

Document:-
A/CN.4/SR.418

Summary record of the 418th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1957 , vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

of the utmost value, as Sir Gerald had said, in avoiding possible pitfalls.

38. Mr. TUNKIN said that the question the Commission was at present concerned with was a question of procedure. He would not, therefore, reply to certain points made by the Special Rapporteur in his report and in his statement at the beginning of the meeting, but would merely say he could not agree with him on many points, particularly when he divided States into different groups depending on their attitude to international law and its development.

39. He thought all the members of the Commission agreed that, whenever practicable, it was desirable to submit its drafts in the form of conventions. The Commission was not living in the age of the *consolato del mare*, and international treaties were undoubtedly the main source of present-day international law. He agreed with Mr. Khoman that the Commission must first decide the question referred to it by the Committee, namely, whether it should comply with General Assembly resolution 989 (X) and revise its previous draft in order to make it more acceptable to States, or whether it should adhere to the substance of its former draft at all costs and merely present it in a different form. The view had been expressed that if the Commission revised the draft, it would destroy the whole structure built up by the Special Rapporteur. With all due respect, that was not the decisive factor. The Commission's task was to make a contribution to the development of international law, and, as Mr. Amado himself had pointed out, international law was developed not by professors but by States.

40. Mr. Tunkin was of the opinion that the Commission should carefully reconsider the draft and make the necessary changes in the light of the observations made by various Governments, whether in writing or orally in the Sixth Committee.

41. He could not agree with Mr. Spiropoulos that the Commission should postpone its decision until the next session. For, if the Commission decided to revise the Special Rapporteur's draft in accordance with the General Assembly resolution, the Committee could begin work at once, and all members of the Commission would be able to reflect on the matter further between the sessions, knowing what end was in view.

42. Mr. BARTOS said he fully agreed with Mr. Khoman and Mr. Spiropoulos. With due respect to the Special Rapporteur, every member of the Commission had the duty to examine the drafts on which he was asked to vote. Of course new members of the Commission might take no part in the vote; but if it was desired that the draft should be submitted by the Commission as a whole, even in the form of a model draft, all its members must have a chance to comment on its provisions. There was, therefore, some objection even to referring the draft to the Committee, at least before those who were not represented on the Committee had been able to comment on it.

43. Mr. Bartos could see no objection to referring the draft again to Governments, in the amended form proposed by the Special Rapporteur, and considering it in plenary at the next session with all the relevant facts available.

The meeting rose at 1 p.m.

418th MEETING

Monday, 17 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 1]

1. Mr. KHOMAN observed that some speakers had expressed the view that there was a fundamental difference between a draft convention and a model draft, and that they favoured a draft convention, but were nevertheless prepared to approve without discussion the Special Rapporteur's model draft (A/CN.4/109). That attitude seemed inconsistent. Personally, he was in favour of a model draft.

2. With regard to procedure, he thought that the Committee might be asked to hold two or three more meetings to consider the question and then to submit its proposals regarding the form to be adopted. In his own view, all that the Commission was required to do was to study the comments by Governments and see in what way the proposals embodied in the draft could be modified.

43. Mr. EL-ERIAN said that the General Assembly had asked the Commission to reconsider the draft in the light of the observations in the General Assembly and of the comments from Governments. Accordingly, the Commission should spare no effort to amend the draft in the light of those observations and comments; he felt that the draft now submitted by the Special Rapporteur did not give due consideration to the different approaches and constructive suggestions contained in the comments of Governments and the observations of delegations. The reasons which had compelled some Governments to reject the draft were quite complex, and it was not appropriate to dismiss objections on such grounds as that those Governments had newly come into existence. Such an attitude would be an over-simplification of the problem. While all admired the keen interest displayed by the Special Rapporteur in the development of arbitral procedure, it would not be right to accept his attitude, which seemed to be that failure to endorse the view of the Commission was due to lack of experience on the part of the newly independent Governments. The comments of Governments should be classified, but to contrast the attitude adopted by Governments with long histories of sovereignty with that adopted by others could not be described as a "universal" approach to membership in the community of nations.

