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Summary record of the 439th meeting

Topic:
<multiple topics>

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

86. The CHAIRMAN said that in consequence of the vote it would be unnecessary to vote on Mr. Yokota's proposal.

The meeting rose at 1 p.m.

439th MEETING

Thursday, 8 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Communication from the Asian-African Legal Consultative Committee

1. Mr. LIANG, Secretary to the Commission, brought to the attention of the Commission a communication from the Secretariat of the Asian-African Legal Consultative Committee, informing the Commission that the second session of that Committee would be held at Colombo, Ceylon, from 14 to 26 July 1958, and that under its rules the Committee had authority to admit observers from international organizations.

2. The provisional agenda for the second session of the Committee included some items relating to the work of the International Law Commission.

3. Mr. LIANG suggested that the communication might be discussed by the Commission when it dealt with matters relating to co-operation with other bodies. Meanwhile, he would inform the Asian-African Legal Consultative Committee that its communication had been brought to the attention of the Commission.

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 4

4. Mr. SCELLE, Special Rapporteur, introduced article 4 of the model draft, the text of which followed very much the same lines as articles 3 and 4 of the 1953 draft.[1]

5. Mr. ZOUREK proposed that article 4 be amended to read:

" 1. Immediately after the request made for the submission of the dispute to arbitration or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, within the time limit and in the manner agreed upon between the parties, in order to arrive at the constitution of the arbitral tribunal.

" 2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision on the arbitrability of the dispute, the appointment of the arbitrators not yet designated shall, at the request of either party, be made in conformity with the provisions of article 45 of the Convention for the Pacific Settlement of International Disputes, Signed at The Hague in 1907.

" 3. If one of the parties should refuse to follow the procedure specified in paragraph 2, the appointment of the arbitrators not yet designated shall, at the request of either party, be made by the President of the International Court of Justice.

" 4. The appointments referred to in paragraph 3 shall be made in accordance with the provisions of the *compromis*, or of any other instrument containing the undertaking to arbitrate, and after consultation with the parties. In so far as these texts contain no rules with regard to the composition of the tribunal, the composition of the tribunal shall conform to the provisions of article 45 of the Convention for the Pacific Settlement of International Disputes, 1907.

" 5. Where provision is made for the choice of a president of the tribunal, or of other arbitrators, by the arbitrators already designated, the tribunal shall be deemed constituted when all the arbitrators and the president of the tribunal have been selected. If the president and the other arbitrators have not been chosen within two months of the appointment of the arbitrators designated by the parties to the dispute, they shall be appointed in the manner described in paragraphs 2 and 3.

" 6. The time limits specified in the present article shall apply only if longer time limits have not been fixed by common consent between the parties.

" 7. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law."

6. The main object of his proposal was to offer a possible answer to some of the objections raised by Governments to the procedure described in the corresponding provisions of the 1953 draft, particularly the objection that that procedure gave excessive prominence and discretionary power to the President of the International Court of Justice and hence conflicted with the principle of the autonomy of the parties in international arbitration.[2] He therefore proposed, in paragraph 2, that if the tribunal was not constituted within the specified period, recourse should be had to the procedure laid down in article 45 of the 1907 Convention for the Pacific Settlement of International Disputes, which provided for the intervention of a third party or third parties chosen by the parties to the dispute, and, in the last resort, for determining the matter by lot.[3] Mr. Zourek said that that procedure, while more complicated than the one provided for in

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

[2] See document A/CN.4/L.71, under article 3, sect. B.

[3] *The Reports to the Hague Conference of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 300.

the Special Rapporteur's draft, was better adapted to arbitration which was based essentially on the will of the parties. It was only if one party showed obvious bad faith by refusing to follow the procedure specified in paragraph 2 that he proposed, in paragraph 3, that recourse should be had to the President of the International Court of Justice.

7. The purpose of paragraph 4 was to ensure that if application was made to the President of the International Court of Justice, he should be given some guidance with regard to the composition of the tribunal, even if the *compromis* contained no rules in that respect.

