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Summary record of the 421st meeting

Topic:
Arbitral Procedure

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binding convention. Even if it did not commit States, it certainly committed the body which was presenting it to the General Assembly.

59. Mr. SCELLE, Special Rapporteur, said that in the main he associated himself with what Sir Gerald Fitzmaurice, Mr. Spiropoulos and Mr. Ago had said in reply to the various points that had been raised. In particular, he could not share the fears expressed by the Chairman and Mr. Tunkin; for, in the unlikely event of two States agreeing to take the draft as a whole as the basis for an arbitration treaty, they would do so by means of a *compromis* relating to the specific types of dispute which they agreed to refer to arbitration. Some at least of Mr. Tunkin's objections appeared to relate rather to article 3.

60. In his view, the only valid point that had been made was Mr. Verdross's criticism of paragraph 2. He had only inserted that paragraph in order to try to meet the views of certain Governments, who were anxious to remove any doubts as to the draft's retrospective effect; he realised that if it was to be retained it would be necessary to expand it considerably, and so willingly agreed to its deletion.

61. If the Commission so desired, he would also be willing to delete paragraph 4, but would prefer to retain it.

62. The CHAIRMAN asked Mr. Tunkin how he would formulate his proposed addition to article 1.

63. After some discussion between Mr. TUNKIN and Mr. SCELLE, Mr. VERDROSS proposed that it be stated at the beginning of article 1 that "the following rules are only applicable when incorporated in whole or in part, in an arbitration treaty or a *compromis.*"

The proposal was adopted by 18 votes to none, with 1 abstention.

64. Referring to a point raised earlier by Mr. Bartos (para. 46 above), Sir Gerald FITZMAURICE observed that two States which had accepted the compulsory jurisdiction of the International Court of Justice by virtue of the optional clause in the Court's Statute were always free to conclude a separate agreement, stipulating that particular types of dispute should not be submitted to the Court but must be referred to arbitration. In such a case the special agreement would prevail over the general agreement. The point, therefore, appeared to require further consideration.

The meeting rose at 1.15 p.m.

421st MEETING

Wednesday, 19 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 1 *(continued)*

1. Mr. VERDROSS, recalling the decision that had been taken at his suggestion (420th meeting, para. 63) just before the close of the previous meeting, said that on consideration it seemed necessary to refer not only to "an arbitration treaty or a *compromis*" but also to "another international treaty"; for the rules, or some of them, might well be incorporated in instruments, like the Convention for the Pacific Settlement of International Disputes (The Hague, 1907), which were neither *compromis* nor, strictly speaking, arbitration treaties at all.

2. Mr. Verdross's proposal, therefore, would insert the following clause at the beginning of article 1: "the following rules are only applicable when incorporated, in whole or in part, in an arbitration treaty, a *compromis* or another international treaty."

3. Also, arbitration treaties proper were of two kinds. Most of those concluded since the First World War laid down the manner in which the tribunal was to be constituted and gave the parties the right to have direct recourse to it. Those concluded before the First World War, on the other hand, had, for the most part, confined themselves to saying that if a dispute arose which came within the scope of the obligation to go to arbitration, the parties should conclude a *compromis* laying down the manner in which the tribunal was to be constituted and other related matters. The Commission should not leave the latter type out of account just because it was no longer fashionable.

4. He therefore suggested that the Commission insert the following clause in article 1:

> "The arbitration treaty may leave the question of the establishment of the arbitral tribunal and other points in the arbitral procedure open, to be determined in the *compromis.*"

5. Mr. GARCIA AMADOR wondered how the Commission could insert in a set of rules whose whole purpose was to limit the parties' freedom of action and establish an automatic procedure which might even continue to operate against their wishes, a provision which appeared to be an open invitation to revert to the old system where everything depended on the will of the parties at every stage of the procedure.

6. The CHAIRMAN thought that, since there were treaties in existence which relegated the establishment of the tribunal and such matters to the *compromis,* Mr. Verdross had been perfectly right to raise the matter, as long as the question of the draft's retrospective effect had not been settled.

7. He could not agree with Mr. García Amador—nor, he thought, could the Special Rapporteur—that the purpose of the draft was to substitute an automatic procedure for one depending on the will of the parties. The consent of both parties was essential before recourse was had to arbitration; the sole purpose of the draft was to ensure that once that step had been taken, arbitration should be continued until a decision was reached.

