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Summary record of the 422nd meeting

Topic:
Arbitral Procedure

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prevented from rendering an award. The principle that in arbitration everything flowed from the initial will of the parties to arbitrate applied to procedural matters too, in so far as the parties might have agreed to arbitrate only on condition that the abitration was conducted in a certain fashion. When a fact arising out of the expressed will of the parties prevented the tribunal from reaching a decision, the tribunal had no alternative but to accept the situation, and to assume that the parties themselves had been aware of that possibility from the outset and were resigned to it.

70. Mr. SCELLE, Special Rapporteur, said that on that point he was prepared to go further than either Mr. Ago or Sir Gerald Fitzmaurice. In his view, the provisions of the *compromis* were subsidiary and supplementary to the provisions of the undertaking to arbitrate. It might, and did fairly frequently happen that one party was mistaken or even misled when drawing up the *compromis*. If, for instance, the parties instructed the tribunal in the *compromis* to fix a frontier on the line of the watershed and the tribunal could find no watershed, that provision of the *compromis* would be null and void. Once the arbitral tribunal was constituted it was not merely an organ of the parties, but an international organ with the task of settling a conflict.

71. Mr. AGO remarked that a further point which ought to be mentioned in the *compromis*, and hence in the second paragraph of article 2, was the power of the tribunal to revise its award.

72. Mr. SCELLE, Special Rapporteur, considered such a reference to be unnecessary. Any tribunal had the power to revise its award, always provided that some significant new fact emerged which justified the conclusion that, in rendering its award, it had not been in possession of the full facts.

73. The CHAIRMAN said that the Commission appeared to be prepared to take a decision of principle on the article, without prejudice to formal changes that might be rendered necessary by the nature of the final structure of the draft and to the possibility of additions to the thirteen items in the second paragraph.

74. He assumed that the Commission agreed that the reference to the role of the International Court of Justice or its President should be clarified on the lines indicated by the Secretary.

75. Mr. GARCIA AMADOR gave notice of his intention to raise the question of adding a further paragraph to the article.

It was accordingly agreed to defer a decision article 2 until the next meeting.

The meeting rose at 1.10 p.m.

422nd MEETING

Thursday, 20 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]

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

ARTICLE 2 *(continued)*

1. Mr. GARCIA AMADOR remarked that the fundamental question of the role played by article 2 as a whole in the system of arbitral procedure established by the set of rules did not appear to have been raised. The obligations imposed by the article could be described as imperfect, in the sense that States could comply with the letter without the real purpose of the article being fulfilled. A typical example of such an imperfect obligation was that which the Charter of the United Nations placed on Members to co-operate with the Organization for the achievement of some of its purposes. Members might co-operate but there was no guarantee that the purposes would be achieved. A similar situation prevailed with regard to article 2. Under the first paragraph, the obligation of the parties to a dispute began and ended with the duty to initiate negotiations, for there was no rule of international law which stipulated that States must necessarily come to an agreement. The second paragraph, being optional in character, was even weaker and might be said merely to recognize the right of the parties to include certain matters in the *compromis* rather than to put any obligation on them to do so.

2. The inadequacy of the article became more apparent when it was compared with article XLIII of the American Treaty on Pacific Settlement ("Pact of Bogotá"), ratified by eight American States, non of which had entered any reservation with respect to the article in question. The text of the article was as follows:

> "The parties shall in each case draw up a special agreement clearly defining the specific matter that is the subject of the controversy, the seat of the Tribunal, the rules of procedure to be observed, the period within which the award is to be handed down, and such other conditions as they may agree upon among themselves.
>
> "If the special agreement cannot be drawn up within three months after the date of the installation of the Tribunal, it shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the parties."[1]

As could be seen, the obligation established in the first paragraph was also an imperfect one, but it was completed in the second paragraph by the stipulation that, failing agreement by the parties, a *compromis* binding upon them should be drawn up by the International Court of Justice.