4. As to what should be done with the draft, he felt that the Commission should attempt to adapt it in the light of the comments by Governments and by the representatives of the Sixth Committee. The subject would be included on the agenda for the thirteenth session of the General Assembly, which could then consider the possibility of convening a conference of plenipotentiaries with a view to the conclusion of a convention. The Committee should try to complete its consideration of the draft accordingly, after which the Commission should reconsider it, if necessary at its next session. The issues were well-defined, and the fact that the Commission now included a number of new members need not delay matters, since some of the new members had participated in the Sixth Com-

mittee when the draft convention had been discussed, and the others were no less familiar with a draft which they had more than once consulted in their capacity as legal advisers to their foreign offices.

5. Mr. YOKOTA said that the Commission's task was to formulate a draft acceptable to the largest possible number of States, and in his view, a view expressed by Mr. Tunkin and also once shared by Mr. Amado, since the Commission was not merely an academic body, it should strive to evolve a draft convention. In so doing, it should be careful to keep intact the fundamental principles embodied in the draft prepared by the Special Rapporteur, which constituted a valuable contribution to the development of international law in the field of arbitration. Moreover, the continuity of the Commission's work should be maintained, and the essential characteristics of its procedure should not be changed without good reason; in other words, even new members should pay proper respect to the Commission's past work.

6. It would be advisable to postpone, perhaps until the next session, the final decision on whether the draft should take the form of a draft convention or that of a model draft until the comments of Governments had been studied thoroughly.

7. Mr. AMADO pointed out that, contrary to what Mr. Yokota appeared to think, he had not changed his mind, as a perusal of the records of his earlier statements would show. His attitude had been completely consistent.

8. The CHAIRMAN pointed out that he had asked the Commission to decide on the form of the draft at the current session because certain members of the Committee felt that, without such a decision, it was impossible to agree on the text of the articles.

9. Mr. SPIROPOULOS observed that the General Assembly, in its resolution 989 (X), had invited the Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the value of the draft on arbitral procedure. It had not asked the Commission to discuss the form. The Commission was merely asked to see if it could improve on the proposed articles in the light of the comments made. The General Assembly would itself decide on the form the draft would finally take, though the Commission could, of course, make recommendations to the General Assembly with regard to the form.

10. Many of the objections raised by Governments were purely technical, and could quite well be handled by the Committee, but important questions would have to be handled by the Commission itself. As the Commission was due to meet again on 28 April 1958, the Committee might meet one week earlier, and hold two meetings daily.

11. The CHAIRMAN pointed out that he had asked the Commission for a decision not only on the question of the form of the draft, but also on the question whether it should review the draft on arbitral procedure in the light of the comments from Governments, with a view to increasing the practical value of the draft.

12. Mr. VERDROSS thought all the members would agree that the comments by Governments should be taken into account. It would, however, be difficult to elaborate a draft that would be generally acceptable,

since any draft that took into account only the observations of some Governments and disregarded those of others would be useless.

13. Mr. MATINE-DAFTARY said that the draft was not that of a convention making arbitration compulsory, but of a convention laying down the procedure for arbitration where the obligation to arbitrate already existed. Every State that signed the convention would thereby surrender a part of its sovereignty. He was therefore opposed to discussion of the draft at the present stage. The different, and sometimes contradictory, observations of Governments would have to be studied first. The Commission must try to carry out the task that had been set it by the General Assembly, and to do that it would have to pass the whole question through the hands of the Committee.

14. Mr. TUNKIN felt it was not desirable to devote the remaining meetings of the Commission to the discussion of arbitral procedure; it would be better for the subject to be discussed by the Committee, and if the Committee did not finish its work at the current session, then it could continue it at the next. The comments of Governments could not simply be brushed aside. The Commission could not take an immediate decision, so it should ask the Committee to examine the comments of Governments so far as it could during the remainder of the session and then report back.

