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Summary record of the 419th meeting

Topic:
Arbitral Procedure

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63. Mr. AMADO urged that the Commission should vote forthwith on the Special Rapporteur's formal proposal and decide whether the draft should be reconsidered by the Committee or in plenary session.

64. Mr. SPIROPOULOS emphasized that the main issue was whether or not arbitration was to be judicial, and that that issue could be decided without studying all the comments of Governments.

65. The CHAIRMAN observed that, if a member of the Commission objected that he was unable for technical reasons to follow the discussion, his objection ought to be taken into consideration. It had been pointed out to him, however, that those who were unable to read Conference Room Paper No. 46—which had been issued in French only—could find the relevant material in the documents for consideration under item 52 of the agenda of the General Assembly's tenth session,[4] and also in the records of the meetings of the Sixth Committee on that item at the same session.[5]

66. The CHAIRMAN called upon the Commission to decide whether or not articles 1, 2, 3, 4 and 9 of the draft on arbitral procedure should be considered by the Commission in plenary session.

The question was decided in the affirmative by 14 votes to none, with 5 absentions.

67. Mr. AMADO asked whether that decision implied that discussion of other articles of the draft was excluded.

68. The CHAIRMAN replied that that was so.

State responsibility *(continued)*[6]

[Agenda item 5]

69. Mr. TUNKIN asked whether the discussion on agenda item 5, State responsibility, was to be adjourned.

70. The CHAIRMAN replied that he had understood that the majority of the members had agreed on the need for an adjournment, but if there was any doubt on the matter, he would invite members of the Commission to vote on the question whether discussion on State responsibility should be adjourned until the Commission's tenth Session.

It was decided by 12 votes to 2, with 4 abstensions, that the discussion on agenda item 5 should be adjourned.

The meeting rose at 1.35 p.m.

419th MEETING

Monday, 17 June 1957, at 3.30 p.m.

Chairman: Mr. Jaroslav ZOUREK.

Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) *(continued)*

[Agenda item 1]

1. The CHAIRMAN invited the Commission to decide on the form and purpose of the draft on arbitral procedure (A/CN.4/109) before proceeding to review the text of the crucial articles, as decided at the previous meeting. Some members of the Commission did not regard the question as a vital one, but others, including the First Vice-Chairman, attached considerable importance to it and regarded a decision on the point as an essential preliminary to any discussion of the text.

2. Mr. MATINE-DAFTARY pointed out that it was customary to decide on the substance of a draft before settling the form it should take. The articles to be discussed dealt with a question of primary importance, namely, the role to be played by the International Court of Justice in arbitration. He accordingly proposed that the text of the articles be reviewed before taking a decision on the form and purpose of the draft.

3. Mr. TUNKIN said that he would not object to Mr. Matine-Daftary's proposal, but nonetheless regarded the question of the form of the draft of considerable importance. To judge from remarks made in the course of the discussion, there appeared to be a tendency on the part of some members to assume that, if the Commission agreed that the text should serve merely as a model for the guidance of States, it could be left as presented by the Special Rapporteur. He could not agree with that assumption, and if the Commission adopted such a course, it would be evading its responsibilities and failing to comply with General Assembly resolution 989 (X).

4. Mr. GARCÍA AMADOR said that, while generally speaking it would be the normal procedure to consider the question of form after that of substance, the case under consideration was so different as to warrant the reverse procedure. It was essential to know exactly what purpose was to be served by the text before members could decide on the substance of certain articles. If the text was to serve as a basis for an international convention, it would be necessary, for instance, to modify article 2 quite considerably; even then it would probably win little support from States. On the other hand, in a text merely intended as a guide, article 2 might secure far wider acceptance. He saw no alternative to submitting the text as a model. Any draft convention on arbitral procedure likely to win wide acceptance in the existing political situation would be so much on the lines of traditional arbitration that it would be better for the Commission not to have prepared it at all.

