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Summary record of the 417th meeting

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cle 4 raised a difficult and fundamental question on which it would be useful to have a full discussion. Regarding articles 5 and 6, the Commission must make up its mind whether it was in favour of the approach he proposed or not; if not, it would have to choose between the principle of an international standard of justice and that of the equality of nationals and aliens; but the whole question was one on which members of the Commission might wish to reflect for another year, for it was indeed the crux of the whole draft. Articles 7, 8 and 9 had been described as substantive law, but they had been discussed at length at the 1930 Codification Conference, and had always been regarded as an integral part of State responsibility; he himself had no doubt that they should be retained in the draft, and it would be desirable for them to be discussed at the current session if time allowed. Unfortunately, time would almost certainly not allow discussion of the one fundamental question raised in articles 10, 11 and 12, namely, the question of negligence. Even so, discussion of the remaining points he had referred to should give him invaluable guidance in revising the draft articles for further consideration at the next session.

39. Mr. PADILLA NERVO expressed the view that, in considering the draft articles, the Commission should not vote on them or on any amendments submitted to them but merely discuss, in a general manner, the various points that were raised, especially those to which the Special Rapporteur had just drawn particular attention.

40. Mr. SPIROPOULOS said he was quite willing that the Commission should proceed to discuss the draft articles, beginning with article 2, as suggested by the Chairman and the Special Rapporteur, since he did not think it would reach chapter III anyway.

41. Mr. MATINE-DAFTARY said he did not insist on his proposal, (para. 36 above) since the procedure suggested by the Chairman would in practice amount to the same thing.

The Commission decided to discuss the draft (A/CN.4/106, annex) article by article, beginning with article 2.

The meeting rose at 1.5 p.m.

417th MEETING

Friday, 14 June 1957, at 9.30 a.m.
Chairman: Mr. Jaroslav ZOUREK.

Co-operation with international bodies

1. The CHAIRMAN invited the Commission to consider the contents of a letter dated 27 May 1957 addressed to the Secretary of the Commission by the Acting Secretary of the Asian Legal Consultative Committee, and drew attention in that connexion to article 26 of the Commission's Statute, relating to consultation with international or national organizations, and to the resolutions on co-operation with inter-American bodies adopted by the Commission at its sixth, seventh and eighth sessions.

2. Mr. LIANG (Secretary to the Commission) stated that he wished first of all to report to the Commission regarding the resolution adopted by the Commission in 1956 on the subject of co-operation with inter-American bodies. Under that resolution the Commission requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, as an observer, the fourth meeting of the Inter-American Council of Jurists to be held at Santiago, Chile, in 1958.[1] He had, however, been informed that, owing to the need for further preparatory work by the Inter-American Juridical Committee of Rio de Janeiro, the meeting would have to be postponed until 1959. No further action by the Commission was required in that connexion.

3. He then went on to explain that the Asian Legal Consultative Committee, described by its Acting Secretary as an "intergovernmental committee of legal experts", had been established on 15 November 1956 for an initial period of five years by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. According to article 3 of the Committee's Statute, one of its objects was "to examine the questions under consideration by the International Law Commission and to arrange for its views to be placed before that Commission." At the Committee's first meeting at New Delhi from 18 to 27 April 1957, it had instructed its Acting Secretary to get in touch with the Commission with a view to establishing consultative relations.

4. The CHAIRMAN proposed that the Commission authorize the Secretary to reply to the Asian Legal Consultative Committee on the following lines:

(1) The Commission will ask the Secretary-General of the United Nations to put the Asian Legal Consultative Committee on the list of organizations which receive the Commission's documents (see article 26, paragraph 2, of the Commission's Statute).

(2) The Commission requests the Consultative Committee to send, whenever it sees fit, any observations it may wish to make on questions under study by the Commission.

(3) The Commission has pleasure in acknowledging the Committee's letter, and expresses a keen interest in its work. The Commission would welcome any information on the development of its programme.

