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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. THORVALDSON (Canada) said that, contrary to the belief of certain delegations, the model rules on arbitral procedure (A/3859, para.22) would not give rise to legal obligations or even to any moral obligation, since they were only intended as a guide and their provisions were optional.
2. He thought the criticism that the draft would transform arbitration into a supra-national jurisdictional procedure was ill-founded. States could not be said to be placed in a straitjacket when they were free to draw upon the rules to the extent they saw fit. In particular, States could not be forced, without their consent, to have recourse to the International Court of Justice.
3. With regard to the question whether the substance itself of the draft was acceptable, he drew attention to the two key paragraphs in the preamble to which Mr. Pal had already referred (554th meeting). Paragraph 1, which defined the principle of non-frustration, presupposed that two States had entered into an arbitration agreement, which they were free not to do. Such an agreement involved an exercise of sovereignty, not a surrender of it. In the circumstances, the International Law Commission was fully justified without derogating from the sovereignty of States, in showing how the parties could close the door on all possible avenues of frustration. To go back on those provisions would completely destroy the draft.
4. The second fundamental principle of the model rules was that of the autonomy of the parties (see paragraph 4 of the preamble). The procedures suggested could not operate automatically, because the parties were free to adopt them or not, or to introduce whatever alterations seemed good to them.
5. For those reasons, the Canadian delegation believed that the substance of the draft rules was broadly acceptable and saw no benefit in an article by article discussion.
6. If the General Assembly were to adopt the Commission's report by resolution, the model rules would

serve their purpose as a guide for States. States could always, if they so desired, draw up an arbitration agreement in such a way that its object could be impeded or frustrated, but they would at least do so with open eyes. A guide could do no more, and it would be of no value if it did less.

7. In conclusion, the Canadian delegation would support the Commission's recommendation that the General Assembly should adopt its report by a resolution.

8. Mr. PECHOTA (Czechoslovakia) said that the debate had shown that the new draft was based on the same conception as the 1953 draft (A/2456, para.57), which had been criticized so much, and that it was just as remote from the needs of the present international relations. The new draft was in sharp contradiction with the principles of international law in force, under which arbitration rested on the free consent of the parties; it introduced into arbitration an element of compulsion which was entirely foreign to that means of settlement. The draft replaced the freedom of the will of the parties by the will of the arbitral tribunal and the International Court of Justice, and attempted to turn arbitral procedure into a judicial procedure. Such a development could only impair international co-operation and render the settlement of many international disputes more difficult. If the draft were adopted, States would avoid the use of arbitral procedure which, in its present form, offered so many advantages.

9. Some examples could be given of provisions which departed from recognized principles of international law and made the draft unacceptable.

10. Article 1 envisaged the possibility of compelling States to submit the question of the arbitrability of the dispute to the International Court of Justice. The draft attempted to establish the arbitral tribunal as a supra-national authority depending as little as possible on the will of the parties and endowed with independent powers. That tendency, which was incompatible with the very essence of arbitral procedure, was evident, for example, in articles 4, 20, and 25. The draft provided in several places for the compulsory jurisdiction of the International Court of Justice and enabled that Court, contrary to its Statute, to take decisions on arbitral procedure at the request of only one of the parties to the dispute. A number of articles gave the Court or its President the power to interfere in arbitral procedure in its various stages. Thus to subordinate the arbitral tribunal to the authority of the International Court of Justice would result in establishing a new form of quasi-judicial procedure with all its drawbacks, and would eliminate arbitral procedure as an independent institution. Every State which, in one way or another, had to accept the proposed rules would thus also in effect be subject to the compulsory jurisdiction of the Court, whether or not such a State had made a declaration under Article 36, paragraph 2, of the Statute of the Court. The draft also disregarded the provisions

of Article 35, paragraph 2, of that Statute and the resolution of the Security Council of 15 October 1946<sup>1/</sup> which set forth the conditions for access to the Court of States which were not Members of the United Nations. In fact, the draft imposed upon the International Court of Justice the functions of a court of appeal, functions which were incompatible with its mission as defined in the Charter and in its Statute.

11. Since the draft constituted a homogeneous whole, as stressed by the International Law Commission itself (A/3859, para.14), the unacceptable nature of some of its provisions rendered the practical value of the model rules questionable.

12. The International Law Commission hoped that many delegations which had criticized the original draft convention would be prepared to vote for the new draft, even though it was in substance identical, because it took the form of model rules.