8. In other respects, his proposal followed broadly the lines of the model draft, except that he had inserted a new paragraph (paragraph 6) to meet the Yugoslav Government's point that it should be open to the parties to stipulate longer time limits than those laid down in the article.[4]

9. Mr. EDMONDS, referring to the second sentence of paragraph 5 in the model draft, asked what the precise status of the experts would be.

10. Mr. SCELLE, Special Rapporteur, said that it was normal practice in domestic arbitration for the tribunal to call, where necessary, on expert advisers who sat with the tribunal but without the right to vote.

11. Mr. LIANG, Secretary to the Commission, wondered if Mr. Edmonds was thinking of the status of expert witnesses in American procedure. In France and other countries on the continent of Europe, however, experts were not regarded as witnesses. In that connexion he also drew attention to Articles 50 and 51 of the Statute of the International Court of Justice.

12. Sir Gerald FITZMAURICE agreed that by "experts" the Special Rapporteur meant, in paragraph 5, what were known in English, and he thought American, procedure as "assessors". Assessors sat with the tribunal as expert advisers, but without the right to vote; they were not witnesses and could not be cross-examined by the other side.

13. Mr. SANDSTRÖM said that in his view experts could not be regarded as members of the tribunal, and it was therefore somewhat surprising to find them referred to in the article relating to the constitution of the tribunal. A more appropriate place would appear to be the provisions relating to the tribunal's procedure.

14. Mr. ZOUREK agreed, and pointed out that he had omitted the sentence in question from his proposal.

15. Mr. SCELLE, Special Rapporteur, said that the Secretary's explanation concerning the meaning of the word "experts" as used in the model draft was correct. Though not on the same footing as the arbitrators, the experts would nevertheless collaborate with the tribunal.

16. Mr. YOKOTA doubted whether the procedure referred to in paragraph 2 of Mr. Zourek's proposal was really necessary. Paragraph 4 related to the case where the undertaking to arbitrate contained no rules with regard to the composition of the tribunal; so it was to be assumed that paragraph 2 related to the case where it did contain such rules. That being so, and provided the parties reached agreement on the composition of the tribunal, its composition would normally be similar to that provided for in article 45 of The Hague Convention of 1907. If they failed to reach agreement, the effect of Mr. Zourek's proposal would therefore be to throw them back on a procedure which they had already tried unsuccessfully.

17. On the other hand he supported paragraph 4 of Mr. Zourek's proposal. Paragraph 3 in the model draft was open to the objection that the President of the International Court of Justice would find it very difficult to determine the composition of the tribunal if no rules were laid down in advance.

18. Mr. FRANÇOIS said he shared Mr. Yokota's doubts regarding paragraph 2 of Mr. Zourek's proposal, though it admittedly had the merit of limiting the number of cases in which recourse would be had to the President of the International Court of Justice. In that connexion he asked to what extent the President had accepted similar functions in the past, and whether, before doing so, he had sought the advice of the Court. For to say that the President was applied to in his personal capacity did not alter the fact that it was as President of the International Court of Justice that the matter was referred to him — as was clear from the provision that if he was prevented from acting, the appointments were made by the Vice-President or another member of the Court; nor did it, for example, alter the fact that if his decision proved unwise, the reputation of the Court itself would suffer.

19. Mr. LIANG, Secretary to the Commission, said that the Court's Yearbook for 1956-1957 contained some thirty pages, with about 250 items, listing instruments which conferred on the Court or its President functions similar to those which were conferred on the President in the model draft.[5] It was clear, therefore, that the practice of conferring such functions on the Court or its President was already fairly widespread.

20. Mr. BARTOS said that many of the arbitration conventions which had been concluded by Yugoslavia provided for recourse to the President of the International Court of Justice if the parties failed to agree on the appointment of arbitrators and other matters. Before accepting the functions thus placed upon him, however, the President habitually consulted the other members of the Court, although there were slight differences in the way in which individual presidents interpreted the nature of the extrajudicial functions entrusted to them. Actually, none of them had ever

[4] See document A/CN.4/L.71, under article 3, sect. E.

[5] International Court of Justice, *Yearbook, 1956-1957*, chapter X, fourth part, "Instruments conferring upon the Court, or its President, an extrajudicial function: appointment of umpires, members of conciliation commissions, etc, etc.".

had to exercise those functions, since the parties had invariably reached agreement on all the matters in point.