15. Mr. SCHELLE, Special Rapporteur, observed that the 1953 draft¹ had been adopted by a small majority only; however, having been adopted by a majority, it was a draft by the Commission. The membership of the Commission had since changed, and the majority which would now be achieved might be different; it might be that some articles would be changed or even omitted. That being so, all the articles should be discussed, in turn, by the full Commission; even if some of the work was done by the Committee, its decisions would have to be reviewed by the full Commission.

16. It seemed to him that some Governments had a confused idea of the purpose of the draft, which was not to make arbitration compulsory, but to prescribe the procedure to be followed in cases where there was an obligation or agreement to arbitrate. Some Governments had rejected the draft because they wished to be free to withdraw from arbitration if they so desired; they wished to be, not only parties to arbitral proceedings, but also judges in those proceedings.

17. He agreed that much might be left to the Committee; on the other hand, it was certain that the Committee would not be able to adopt decisions that would all be acceptable to the Commission as a whole, and the matters to which those decisions related would therefore have to be dealt with by the Commission itself.

18. He had been accused of dividing States into classes. But not all States were the same age, and some of them had in the past been kept in a position of inferiority by colonial Powers. There were likewise wide divergences of view between western and eastern States on certain subjects. There were States which were not only older, but also perhaps "tired" than others. All he had done had been to note those facts in his classification; no criticism had been expressed or implied.

19. It had been rightly said that the comments by Governments should be taken into account. That was

¹ *Official Records of the General Assembly, Eighth Session, Supplement No. 9, para. 57.*

precisely what he had done, with the aid of the Secretariat, in his report. The Secretariat had summarized the comments, and he had summarized those summaries. He had considered all the comments which related to the substance of his report.

20. If the term "*projet-modèle*", by which his model draft was described in French, was considered a little clumsy or otherwise inappropriate, there was no reason why the expression "*projet-type*" should not be used instead.

21. He suggested the Commission should now consider the draft articles one by one, taking the comments of Governments into account. It might well be that the difficulties confronting the Commission could be resolved by presenting a draft which would leave it open to Governments either to accept arbitrability or, if they chose, to reject it, but it would be useless to put forward a document in which what was said in the first part was contradicted in the second.

22. The CHAIRMAN was glad to note that the Special Rapporteur shared the view of the majority of the Commission that the draft should be reconsidered in the light of the comments of Governments and the discussions in the Sixth Committee, with a view to effecting some amelioration.

23. Sir Gerald FITZMAURICE said that the view attributed to the majority was not his view. To him, as to Mr. Amado, it was clear that the draft prepared by the Special Rapporteur was founded on a definite concept of the arbitral process, and that the General Assembly's request to the Commission to re-examine the draft was tantamount to saying that the Assembly did not agree with that concept. If the Assembly had agreed with the concept, the draft would not have been sent back.

24. To speak of an amelioration of the draft was begging the question. It would indeed be possible to alter the draft, but it was a moot point whether such alteration would represent any amelioration. He was inclined to think, moreover, that it might be a waste of time to alter the draft, since, whatever changes might be introduced, it would be impossible to produce a draft convention which all States would be prepared to sign.

25. He suggested, therefore, that the draft should be left in its present form, in which it would be of immense value to Governments, because it would indicate to them the type of point they must look out for in drafting arbitral agreements or a *compromis*. It should be presented to the Assembly, not as a draft convention but simply as a general concept of arbitral procedure which the Commission wished to place on record.

26. The CHAIRMAN pointed out that the Commission could not refer the draft back to the Assembly without considering the comments of Governments.

27. Mr. AMADO, while agreeing with that observation, wished to point out that resolution 989 (X) invited the Commission "to consider the comments of Governments . . . in so far as they may contribute further to the value of the draft". He asked what was meant by the word "value". Was it intended to convey that the merit of the draft would necessarily be increased if it were made acceptable to all States by the abandonment of concepts which had already been endorsed by the Commission, even if only by a small majority? In his view it carried no such connotation,

and he felt that the Assembly had not given the Commission any precise instructions concerning the object to be achieved in reconsidering the draft.