8. Mr. VERDROSS, agreeing, maintained that his amendment was in complete harmony with the Special Rapporteur's draft, in which everything depended on the initial willingness of the parties to have recourse to arbitration, and the aim was simply to ensure that, granted such willingness, the procedure was continued to its end.

9. Mr. SCELLE, Special Rapporteur, said he gladly accepted Mr. Verdross's first suggestion (para. 2 above), which filled an obvious gap. Thus supplemented, the provision that had been agreed on at the previous meeting

could become paragraph 2, in place of the paragraph 2 he had agreed to delete.

10. As regards Mr. Verdross's second suggestion (420th meeting, para. 60), (para. 4 above), he was of course in complete agreement with him in principle. He wondered, however, whether the point was not already covered by the text of article 2, in which he had sought to give equal recognition to the two principles involved, the absolute freedom of the parties as regards the initial undertaking to have recourse to arbitration, and the necessity of subsequently curtailing their freedom to the extent needed in order to prevent either of them from bringing the procedure to a premature end—and to that extent only, for the parties remained entirely free to include in the *compromis* whatever they wished, with one important exception. They could not include in it any provision which would make it possible for either of them to evade its obligation to follow the procedure through to its appointed end; otherwise, in the words of sub-paragraph 30 of the second paragraph of article 2, the tribunal would "remain free to remove obstacles which may prevent it from rendering its award".

11. The whole purpose of the draft was to ensure that the will of the parties was respected, but by "the will of the parties" he meant the will of both parties, as expressed in the undertaking to have recourse to arbitration, not just the subsequent desire of one party to frustrate that joint expression of will because he felt the case was likely to go against him.

12. Mr. EL-ERIAN said that, in order to remove any possible misunderstanding as to the difference between the Commission's draft and a treaty on arbitration, it seemed desirable to remove from article 1 all those provisions which did not relate directly to the basis of arbitral procedure but bore rather on the substance of arbitration.

13. He therefore proposed that the whole of article 1 be replaced by the following text:

> "Recourse to arbitration is based on the mutual consent of parties as expressed in a definite undertaking to have recourse to arbitration (arbitration treaty—arbitration clause)."

14. Mr. SCELLE, Special Rapporteur, said he was strongly opposed to Mr. El-Erian's proposal which, by failing to specify the nature and scope of the undertaking to have recourse to arbitration, destroyed the whole basis of his draft and so left full freedom to the parties at every stage of the procedure.

15. Mr. EL-ERIAN expressed regret that his proposal seemed to have been misunderstood. He had no intention of destroying the basis of the Special Rapporteur's draft; the only purpose of his proposal was to introduce the draft by a statement of fact similar to that which introduced the draft on diplomatic intercourse and immunities, article 1 of which, in the form agreed by the Drafting Committee, began: "The establishment of diplomatic relations between States . . . take place by mutual consent." He could have understood the Special Rapporteur's objection if his proposal had read: "Recourse to arbitration is based on the mutual consent of parties as expressed in the *compromis*", but in the form in which he had proposed it it appeared to him unobjectionable.

16. The CHAIRMAN suggested that, pending distribution of Mr. Verdross's and Mr. El-Erian proposals in writing, the Commission should consider Mr. Matine-Daftary's proposal to delete paragraph 4 (420th meeting, para. 48).

It was so agreed.

17. Mr. SCELLE, Special Rapporteur, agreed that the statement contained in paragraph 4 was valid for all treaties, and amounted to little more than a tautology. Even so, he would prefer to retain it because it gave added force to paragraph 1. Although an undertaking to have recourse to arbitration resulted from the will of the parties, it was a question not simply of their good intentions, but, as was said in paragraph 4, of a legal obligation which must be carried out in good faith. Under the traditional procedure there might be some doubt as to whether the undertaking to have recourse to arbitration was not perhaps subordinate to the way in which the parties interpreted it—the way in which they gave concrete expression to it in the *compromis*.

18. Mr. MATINE-DAFTARY, in the light of the explanation by the Special Rapporteur, said he withdrew his proposal to delete paragraph 4.