3. The Pact of Bogotá had been drawn up with the same aim as the Special Rapporteur's draft, namely to develop arbitral procedure on lines that would remedy the defects of the traditional system. But the Ninth International Conference of American States, in its concern not to limit the article to a stipulation which might frustrate the purpose of the procedure, had not only imposed the obligation to draw up a special agreement but had also established machinery to ensure that it came into being.

4. Article 9 of the draft admittedly sought to remedy the deficiencies of article 2, in that it provided that the undertaking to arbitrate might replace the *compromis*, on two conditions: that it contained provisions which

[1] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series*, Vol. 30, 1949, No. 449, p. 100.

seemed sufficient for the purpose, and that the tribunal was already constituted. Those two conditions, however, tended to destroy the efficacy of the provision. The first would hardly ever be fulfilled in practice, since it was extremely rare for agreements to arbitrate to go into sufficient detail to make a *compromis* superfluous. The second was also unlikely to be fulfilled, since the tribunal was generally set up as a result of the *compromis* and not before it had been drafted.

5. Although the most logical course for him would be to propose the addition of a paragraph on the lines of article XLIII of the Pact of Bogotá, he hesitated to advocate a course which would run counter not only to the views of a large number of the members of the Commission but also to the opinion of most Governments, as expressed in their comments on the 1953 draft.[2] He nevertheless remained convinced that it was essential that article 2 should impose, not an imperfect obligation as in the existing text, but one that provided a remedy where there was a lack of agreement between the parties.

6. Mr. SCELLE, Special Rapporteur, said that, if he considered only his personal views, he would be in full agreement with Mr. García Amador. However, it appeared from the comments of Governments that what they chiefly objected to and even feared was the obligation to have recourse to the International Court of Justice. That was why he had drafted article 2 so as to leave States all possible freedom in preparing a *compromis*, which, provided it served the purpose of arbitration, could be drawn up entirely according to their will.

7. Legally speaking, the obligation imposed in article 2 was an imperfect one, in that it made no provision for the intervention of a public authority able to compel the parties to fulfil their duty. Politically speaking, however, it was not wholly imperfect, for Articles 34, 35 and 36 of the United Nations Charter gave the Security Council the power to exercise various degrees of influence on the parties to international disputes, while Article 36 drew attention to the fact that such disputes should as a general rule be referred to the International Court of Justice. Thus, article XLIII of the Pact of Bogotá, though much more drastic, was not totally different in essentials from Articles 33 to 36 of the Charter.

8. In view of the marked reluctance of most Governments to have recourse to the International Court of Justice, and more especially to ask the Court to draw up a *compromis* in case of disputes, he had sought to achieve the same object as article XLIII of the Pact of Bogotá by giving the power of preparing the *compromis* not to the Court but to the arbitral tribunal itself, as in the General Act for the Pacific Settlement of International Disputes. The possibility of the *compromis* not being executable or not being properly implemented was provided for in subsequent articles. They applied, however, only to cases where one, and one only, of the parties proved recalcitrant. When both parties were unwilling to submit their dispute to arbitration, nothing more could be done, since no external authority could force them to do so.

9. Article XLIII of the Pact of Bogotá had been adopted only in one region of the world, and he considered it quite impossible for an article on the same lines, even when merely part of a model set of rules, to win the acceptance either of the Commission or of Governments in general.

10. The CHAIRMAN asked whether Mr. García Amador wished to move a formal amendment.

11. Mr. GARCIA AMADOR said that, as he had already mentioned, he did not wish to press his suggestion in face of the obvious preference of Governments for the traditional system of arbitration. It was to be noted that, although article 2 of the draft made the preparation of the *compromis* dependent on the will of the parties and thus virtually returned to the traditional system of arbitration, many Governments, including some which had accepted the Pact of Bogotá, had seen a tendency towards judicial arbitration even in those provisions.