5. Mr. PAL supported Mr. Matine-Daftary's proposal. It appeared that fourteen Governments, in comments[1] submitted after the discussion of the matter in the Sixth Committee, still regarded the draft as a possible basis for an international convention. The United Kingdom Government, in particular, had expressed itself quite explicitly on the subject, while none had expressly stated that there was no possibility of a convention being concluded on the subject. Indeed most of them had indicated that, provided certain changes were made in the draft, they would be prepared to consider the possibility of concluding a convention. At any rate, so far no proposal had been placed before the Commission formally calling for a decision not to consider at that stage the possibility of a convention.

6. Mr. SCELLE, Special Rapporteur, remarked that he had taken account of the comments of the fourteen Governments in question in his report. It must be borne in mind, however, that there would be in all eighty-one Governments represented at the General Assembly.

[4] *Official Records of the General Assembly, Tenth Session, Annexes,* agenda item 52, document A/2899 and Add.1 and 2.

[5] *Ibid., Sixth Committee,* 461st to 464th and 466th to 472nd meetings.

[6] Resumed from 416th meeting.

[1] *Official Records of the General Assembly, Tenth Session, Annexes,* agenda item 52, document A/2899 and Add.1 and 2.

7. He agreed with Mr. García Amador. A decision simply to recommend the draft to Governments for their guidance would materially affect the attitude of members of the Commission towards the substance of the articles. A model set of rules would place no obligation on any State. The General Assembly could, if it wished, even agree to the simple publication of the draft by the Secretariat, without indicating its own attitude towards it.

8. Mr. TUNKIN thought that to submit substantially the same text as before, but merely as a model draft and not as a draft convention, would be contrary to the spirit of resolution 989 (X). The General Assembly had found the draft convention unacceptable and had referred it back to the Commission for reconsideration in the light of the comments of Governments. The Commission was bound to revise the draft, and the question was what principles it should submit. The Special Rapporteur proposed to bring arbitral procedure closer to judicial arbitration, as opposed to what was described by him as "diplomatic arbitration", by which was meant the generally accepted procedure. His draft would make the arbitral tribunal a kind of subsidiary court of the International Court of Justice. Such a course, however, was in the interest neither of the development of international law, nor of the improvement of international relations. Arbitration was an alternative means of settlement of disputes quite distinct from reference to the International Court of Justice.

9. He saw little purpose in submitting a model set of rules such as any association of jurists could produce. The Commission as an organ of the United Nations must endeavour to make a practical contribution to the development of international law. And the best way to do that was to submit a draft convention, based on well-known principles of arbitration and taking into consideration the practice in the matter of arbitration over the last fifty years.

10. Mr. LIANG, Secretary to the Commission, said that the comments of Governments, referred to by Mr. Pal, though subsequent to the discussions in the Sixth Committee at the Assembly's eighth session in 1953, were prior to the discussions at its tenth session in 1955, and had been taken into account in resolution 989 (X).

11. There were two ways in which a revised version of the draft might become an international convention. It might be adopted by the General Assembly as such, or it might serve as the basis for discussion at an international conference convened by the Assembly for the purpose of concluding a convention. In either case, action would have to be adopted by a clear majority of the Assembly. To judge from the discussions at the eighth and tenth sessions, that was a very unlikely eventuality. If, however, the Commission submitted its text as a model draft or set of rules, there would be nothing to prevent States agreeing in bilateral agreements to follow its principles.

12. Sir Gerald FITZMAURICE said that, although Mr. Matine-Daftary's proposal undoubtedly reflected the normal procedure, the views of members on the substance of the draft depended so much on the decision as to its form and purpose that he felt it advisable that that decision should be taken without delay. In discussing any draft, the Commission was bound to bear the practical possibilities in mind and to have some view as to its ultimate fate. It was no use preparing a draft convention unless there was reason to suppose that the General Assembly would accept it. It seemed, however, in the highest degree unlikely that it would do so; the most it might do, and that was not very likely, was to convene an international conference which would go again over the ground already covered by the Commission. And even if such a conference did produce a convention, he doubted whether it would obtain many signatures. There seemed, however, therefore, to be no point in making all the adjustments and concessions required to render the draft acceptable as a convention.