It was so agreed.

Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) *(continued)*[2]

[Agenda item 1]

5. The CHAIRMAN recalled that the Commission, after adopting its draft convention on arbitral procedure at its fifth session, had recommended to the General Assembly, under article 23, paragraph 1, of its Statute, that the Assembly recommend the draft to members with a view to the conclusion of a convention.[3] Under resolution 989 (X) adopted by the Assembly on 14 December 1955, the Commission was invited to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session. The Assembly had also decided to place on the provisional agenda for its thirteenth

[1] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9*, para. 47.

[2] Resumed from 404th meeting.

[3] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, paras. 53-55.

session the question of arbitral procedure, including the question of the desirability of convening an international conference of plenipotentiaries to conclude a convention on the subject.

6. The Special Rapporteur, Mr. Scelle, had prepared a report (A/CN.4/109) on the basis of those comments and discussions. In order to expedite the discussion, the Commission had decided at its 404th meeting to set up a committee to consider the situation and report back to the Commission. The Special Rapporteur being of the opinion that there was no longer any point in submitting the text to the General Assembly in the form of a draft convention and that it should take the form of a "model", certain members of the Committee had urged that that preliminary question be referred to the Commission for decision. In the opinion of some of the members of the Committee, the question was identical with the question whether the Commission should review the articles of the draft in the light of the observations of Governments.

7. Speaking as a member of the Commission, he said that the terms of the General Assembly resolution and the fact that nine new articles had been added to the draft made a review of the text essential. The Commission need not review every article. It could follow the usual practice of merely reconsidering those affected by the comments of Governments or their representatives in the Sixth Committee.

8. Mr. SCELLE, Special Rapporteur, said that he could not entirely agree with the view just expressed by the Chairman. The articles of the draft all hung together to form a coherent whole, and it would be very difficult to review some without the others.

9. The draft, it would be recalled, had been adopted by only a narrow majority at the Commission's fifth session, members being divided between the concepts of "diplomatic arbitration" and "judicial arbitration". Though it was difficult to discern any definite trend in the conflicting comments made by Governments, either in writing or through their representatives in the Sixth Committee or the Assembly itself, it was clear that the general tendency was to reject the draft, and that States, naturally enough, continued to regard arbitration as a diplomatic and not a judicial procedure, and wished to retain the old system under which the *compromis* was the keystone of the whole edifice—the basis on which the entire procedure was regulated.

10. The Commission had, none the less, in the report on its fifth session, made it clear that the draft could be used neither as a means of imposing compulsory arbitration nor, indirectly, to give the International Court of Justice any influence over cases submitted to arbitration.[4] No State would be obliged either to sign the convention or to resort to arbitration, but once a State had given an undertaking to accept the arbitral procedure indicated in the convention and had signed the instrument, it would be bound to apply that procedure. Even so, it could, before signature, enter reservations to the effect that the provisions would not apply to incidents prior to signature.

11. Notwithstanding those assurances, States apparently preferred the traditional system of arbitration, under which the States parties to a dispute remained masters of the procedure followed, and could frustrate or delay a settlement by not appointing arbitrators or by changing them whenever they appeared not to support the State's case. Such a system, in the Commission's view at least, was inacceptable to jurists. The procedure could not be left in the hands of the parties and must culminate in an award, which, once finally rendered, was binding on the parties. The very essence of arbitration was that it must culminate in a final award which put an end to the dispute, unless some new fact emerged that justified review of the award. Such a view had already been established doctrine, more than fifty years before, in the days of Oppenheim, Lapradelle, Politis and Renault, the latter of whom had been the first to declare that there could be no hope of progress so long as arbitration was not established on a judicial basis, and so long as the States parties to the dispute were masters of the procedure followed.

