection that article 1 would give the Court new powers, exceeding the scope of its normal functions, he stressed the essential need of an organ competent to decide the preliminary question of arbitrability. There were frequent instances of preliminary questions to be determined, even before the constitution of the body competent to rule on the substance of the dispute, both in domestic law and in private international law. Furthermore, that objection had been adequately refuted by Professor Georges Scelle in his report on the draft convention on arbitral procedure adopted by the Commission at its fifth session. He had stated (A/CN.4/109, para. 29) that acceptance of the article on arbitrability might be regarded as equivalent to the optional clause relating to the compulsory jurisdiction of the Court so far as concerned the special purpose in view, and that the Court therefore could not disavow its jurisdiction, since it was a matter of treaty interpretation. But the reference to the "special purpose" also stressed the fundamental difference between acceptance of compulsory jurisdiction in conformity with Article 36 of the Court's Statute and article 1 of the model draft articles. Article 36 in fact meant that States accepting the optional clause were recognizing the Court's jurisdiction in any juridical dispute that might arise between them, while the Commission's draft confined itself to a single matter regarding which the States concerned had already entered into an undertaking that they were bound to carry out in good faith. Their good faith, of course, would be open to doubt if they refused to submit to the jurisdiction of a body called upon to rule on the very limits of the obligation previously assumed.

10. The Court's competence under article 1 of the draft would also differ from its powers under Article 36 in another respect: in the case of article 1 of the draft, the possibility of reservations was inconceivable. States sometimes made reservations on exercising the option as provided in Article 36, but that was precisely because, in consequence of their acceptance of the

compulsory jurisdiction clause, the Court could rule on almost any matter and not merely on a restricted issue such as that envisaged in the Commission's draft.

11. In considering the Commission's proposals, the Sixth Committee should not dwell unduly on details, but should rather concentrate on the proposed system as a whole. The draft articles themselves were not of direct concern, for the very simple reason that the rules would not be compulsory. That fact was aptly stressed in paragraph 17 (iv) of the Commission's report which showed that if States could not accept any given rule they could decide not to apply it. Moreover, if certain States thought that the draft could be improved or amplified, they could always insert in any compromis to which they were party, in addition to any of the Commission's rules, such further provisions as they might consider helpful. Any such action would indeed contribute to the attainment of one of the principal purposes of arbitral justice, which was the establishment of the tribunal and the procedure best adapted to the specific case. That fact, too, had been clearly stated by the Special Rapporteur in his reports (A/CN.4/109 and A/CN.4/113).

12. Lastly, there was the question of the action which the General Assembly should take in the matter. The Italian delegation thought that the method proposed by the Commission was appropriate, precisely because the text was designed to be optional. Consequently, the Committee should adopt a resolution endorsing the Commission's text and recommending it to States for the purposes for which it was designed. In that connexion, the discussion on the subject would be greatly facilitated if the draft resolution were circulated at the earliest opportunity. That suggestion admittedly presupposed that the majority of the Committee was in agreement with the Italian delegation, for the arguments of those who opposed the Commission's recommendations seemed unconvincing. For example, it had been said that, once a resolution had been adopted by the Assembly, even the States which had voted against it would be placed under a moral obligation. The only reply seemed to be that those who were not prepared to accept such a moral obligation perhaps had no true interest in the development of arbitral justice and little confidence in the pacific settlement of international disputes. As to the suggestion that the General Assembly should merely take note of the draft, such a solution might allay the fears of certain delegations but it was too modest a one. The Italian delegation therefore hoped that the draft, optional and flexible yet a substantial contribution to the development of international law, would be presented to the General Assembly for final adoption.

13. Mr. DZIRASA (Ghana) said that the dangerous pass reached by international relations made it imperative for mankind to accept the rule of law as the foundation of relations between States. Since nations were becoming increasingly interdependent, above all economically, it was all the more necessary for States to respect each others' independence, sovereignty and territorial integrity.

14. The issue before the world was not the laying down of rules for the conduct of business and the promotion of peace among nations. There were already many accepted conventions and rules, but they were often broken, sometimes with impunity. The difficulty was to secure compliance with existing rules.

15. The International Law Commission had undertaken to draft rules for arbitral procedure; that was a difficult task because the political issues involved affected the domestic and material interests of States. The difficulty was even greater for the newly independent States which still had to uphold their territorial integrity against colonial influence. The codification of existing rules, many of which still bore the imprint of colonial ideas, would not prove acceptable to those newly independent States and would therefore not result in an effective international co-operation in political matters.