28. The value of the draft lay in the fact that it was a remarkable contribution by the Commission to the scientific study of arbitral procedure. The facts were that arbitration and arbitral institutions were already in existence, but that some States, being disinclined to delegate their prerogatives in the field of arbitration and wishing to remain masters of arbitral procedure, preferred to retain the system whereby arbitral procedure derived from the *compromis*. In that light the draft should be regarded as a document defining the present stage of development of international law regarding arbitration.

29. Mr. LIANG, Secretary to the Commission, with reference to an earlier statement by Mr. Spiropoulos that resolution 989 (X) said nothing of the form in which the draft should be presented (para. 9 above), pointed out that the preamble to the resolution lent weight to the Special Rapporteur's proposals to present the draft as a model. While there was no mention of the word "convention", the preamble indicated the Assembly's 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", a statement which surely left it open to the Commission to present the draft as a model, for guidance or reference. There was nothing in the resolution which suggested that the Commission was called upon to revise the draft only as the text of a convention.

30. Mr. SPIROPOULOS said that he had simply wished to emphasize that the General Assembly had invited the Commission "to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft" and had not specifically called upon the Commission to decide on the form of presentation. Notwithstanding, it was within the Commission's competence to decide whether the draft should be presented in the form of a convention or as a model, or in any other appropriate form.

31. Mr. PAL, while agreeing with the Secretary that, in view of the statement contained in the fourth paragraph of the preamble to resolution 989 (X), the possibility of presenting the draft as a model was not excluded, wished to observe at the same time that paragraph 3 of the operative part of the resolution, in which the General Assembly had decided "to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure", did not exclude the possibility of submitting a draft convention.

32. He urged, however, that before deciding on the form in which the draft should be presented, the Commission should first reconsider the draft in the light of the comments of Governments. If, for instance, it was decided to alter the article on the *compromis*, the whole purport of the draft would be radically changed, and that in turn might affect the views of individual members of the Commission on the form in which the draft should be presented to the Assembly.

33. As to whether the draft should be reconsidered in plenary session or by the Committee, he proposed that, if the draft were referred to the Committee in the first

instance, it should be considered once again by the Commission. He personally would prefer the course that had been followed in the case of the report on the régime of the high seas: the Special Rapporteur had summarized the comments of Governments, given his own comments on those comments, and had then placed all that material before the whole Commission, together with his own suggestions. Mr. Pal did not see why that could not be done in the present case. If the Committee were to function at all, it should function only as the Special Rapporteur had done in the case of the high seas.

34. The CHAIRMAN said that the Commission had decided at its 404th meeting to refer the draft to a committee, and that it was inappropriate to discuss the matter again, unless a formal proposal for a reversal of that decision were submitted.

35. There was no doubt in his mind that reconsideration of the 1953 draft implied possible changes in the draft. The third paragraph of the preamble to resolution 989 (X) stated that the General Assembly had noted "that a number of suggestions for improvements on the draft have been put forward". The Special Rapporteur had not only modified a number of articles and inserted some additional ones, but had offered two alternative texts for article 3, so that it seemed the Commission could not evade consideration of the draft.

36. Mr. SCELLE, Special Rapporteur, wished to submit a formal proposal which, he was aware, was in direct contrast to some of the suggestions he had made earlier. As there was no means of telling whether the Committee was genuinely representative of the Commission and whether its decisions would be accepted by the Commission as a whole, he was afraid that much of the work which might be undertaken in the Committee, especially if it were prolonged over two years, would be of no avail. He proposed therefore that the Commission itself should examine each article of the draft at the current session, and in plenary meeting. Since there were seven new members of the Commission at the current session, it was by no means certain that the voting on the draft would be the same as in 1953.

37. Mr. AMADO pointed out, in support of Mr. Scelle's proposal, that, while the older members of the Commission were not interested in the specific details of the problem, the new members were probably better able to consider it in its entirety, and also that it would be difficult to arrive at clear-cut decisions in the Committee.