12. The draft, which was based on the Convention for the Pacific Settlement of International Disputes signed at The Hague in 1907, the General Act adopted in 1928, and the teaching of the writers he had just mentioned, established a strict system of judicial arbitration. Some of its articles might well win the general approval of States, but they were only the formal and technical ones which were valueless by themselves. And if any considerable changes were made in the essential articles in order to produce a draft international convention capable of general adoption, the draft would be emasculated and rendered quite useless for the Commission's purpose.

13. Under General Assembly resolution 989 (X), the Commission was asked "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". However, a large proportion of the conflicting observations made on the draft were not calculated to improve it, but rather to destroy it. Indeed, the whole resolution was to be regarded as a polite rejection of the Commission's draft convention.

14. The reasons were not far to seek. Very few Governments had the same conceptions or practice in the matter of arbitration. Moreover, as had been pointed out in the Sixth Committee, no two arbitration cases ever presented themselves in the same light. Owing to political circumstances, it was very rare for two *compromis* to be alike, so that as long as the *compromis* regulated the entire procedure, that procedure was bound to be different in each case. Of the whole membership of the United Nations, there were probably less than ten Governments, those with a long practice of arbitration, whose conceptions were close enough to those of the draft to make it likely that they would ratify a convention based on it. The General Act for the Pacific Settlement of International Disputes drawn up by the League of Nations had obtained twenty-four ratifications. The same instrument when taken up by the United Nations had obtained a bare four. The reason was the emergence since the Second World War of a group of States wedded to the concept of national sovereignty. The numerous newly-established States were also firmly attached to the same concept. Consequently, with the steadily increasing membership of the United Nations, there would be less chance of a convention based on the draft securing anything approaching general acceptance.

15. The new draft which he had prepared did not differ a great deal in substance from the previous one, although it included a few new articles. It differed merely in form and purpose, being intended only as a

[4] *Ibid.*, paras 28 and 29.

model draft on arbitral procedure that Governments were free to ignore or to follow as they wished. On the other hand, there was nothing to prevent its serving as a basis for an international convention whenever greater harmony prevailed between States.

16. He was in favour of submitting the draft to the Assembly in that form, and of recommending, under article 23, sub-paragraph 1 (*b*) of the Commission's Statute, that the Assembly simply "take note of" the draft.

17. Mr. SPIROPOULOS agreed that the Commission must take a decision on its programme of work with regard to arbitral procedure, but did not think there was any point in deciding immediately on the form the draft should take. What was perhaps more urgent was to consider what action the Commission should take afterwards, since it was obviously impossible for the Sub-Committee to do any serious work on the revision of the draft in the short time left to it.

18. He would have difficulty in accepting the procedure, which he understood to be under consideration by the Secretariat, namely, to submit the revised text to Governments in 1957 with a view to establishing a final text at the Commission's next session in the light of their replies. The Commission already had the comments of Governments and the record of the discussions in the Sixth Committee, and it would seem very odd if it were to submit the draft again to Governments for further comments. The only course, in his opinion, was to decide on the form of the draft and review the text at the next session. That would allow the Commission time to give mature consideration to the text of the draft, and would enable it to submit the revised text to the General Assembly for its thirteenth session, as stipulated in General Assembly resolution 989 (X), and should not prevent it from completing its work on diplomatic intercourse and immunities at the same session.

19. Mr. LIANG (Secretary to the Commission) agreed with Mr. Spiropoulos on the inadvisability of referring drafts to Governments time and time again. He had thought that, if the Commission could agree to the proposal of the Special Rapporteur, the draft could be sent to Governments in 1957 as a reminder that the matter was to come before the General Assembly in 1958, and in order to give them time to define their attitude. Revision of the text of the draft would take up a considerable number of meetings, and clearly could not be completed at the current session.

20. The CHAIRMAN, recalling that the establishment of the Committee had been advocated as a means of expediting the work of the Commission, urged that the Committee be allowed to continue its work. Otherwise, the Commission would find itself in exactly the same position at its tenth session, with the difference that it would then be no longer possible to delay the work on arbitral procedure any further.