16. The General Assembly in resolution 989 (X) of 14 December 1955 had stated its belief that a set of rules on arbitral procedure would inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements, and invited the International Law Commission to report further to the General Assembly at its thirteenth session. As stated in its report (A/3859, para. 14), however, the International Law Commission had not in fact reviewed the draft but had left its structure virtually unchanged under the new name of "model rules" the application of which was left entirely to the discretion of States.

17. Although the model rules were intended merely as a guide, it was indicated in the report (*ibid.*, para. 18) that, once a State had given its consent to apply them, the rules would become binding. That view was expressed in paragraph 1 of the preamble which stated that the undertaking to have recourse to arbitration constituted a legal obligation.

18. The principle of non-frustration embodied in the model rules, and clearly asserted in the Commission's report (*ibid.*, para. 19), would make it possible, under those rules, to remove political matters from their proper place to the realm of law; an effort was being made to evolve a common method for dealing with the political matters usually referred to arbitration.

19. Since the General Assembly in resolution 989 (X) had stated its belief that a set of rules would be a source of inspiration to States, the Sixth Committee should simply recommend to the General Assembly to take note of the rules, instead of adopting them by a resolution. That course would be in keeping with the purpose for which the rules were drafted, and would make it easier for States to refer to them without fear of subsequent complications.

20. U AUNG THA GYAW (Burma) said that the two reports by the Special Rapporteur of the International Law Commission on the topic of arbitration (A/CN.4/109 and A/CN.4/113) set out fully the reasons for preparing the present draft merely as a model set of rules which States could, at their discretion, adopt wholly or partly, or indeed not at all, for the settlement of their disputes by means of arbitration.

21. The Commission's earlier draft had marked a departure from the customary combination of arbitration with diplomacy, and fears had been expressed that the terms of that draft would conflict with the principle of State sovereignty. The Commission, in preparing the new draft, had reached the conclusion that to give in to those fears would amount to a regrettable retreat from a position of progress reached by the community of nations half a century ago (see S/CN.4/109, para. 38).

22. The adoption of the present model rules could well involve an extension of the compulsory jurisdiction of the International Court of Justice. Such an extension, however, was in keeping with the spirit of the Charter. Under Article 93 of the Charter, all Members of the United Nations were *ipso facto* parties to the Statute of the International Court of Justice, and although certain countries, like Burma for example, had not made their declarations as provided in Article 36, paragraph 2, of the Statute of the Court, it had always been the General Assembly's ardent wish that the greatest possible number of States should accept the jurisdiction of the International Court with as few reservations as possible. In conventions between States, arbitration clauses might with advantage be inserted providing for submission to the Court of disputes concerning the interpretation or application of their provisions.

23. It had been said that the principles of immutability of the arbitral tribunal and of non-frustration and the jurisdictional aspects embodied in the model rules conflicted with the traditional view of the sovereignty of States. That position was, however, inescapable if the purpose of recourse to arbitration was to secure that impartial justice for which mere satisfaction or settlement resulting from recourse to customary diplomacy could not be a fair substitute.

24. For those reasons, the Burmese delegation supported the proposal for the adoption of the model rules put forward by the International Law Commission.

25. Mr. MADEIRA RODRIGUES (Portugal) said that his country was a staunch advocate of arbitration as a means of settling international disputes. So much so, that Portugal's position in that respect was actually proclaimed in a provision of its Constitution. Accordingly, Portugal had entered into numerous arbitration agreements with other countries.

26. The Portuguese delegation approved, in principle, the draft prepared by the International Law Commission. It was a diluted version of the Commission's earlier draft and it was difficult to see how the text could be watered down any more.

27. There was nothing in the model rules drawn up by the Commission which could be considered as detracting in any way from the sovereignty of States. A State signing an undertaking to arbitrate did so in the full exercise of its sovereign powers and in complete freedom.

28. The Portuguese delegation wished to pay a tribute to the Commission for the work it had accomplished in the field of arbitral procedure. That work and all its other work, particularly the outstanding draft on the law of the sea, would contribute to the development of international law. His delegation hoped that, with the help of the Commission, a day would come when all States would accept the supremacy of law in the settlement of international disputes.

29. Mr. MACINTYRE (Federation of Malaya) said that the adoption of the Commission's draft by the General Assembly, even as a set of model rules, might create a moral obligation for the countries supporting the resolution to accept those rules as a basis for future arbitration agreements.

30. One of the essential features of international arbitration was the freedom of the parties to choose

the arbitrators. That principle had undergone some modification under the provisions of article 3 of the draft rules which stated that, in the event of the parties being unable to agree on the constitution of the arbitration tribunal within three months from the date of the request made for the submission of the dispute to arbitration, the President of the International Court of Justice would, on the application of either party, appoint the arbitrators after consultation with the parties to the dispute, but not necessarily with their consent. If international law was to grow in proportion to the aims of the United Nations, it was essential that States should not be permitted to frustrate the processes of arbitration.