38. The CHAIRMAN put to the vote the question whether or not the Commission should reconsider the draft in the light of the comments of Governments and the discussions in the Sixth Committee of the General Assembly.

The question was decided in the affirmative by 13 votes to 2, with 4 abstentions.

39. Mr. MATINE-DAFTARY explained that he had voted against the decision, not because he contested that the Commission should have the last word on the matter, or because he felt that it should disregard the General Assembly's instruction to consider the comments of Governments and the discussions in the Sixth Committee, but because he had understood that it was intended to submit the draft to the General Assembly

at the same time as the Commission's report, and he felt that the time still available was inadequate for a thorough examination of the draft.

40. In his view, the amended draft prepared by the Special Rapporteur should be referred to the Committee, which in turn should ask Governments to express their views on the Special Rapporteur's proposals. He was convinced that the Governments had misunderstood some of the essential features of the original draft.

41. Mr. EDMONDS said that he had voted against the decision, not because he was opposed to reconsideration of the draft, but because the Commission had not yet reached a decision on the fundamental question whether the draft was to be considered in a jurisdictional form or in some other form. If the form of the draft was to be changed, it would be a very long and arduous task to reconstruct it; while, if it was to be considered in the form presented by the Special Rapporteur, he did not feel that much time would be required. Before discussing whether the draft should be considered by the Committee or in plenary session, the Commission should first agree in what form the draft was to be presented to the General Assembly.

42. Mr. GARCÍA AMADOR explained that he had taken no part in the discussion because he wished to hear the views of the other members of the Commission on the question of arbitral procedure.

43. He himself had played an active role, as the representative of Cuba, in the General Assembly's debates on the question. In 1953 he had been the first to propose that the draft should be accepted by the General Assembly.² In 1955, when the matter had been raised in the General Assembly again, he had suggested that the draft be adopted by the Assembly as a model for Governments to follow.³ He regretted that Governments were not prepared to accept a draft which did not impose an obligation to accept arbitration, but he felt that there was no alternative for the Commission, as a subsidiary organ of the General Assembly, to carry out the Assembly's instructions to reconsider the draft in the light of the comments of Governments.

44. The Commission need not, however, undertake a substantial revision of the draft, but merely discuss certain clauses which gave it a somewhat rigid character. It was impossible to impose on Governments the obligation to accept arbitration whether they were inclined to do so or not, and he felt that a measure of flexibility could be introduced into the draft without abandoning the fundamental principles.

45. Mr. YOKOTA said he had voted in favour of reconsideration of the draft because he felt that the Commission ought to comply with the General Assembly's wishes. He pointed out, however, that reconsideration did not imply that the fundamental character and economy of the draft need be altered. There had been much discussion as to the form in which the draft should be presented to the General Assembly, and it seemed to him that that discussion concealed an essential difference of opinion about the substance of the draft. Those who were in favour of submitting the draft simply as a model felt that there was no need to change its fundamental character, but those who wished the Commission

² *Ibid.*, Eighth Session, Sixth Committee, 382nd meeting.

³ *Ibid.*, Tenth Session, Annexes, agenda item 52, document A/C.6/L.369.

to submit a draft convention to the Assembly tended to the view that its fundamental character must be changed in order to meet the views of certain Governments. He personally was in favour of the first alternative.

46. He would suggest that the Commission, having decided to reconsider the draft in the light of the comments of Governments, should now make up its mind whether to keep the fundamental character of the draft intact, or whether to proceed with substantial alterations.

47. Mr. BARTOS explained that he had voted in favour of reconsideration of the draft for two reasons. First, the Commission, as a subsidiary body of the General Assembly, was obliged to comply with the Assembly's recommendations. Secondly, if the draft were submitted in its present form as a model, without further reconsideration, it might nevertheless come to be regarded as a subsidiary source of law, and he thought that the creation of subsidiary sources of law was in principle to be avoided.

48. The CHAIRMAN invited the Commission to decide whether it would abide by the decision it took at its 404th meeting to refer the draft to the Committee for reconsideration, or whether it would consider the whole draft, article by article, in plenary session, as had been formally proposed by the Special Rapporteur (para. 36 above).