21. Speaking as a member of the Commission, he said that he did not share Mr. Spiropoulos's pessimistic view. If the Commission settled the preliminary question of the form to be given to the draft and took a decision on some of its fundamental articles, the Committee could then review fairly quickly most of the articles. Actually many dealt with purely technical matters on which there could be little difference of opinion. Those could be adopted forthwith, subject to reference to the Drafting Committee, and only the controversial articles need be referred to the Commission for discussion.

22. The capital question was whether or not the Commission was to revise the draft in the light of the comments of Governments and the discussions in the Sixth Committee. In his opinion it was bound to do so. A mere change in the form of the draft would not be sufficient to give it any chance of adoption by the General Assembly. Moreover, the Sixth Committee had already discussed the possibility of drawing the attention of the Member States to the draft so that they could use it as a *model* when they drew up provisions to be incorporated in arbitration treaties; but the Committee had rejected the idea on the grounds that even such action would imply approval of the principles of the draft.

23. Mr. AMADO stated that it seemed to him useless to reopen the discussion, as the subject had been exhausted in the previous sessions of the Commission. Besides, Mr. Scelle's draft constituted a whole whose structure would be destroyed if one tried to modify its main articles. Like many other members of the Commission, he had been concerned with the problems of arbitration throughout his career, and had considered and discussed them *ad nauseam*. There was no point in discussing the question further if there was no chance of the draft's serving as a basis for an international convention. He was not interested in international law in the abstract, but only in its diplomatic implications. —in what it meant in practical terms for States and the international community.

24. Mr. FRANÇOIS, after paying a tribute to the work of the Special Rapporteur, said he found himself in entire agreement with Mr. Spiropoulos. In his view, the Commission should continue to pay the same careful attention to the comments of Governments as it had always done in the past, and not treat them lightly. It clearly did not have time to give proper attention to them in what remained of the current session, even if it had further recourse to the Committee—and that, in his view, would be a waste of time. It therefore had no choice but to consider them at its next session. That might well take three or even four weeks, and the Commission would then have no time for anything more than to complete its work on diplomatic intercourse and immunities. The fact that the General Assembly only allowed the Commission ten weeks a year should not be made an excuse for skimping its work. In his opinion, it was far better to submit a few carefully considered drafts than a large number which bore the marks of hasty preparation. Moreover, it must be borne in mind that the Commission had a number of new members, who must be given an opportunity to express their views. The General Assembly wished to have the advice of the Commission as it now was, not as it had been a few years previously.

25. The final argument in favour of Mr. Spiropoulos's proposal was that it would enable all the members of the Commission to study the Special Rapporteur's most recent report at leisure, in the light of the comments made in the Sixth Committee. Mr. François himself, and, he thought, most of the other members, had not yet had a chance of doing so.

26. Mr. KHOMAN said it seemed that the main point at issue in the Committee had been whether to submit the draft in the form of a draft convention or a model draft. But that question was of no particular importance

or urgency because the Commission had not been asked it by the General Assembly in resolution 989 (X). Moreover, as the Special Rapporteur had said, his latest text (A/CN.4/109), which was in the form of a model draft, differed very little from the draft convention which the Commission had prepared at its fifth session. Finally, the Commission had no assurance that the General Assembly would be any more likely to accept that text in the form of a model draft than in the form of a draft convention.

27. In his view, the most important and urgent matter with which the Commission was faced was the comments made at the tenth session of the General Assembly. The Special Rapporteur apparently thought that if those comments were taken into account it would destroy the whole value of his draft, but, with all due respect, that was only his personal opinion, and the question was one for the Commission to decide.

28. While he agreed with Mr. Spiropoulos that very little time remained for that purpose, he shared the Chairman's view that the Committee should use such time as was available to consider as many of the comments of Government as possible. Then, if the results of the Committee's efforts warranted it, the Commission could even consider submitting an interim report. What the General Assembly would not understand would be a failure by the Commission to take any action in the matter at its current session.

