United Nations
GENERAL ASSEMBLY
EIGHTH SESSION
Official Records

SIXTH COMMITTEE, 382nd MEETING

Monday, 9 November 1953, at 3.15 p.m.

New York

CONTENTS

Chairman: **Mr. Juliusz KATZ-SUCHY (Poland).**

Tribute to the memory of His Majesty King Abdul Aziz Ibn Abdul Rahman Al Faisal Al Saud of Saudi Arabia

1. The CHAIRMAN, speaking on behalf of the Committee, conveyed to the Government and delegation of Saudi Arabia its profound regret at the news of the death of King Ibn Saud, and asked them to accept its heartfelt condolences.

2. He invited the Committee to observe one minute's silence in memory of the deceased sovereign.

The Committee observed one minute's silence in memory of H.M. King Abdul Aziz Ibn Abdul Rahman Al Faisal Al Saud.

3. Mr. ABOU KHADRA (Saudi Arabia) thanked the Chairman and the members of the Committee for the tribute paid to the memory of King Ibn Saud. The wisdom and competence with which that great king had guided his people were universally known. His death was an irreparable loss to his country.

Report of the International Law Commission on the work of its fifth session (A/2456, A/C.6/L.311) (*continued*)

[Item 53]*

4. Mr. RIVERA REYES (Panama), speaking on a point of order, proposed that the Committee should decide at once not to discuss chapter III (régime of the high seas) of the Commission's report at the current session but to refer that and related topics dealt with in that chapter back to the Commission for closer and fuller study.

5. Mr. STABEL (Norway) supported the proposal that chapter III should be discussed at a later session. The International Law Commission's report having been circulated only a few weeks earlier, governments had not had time to study it properly and the Norwegian delegation, for its part, was not prepared to discuss the subject in detail.

6. The CHAIRMAN recalled that at the preceding meeting the Committee had agreed that it would decide how to deal with chapter III after it had completed the consideration of chapter II.

7. Perhaps the Panamanian proposal should therefore be held over until the Committee came to consider chapter III.

8. After a brief exchange of views in which Mr. LOUTFI (Egypt), Mr.. MAURTUA (Peru), Mr. VALLAT (United Kingdom), Mr. CAREY (United States of America) and Mr. BIHIN (Belgium) took part, Mr. RIVERA REYES (Panama) said that he had raised his point of order merely in order to enable the Committee to decide how many topics it would consider and so to plan the time it would spend in discussing each of them.

9. Nevertheless, he would not press for a decision forthwith, on the understanding that his proposal would be discussed as soon as the Committee completed the consideration of chapter II.

Chapter II: Arbitral Procedure

GENERAL DEBATE

10. The CHAIRMAN invited debate on chapter II of the International Law Commission's report (A/2456), dealing with arbitral procedure.

11. Mr. TAMMES (Netherlands) paid a tribute to the International Law Commission for its very valuable report to the General Assembly. The Netherlands Government had at all times unreservedly supported the movement in favour of arbitration, which had begun in the nineteenth century. That movement had culminated in The Hague Conventions of 1899 and 1907 and in the establishment of the Permanent Court of Arbitration. Notwithstanding the progress made in the pacific settlement of disputes by the establishment of an international court, and the fact that the International Court of Justice was the most important source of the application and interpretation of international public law, arbitration still had its use as a flexible procedure which could be adapted to the special conditions of a case and to the requirements of the parties. In the case of some disputes recourse to the lengthy procedure of the International Court of Justice might not be appropriate or the parties might want a certain law to be applied or a certain procedure to be followed.

12. If it was to remain flexible, arbitration had to remain a judicial procedure and should not take the form merely of mediation or conciliation. While mediation and conciliation played an important part in the specific settlement of disputes, arbitration differed from them in nature and in function. As John Bassett Moore had pointed out, mediation was advisory and arbitration judicial; arbitration led to an award which was binding on the parties.