12. It was, however, a curious phenomenon that when it came to signing a convention containing the most complicated clauses, to which Governments had previously raised all sorts of objections, the latter disappeared as if by magic and those same Governments signed an instrument to which they had previously appeared to be irrevocably opposed. In the discussions in the Sixth Committee of the General Assembly, many of the severest criticisms of the Commission's 1953 draft had come from Governments which had already signed the Pact of Bogotá, an instrument which in many respects went much further than the Commission's draft. That did not of course mean that the comments of Governments were negligible, but it did show that they did not necessarily reflect those Governments' final position.

13. He hoped that at its next session the Commission would be able to reconsider the question of the legal, if not the political, deficiency of article 2 and provide machinery to ensure the effective execution of the undertaking to arbitrate.

14. The CHAIRMAN invited the Commission to vote on article 2 as variously amended, subject to the possibility of supplementing the list of points in the second paragraph.

15. The following amendments had been accepted by the Special Rapporteur: to insert at the head of the three points listed in the first paragraph a new point (*a*) as follows: "the agreement of the parties to submit the dispute to arbitration"; to substitute the phrase "the rules and principles" for the phrase "the law and the principles" in item 1 of the second paragraph; to add to that same item a provision on the lines of article 1 of the Swiss Civil Code; to substitute in item 3 the words "or the power of the tribunal to establish its rules of procedure" for the clause beginning "on condition that"; to clarify in item 13 the part which the International Court of Justice might be asked to play; and to add a clause to the effect that, in the absence of any specific agreement by the parties on any of the points mentioned in the second paragraph, the matter, unless covered by other articles of the draft, should be settled either by the tribunal or by another appropriate authority.

16. Mr. BARTOS asked for a separate vote on each of the two paragraphs.

17. The CHAIRMAN put to the vote the first paragraph of article 2 as amended.

The first paragraph was adopted by 18 votes to 1.

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

18. Mr. BARTOS explained that he had voted against the paragraph because he was not convinced that it did not constitute a departure from the traditional system of arbitration.

19. The CHAIRMAN put to the vote the second paragraph of article 2 as amended.

The second paragraph was adopted unanimously.

20. The CHAIRMAN put article 2, as amended, as a whole to the vote.

Article 2, as amended, was adopted by 19 votes to 1 with one abstention.

ARTICLE 1 *(continued)*[3]

21. The CHAIRMAN invited the Commission to take a decision on article 1, the vote on which had been deferred at the previous meeting (421st meeting, para. 34) pending the distribution of the text of the amendments submitted by Mr. Verdross, Mr. El-Erian and Mr. Khoman.

22. Mr. VERDROSS, explaining his amendment (421st meeting, para. 4), said that an agreement to submit disputes to arbitration could contain either explicit provisions on the constitution of the tribunal and the regulation of its procedure or simply an abstract undertaking to have recourse to arbitration. The amendment merely drew the logical conclusion from the implied recognition of the possibility of such different types of undertaking in the first paragraph of article 2.

23. Mr. SCELLE, Special Rapporteur, said that Mr. Verdross's amendment was unacceptable as it stood. To leave to the *compromis* fundamental provisions which might or might not be accepted by the parties would completely undermine the whole economy of his draft.

24. Mr. AMADO observed that by the words "The arbitration treaty" in his amendment Mr. Verdross presumably meant the undertaking to arbitrate.

25. In his opinion, Mr. Verdross's point was already covered by the first part of article 2. Although he was opposed to the whole principle of the Special Rapporteur's draft which, as the Special Rapporteur would be the first to admit, was designed to deprive arbitration of its arbitral character, he must agree that, from the logical standpoint, Mr. Verdross's amendment ran counter to the spirit of the draft.

26. The CHAIRMAN, speaking as a member of the Commission, pointed out that the possibility of the method of constituting the tribunal not being dealt with in the undertaking to arbitrate was recognized in the first paragraph of article 2. There were three possible types of undertaking to arbitrate. The first was a detailed undertaking which either designated a tribunal—the Permanent Court of Arbitration for instance—to which disputes should be referred, or provided for the constitution of the tribunal, or laid down the procedure for constituting it. The second was the ordinary arbitration clause found in agreements. The third was an undertaking in principle to arbitrate, the parties leaving open the question of the constitution of the tribunal and the procedure it should follow, but making certain provisions in the event of their not agreeing on the latter points when a dispute arose. Mr. Verdross's amendment merely catered for the last type of undertaking.