21. He preferred paragraph 2 in the model draft to paragraph 2 of Mr. Zourek's proposal, since the procedure laid down in article 45 of the The Hague Convention had, in his view, largely given way to recourse to the President of the International Court of Justice.

22. Sir Gerald FITZMAURICE welcomed the fact that the Court's Yearbook for 1956-1957 so clearly illustrated what he had already emphasized on a number of occasions, namely, that a large number of existing bilateral conventions already contained provisions of the kind proposed by the Special Rapporteur. To the best of his knowledge, the Court and its President had never objected, and could therefore be regarded as having tacitly accepted the practice.

23. He had noted Mr. Zourek's comment that the main difference between his proposal and the model draft was that the former left the parties free to constitute the arbitral tribunal in the first place by agreement between themselves, and only as a last resort provided for recourse to the President of the International Court of Justice. In that respect, however, it did not differ in the slightest from the model draft. In his opinion, the only difference between the two was that Mr. Zourek's proposal interposed an additional procedure which, as Mr. Yokota had pointed out, was very similar to that which *ex hypothesi* the parties had already tried unsuccessfully.

24. Mr. SANDSTRÖM said that he preferred the text in the model draft, not only because it was in keeping with the Commission's earlier decisions but also because it would result in the tribunal's being constituted more simply and rapidly.

25. Mr. GARCIA AMADOR agreed that paragraph 2 of Mr. Zourek's proposal might give rise to very serious — in fact indefinite — delay, which would frustrate the whole purpose of the undertaking to arbitrate. Mr. Zourek's main concern appeared to be to ensure that the will of the parties was respected, but that point was already covered in the model draft, which provided for recourse to the President of the International Court of Justice only as a last resort. There was nothing in the model draft which would prevent the parties from having recourse to the procedure laid down in article 45 of The Hague Convention if they thought that would help them to reach agreement. In that respect he welcomed the flexibility which had been introduced into the model draft by comparison with the 1953 draft, but would be opposed to introducing any further flexibility at the expense of the whole purpose of the draft, which was to ensure that the will of the parties, as expressed in the undertaking to arbitrate, was duly implemented.

26. Mr. ZOUREK stressed that the procedure he proposed was designed to meet criticisms which had been expressed by several Governments, including those of Argentina, Brazil, the Byelorussian Soviet Socialist Republic, Chile, Czechoslovakia, Iran, the Union of Soviet Socialist Republics and Uruguay. He did not press for a separate vote on his proposal, but would ask the Special Rapporteur if he could not at least accept paragraph 4, which would give the President of the International Court of Justice some guidance with regard to the composition of the tribunal in cases where the *compromis* or other instrument containing the undertaking to arbitrate contained no rules in that respect. He thought they would be going too far if they gave the President of the Court the power to determine the composition of the arbitral tribunal.

27. Mr. SCELLE, Special Rapporteur, said he did not think it was possible to accept Mr. Zourek's proposal, which seemed to be based on the assumption that the model draft, by providing in a number of places for recourse to the International Court of Justice or its President, did not take the will of the parties sufficiently into account. That objection might have some force if the Commission was drafting a multilateral convention, but it was now only preparing a model draft which States were free to use or not to use as they thought fit. He had deliberately refrained from referring to The Hague Convention, the basic conceptions underlying which had long since given way to the desire for a speedier procedure in international arbitration, and he would be very unwilling to reintroduce any mention of it in any part of the draft.

28. Sir Gerald FITZMAURICE said that it was a serious objection to paragraph 4 of Mr. Zourek's proposal that it bound the President of the International Court of Justice to conform to the provisions of article 45 of The Hague Convention, when making appointments under paragraph 3 of the article and in the absence of any rules with regard to the composition of the tribunal in the *compromis* or any other instrument containing the undertaking to arbitrate. The President of the Court could be requested to make such appointments, and might agree to do so, but it was very doubtful whether he could be compelled to follow a particular procedure. Paragraph 3 of the Special Rapporteur's draft article was open to a similar objection, but to a much lesser degree, since it merely bound the President of the Court to consult the parties, which he might be expected to do in any case.