13. The International Law Commission had succeeded in bringing out that basic principle, and so had performed its dual task under article 1(I) of its Statute, which spoke of the progressive development of international law and the codification of international

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

law. Based on the fundamental principle that by freely deciding to resort to arbitration the parties recognized the binding force of the arbitral award, the draft convention was in no way revolutionary. Indeed, the obligation to arbitrate would hardly be undertaken except in the expectation that the given arbitration would produce results. The Interational Law Commission had never lost sight of that fundamental idea, and the Netherlands delegations believed provisions such as those contained in articles 3 and 10 of the draft convention to be indispensable.

14. Article 3 was meant to prevent the constitution of the tribunal and fulfilment of the obligation to arbitrate from being frustrated by the inaction of one of the parties, which, as the report pointed out, was more than a theoretical possibility. Nevertheless, it was possible that, though in good faith, the parties might fail to reach an agreement. The Netherlands delegation would be reluctant to support the idea that the tribunal should in such cases be set up by an outside authority; it recognized, however, the difficulty of devising a test for distinguishing between lack of agreement in good faith, and unilateral refusal to co-operate. Article 3, paragraph 2, was perhaps less satisfactory than the corresponding paragraphs of the original draft contained in the International Law Commission's report on the work of its fourth session (A/2163, chapter II). While the new text was a simplification in that it did not provide for recourse to third States, it seemed to provide solely for the case in which one of the parties failed to make the necessary appointments.

15. Article 10 went so far as to replace the agreement of the parties on a *compromis* by a decision independent of their will, but the provision was justified by the voluntary undertaking of both parties to resort to arbitration.

16. The draft convention, being based on the free will of the parties, was in conformity with modern ideas concerning State sovereignty. The draft would make it possible to clarify international relations. The act of undertaking to arbitrate presupposed the existence of real obligations and meant that in subsequent disputes, the parties remained quite free to decide whether to submit the dispute in question to arbitration or not.

17. Article 2 of the draft was designed to prevent disagreement between the parties on the existence of a dispute or on the question whether the existing dispute came within the scope of the obligation to resort to arbitration. It was not, however, clear to his delegation whether the provisions permitting the parties to submit that previous question to some other procedure applied only to the procedure to be observed, or meant that each party was free to settle that previous question by unilateral action. The general principle on which article 2 was based was sound and even more important than the draft convention itself. Undertakings which had no practical significance did not improve international relations, and governments could not take back with one hand what they had presumably given with the other.

18. Referring to article 4, paragraph 1, of the draft, he said that perhaps it should stipulate expressly that the tribunal should consist of an odd number of arbitrators, unless article 13, paragraph 1, which stipulated that all questions should be decided by a majority, was sufficient.

19. His delegation intended to reserve its position for the moment on the action recommended by the International Law Commission with regard to the draft. Should the discussion reveal many objections, making it appear likely that the text in question would not receive sufficient signatures, the action provided for in article 23, paragraph 1 (*c*), of the Commission's Statute would of course be inapplicable. But even if the General Assembly did not recommend the draft to Members with a view to the conclusion of a convention, the draft would nevertheless constitute a standard convention of great value to all States proposing to act according to sound principles when undertaking to have recourse to arbitration.

20. Mr. GARCIA AMADOR (Cuba) felt that the debate, at that stage, should be confined to a study of the fundamental principles underlying the draft convention on arbitral procedure and its principal aims.

21. In respect of the *de lege lata* provisions codified by the draft, there was nothing to prevent the adoption of a resolution of the kind recommended by the International Law Commission in paragraph 55 of its report (A/2456). Not only did those provisions constitute the major part of the draft, but they also related to the main aspects of the arbitral procedure, such as the arbitrability of the dispute, the constitution of the tribunal, the establishment of the *compromis*, and the determination of the law to be applied by the tribunal.

22. His delegation would not find it any more difficult to adopt the same attitude in regard to the *de lege ferenda* provisions incorporated in the draft. As was stated in paragraph 18 of the Commission's report, the sole purpose of those new rules was to devise certain procedural safeguards for securing the effectiveness of an undertaking to arbitrate. Far from seeking to restrict the scope of the basic principle of the automony of the parties, the draft, after vigorously reaffirming that essential principle, aimed solely at safeguarding the effectiveness of the undertaking, either in the event of absence of good faith on the part of one of the parties, or in the event of certain gaps in existing rules and practice.