19. Nor would he insist on his proposal to add at the end of paragraph 1 a reference to Article 2, paragraph 7, of the United Nations Charter, since the cases he had in mind were exceptional cases such as the Commission had already agreed, in other instances could safely be left aside.

20. On the other hand, he maintained his proposal that the words in parenthesis in paragraph 1: "(arbitration treaty—arbitration clause)" should be transferred to the end of paragraph 3.

21. Mr. SCELLE, Special Rapporteur, accepted that proposal.

22. The CHAIRMAN said that Mr. Ago had drawn his attention to the fact that, as paragraph 1 referred to existing disputes, the words in parenthesis should also include mention of a *compromis*.

23. Mr. SCELLE, Special Rapporteur, said he did not necessarily agree, for the undertaking to have recourse to arbitration might be a *nudum pactum* which had the force of a *compromis*, even if it said no more than that the parties agreed to have recourse to arbitration.

24. The CHAIRMAN pointed out that States often concluded a single instrument, a *compromis*, with no prior arbitration treaty.

25. Mr. AMADO observed that the fact that the *compromis* and the undertaking to have recourse to arbitration could sometimes be combined in a single instrument did not mean that they were the same. The great achievement of the Special Rapporteur's draft was that it clearly distinguished between the undertaking to have recourse to arbitration and the *compromis*, and made the second subordinate to the first. If article 1 were replaced by the text proposed by Mr. El-Erian, that distinction would be lost.

26. Mr. KHOMAN thought that, in the light of the explanation by the Special Rapporteur in connexion with the proposal to delete paragraph 4, it might be advisable to combine that paragraph with the first part of paragraph 1 and make the second part of paragraph 1 a separate paragraph, since it related to a somewhat separate matter.

27. He therefore proposed that paragraph 1 should be amended to read as follows:

"An undertaking to have recourse to arbitration results from the agreement of the parties and must therefore be carried out in good faith."

and that the following text should be inserted as paragraph 2:

"The undertaking, which may be included in an arbitration treaty, an arbitration clause or a *compromis,* may apply to existing disputes or to disputes arising in the future."

Consideration of Mr. Khoman's proposal was deferred pending its distribution in written form.

28. Mr. BARTOS, reverting to the suggestion he had made at the previous meeting (420th meeting, para. 46), futher consideration of which had been deferred, said that paragraph 1 seemed to suggest that a dispute which came within the scope of the undertaking to have recourse to arbitration must necessarily be referred to arbitration, even if the two parties had accepted the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's Statute, and one party wished to submit the dispute to the Court. In his view, as long as there was no *compromis* in the sense of article 2, but only an undertaking *in abstracto,* then the optional clause providing for recourse to the Court should prevail.

29. Sir Gerald FITZMAURICE said the question was one of great complexity but, fortunately for the Commission, did not relate to the matter it was considering. In his view, if two States which were bound by their acceptance of the optional clause in the Statute of the International Court of Justice had concluded a special treaty stipulating that disputes on the specific matters dealt with in that treaty should be referred to arbitration, it might well be that the latter jurisdiction would prevail. He could, however, think of special cases where the conflict of obligations could probably only be decided by the competent international tribunals themselves.

30. Mr. SPIROPOULOS said that the question referred to by Mr. Bartos, though of great importance, was not relevant to the draft. Many States which had accepted the optional clause in the Court's Statute had made a reservation to the effect that they would not have recourse to the Court where other possibilities of peaceful settlement, such as arbitration, existed. In such cases, there was clearly no possibility of conflict with arbitration treaties or arbitration clauses in other treaties; but where States had accepted the optional clause without any reservation, there clearly was a possibility of conflict. In his view, no general rule could be laid down for the purpose of resolving such conflicts, since it was necessary in each case to interpret the will of the parties at the time they accepted whichever obligation came last—the obligation to have recourse to arbitration or the obligation to have recourse to the Court. The reason why the question was not relevant to the draft was that the draft did not establish an obligation to have recourse to arbitration.

31. Mr. YOKOTA, after recalling that he had raised a somewhat similar point (420th meeting, para. 39), said that, on consideration, he agreed with Sir Gerald Fitzmaurice that the Commission should not attempt to settle it in the present draft but should leave it to the science of international law and the decisions of international tribunals.