13. The General Assembly, however, could not accept a draft which was inconsistent with the established rules of international law. The recommendations of the Assembly had to be in harmony with the interests of international co-operation based on the principles of sovereign equality of States and non-interference in their domestic affairs. Any recommendation of the model rules would imply, on the part of the Assembly, the adoption of all its provisions. It was obvious, however, that that model merely reflected the views of a certain school of thought, and contained provisions which were unacceptable to the majority of Member States. Nevertheless, some delegations were proposing that the draft should be accepted as it stood, even without a detailed examination, as a model to be recommended by the General Assembly. The General Assembly, and particularly the Sixth Committee, could only recommend texts which were consistent with international law and favoured the development of peaceful relations between States.

14. In conclusion, the Czechoslovak delegation could not support the proposal of the International Law Commission to recommend the draft articles on arbitral procedure to Member States.

15. Mr. PHLEGER (United States of America) said that the International Law Commission's draft was an important contribution to the efforts of the United Nations to build a peaceful world order based on principles of justice.

16. In the discussion of the 1953 draft, a large number of delegations, including that of the United States, had expressed serious doubts regarding the advisability of drafting a convention which might be ratified by only a small number of States, or would have to be considerably weakened to make it acceptable.

17. The United States delegation was therefore pleased to note that the draft articles were not submitted as a draft convention but simply as a guide. It favoured action by the General Assembly to commend those articles to Governments as a guide for their consideration in concluding agreements for the settlement of their disputes.

18. Some delegations had asserted that the model rules made arbitration compulsory and infringed the

independence and sovereignty of States. Those contentions were not well founded. The Chairman of the International Law Commission had emphasized the voluntary character of the model rules. As stated in paragraph 4 of the preamble, the procedure suggested would not be binding unless the States parties to a dispute agreed to adopt them.

19. Governments were thus entirely free to adopt as much or as little of the draft articles as they chose in making an arbitration agreement. In particular, if they decided to enter into a general arbitration agreement, they were free to exclude from its scope any particular class of disputes.

20. It was therefore clear that Governments which voted in favour of the draft articles would not be committing themselves, and would remain entirely free to incorporate any or all or none of the draft provisions in an arbitration agreement. The resolution to be adopted by the General Assembly should make that fact clear.

21. Almost sixty years had elapsed since the first Conference at The Hague, that had drafted the Convention for the Pacific Settlement of International Disputes to which more than forty States had acceded. It was a matter for regret that States seldom submitted their international disputes to arbitration or judicial settlement. Little progress would be made on the road to world order under law until there was a greater willingness to settle disputes between nations by impartial decision.

22. Indeed, a willingness to settle international disputes was not enough. There had to be a determination to solve them under a rule of law. If it was too ambitious at the present time to seek general agreement on the universal submission of international disputes to arbitration or adjudication, it was at least possible to encourage States to submit particular disputes to arbitration. The United States delegation hoped that Governments would increasingly follow that course. In submitting the model rules on arbitral procedure, the International Law Commission had made an important contribution to the rule of law and the cause of peace.

23. Mr. NINCIC (Yugoslavia) recalled that at the General Assembly's tenth session the Yugoslav delegation, together with other delegations, had expressed certain misgivings with regard to the 1953 draft; it had seemed to it that the International Law Commission had departed from certain precepts of arbitral procedure and had gone farther than most Governments were prepared to go, and farther than the then existing international realities allowed.

24. Although the International Law Commission had made an effort to meet some of the objections raised at the tenth session of the General Assembly, it had not deemed it advisable to alter the basic structure of its draft, and, in those conditions, it was not surprising that the new text had met with much the same praise and much the same criticism as its predecessor.

25. While considering that the present draft was, in certain respects, an improvement on the 1953 text, and that some of its provisions were more flexible, the Yugoslav delegation found that the draft still represented a departure from diplomatic or classical arbitration, since it obliterated the dividing line between arbitration and judicial procedure, and tended

<sup>1/</sup> See Official Records of the General Assembly, Second Session, Supplement No. 2, paras. 1225-1236.

to deprive arbitration of its individuality within the system of peaceful settlement provided for in Article 33 of the Charter. The Yugoslav delegation would have certain observations to make later with regard to the responsibilities the International Court of Justice would be called upon to assume under the proposed procedure, and which did not seem to be entirely in keeping either with its Statute or with the principles of arbitration.

26. He would not object if the Sixth Committee sought to improve the draft by detailed discussion, although it was not certain whether that course would prove to be an immediate practical possibility. As the representative of France had observed (558th meeting, para.15), it would be difficult for the Sixth Committee to endorse the text without studying it in sufficient detail. It was true, of course, that no recommendation by the General Assembly would place States under the obligation of applying the proposed rules, but the Assembly was under the moral obligation not to recommend a text until it had assured itself that it was satisfactory in every respect. For that reason, the Yugoslav delegation would prefer to accept the suggestion of the representative of Denmark (555th meeting, para.23) that the Assembly should, in the absence of a more thorough examination, merely take note of the International Law Commission's report.