13. If, however, the Commission reviewed the articles with the idea in mind that they would best serve as a model set of rules, its work would be of considerable value. He must challenge the claim that such a course would be contrary to the spirit of resolution 989 (X). The only reference in the resolution to the question of a draft convention on arbitral procedure was in paragraph 3 of the operative part, and even there it was couched in the most guarded terms. The Assembly merely decided to put the question of arbitral procedure on the provisional agenda of its thirteenth session, including, it would be noticed, not the problem of convening an international conference to conclude a convention but merely "the problem of desirability" of convening one. On the other hand, it expressly stated in the preamble its belief that "a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements". That was as explicit a reference to a model set of rules for the guidance of States as one could wish to have.

14. Regarding the comments of the United Kingdom Government, referred to by Mr. Pal, though naturally unable as a member of the Commission to speak on behalf of his country, he thought it would be unwise to assume that the United Kingdom Government would necessarily still hold the same view it had expressed some years previously before the Assembly's decision.

15. Mr. AGO recalled that he himself had made a proposal in the Committee which would in a way have left both courses open. After listening to the discussion, however, he felt that the Commission must make a choice between the two widely different courses, since its decision would affect the substance of the crucial articles of the draft. He saw no alternative to adopting the course advocated by the Special Rapporteur. Since it was most unlikely that an international conference would consider concluding a convention on the basis of the existing draft, if the Commission still thought of suggesting a draft convention, it would be bound to make radical changes in the draft. Mr. Ago was accordingly of the opinion that it would be better if the Commission did not make too many innovations, and contented itself with submitting the draft as a simple guide for Governments instead of turning it into a rather colourless text which could be accepted by all States as binding.

16. Mr. PADILLA NERVO said that various members had referred to General Assembly resolution 989 (X), but it was to be noted that the only paragraph of that resolution in which the General Assembly might appear to have expressed some preference for a draft convention, namely the last, was also the only one which was not, so to speak, addressed to the Commission but related solely to action to be taken by the General Assembly itself. In all the preceding paragraphs there was

nothing to suggest that the Commission was expected to present its revised draft in the form of a draft convention; on the contrary, the General Assembly referred specifically to "a set of rules on arbitral procedure" which, in its view, would "inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements". It would therefore be entirely in accordance with the General Assembly's resolution if the Commission now submitted a draft set of rules. Moreover, as had already been pointed out, there was very little prospect of States accepting a draft convention, even if the text proposed by the Special Rapporteur were toned down to resemble the Convention for the Pacific Settlement of International Disputes, signed at The Hague in 1907.

17. It was, in any case, essential that the Commission should decide the form without further delay. If it took up the draft articles proposed by the Special Rapporteur without first deciding what form they should eventually take, as proposed by Mr. Matine-Daftary, it would be obliged to reckon with the possibility that they might conceivably take the form of a convention and would therefore be obliged to consider them from that point of view. Such a proposal was equivalent to asking an architect to design a building without specifying the purpose it was to serve.

18. Mr. TUNKIN said he had never suggested that General Assembly resolution 989(X) had instructed the Commission to present its revised draft in the form of a convention. All he had wished to point out was that certain members at least appeared to think that only by presenting the draft in the form of a model set of rules could the Commission conserve the principles of the draft that it had adopted at its fifth session; but it was the very principles of that draft which the General Assembly had refused to accept.

19. Mr. MATINE-DAFTARY felt that the Commission would hardly have decided to reconsider specific articles of the draft in the light of the comments made by Governments if it had not intended to submit it in the form of a convention; if its intention had been to submit it as a model set of rules, there would have been no need to take the comments of Governments into account.

20. Mr. SPIROPOULOS said that since he could vote for all the articles in the draft, whether it was to take the form of a convention or of a model set of rules, it was a matter of indifference to him whether the Commission decided the form before discussing the substance. He realized, however, that there might be certain members who would vote differently on the articles, depending on whether they were to take the form of a convention or a model set of rules. For their sake at least, it would be desirable to decide on the form first.

21. As regards the substance, he felt that if the Commission removed the idea of judicial arbitration, it would be destroying the whole basis of the draft and reverting to all intents and purposes, to the system established by The Hague Convention of 1907.