[3] Resumed from 421st meeting.

27. Mr. SCELLE, Special Rapporteur, said that the constitution of the tribunal had always been the stumbling block in aribtral procedure. Mr. Verdross's amendment took exactly the opposite approach from article 2 of the draft, which stated that the parties to a dispute were free to include almost anything in the *compromis*. Mr. Verdross, on the other hand, gave the parties the right to leave agreement on certain crucial points to the *compromis*.

28. Mr. LIANG, Secretary to the Committee, remarked that although Mr. Verdross's amendment undoubtedly reflected the existing juridical situation, he appreciated the Special Rapporteur's contention that it conflicted with the whole idea of his draft. The conflict lay, however, not so much in what the amendment said as in the shift of emphasis which it implied. In the system established by the Special Rapporteur, the *compromis* played a subordinate role. Mr. Verdross's amendment, on the other hand, placed less emphasis on the original agreement to arbitrate while raising the *compromis* to a position of greater importance.

29. Mr. MATINE-DAFTARY suggested that Mr. Verdross's amendment could best be considered in connexion with article 4, which dealt with cases where the party or parties failed to constitute the tribunal.

30. Sir Gerald FITZMAURICE said that he had difficulty in grasping the exact point of the controversy. The idea contained in Mr. Verdross's amendment appeared to him so self-evident that it was hardly necessary even to state it. Apart from *ad hoc* arbitral agreements, where everything was settled in a single document, it was the practice in virtually every other case for parties undertaking to arbitrate to leave open such questions as the constitution of the tribunal and its procedure. It was not always possible for them to state in advance how many arbitrators they would need and who they should be. Such decisions depended on the nature of the particular dispute.

31. As he had often pointed out, the Special Rapporteur's draft enjoyed his general support, but he would have no difficulty in accepting Mr. Verdross's amendment, and could not see what objection there was to it, even from the Special Rapporteur's standpoint.

32. Mr. VERDROSS observed that nobody could forbid States, when entering into an agreement to arbitrate, to leave certain matters for settlement in the *compromis*.

33. Mr. SCELLE, Special Rapporteur, said that he could accept Mr. Verdross's amendment only if it were qualified by the words "subject to the provisions of subsequent articles".

34. Mr. VERDROSS replied that he had no objection whatever to such a qualification.

35. Mr. YOKOTA considered Mr. Verdross's point to be already covered by the first paragraph of article 2. He saw no need for its inclusion, either as part of article 1 or in the commentary.

36. Mr. SANDSTRÖM said that he saw no objection to the substance of Mr. Verdross's amendment, though he considered the idea it contained to be already implied in article 2. He was not in favour of it, however, on other grounds.

37. The draft did not deal with arbitration in general, but was concerned with establishing rules of arbitral

procedure. It must accordingly leave out many things on the assumption that they were already known. The whole of article 1 could, in fact, be dispensed with, some of the ideas it contained being merely mentioned in a preamble and the ideas in paragraphs 1 and 2 being worked into the text of article 2. That was a question, however, which could be discussed in a drafting committee at the next session.

38. Mr. AMADO agreed with the Secretary. Mr. Verdross's amendment introduced a completely foreign element into the Special Rapporteur's perfectly coherent, but to him unacceptable, structure.

39. The CHAIRMAN, speaking as a member of the Commission, agreed with Sir Gerald Fitzmaurice. Arbitration agreements in which the details of the execution of the undertaking to arbitrate were not specified were extremely common.

40. Faris Bey EL-KHOURI agreed that Mr. Verdross's amendment contained elements calculated to undermine the whole system of the draft, since it gave either party the possibility of frustrating the intent of the original undertaking to arbitrate by simply not agreeing on the constitution of the tribunal.