32. Mr. SCELLE, Special Rapporteur, said that if the Commission wished to consider the matter raised by Mr. Bartos, it would have to consider it from two angles —the nature of the two conflicting obligations, and their relation to each other in time—on the basis of the principle *lex posterior derogat priori.*

33. Mr. BARTOS said that, in the light of what had been said, he would not insist on his suggestion, but would reserve the right to enter a dissenting opinion.

34. The CHAIRMAN proposed that further consideration of article 1 should be deferred until the amendments of Mr. Verdross, Mr. El-Erian and Mr. Khoman had been distributed in written form.

It was so decided.

ARTICLE 2

35. Mr. SCELLE, Special Rapporteur, replying to a question by the CHAIRMAN, said that the last word of item 11 in the French text of the second paragraph of article 2 should read *"dépens"*, which did not mean the same as *"dépenses"*. Since, however, the word was peculiar to French legal terminology, he was prepared to omit it and refer only to *"frais"*.

36. Mr. BARTOS said that competent academic jurists in Yugoslavia, during a discussion of the question of international arbitration at a scientific conference, had asked him, in connexion with the Commission's draft on arbitral procedure, to say that they agreed that there should be co-operation between arbitral tribunals and the International Court of Justice only on the understanding that such co-operation was compatible with the Statute and the rules of the Court, in view of the fact that the Statute of the International Court of Justice derived its legal validity from the Charter of the United Nations.

37. They had further asked him to say that, in their view—which coincided in the present instance with his own—there was no obligation on the parties to refer a particular dispute to arbitration until they had agreed on the subject-matter of the dispute and the method of constituting the tribunal (points (*a*) and (*b*) in the first paragraph of article 2).

38. Mr. SCELLE, Special Rapporteur, expressed his emphatic disagreement. The obligation to arbitrate existed irrespective of any arbitration machinery. Mr. Bartos's remarks served to show that paragraph 4 of article 1 was no empty tautology but an essential part of the very core of the draft.

39. The main difference in arrangement between the draft adopted at the fifth session[1] and that now under consideration was that in the former he had, following the example of the General Act for the Pacific Settlement of International Disputes, introduced a judicial element into the procedure from the very outset; now, in an effort to placate those Governments which seemed so critical of any reference to the International Court of Justice, he had sought to keep such references to the minimum and make them as inconspicuous as possible. Thus, with regard to the conclusion of the *compromis,* he had reverted in principle to the system established

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

by article 52 of The Hague Convention of 1907.[2] The parties were free to include in the *compromis* whatever they liked, with the one exception to which he had already drawn attention. If there were obstacles to its rendering an award, the tribunal, under the traditional system, could bring in a finding of *non liquet;* but by virtue of article 12—which had been adopted at the fifth session by a much greater majority than many of the other articles—the tribunal could not bring in a finding of *non liquet;* it must therefore have power to remove such obstacles, even if they stemmed directly from the *compromis* itself. The proviso in item 3 was therefore an essential element of the whole draft.

40. Mr. AMADO maintained that the draft was an entity and must be viewed as a whole. It established a system which was totally different from the traditional system of arbitration, and before considering it, members of the Commission must clear their minds of preconceptions born of long years' experience of traditional arbitration. If Governments did not like the system it established, they would be free to ignore it.

41. But as regards the particular question raised by Mr. Bartos, he drew attention to the provisions of article 9, paragraph 1, and article 10, where it was stated that the tribunal could decide "whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 2 to enable it to proceed with the case" and that the tribunal "shall be fully competent to interpret the *compromis*".

42. Mr. BARTOS said the Special Rapporteur's successive remarks showed ever more clearly that, while his general conception was undoubtedly logical, it did not correspond to the existing system of arbitration; nor could it be regarded as corresponding sufficiently closely to any system that was likely to be established in the comparatively near future for it to be acceptable to the Commission under the heading of the "progressive development of international law".

43. As a practical jurist he had not the slightest doubt that, at the present time, in order for there to be an obligation to refer a particular dispute to arbitration there must be a *compromis*—to use that term in its broadest sense—an agreement expressing willingness to refer the dispute to arbitration, and defining, as an irreducible minimum, its subject-matter and the manner in which the tribunal was to be constituted. He deeply regretted that he was therefore in profound disagreement with Mr. Scelle.