22. Mr. EL-ERIAN said that the discussion raised two important questions, the constitutional relationship between the Commission and the General Assembly, and the nature of the Commission's functions.

23. Regarding the first question, he had already stated that, in accordance with General Assembly resolution 989 (X), by which the Assembly, in the words of article 23, paragraph 2, of the Commission's Statute, had referred the draft "back to the Commission for reconsideration or redrafting", the Commission was in duty bound to reconsider the draft in the light of the comments of Governments and the discussions in the Sixth Committee. The Commission could not discharge that duty properly if it decided from the outset that it was only going to make a few minor amendments on technical points.

24. That, in turn, raised the second question, the nature of the Commission's functions. The Commission had the dual task of codifying international law and promoting its progressive development. In laying down rules designed to promote the progressive development of international law, however, it must clearly bear the views of Governments in mind; for, as Mr. Amado had pointed out, new rules of law were not evolved by professors but by Governments. Article 38 of the Statute of the International Court of Justice put doctrine and jurisprudence in their proper perspective.

25. The root of the difficulty lay in the fact that the draft which the Commission had adopted at its fifth session[2] departed from the accepted rules of arbitration as a means of settling disputes as distinct from judicial settlement through the International Court of Justice, and tended to identify the two by laying down a complicated procedure which, in fact, made arbitration a subsidiary process in the system of international jurisdiction at whose centre was the International Court of Justice. The General Assembly's entire action and attitude had been determined solely by the terms of that earlier draft. If a draft along different lines were submitted, the General Assembly might take a different view and decide to convene a conference for the purpose of concluding a convention.

26. The question was, as Mr. Amado had neatly summed it up in 1953, and again in 1955, in the Sixth Committee of the General Assembly, whether the Commission intended to submit a draft on arbitral procedure or a draft of arbitrary procedure.

27. The CHAIRMAN, speaking as a member of the Commission, recalled that he had been one of the severest critics of the draft produced at the fifth session. In his view, the form of the draft was not of great importance, as the Commission's responsibility was the same in either case.

28. He agreed with Mr. El-Erian that the Commission must take the comments of Governments into account if the whole process of consulting them was to serve any useful purpose. On the other hand, he could not agree with those who argued that, if it removed certain articles, the Commission would be putting the clock back to 1907; for The Hague Convention of that year did not settle a number of points which could usefully be settled now. Arbitration rested on the will of the parties: where the purpose of the draft was to oblige them to respect their obligations, he fully supported it, but not where it sought to create obligations where there were none, or to apply rules which could only properly apply to other forms of peaceful settlement.

29. Mr. SCELLE, Special Rapporteur, said that he had carefully studied all the comments made by Governments or by their representatives in the Sixth Committee, and had been particularly struck by two objec-

[2] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

tions to the draft presented in 1953. The first was that that draft, if accepted, would actually be harmful to the cause of arbitration, since it placed arbitration in a straitjacket and would therefore deter Governments from having recourse to that method of settling their disputes. The second was that no two cases of arbitration were alike, and that it was therefore wrong to try to lay down a uniform procedure covering all cases; it had been argued that it might be embarrassing for Governments to accede to an arbitral convention without knowing in advance in what specific disputes they would be obliged to comply with it. There was considerable force in both those objections which, more than anything else, had led him to the view that it might after all be better to abandon the idea of a convention.

30. The statements of Mr. Tunkin, Sir Gerald Fitzmaurice and Mr. El-Erian all showed that in deciding the form of the draft the Commission would be deciding much more than that; it would be deciding whether a draft which was based on a judicial concept of arbitration should be replaced by a draft which simply reflected existing international custom. That would not be putting the clock back to 1907, it would be putting it back to very much earlier, to a period when respect for international law and for international obligations had been at as low an ebb as it was at present.

31. There was no ground for the suggestion that the present draft made arbitration a kind of ancillary procedure of the International Court of Justice. The Court was not the only tribunal to which difficulties or differences of opinion arising out of the arbitral procedure could be referred; the draft provided in many cases for recourse to another arbitral tribunal or to the Permanent Court of Arbitration. It was, however, absolutely essential that differences of opinion regarding the arbitrability of the dispute should be referred to some judicial organ for final settlement; the only reason why the draft gave that responsibility to the International Court of Justice was that the Court seemed the most appropriate organ.