31. The main objection to the adoption of the model rules appeared to be the fear that they might lead to limitations on the sovereign rights of States. His delegation represented one of the small nations of the world, one which had neither the will nor the means to settle international disputes otherwise than by such peaceful methods as arbitration. From the point of view of his delegation, therefore, it was essential that national pride and national prejudices based on the old notion of sovereignty should not stand in the way of the just and peaceful settlement of disputes. If the world community was to be brought under the rule of law, the nineteenth century ideas of nationalism and sovereignty had to be modified to meet present exigencies; each nation had to be prepared to give up a portion of its so-called sovereign rights in the interests of mankind as a whole.

32. His delegation therefore supported the draft rules on arbitral procedure for recommendation to the General Assembly.

33. Mr. RUSIN (Ukrainian Soviet Socialist Republic) said that arbitration could play a useful part in the peaceful settlement of international disputes, provided that it was used in accordance with the principles of international law and the Purposes and Principles of the Charter. The Commission's 1953 draft had been criticized in the Sixth Committee as inconsistent with international law because it introduced an element of compulsion. Despite the General Assembly's recommendation (resolution 989 (X)), however, the present set of model rules did not represent an improvement on that draft, but continued to provide for automatic procedures for intervention by the International Court of Justice which, in essence, did away with the principle of the autonomy of the will of the parties. That principle, as the Byelorussian representative had pointed out (554th meeting, para. 27) derived from the sovereignty and equality of States and the fact that there was no central authority to give them orders. Even the Commission admitted (A/3859, para. 18) that nothing could compel two States to engage in arbitration except their own agreement to do so.

34. Under the model rules, the International Court of Justice was granted such broad powers that arbitration, to all intents and purposes, became a secondary activity of the Court itself. The rules failed to make the necessary distinction between the two entirely different procedures of arbitration and judicial settlement. His delegation recognized the principle of judicial settlement; under the existing order, if States wished to refer disputes to the Court, they were free

to do so. The procedure provided for in the model rules, however, would do away with arbitration as provided in Article 33 of the Charter and transfer its functions to a special department of the Court. Such a procedure would clearly be contrary both to the Charter and the Statute of the Court. Its sponsors were obviously moved by a dislike of the traditional forms of arbitral procedure and the procedure of the Court. Under the latter, States were free to accept the jurisdiction of the Court with reservations, but the adoption of the model rules might lead to a situation where a State which did not recognize the unconditional jurisdiction of the Court would be subsequently forced to recognize it. Such a precedent would be particularly dangerous in disputes between small and large States. His delegation, therefore, like those of the Byelorussian SSR and Hungary, was prepared to defend the classical principles of arbitration and oppose the model rules of arbitral procedure adopted by the International Law Commission.

35. Mr. CHAMANDI (Yemen) said that his delegation considered that the draft rules prepared by the International Law Commission were fully adequate and the best that could be drawn up in view of the world situation. The rules did, indeed, contain some loopholes, but the vital principle of State sovereignty had been amply respected, and he was confident that the loopholes would be filled in the course of time by the Commission itself. His delegation was prepared to vote for any favourable action which the Committee might recommend with regard to the model rules.

36. Mr. PAL (Chairman of the International Law Commission) wished, before his departure, to thank the members of the Sixth Committee for the kind words which they had addressed to him in connexion with his presentation of the Commission's report.

37. He would like to correct the impression that seemed to exist in certain quarters that the model rules sought to impose some form of compulsory arbitration. Nowhere did the rules state that in certain circumstances States must undertake to have recourse to arbitration; on the contrary, it was clearly stated that those rules would not be compulsory unless the States concerned had agreed, either in the compromis or in some other undertaking to have recourse thereto. Nevertheless, every rational human relationship involved some obligation towards others. The very foundations of communal life would be impossible unless there was a general expectation that promises given would be duly fulfilled. Such an expectation could not exist if an undertaking to fulfil a promise were to remain optional up to the last minute. If nations aspired to an international communal life, it was necessary to have a set of rules to prevent such an undertaking from being frustrated. The model rules did no more than assume that States would agree voluntarily to safeguard the expectation of fulfilment.

38. The CHAIRMAN, speaking on behalf of all the members, thanked the Chairman of the International Law Commission for having attended the meetings of the Sixth Committee and for having given the Committee the benefit of his views.

The meeting rose at 4.40 p.m.