27. Mr. TAMMES (Netherlands) said that the draft was satisfactory with respect to substance and would limit himself to comments on the form. The exact meaning of the word "model" in its present context might be queried. In 1955, the General Assembly had avoided using that word in resolution 989 (X). It might be asked if that meant it was impossible to define a form of arbitral procedure which would be ideal for all States and could "contribute further to the value of the draft"?

28. The present system of arbitral procedure took into account two essential principles. The first was the principle of effectiveness. Any party to an undertaking to arbitrate was entitled to expect that that procedure would be kept going until the final award; that was not only essential in cases of particular arbitral agreements but also in the case of international, bilateral or multilateral agreements, conventions regulating economic and social co-operation, and the like. When vital world interests were at stake, it was indispensable to ensure that arbitration would possess a certain effectiveness. From that point of view, it could be said that the draft submitted by the International Law Commission truly constituted a model, even when applied to bilateral agreements, where the parties were most likely to demonstrate bad faith. In the latter case, the principle of effectiveness took the form of "non-frustration": there it was primarily a question of providing safeguards against loopholes. In that respect, although the draft was capable of improvement, it could be considered to meet all practical purposes.

29. He thought that the rules proposed by the International Law Commission would be particularly useful in the new field opened up to arbitration, namely, that of settling disputes to which international organizations were parties, where, in the interests of international co-operation and the implementation of economic and social programmes, the principle of effectiveness took precedence over that of sovereignty.

30. The draft, however, also satisfied the principle of the impartiality of arbitration, which was expressed by

the immutability of the tribunal once it had been set up. The International Law Commission had departed from the traditional conception of "diplomatic" arbitration in favour of the more progressive one of judicial arbitration. In fact, it was possible for that judicial character to be more or less pronounced according to the nature of the dispute, and in certain cases arbitration could have a mixed character. He thought that the draft could be considered a model in that respect.

31. In conclusion, the Netherlands delegation was of the opinion that the model rules were a legal work of great value, and hoped that they would be recommended to the attention of States, which would not incur thereby any moral obligation other than the obligation to examine the solutions in the draft.

32. Mr. PATHAK (India) recalled that the undertaking to arbitrate should be based on the autonomy of the will of the parties, and that the introduction of an element of obligation was foreign to the traditional conception of arbitral procedure. Moreover, the powers of the International Court of Justice or of its President could not be enlarged without amendment of the Charter. Although it was true that a set of model rules would have no binding force on States, it would nevertheless possess a moral value if it were adopted by the General Assembly; it was necessary therefore for the Sixth Committee to make a careful examination of the questions of principle raised by such rules.

33. The Indian delegation expressed its gratitude for the work accomplished by the International Law Commission, and acknowledged that a State which had entered into an undertaking to arbitrate should be prepared to carry out its agreement and assume the consequences, yet it thought that the parties could not be compelled to resort to arbitration. That would be a departure from the rules of traditional international law, and a large number of States would refuse to agree to it.

34. He had the greatest admiration for the ideals which had inspired the International Law Commission, but the draft submitted by the latter seemed to call for certain observations. For example, it departed from a fundamental principle of traditional international arbitration, namely, the freedom of the parties to choose their own arbitrators. The International Law Commission had tried to combine the rules of traditional arbitration with those of the judicial procedure for settling disputes, but it was questionable whether the international community was prepared to accept that innovation. If not, the practical utility of the draft rules would be substantially reduced. There had to be a correspondence between international law and international life.

35. If one examined the recent evolution in the judicial settlement of international disputes, it was apparent that the number of States bound by the optional clause in Article 36 of the Statute of the International Court of Justice, which recognized the compulsory jurisdiction of the Court, had been steadily decreasing. That was a fact of international life which could not be ignored. It must be asked whether, in spite of that fact, the International Law Commission had not gone beyond the rules of present international law and created a compulsory jurisdiction under the pretext of closing all possible loopholes.

36. In addition, he observed that the appointment of an arbitrator by the President of the International Court



of Justice might place the President in an embarrassing position which could affect the prestige and dignity of the Court. Moreover, the validity of such a power granted to the President seemed extremely questionable, despite the fact that the President had exercised a similar power on several occasions in the past. Under the provisions of the Court's Statute, its members could exercise only judicial or advisory functions, which would not be the case here; in particular, they could not exercise any political functions. But when disputes submitted to arbitration were of a political nature, as was frequently the case, the appointment of an arbitrator necessarily had a political character and therefore could not come within the competence of the President of the Court.