49. When the officers of the Commission had proposed that a committee be established to consider the 1953 draft and Mr. Scelle's amended draft in the light of the comments of Governments and the discussions in the Sixth Committee (404th meeting, para. 3), they had hoped that that procedure would result in a considerable saving of time. It was expected that the committee would reach agreement on many of the more technical articles without a great deal of discussion, and would refer to the Commission only those articles on which they had found it impossible to agree. It had been the intention, of course, that the Committee should deal only with matters of substance, and that drafting should be entrusted to a drafting committee at a later stage. However, the Committee had not yet begun its consideration of individual articles, so that it was impossible to say how quickly the work would proceed.

50. With regard to the Special Rapporteur's alternative proposal that the draft be considered article by article by the full Commission, the Chairman asked if Mr. Scelle would agree to a postponement of the vote on his proposal until some experience had been gained of the rate of work in the Committee.

51. Mr. SCELLE, Special Rapporteur, stated that in submitting his formal proposal he had felt, on the contrary, that consideration of the draft in the Committee would be valueless and time-wasting.

52. It was not easy to foresee on which articles the Committee was likely to agree at once, until some decision had been reached on the major articles which determined the essential character of the draft. It was true that on the articles of a purely formal nature, which merely recapitulated the provisions of existing conventions, a decision might be reached quickly. But on the more difficult articles there was bound to be a difference of opinion, since some members would wish to attach overriding importance to the *compromis* while

others were in favour of reducing its importance. In those cases, nothing could be decided without reference to the Commission in plenary session.

53. The CHAIRMAN felt that another solution might be to ask the Special Rapporteur to state which articles would require discussion by the Commission.

54. Mr. SCELLE, Special Rapporteur, thought that article 1, for a start, would have to be discussed in plenary session.

55. Mr. SPIROPOULOS observed that, when he had spoken earlier in the meeting, he had taken it for granted that the discussion on item 5 of the agenda, State responsibility, would be adjourned to allow more time for consideration of the draft on arbitral procedure.

56. The Commission could not get out of its present impasse until members knew whether the draft was to be presented to the General Assembly as a draft convention or as a model which might possibly be accepted as the text for a convention. Personally, he did not think that more than five or six articles need be debated in plenary session; there would certainly be differences of opinion over articles 2 and 3, and some others might call for revision or even be rejected altogether.

57. He urged that there should be no further discussion until the Commission had decided one way or another on the essential character of the draft.

58. Mr. SCELLE, Special Rapporteur, thought that, if the Commission came to a decision on articles 1, 2 and 4, the crux of the matter would be settled.

59. Mr. GARCIA AMADOR said he had no objection whatsoever to adjournment of the discussion on State responsibility in order to permit the Commission to reach a final decision on arbitral procedure. From the practical aspect, however, he thought that the reconsideration of the draft on arbitral procedure should be undertaken in part by the Committee, so that the Commission would have time to deal with the draft convention on diplomatic intercourse and immunities during the current session.

60. Mr. PADILLA NERVO explained that his vote in favour of a reconsideration of the draft in the light of the comments of Governments had been based on a careful study of all those comments and on the conviction that a reconsideration of the draft would not necessarily imply any substantial modifications.

61. On the question whether some of the crucial articles, such as articles 1, 2 and 3 and, perhaps, 9 should be considered by the Committee or in plenary session, he pointed out that the Committee had already expressed the opinion that it was useless to consider articles 1, 2 and 3 without knowing what form the draft was to take, and had referred the matter back to the Commission. But, in the discussion in the Commission a vicious circle had formed, some members saying that their views on individual articles depended on the form in which the draft was to be presented, other members refusing to discuss the form until consideration of individual articles had been completed. That vicious circle could only be broken by a decision in plenary session.

62. Mr. PADILLA NERVO suggested that the Commission first decide in what form the draft was to be presented.

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 abstentions, 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

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.

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 comments¹ 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.

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