29. Mr. ZOUREK said that he had been struck by the fact that under the Special Rapporteur's draft article the President of the International Court of Justice would be called upon not only to appoint arbitrators but even to decide on the constitution of the tribunal. In his own proposal he had replaced that provision by a reference not, as had been claimed, to the procedure laid down in article 45 of The Hague Convention of 1907 but to the composition of the tribunal as set out in that article. The difficulty could perhaps be avoided in another way, by substituting a text on the following lines for the last sentence of paragraph 4 in his own proposal:

" In so far as these texts contain no rules with

regard to the composition of the tribunal, each party shall appoint two arbitrators, of whom one only may be its national or chosen from among the persons selected by it as members of the Permanent Court of Arbitration. These arbitrators shall together choose an umpire."

By adopting such a clause, which provided for what might be said to be the normal composition of an arbitral tribunal in conformity with the terms of a large number of treaties, the Commission would make it unnecessary for the parties to apply to the President of the International Court of Justice for the purpose of the constitution of the tribunal ; they would call on his services only for the purpose of making appointments.

30. Sir Gerald FITZMAURICE, replying to a question from the CHAIRMAN, said that he had always found article 4, paragraph 3, of the model draft somewhat puzzling. The constitution of the arbitral tribunal was almost invariably fixed in the *compromis* or the arbitration agreement ; so much so that the supposition of no such provision being made in the *compromis* was hardly realistic. He had never envisaged the possibility of the President of the International Court of Justice being called on to do anything more than appoint an arbitrator or arbitrators, and had never thought that the President might have to decide how the arbitral tribunal should be composed and constitute it himself. Such a case might possibly arise, but it was so rare as to be hardly worth taking into account. Perhaps Mr. Zourek's latest suggestion could be adopted in that connexion.

31. Mr. AMADO agreed that it was difficult to conceive that a case would ever arise in practice where the parties to a dispute in which vital interests might be at stake would fail to specify so elementary and essential an element of the *compromis* as the composition of the arbitral tribunal. He was willing to accept the Special Rapporteur's article, which, despite the observations of the Brazilian Government,[6] was one in which respect for the will of the parties was carried to the extreme. He must point out, however, that the situation envisaged in the second sentence of paragraph 3 seemed practically inconceivable.

32. Mr. AGO recalled that the Commission had already stipulated in article 2 that the parties should conclude a *compromis* which should specify, among other things, the method of constituting the tribunal and the number of arbitrators. If, therefore, the parties had drawn up the *compromis*, it was difficult to imagine that they would not have specified the method of constituting the tribunal, and if they had done so the second sentence of article 4, paragraph 3, of the model draft would not apply. The other possibility was that the parties had not drawn up a *compromis* ; he wondered whether that was the case the Special Rapporteur had had in mind and whether he wished to provide that, if such a case should arise, the President of the Court should take the place of the parties and draw up the *compromis* himself. He found the idea difficult to accept.

33. Mr. YOKOTA pointed out that the first sentence in paragraph 3 in the model draft stipulated that the appointment should be made in accordance with the provisions of the *compromis* or of any other instrument pursuant to the undertaking to arbitrate, while paragraph 1 specified that the parties to the undertaking to arbitrate should take the necessary steps, either in the *compromis* or by special agreement, in order to arrive at the constitution of the arbitral tribunal. In view of those two provisions there seemed to be no need for the second sentence in paragraph 3 at all.

34. Mr. SCELLE, Special Rapporteur, suggested that the Commission appeared to be going too far in the search for possible implications of article 4. Paragraph 1 of the article, just referred to by Mr. Yokota, laid down the normal procedure. The parties might not, however, succeed in fixing the composition of the arbitral tribunal in the *compromis*, and it was precisely on that point that many moves to have recourse to arbitration had broken down in the past. If, at that stage, neither party made any request to the President of the International Court of Justice there would simply be no arbitration. But if either party requested the President of the Court to act, he could appoint an arbitrator or, in exceptional cases of complete failure by the parties to constitute the tribunal, could appoint all the members of the tribunal. In doing so, he must nevertheless consult all the documents from which he could obtain guidance on the question. The article said no more than that and he saw no particular difficulty in it.