37. Lastly, article 1 of the model rules conferred an absolute power on the Court which might be inconsistent with the limitations attached by certain States to declarations made in accordance with Article 36 of the Statute. The obligatory character of article 1 was also unacceptable.

38. As a result, the Indian delegation was unable to approve the model rules in their present form. It reserved the right to deal with them in detail later, if necessary.

39. Mr. STABELL (Norway) pointed out that the draft before the Sixth Committee differed greatly from the original draft. The latter was a draft convention to regulate the procedural rules to be applied to any substantive arbitral agreement: most of the articles were optional in the sense that they would only apply in the absence of provisions to the contrary in the arbitral agreement, but some of them were mandatory.

40. On the other hand, the present draft was a set of model rules which States, when drawing up substantive agreements, would use as a guide to ensure that those agreements included procedural provisions to prevent the frustration of an undertaking to arbitrate.

41. The Sixth Committee should, above all, determine whether the final text served the purposes for which it was intended. Those purposes were listed in paragraph 17 of the International Law Commission's report.

42. The first case in which the articles would become binding would occur if they were embodied in a convention between two or more States for the settlement of future disputes between them. The representative of Hungary had objected (554th meeting) that, like the present draft, the 1953 draft would also not have obtained any binding force unless it was the subject of a convention, and that from that moment on both drafts gave arbitration a compulsory character as opposed to its traditional diplomatic character. In the first draft, however, that risk arose from the fact that it was a purely procedural convention which, upon its conclusion, would be applicable to all substantive arbitral agreements, and some of its articles were intended to be mandatory. The final draft, on the other hand, was a mere set of model rules which, if the parties saw fit, could be included in any substantive arbitral agreement; the final draft was not, therefore, open to the same criticism, unless it was assumed that such agreements must necessarily be drafted in such a way as to leave the parties loopholes through which they could avoid the fulfilment of their arbitral undertaking at the implementation stage.

43. Therefore, so far as the first hypothesis was concerned, the Norwegian delegation considered that, as a whole, the rules proposed were such as to secure the effective implementation of the arbitral conventions in which they would be incorporated. On the other hand, it had some misgivings about article 2, which contained rules of a very different kind to those laid down in the other articles and greatly exceeded the scope of model rules. Thus it would be possible for the provisions of paragraph 2 (iv), that was drafted in imperative terms, to fit perfectly into a general convention on arbitral procedure, but they appeared to be incompatible with the aim set out in paragraph 21 of the report. Moreover, article 2 was not the only article which showed that the International Law Commission had not been wholly successful in adapting the previous draft to the new objective which it had set for itself. A certain number of the model rules, such as those set out in articles 10, 12 and 19, were preceded by provisos to the effect that the rules would only apply in the absence of agreement to the contrary between the parties. Such provisos seemed completely inappropriate in a set of model procedural rules intended for inclusion in substantive arbitral conventions.

44. With reference to the second hypothesis envisaged in paragraph 17 of the Commission's report, the Norwegian delegation did not think that all the rules proposed were suitable for incorporation in arbitral agreements concerning the settlement of existing disputes. That applied particularly to article 1, paragraphs 1 and 3, and to the major part of article 3. It was wholly in agreement with the view expressed by the delegation of Sweden on the subject (557th meeting, para.43). The Commission would have added considerably to the usefulness of its draft if it had stated which rules might suitably be incorporated in general conventions intended to govern the settlement of future disputes and which ones were suitable for insertion in conventions relating to the settlement of disputes already in existence. The third and fourth hypotheses appeared to be little more than variants of the first and second.

45. The preamble was the part of the draft of which the Norwegian delegation had the most serious doubts. In effect, after having stressed in paragraph 18 of its report that the articles in the draft respected the principle of the autonomy of the will of the parties, the International Law Commission affirmed in paragraph 24 that the substantive articles in the preamble governed any arbitration as principles of general international law rather than as rules derived from the agreement of the parties. Under such conditions, it was open to question whether the adoption by the General Assembly of the Commission's report would not give the rules in the preamble authority which would carry more weight than the approval of the rules laid down in the articles themselves. For its part, the delegation of Norway would be very hesitant to vote for a resolution which would involve the adoption of the rules laid down in the preamble since, in its view, it was very doubtful whether they could all be regarded as the fundamental principles of international law on questions of arbitration.