32. The CHAIRMAN put to the vote Mr. Matine-Daftary's proposal that the Commission defer any decision on the final form of the draft until it had discussed the substance of articles 1, 2, 3, 5 and 9.

The proposal was rejected by 10 votes to 8 with one abstention.

33. The CHAIRMAN said that the Commission must now decide the form of the draft. The only proposal before it was the Special Rapporteur's proposal that it should take the form of a "model draft".

34. Mr. BARTOS asked under what provision of the Commission's Statute the draft would fall if the Commission decided it should take the form of a model set of rules.

35. The CHAIRMAN replied that the only obligation which its Statute placed on the Commission in that connexion was that referred to in article 20, namely, that the Commission "shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary". Under article 23, paragraph 1, however, the Commission could recommend to the General Assembly one of four different courses:

"(*a*) To take no action, the report having already been published;

(*b*) To take note of or adopt the report by resolution;

(*c*) To recommend the draft to Members with a view to the conclusion of a convention;

(*d*) To convoke a conference to conclude a convention".

36. Mr. BARTOS felt that the Commission was under an obligation to recommend one of those courses. The words "may recommend to the General Assembly" referred to the fact that it had a choice between them. In the present instance it should, he believed, simply recommend the General Assembly to take note of its draft.

37. Mr. AMADO agreed that the Commission should recommend the General Assembly to take note of its draft, not as a model but, in the words used in General Assembly resolution 989(X) itself, as a "set of rules" which could provide useful guidance to States "in the drawing up of provisions for inclusion in international treaties and special arbitration agreements."

38. Mr. SCELLE, Special Rapporteur, agreed that in the present circumstances the most appropriate course would be simply to recommend that the General Assembly take note of the draft.

39. Mr. GARCÍA AMADOR pointed out that that was the formula adopted by the General Assembly when it wished to avoid taking any action on a report or expressing any opinion as to its value. In the present instance, the General Assembly had surely not asked the Commission to revise its draft simply with a view to "taking note of" it. In his view, the General Assembly would undoubtedly expect the Commission to adopt a more positive and constructive course by asking it to recommend that Governments use the revised draft as a guide in drafting arbitral provisions.

40. Mr. PADILLA NERVO felt that there was no need for the Commision to take an immediate decision on the nature of its recommendation to the General Assembly; that question could be considered after the draft articles had been examined. Moreover, other courses were open to the General Assembly than those already mentioned. It might, for example, adopt similar wording to that which it had used in resolution 375(IV), relating to the draft Declaration on Rights and Duties of States; paragraph 2 of the operative part of that draft resolution read as follows:

"*Deems* the draft Declaration a notable and substantial contribution towards the progressive development of international law and its codification and as such commends it to the continuing attention of Member States and of jurists of all nations".

41. However, the only point that had to be decided before examining the draft articles was whether they were to be submitted as a draft convention or as a set of rules.

42. Mr. VERDROSS protested that the term "draft convention" was itself ambiguous. It could refer either to an instrument which would be binding on all States that had ratified it in all cases where they wished to arbitrate, or to one which would be binding on them only in cases where they had not agreed in some other instrument to adopt some other procedure.

43. The CHAIRMAN said that would be a matter for the General Assembly to decide. The only question the Commission was now called on to decide was

whether it wished to submit the draft as a draft convention.

The question was decided in the negative, by 10 votes to 4 with 5 abstentions.

The meeting rose at 6.10 p.m.

420th MEETING

Tuesday, 18 June 1957, at 930 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) *(continued)*

[Agenda item 1]

1. The CHAIRMAN said that certain members of the Commission wished first to explain their votes on the question decided at the end of the previous meeting, namely, whether to submit the draft to the General Assembly in the form of a draft convention (419th meeting, para: 43).