23. Those new provisions were of considerable importance. Theoretically, it should be possible to presume the good faith of the parties to an undertaking to arbitrate and their sincere wish to settle by agreement the problems raised by the implementation of that procedure. Practice had shown that in arbitration theoretical presumptions were not always warranted. In the past there had been only too many cases in which arbitration had failed for one of the two reasons mentioned. Those shortcomings had had serious consequences. By ratifying the Charter, the signatory States had knowingly assumed the obligation to have recourse to peaceful means of settling disputes. Moreover, the draft contained no provision challenging the universally acknowledged principle of the essentially contractual nature of arbitration. It was therefore difficult to see what objections could be raised to the adoption of measures designed to prevent the repetition of past setbacks.

24. Certain contemporary instruments, such as the General Act of 26 September 1928 for the pacific settlement of international disputes and the American Treaty on Pacific Settlement (Pact of Bogotá) already provided machinery which in several respects resembled the new rules of procedure introduced by the draft.

25. His delegation was therefore willing to support any action likely to secure the acceptance of the draft convention by the Member States.

26. Mr. ROBINSON (Israel) congratulated the International Law Commission, the special Rapporteur, Mr. Georges Scelle, and the Secretariat. For the moment he would discuss merely the courses of action open to the Sixth Committee on the draft convention on arbitral procedure.

27. The idea of considering the draft article by article should be dismissed as being prolonged, useless and even harmful.

28. One possible course of action was to postpone the consideration of the draft and invite Member States to offer more or additional comments. That course would serve no useful purpose, because the States that had wanted to submit observations had presumably already done so; the method would lead to unnecessary delays. Moreover, the International Law Commission, or at least the majority of its members, considered the work as done. It was difficult to ask the Commission to resume consideration of its draft.

29. His delegation was unfortunately unable to endorse the Commission's suggestion that the General Assembly should recommend the draft to Members with a view to the conclusion of a convention. The draft did not contain the necessary elements, whether of a substantive or a formal nature, of a contract. States would not be ready to assume in advance a general obligation to apply the contemplated arbitral procedure in all cases. If they accepted a convention for use merely as a guide for future litigations, that would not constitute a legal obligation needing the heavy machinery of a convention. Furthermore, multilateral conventions—even with a reciprocity clause—were not the proper instruments for procedures appropriate to courts concerned with bilateral disputes, the only ones that would be submitted to arbitration. In addition, the convention, which had been opposed by several members of the International Law Commission, would certainly give rise to numerous objections by States. There would thus arise the danger, pointed out in 1947 by the Institute of International Law, that any government, by a refusal of acceptance, might challenge rules of law which up to that date doctrine and jurisprudence had considered as generally established.

30. For the same reasons the convention of an international conference for the adoption of a convention seemed to his delegation to be inadvisable. The method of adopting the draft by resolution of the General Assembly should also be discarded. The legal value of such a resolution was open to doubt and its adoption by a slight majority, with numerous abstentions, could only weaken the importance of the document.

31. His delegation therefore suggested that note should be taken of the draft convention as representing an expression of the majority views of a body enjoying authority in the world. The instrument had an undeniable scientific and practical value as being the result of thorough inquiry into the state of the modern international law relating to arbitration, with the addition of certain new elements not generally accepted. The draft thus qualified, under article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, as a "subsidiary means for the determination of rules of law".

32. The General Assembly should also request the Secretary-General to prepare a volume containing the text of the draft convention, its history, a comprehensive commentary and a basic list of references restricted to the elements of the convention. The International Law Commission had recommended, in paragraph 13 of its report, that the commentary prepared by the Secretariat, after being revised and supplemented, should be published. It was desirable that the commentary, as revised, should contain a textual exegesis of each article, followed by comments based on jurisprudence and literature. The document should embody all the valuable comments made on arbitral procedure by the Commission and its members. The list of references should consist merely of selected references dealing with the particular problems raised in individual articles of the draft. It should also contain the necessary tables and index. Such a volume would become the standard reference work for departments of foreign affairs and for scholars. It would exercise a great influence on the development of that branch of international law.

33. At that stage of the debate, it was not his intention to frame his suggestion as a specific proposal.

The meeting rose at 4.35 p.m.

Printed in U.S.A. S—43501—December 1953—1,850