46. The negative attitude adopted by the Norwegian delegation with regard to the preamble did not, however, extend to the articles in the draft which were a model for States to conclude arbitral conventions. The

Norwegian delegation agreed with the delegation of Denmark that the General Assembly should confine itself to taking note of the report of the International Law Commission and that it should not adopt it in a resolution. The draft was not in fact a codification of international law which required adoption by the highest political organ of the United Nations, but a set of model rules intended for the guidance of States, or, in other words, a kind of technical legal opinion which could only be adopted in any real sense of the word by States faced with the drafting problems envisaged. The draft articles prepared by the International Law Commission, like all its other work, had an undeniable intrinsic value, and in this particular case it was difficult to see how that value could be substantially affected whether the draft was adopted, rejected or amended by the General Assembly. The text would surely be consulted by States whenever they were faced with drafting problems relating to arbitral procedure. The Sixth Committee should avoid taking a vote on the adoption of the draft, all the more since it would not be able to adopt the text without a previous detailed examination of it; that would require far more time than was available, and would not necessarily produce a text better than the one prepared by the International Law Commission. The Committee should take note of the part of the International Law Commission's report dealing with arbitral procedure and recommend it to the attention of Member States.

47. Mr. EL-ERIAN (United Arab Republic) said that, although his delegation appreciated the efforts made by the International Law Commission and its Special Rapporteur to modify the original draft in the light of the objections raised by various Governments, it regretted that the changes made had not succeeded in removing certain basic features of the draft which had aroused strong opposition on the part of a large number of delegations.

48. The delegation of the United Arab Republic attached very special importance to developing arbitration as a method of settling international disputes. It was in full agreement with the rule laid down in paragraph 1 of the preamble to the draft, but, contrary to the views of the International Law Commission, it did not consider that it was either desirable or necessary, for the purpose of making the undertaking more effective, to have recourse to arbitration or to depart from the principles of the autonomy of the will of the parties, of the flexibility of arbitral procedure and of the voluntary agreement of the parties; those characteristics were of the very essence of arbitration, and distinguished it from a judicial settlement of international disputes by the International Court of Justice.

49. The International Law Commission had said that its attitude had been dictated by the need to prevent the frustration of the agreement to arbitrate. A study of various cases in the history of arbitration provided no support for the Committee's pessimistic view. Many serious disputes had been settled by arbitration without the prestige of the States concerned having suffered on that account. He referred to some of the cases and concluded that arbitration had proved itself to be an extremely valuable institution.

50. The delegation of the United Arab Republic considered that traditional rules of arbitral procedure adequately met present day needs, and that it was unnecessary to make any fundamental changes in them. If it regarded the rules proposed by the International Law Commission as unacceptable, it was because they departed from the principle of the autonomy of the will of the parties, which was at the very foundation of arbitration; further, the rules established a complicated relationship with the International Court of Justice, a situation that could make for constitutional and practical difficulties. The draft could not be recommended as model rules on arbitral procedure, although it contained many elements which would provide valuable guidance to States about to conclude an arbitration agreement.

51. Some delegations feared that a negative attitude on the part of the Sixth Committee with regard to the draft concerning arbitral procedure would discourage the International Law Commission from undertaking projects for the progressive development of international law, and might induce it to confine itself to the codification of existing customs. There was no foundation for such a fear, for States were quite prepared—the recent United Nations Conference on the Law of the Sea had shown that—to accept changes in traditional rules when there was a real need for them. But that was not so in the case of arbitral procedure.

52. Other delegations had stressed that the rules proposed were in no sense binding. He could not however fail to consider the consequences which would follow a decision by the General Assembly recommending the International Law Commission's draft as model rules on arbitral procedure. The Assembly could not make such a recommendation without previous study of the terms of the draft, and it appeared that most of the objections to the original text applied equally to the new text.

53. Lastly, some delegations had laid emphasis on the need to develop arbitration and ensure that States made more frequent use of that method of settlement of disputes. He pointed out that the draft did not deal with arbitration itself but with arbitral procedure.

54. In conclusion, he stated that the Sixth Committee was faced with the choice between two solutions: either it must call an international conference to prepare a convention on arbitral procedure, or it must take note of the International Law Commission's report. The prevailing attitude in the Committee hardly seemed to favour the first solution. It was the view of the delegation of the United Arab Republic that it would be preferable to take note of the draft prepared by the International Law Commission, which was a valuable contribution to the development of international law, and to recommend that Member States and jurists in all countries keep it constantly before them when concluding arbitration agreements.

55. The CHAIRMAN drew the attention of members of the Committee to the need to accelerate its work. He asked delegations who wished to submit draft resolutions to do so at the earliest possible moment.

The meeting rose at 5.45 p.m.