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Summary record of the 435th meeting

Topic
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Extract from the Yearbook of the International Law Commission:-
1958, vol I,

for the unfounded suspicion that the draft somehow provided for a system of compulsory arbitration. If the provisions in question were removed from the body of the text and made to form an introductory statement of the basic law of arbitration, the purpose of the draft might be clarified and certain current misunderstandings cleared up.

55. Mr. ZOUREK recalled that the Special Rapporteur had accepted his suggestion that paragraph 4 be removed from the body of the text and placed in a kind of introduction. It seemed therefore that paragraph 4 could also be referred to the Drafting Committee on the understanding that that would be done.

56. The CHAIRMAN proposed that article 1 be referred to the Drafting Committee on that understanding, and on the understanding that the arrangement of the articles as a whole would be further considered in the light of Sir Gerald Fitzmaurice 's suggestion.

It was so agreed.

ARTICLE 2

57. The CHAIRMAN recalled that the Commission had already adopted article 2 at its ninth session.[6]

The meeting rose at 1 p.m.

[6] See *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 422nd meeting, para. 20.

435th MEETING

Friday, 2 May 1958, at 9.45 a.m.

Chairman : Mr. Radhabinod PAL.

Communications from Mr. Khoman and Faris Bey El-Khouri

1. Mr. LIANG, Secretary to the Commission, said that Mr. Khoman had written expressing his deep regret that urgent duties in Washington would prevent him from attending the current session before the second half of May. A letter had also been received from Faris Bey El-Khouri, in which he expressed his regret that ill-health temporarily delayed his arrival in Geneva.

Statement by Mr. Hsu

2. Mr. HSU asked to have placed on record his regret that at the 432nd meeting Mr. Tunkin should have again introduced into the Commission's discussions a political question, namely, that of the representation of China.

Arbitral procedure : General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

[Agenda item 2]

ARTICLE 3

3. The CHAIRMAN invited the Commission to take up article 3.

4. Mr. SCELLE, Special Rapporteur, said that article 3 dealt with the delicate but vital question of what he had called arbitrability. A State which wished to escape from its obligation to arbitrate, for reasons which might be legitimate but which were inconsistent with that obligation, could argue that the dispute did not come within the scope of the obligation. That question, which was a purely legal question, must clearly be settled before the arbitral procedure could be set in motion, and could be settled only by an independent legal body. In his view, the International Court of Justice was the most appropriate body for that purpose, and in its previous text [1] the Commission had proposed that, in the absence of agreement between the parties upon another procedure, the question of arbitrability, if raised, should be brought before the International Court of Justice. That provision had been strongly criticised in the General Assembly, however. Accordingly, he now proposed that it be left open to the parties, if they preferred, to refer the question to the Permanent Court of Arbitration.

5. Mr. VERDROSS pointed out that if the parties agreed to refer the question of arbitrability to the Permanent Court of Arbitration, they would still have to choose arbitrators from the panel, which was all that the Court in fact comprised. If one party refused to do so, an impasse would result. He therefore suggested that it be made clear in paragraph 1 of article 3 that, if the parties agreed to refer the question to the Permanent Court of Arbitration and either party then refused to nominate arbitrators, the other party should have the right to bring it before the International Court of Justice.

6. Mr. SCELLE, Special Rapporteur, said he would be quite prepared to add some provision of that kind, in order to meet the perfectly valid point which Mr. Verdross had made. He would only point out that a large proportion of the General Assembly had been opposed to any suggestion of compulsory recourse to the International Court of Justice, and that if Mr. Verdross's suggestion were adopted the same objection might arise again despite the changed nature of the draft.