41. He would nevertheless support the amendment, since he believed in preserving the freedom of choice of parties to a dispute.

42. Mr. SCELLE, Special Rapporteur, pointed out that, if the clause he had proposed were not inserted in Mr. Verdross's amendment, the provisions of article 4 regarding the appointment of arbitrators by the International Court of Justice would no longer be applicable should the parties fail to agree on a *compromis*.

43. He could accept the amendment, however, if it were clear that it did not override the rest of the provisions of the draft; the additional clause he had proposed would provide such a safeguard.

The meeting rose at 11.25 a.m.

423rd MEETING

Friday, 21 June 1957, at 10.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Planning of future work of the Commission

[Agenda item 7]

1. The CHAIRMAN said there could be little doubt that at its next session the Commission must give priority to the questions of arbitral procedure and diplomatic intercourse and immunities.

2. He invited comments on the order in which the remaining three topics on its current programme should be listed on the next session's agenda.

3. Mr. AGO felt it was most desirable that the Commission should take a binding decision at its current session on the topics that would be discussed at the next session in order that members might know what topics specially to prepare. It would take the Commission a large part of the next session to complete its work on arbitral procedure and diplomatic intercourse and immunities, and that should be taken into consideration when deciding the other topics to be taken up.

4. Regarding diplomatic intercourse and immunities, he wondered whether the Secretariat could prepare an analysis of the law and practice of the different States. Such an analysis would have been very valuable to the Commission in its discussions at the current session. Fortunately, however, the Commission had been engaged only on a preliminary reading, so the lack of such analysis had, perhaps, been a less serious matter than it would have been had the Commission been preparing its final draft. It would be desirable to have an analysis of that kind whenever the Commission took up a new topic.

5. Mr. LIANG, Secretary to the Commission, said that the Secretariat was preparing a collection of laws and regulations in the field of diplomatic intercourse and immunities, which would be published before the Commission met for its tenth session next year. It was unfortunately impracticable to supply advance copies to all members of the Commission, since the material was exceedingly voluminous, but it had been made available to Mr. Sandström, Special Rapporteur on the topic of diplomatic intercourse and immunities, and also to Mr. Zourek, Special Rapporteur on the topic of consular intercourse and immunities.

6. Mr. Ago had also mentioned the desirability of compiling materials relating to the practice of States as distinct from their laws. He recalled in that connexion that at its first session the Commission had considered ways of making the evidence of customary international law more readily available,[1] and had eventually submitted certain proposals to the General Assembly regarding the possibility of compiling documentation on the practice of States concerning various branches of international law; no further action, however, had been taken on them. He was afraid that for the next session the Secretariat's resources would not permit it to undertake a work of such large size. He would however study the matter.

7. Sir Gerald FITZMAURICE said that, although in principle he agreed with Mr. Ago, in practice it seemed desirable for the Commission to be prepared to discuss the other three topics on its current programme, at least for a few meetings each. For one thing the Special Rapporteurs would find it useful to have the Commission's preliminary comments on certain key points in their reports; as Special Rapporteur on the question of the law of treaties, he, for example, was very eager to hear the Commission's views on the doctrine of *rebus sic stantibus*. Moreover, it always happened that, after the Commission had finished substantive discussion of the main topics on its agenda, there had necessarily to be a pause while the Drafting Committee completed its work, while the Special Rapporteur revised his commentary, and while the final report was processed. In his view, therefore, the Commission should at least place State responsibility, the law of treaties and consular intercourse and immunities on its agenda for the next session, in addition to the two topics mentioned by the Chairman.

8. Mr. SPIROPOULOS thought that after arbitral procedure and diplomatic intercourse and immunities, the Commission should, next year, give priority to the law of treaties which had been on its programme since 1949. It had always been the Commission's practice to include all topics on its current programme in the agenda for the next session. In addition to the reasons for doing so which Sir Gerald Fitzmaurice had men-

[1] *Official Records of the General Assembly, Fourth Session, Supplement No. 10,* chap. V.