29. The CHAIRMAN, speaking as a member of the Commission, said that he personally agreed with Mr. Khoman that the form of the draft was a secondary matter.

30. Mr. AGO said he entirely agreed with those members of the Commission who thought that further work on the subject should be postponed till the next session. He saw no necessity even of taking a final decision at the current session as to whether the draft should be a draft convention or a set of rules to help Governments in drafting arbitration treaties or *compromis*.

31. Sir Gerald FITZMAURICE agreed that the Commission did not have time to dispose of the draft at its current session, if it wished to revise it completely with a view to presenting it in the form of a draft convention. That, however, was the very question it was asked to decide, and if it did not decide it now it would have to decide it at its next session. In his view, it would be better to decide it now, since, if the Commission did not wish to revise the draft completely, it might be able to dispose of it very quickly. To his mind it was obvious that there was a very great difference regarding the nature of the work that had still to be done on the draft, depending on whether it was to take the form of a convention, a model draft or—if the word "model" had certain unacceptable overtones—simply a project. If it was to be a convention, the Commission was bound to concern itself to some extent at least with making it acceptable to Governments. If it was to be a model draft, or simply a project, which Governments would be free to use, or not to use, as they pleased, it could be drafted from a more purely juristic standpoint.

32. He could not agree that the General Assembly would be just as likely to reject a model draft as a draft convention. The General Assembly need not positively approve or disapprove the draft; it could simply take note of it, as it had done in the case of the draft Declaration on Rights and Duties of States.

33. Finally, he found himself in profound disagreement with certain previous speakers since, in his opinion, it would be extremely valuable to have a model draft or project along the lines proposed by the Special Rapporteur. Speaking from some experience in the matter, he knew how much arbitral procedure depended on the relations between the two States parties to the dispute: if the relations were good, it did not matter if the *compromis* was somewhat loosely drafted; but if they were not particularly good, one party or both would want the *compromis* drawn up in a manner to cover all eventualities. That was where the Special Rapporteur's draft would be of particular value, as a guide to possible pitfalls in arbitral procedure. In fact, it might be even more valuable than a draft convention, for, as the Special Rapporteur had pointed out, there was reason to fear that only comparatively few States would ratify a convention, even if the text were modified radically in order to take account of the objections that had been made to it.

34. For those reasons, he felt that the draft should be regarded simply as a project; and, if that could be agreed, he saw no reason why the Commission should not dispose of it at the current session. Members had already had an opportunity to read the Special Rapporteur's very lucid report and to study the amended draft articles which he proposed. It seemed to Sir Gerald that the Special Rapporteur had done everything possible to take the comments made in the General Assembly into account, to the extent that that could be done without departing from the basic concepts underlying his draft. The Committee could perhaps meet once more, in order to satisfy itself that none of the comments had been overlooked, but, apart from that, he saw no reason why the text should not be submitted to the General Assembly as it stood.

35. Mr. PADILLA NERVO, after recalling the gist of the discussions in the Committee, said that he entirely agreed with all that Sir Gerald Fitzmaurice had said, particularly that a model set of rules enjoying the great moral authority of the International Law Commission and the General Assembly would be of even more value than a draft convention. On the assumption that it was to be a model set of rules, he too was prepared to support the text as it stood, except for one or two not particularly important reservations to articles 3 and 9. He saw no reason why the Commission should not now decide that the draft should take that form. Then, even if other members felt they had not time to discuss the draft articles at the current session, they could at least reflect on them before the next session, without any doubt in their minds as to the form they would eventually take.

36. Mr. HSU said he was in complete agreement with the views expressed by Sir Gerald Fitzmaurice and Mr. Padilla Nervo.

37. Mr. AMADO said that, as far as he knew, there was really no question in anybody's mind of transforming the draft into a convention, since that would mean destroying the whole structure that had been built up by Mr. Scelle. In his view, the draft should not be regarded as a "model", but simply as the Commission's contribution to the development of arbitration, a contribution which he personally was convinced would be

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-