7. Mr. YOKOTA pointed out that there was also the possibility of an impasse if the parties failed to agree whether to bring the question of arbitrability before the

[1] Article 2 of the 1953 draft. See *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

Permanent Court of Arbitration or to bring it before the International Court of Justice. For he doubted very much whether in the phrase " either before the Permanent Court of Arbitration for summary judgement or, preferably, before the International Court of Justice, likewise for summary judgement or for an advisory opinion ", the word " preferably " would be interpreted as meaning that, if the parties failed to agree which of the two Courts should be asked to settle the question, it would be brought before the International Court of Justice. He therefore suggested that the words " either before the Permanent Court of Arbitration for summary judgement or, preferably " be deleted. That would not preclude recourse to the Permanent Court of Arbitration since there was already the proviso contained in the words " failing agreement between the parties upon the adoption of another procedure ", and such other procedure might well be recourse to the Permanent Court of Arbitration. If the majority of the Commission wished to make specific reference to the Permanent Court of Arbitration, he would have no objection, but in that case it should be made clear that, if the parties failed to reach agreement on the proposal to refer the question of arbitrability to the Permanent Court of Arbitration, it should be referred to the International Court of Justice.

8. The last words of paragraph 1 of article 3, namely, " likewise for summary judgement or for an advisory opinion ", might also lead to an impasse. One party might insist on the Court's summary procedure while the other might prefer to seek an advisory opinion. In his view the Commission should choose one procedure or the other, and he thought the summary procedure would be preferable.

9. Mr. BARTOS said he fully agreed that the question of arbitrability was a legal question, which could only be decided by a judicial body. He wondered, however, why the Special Rapporteur would allow the parties to seek an advisory opinion of the International Court of Justice, seeing that the Court's Statute contained no provision whereby States parties to a dispute before it could seek an advisory opinion.

10. The Special Rapporteur's suggestion that the preliminary question of arbitrability be referred in certain circumstances to the International Court of Justice, which might at a later stage in the procedure be called upon to give a ruling on certain aspects of the substance of the dispute, also raised the question whether it was right that the same judicial body should decide legal questions of competence and questions of substance in one and the same dispute. He did not say that the Special Rapporteur's approach was unacceptable, but would merely draw his attention to the fact that on that question there were two points of view. He agreed that in the present case it could be argued that the same judicial body was not concerned, since, in considering the preliminary question, the Court would be acting by summary procedure and only a few of its members would therefore be involved.

11. With regard to paragraph 2, he had no objection to the text proposed but pointed out that, in his view, it only covered one aspect of provisional measures of protection, and that not the most important. It was not merely a question of allowing one party to take steps to protect its interests; the Court must also be empowered to order the other party to take whatever action was necessary to maintain the existing situation and prevent irreparable damage.

12. Mr. ZOUREK pointed out that certain of the objections which had been made to the original text of paragraph 1 had lost their importance because the Commission was no longer engaged in preparing a draft convention, but only a model set of rules which could only become binding on the parties to the extent that they incorporated them, or referred to them, in an international instrument. He wondered whether article 3 should be retained in the draft, since the draft only contained model rules to which Governments could have recourse when they were already agreed on the arbitrability of the dispute.

13. Sir Gerald FITZMAURICE agreed that it was of very little use to refer to the Permanent Court of Arbitration in article 3, since, if the parties were not able to agree on the constitution of an arbitral tribunal, it was most unlikely that they would be able to agree on the constitution of an arbitral panel chosen from the members of the Permanent Court of Arbitration. The Commission could either adopt Mr. Yokota's suggestion — in which case it should perhaps indicate in the commentary that it had taken the comments of Governments into account and explain why, in article 3, it referred only to the International Court of Justice — or, if it wished to retain the reference to the Permanent Court of Arbitration, replace the words " be brought by them within three months " by some such words as " be brought, at the instance of either of them, within three months ".

14. He agreed with Mr. Bartos that States could not ask the International Court of Justice for an advisory opinion and that the words " likewise for summary judgement or for an advisory opinion " in paragraph 1 must therefore be amended. In that connexion he pointed out that in the English text the French words " *procédure sommaire* " should be rendered " summary procedure ", not " summary judgement ". He suggested that the last part of the paragraph might read as follows : " . . . before the International Court of Justice. Unless the parties otherwise determine, the matter shall be settled by summary procedure ".

15. It seemed to him that Mr. Bartos' criticism of paragraph 2 was based on the French text which referred to " les mesures provisoires que les parties pourront prendre ", whereas the English translation referred to " the provisional measures to be taken ". In that particular case he suggested to the Special Rapporteur that the translation was to be preferred to the original.