44. The CHAIRMAN, speaking as a member of the Commission, proposed that, to cover cases where, in the absence of a prior agreement, the *compromis* and the undertaking to arbitrate were one and the same, the following words should be inserted at the head of the list in the first paragraph of article 2: "The agreement of the parties to submit the dispute to arbitration".

45. Mr. AGO supported the Chairman's proposal.

46. Mr. SCELLE, Special Rapporteur, accepted that amendment, but pointed out that the undertaking to arbitrate was nonetheless entirely distinct from the *compromis.*

47. Mr. KHOMAN, referring to the second paragraph of the article, noted that the list of thirteen points which it contained was not intended to be exhaustive. However, not all of the points mentioned might be dealt with in the *compromis.* In the case of some of the points, that eventuality was provided for in other articles. Article 11, for instance, indicated the law applicable in the absence of any agreement between the parties on the subject, while article 13 made the tribunal competent to formulate its own rules of procedure in a similar situation. On other points, however, such as the languages to be used in the proceedings, no such provision was made. Perhaps the Special Rapporteur would consider adding a clause to the effect that, in the absence of any specific agreement of the parties on any of the points mentioned in the paragraph, the matter might be settled either by the tribunal or another authority.

48. Mr. SCELLE, Special Rapporteur, agreed to Mr. Khoman's suggestion.

49. He pointed out, at the same time, that it was not obligatory on the parties even to specify points (*a*), (*b*) and (*c*), mentioned in the first paragraph of the article. In the case of (*c*), if the two parties failed to specify the place where the tribunal should meet, the choice of only one of the parties must be accepted, and the undertaking to arbitrate continued to be valid indefinitely pending such a choice.

50. Mr. AGO said that, in view of the decision that the text was to serve as a guide only, he considered it advisable to include in the second paragraph of article 2 certain additional points which the Special Rapporteur, when preparing the text with a draft convention in mind, had probably intended to deal with in other articles. For example, he thought it advisable for the *compromis* to invest the tribunal, or rather its president, with the power to take provisional measures for the protection of the respective interests of the parties.

51. As far as item 1 was concerned, he was in favour of adopting the suggestion made by the Brazilian Government in its comments,[3] to refer to "the rules and principles" rather than "the law and the principles". A reference to principles coming after the word "law" might give the impression that the principles in question were not principles of law; and that, he presumed, was not the Special Rapporteur's intention.

52. The Special Rapporteur, in his concern to avoid at all costs a finding of *non liquet,* had rightly referred in the same point to the possibility of the tribunal's adjudicating *ex aequo et bono.* He wondered, however, whether the power to adjudicate in equity would cover all eventualities. Perhaps the Special Rapporteur would consider including a provision, on the lines of article 1 of the Swiss Civil Code, to the effect that, where the tribunal was unable to render an award on the basis of the applicable rules and principles of law, it should have the power to decide "according to the rules which it would lay down if it had itself to act as legislator".

53. As regards item 3, he noted that the Special Rapporteur had made provision elsewhere for the tribunal to formulate its rules of procedure in the absence of any agreement between the parties. It would, however, be more in accordance with the general view of the Commission that in arbitration everything flowed from the will of the parties to arbitrate, if the power to formulate its rules of procedure were accorded to the tribunal by

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

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

the parties in the *compromis* itself. That was, in fact, the usual practice, as the parties very rarely went into such detail in the *compromis* as to lay down the actual rules of procedure of the tribunal.

54. Mr. Ago therefore proposed adding the words "or the power of the tribunal to establish its rules of procedure" after the words "the procedure to be followed by the tribunal" in item 3.

55. Although he agreed with the substance of the further clause in item 3 that "the tribunal shall remain free to remove obstacles which may prevent it from rendering its award", he thought it advisable to modify the wording somewhat. Under the new approach to which he had referred, the tribunal could not, strictly speaking, remove obstacles in the way of its rendering an award, unless it had been empowered to do so by the parties. The clause might therefore be amended so as merely to draw attention to the desirability of giving the tribunal such power in the *compromis*.

56. The CHAIRMAN pointed out that the proviso to item 3 to which Mr. Ago had just referred did not appear in article 9 of the draft adopted by the Commission in 1953.

57. Mr. SCELLE, Special Rapporteur, said that he accepted Mr. Ago's proposals to refer to "the rules and principles" instead of "the law and the principles" in item 1 and to add the words "or the power of the tribunal to establish its rules of procedure" in item 3.