2. Sir Gerald FITZMAURICE said that he had voted against the proposal because he considered it more advisable, in the circumstances, to submit it in the form of a technical contribution. It had been argued that such a course was wrong on the ground that the Commission was an international and not a technical body. In point of fact, exactly the opposite was true. The members of the Commission being experts appointed in their personal capacity and not representatives of governments, the Commission could not be described as an international body in that sense. He believed he was right in saying that the Commission was a technical commission of the General Assembly.

3. In connexion with remarks made by some speakers, that it was no longer professors but State practice which made international law, he would point out that theorists had never been directly responsible for making international law. It had always been made by the practice of States, but their debt to the professors was enormous. It had also been said in that connexion that Article 38, paragraph 1(*d*), of the Statute of the International Court of Justice placed teaching and case law in their proper perspective as subsidiary sources of international law. It was interesting to note, however, that the provision in question had been taken word for word from Article 38 of the Statute of the Permanent Court of International Justice. Even in the dark days of 1920, jurists had realized that it was States and not professors that made international law! However, admitted that States made international law, it must also be recognized that a very large part of their ideas came from professors and publicists.

4. Mr. MATINE-DAFTARY said that his abstention was sufficient answer to the allegation that those in favour of his proposal to discuss the substance of the crucial articles of the draft before deciding on its form were necessarily wedded to the idea of submitting it as a draft convention. Incidentally, article 1 of the draft, which the Commission was about to consider, would fit equally well into a draft convention or a model draft.

5. Mr. VERDROSS explained that, in voting against the proposal, he had had in mind a draft convention applicable only in the cases in which the parties had not stipulated other provisions, as in article 51 of the Convention for the Pacific Settlement of International Disputes, signed at The Hague in 1907: "unless other rules have been agreed on by the parties".[1]

DRAFT ON ARBITRAL PROCEDURE (A/CN.4/109, ANNEX)

ARTICLE 1

6. The CHAIRMAN invited the Special Rapporteur to introduce article 1 of his draft (A/CN.4/109, annex).

7. Mr. SCELLE, Special Rapporteur, quoted *in extenso* paragraphs 16 to 20 of his report (A/CN.4/109) and referred to article 37 of The Hague Convention for the Pacific Settlement of International Disputes of 1907, which described the object of international arbitration as "the settlement of disputes between States by judges of their own choice and on the basis of respect for law".[2] He added, in connexion with paragraph 20 of his report, that, prior to The Hague Convention of 1907, some writers had preferred arbitration to legal proceedings as a means of settlement, and had held that the arbitral award must be accepted as final even when not rendered in accordance with law.

8. Sir Gerald FITZMAURICE agreed with the views expressed by the Special Rapporteur. The suggestions made by various Governments regarding the exclusion of political disputes and matters within the domestic jurisdiction of States were beside the point. There was nothing in the draft to oblige any State to resort to arbitration at all, so that it lay entirely with the parties to decide which type of dispute they wished to submit to arbitration.

9. He agreed with the thesis that the undertaking to arbitrate derived from an arbitration agreement and not from the *compromis*. Though an undertaking to arbitrate was sometimes included in the *compromis*, the two things were quite distinct. The undertaking might exist before any dispute arose, but a *compromis* was only drawn up after a dispute had arisen.

10. He thought that it would be more logical in paragraph 3 to say "the undertaking results from a written instrument" rather than "shall result".

11. Mr. GARCÍA AMADOR observed that some comments of Governments appeared to be due to a misunderstanding of the scope of the article, which did not impose compulsory arbitration; the article was in accordance with the traditional system, recourse to arbitration being entirely at the discretion of the parties. Consequently, such considerations as the exclusion of political disputes, matters within the purview of regional agencies and the justiciability of disputes, were relevant not to article 1 but to the original agreement to have recourse to arbitration.

12. Perhaps the article would be less subject to misinterpretation if the statement in paragraph 17 of the Commission's report on its fifth session that "the obligation to arbitrate results from an undertaking voluntarily accepted by the parties"[3] were incorporated in paragraph 1.

[1] *The Hague Conventions and Declarations of 1899 and 1907*, 2nd ed., ed. James Brown Scott, Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), p. 64.

[2] *Ibid.*, p. 55.

[3] *Official Records of the General Assembly, Eighth Session, Supplement No. 9.*