16. Mr. GARCIA AMADOR thought the recent Conference on the Law of the Sea had again

demonstrated that many countries which began by expressing strong criticism of a draft eventually came round to supporting it, because they realized that taken as a whole it would work to their interest ; their initial strictures were largely inspired by the desire to strike as good a bargain as possible in the later stages. For that reason he did not believe that the Commission should make extreme concessions in the endeavour to meet every objection that had been raised. In particular, he believed it would be ill advised to make any concessions at all on article 3, which, as the Special Rapporteur had rightly pointed out, was vital to the draft as a whole. If the parties were to be given the chance of escaping from their obligations by failure to agree on whether to refer a preliminary question of arbitrability to the Permanent Court of Arbitration or the International Court of Justice, the Commission might as well go back to The Hague Convention for the Pacific Settlement of International Disputes of 1907. He accordingly urged the Special Rapporteur to withdraw the fatal and, in his view, unnecessary concession he had made in article 3.

17. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. García Amador that there was no need to make a concession in paragraph 1 of article 3 which was likely to defeat the whole purpose of the draft on arbitral procedure. The procedure outlined in the article, being subject to the proviso in paragraph 4 of article 1, became binding upon the parties only if they had expressly agreed to adopt it. He suggested that the reference to the Permanent Court of Arbitration in the article might well be dispensed with.

18. Mr. SCELLE, Special Rapporteur, said that he was in the curious position of having to defend himself against himself, for the Commission was in effect returning to its original position with which he was in entire agreement. He would gladly delete a reference to the Permanent Court of Arbitration which had been included only as a concession to those Governments which had criticized the idea of the compulsory jurisdiction of the International Court of Justice. Indeed, now that the text was merely a model code of procedure, initial acceptance of which was entirely optional, a whole series of objections by Governments no longer applied. He would point out, however, that in remodelling the draft he had not abandoned everything. If the parties accepted article 3 they must, in the event of disagreement, bring the preliminary question before one court or the other and, if it came before the Permanent Court of Arbitration and either party refused to accept its decision, that party would be committing an act of blatant bad faith.

19. He was, on the other hand, more reluctant to delete the reference to seeking an advisory opinion. It was possible for a State, by a process of substitution similar to that described by Mr. Bartos at the 434th meeting, to seek an advisory opinion through the medium of the competent international organization of which the State was a member. And advisory opinions, even though States were not bound to accept them, carried, in his view, the same force as court judgements. Such a procedure was, in fact, an elegant way out of a dilemma, enabling a State to obtain a ruling on a point of law without losing its case in open court.

20. He had taken note of the pertinent observations made by Sir Gerald Fitzmaurice.

21. Mr. BARTOS fully agreed with the Special Rapporteur that, in the circumstances he had just mentioned, advisory opinions could play a part in disputes between States. The International Civil Aviation Organization, for instance, which was given the role under its constitution [2] of permanent arbitrator, so to speak, and preserver of good relations between its members in matters of civil aviation, might well seek an advisory opinion of the International Court of Justice on behalf of one or more member States. But such advisory opinions could be sought by a State only indirectly through a different legal entity, and paragraph 1 of article 3 did not make that point clear.

22. On the proposal of the CHAIRMAN, Mr. SCELLE, Special Rapporteur, agreed to submit a revised draft of article 3, in the light of the discussion.

The meeting rose at 11.15 a.m.

[2] See article 44 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944, in United Nations, *Treaty Series*, vol. 15, 1948, No. 102.

436th MEETING

Monday, 5 May 1958, at 3 p.m.

Chairman : Mr. Radhabinod PAL.

Appointment of a Drafting Committee

1. The CHAIRMAN proposed that the Commission's Drafting Committee should be constituted as follows : Mr. Amado as Chairman, Sir Gerald Fitzmaurice, Mr. François, Mr. García, Mr. Sandström, Mr. Scelle, Mr. Tunkin and Mr. Zourek.

It was so agreed.

Arbitral procedure : General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 3 *(continued)*

2. Mr. EL-ERIAN said that both he and Mr. Zourek, who was unable to attend that meeting, were of the opinion that the Permanent Court of Arbitration could play a useful part, and that the reference to it in paragraph 1 of article 3 should therefore be retained.