58. As far as the question of freedom to remove obstacles was concerned, he did not regard Mr. Ago's amendment as necessary. If, for instance, it was stipulated in the *compromis* that the tribunal was not free to conduct investigations on the spot, it must ignore that provision if it found it necessary to conduct such investigations in order to render its award.

59. Similarly, though he had no objection to a reference in the *compromis* to the power of the tribunal to take conservatory measures, he considered it in any case the tribunal's right to take such measures, even when the parties refused to grant it such powers, since failure to take them might prevent its rendering an award.

60. Mr. VERDROSS, also referring to item 3, said that he fully accepted the idea that everything depended on the initial will of the parties, and that their will must be carried out until the final award. That principle appeared, however, to be incompatible with the idea that the tribunal could in no case bring a finding of *non liquet*. If, for instance, the parties in a frontier dispute stipulated in the undertaking to arbitrate that the frontier was to be fixed on the basis of existing treaties, and the tribunal could find nothing to guide it in those treaties, the tribunal could not render an award, unless it substituted its will for that of the parties.

61. Mr. SCELLE, Special Rapporteur, said that he could not accept the idea behind Mr. Verdross's argument. The tribunal was bound to conform to the expressed will of the parties only if it would lead to a settlement of the dispute. If, however, their expressed will would frustrate a settlement, the tribunal must substitute its will for that of the parties. In other words, the undertaking to arbitrate overrode everything, including the will of the parties.

62. Mr. VERDROSS said that he could agree with the Special Rapporteur if the provisions of the *compromis* were in contradiction to the undertaking to arbitrate, but he wondered what the position would be if the stipulation which he had cited as an example were already included in the initial undertaking to arbitrate.

63. Mr. MATINE-DAFTARY said that a distinction must be drawn between cases where the tribunal would be bound to bring a finding of *non liquet* on procedural grounds, for example, when forbidden to conduct investigations on the spot, and cases, such as that mentioned by Mr. Verdross, where it would be forced to the same conclusion on substantive grounds. In the case mentioned by Mr. Verdross, the tribunal could not substitute its own law for that emanating from the treaties to which it had been referred. Though the provision of the Swiss Civil Code (and incidentally of the Iranian Civil Code too) that the judge might decide according to the rules which he would lay down if he himself were legislating, applied perfectly well in municipal law, there was no corresponding principle in international law.

64. The CHAIRMAN observed that the question of findings of *non liquet* would be discussed in connexion with article 12.

65. Mr. BARTOS, referring to item 13 in the second paragraph of article 2, enquired whether the services of the International Court of Justice would be rendered strictly within the framework of its Statute and rules.

66. The CHAIRMAN pointed out that item 13 did not appear in article 9 of the Commission's 1953 draft.

67. Mr. SCELLE, Special Rapporteur, replied that the International Court of Justice could naturally not be expected to render services not permitted by its Statute or rules. In any case, the reference in the *compromis* to the part to be played by the International Court would be couched in the form of a request.

68. Mr. LIANG (Secretary to the Commission) said that an enquiry made by the Secretariat into the question of requests to the International Court of Justice had indicated the desirability of drawing a distinction between requests to the Court itself and requests to its President. It was not unusual for the President to be asked to render certain services, such as suggesting an arbitrator or a suitable person to head a special committee of the United Nations, and in such cases, he understood, it was not necessary for the President to consult the Court. If, on the other hand, the request was addressed to the Court, the President could not act alone. It would be noted, too, that in some articles of the 1953 draft, where it was a question of the International Court of Justice intervening, the articles referred to the President of the Court. Incidentally, he wondered whether a more appropriate term than "services" could be found to describe the part which the Court might be requested to play.

69. Sir Gerald FITZMAURICE, referring to the question of the freedom of the tribunal to remove obstacles to the rendering of its award, observed that he had already made clear that he was in favour of the basic concepts of the draft. On that point, however, the Special Rapporteur went further than he himself was prepared to go. Failure of the parties to express their will on a particular point, or ambiguity in its expression, must not be allowed to defeat the will of the parties or the power of the tribunal to reach a final settlement; but whenever the parties expressed a definite intention, effect must be given to it, even if the tribunal was thereby

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.