35. Mr. SANDSTRÖM was of the opinion that the powers of the President of the Court with regard to the *compromis* should be confined to fixing the number of arbitrators and making the necessary appointments.

36. Mr. ZOUREK, replying to a question from the CHAIRMAN, said that he would not press for a vote on his proposal but would like the Drafting Committee to take certain parts of it into account, especially the first sentence in paragraph 5. He agreed with previous speakers in considering that a decision as to the composition of the arbitral tribunal could hardly be entrusted to an outside authority. Such a provision seemed contrary to the whole concept of arbitration and to article 37 of The Hague Convention of 1907, which referred to " the settlement of disputes between States by judges of their own choice ".[7] Since, as Mr. Ago had pointed out, article 2 already stated that the *compromis* should specify the composition of the tribunal, the simplest solution would be to delete the second and third sentences in paragraph 3 of the Special Rapporteur's article.

37. Mr. AGO said that two situations were possible.

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

[7] *The Reports to the Hague Conferences of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 298.

The first hypothesis was that the parties had drawn up a *compromis* but failed to specify the composition of the tribunal. That seemed to him a quite inconceivable state of affairs; moreover, in entertaining such a hypothesis the draft would seem to be contradicting itself, since article 2 already stipulated that the *compromis* should specify the composition of the tribunal. The other hypothesis was that no *compromis* or similar instrument existed, in which case, if the Special Rapporteur's suggestion were followed, it would be necessary to request the President of the International Court of Justice, in effect, to draw up all the provisions of the *compromis*. That was a totally different hypothesis from the first one, going far further than the position apparently envisaged in paragraph 3. If, however, they were to confine themselves to the first hypothesis, he saw no need for the provision contained in the second sentence of paragraph 3.

38. Mr. SCELLE, Special Rapporteur, said that it was perfectly possible for a *compromis* to have been drawn up in which no arbitrators were designated. Article 45 of The Hague Convention of 1907 had been drafted to meet such eventualities. The *compromis* might well simply specify the number of arbitrators and by whom they were to be appointed, and go no further on that point.

39. The CHAIRMAN said that in the Commission's 1953 draft on arbitral procedure, the sentence corresponding to the second sentence in paragraph 3 of the latest draft was somewhat different. It read: "In the absence of such provisions the composition of the tribunal shall be determined, after consultation with the parties, by the President of the International Court of Justice or the judge acting in his place".[8] Perhaps the adoption of that wording, which made no reference to texts, would meet Mr. Ago's objection.

40. Mr. AGO said he was not sure that that suggestion would be in line with what the Special Rapporteur now had in mind, since the 1953 draft was based on the assumption that the *compromis* was in existence.

41. Replying to Mr. Scelle, he pointed out that there were two different questions. The parties might fail to appoint one or all of the arbitrators in the *compromis*. That he was willing to admit as perfectly possible. But that the parties, while taking the trouble to draw up a *compromis*, should make no provision at all, for the constitution of the tribunal seemed very strange indeed. In any case, he thought it would be better to adopt a solution providing for the complete provision for the constitution of the tribunal than to place the President of the Court in the embarrassing position of having to draw up the *compromis* himself in cases where the parties had not done so.

42. Sir Gerald FITZMAURICE said that the difference in wording between the 1953 text and the latest draft was important. The real difficulty in paragraph 3 of the model draft lay in the words "In so far as these texts contain no rules". Since they obviously implied that texts existed, it was difficult not to share Mr. Ago's view that it was inconceivable that no provision had been made in them for the constitution of the tribunal. What was conceivable, however, was that the parties would not succeed in drawing up a *compromis* and would get no further than a formal undertaking to have recourse to arbitration. Article 9, which was shortly to be discussed, made provision precisely for that eventuality, stating in paragraph 2 that the tribunal itself should draw up the *compromis*. But that clearly supposed that the tribunal already existed, and there was therefore a certain logic in the insistence in article 4 on the absolute need for a tribunal to be set up in order for certain steps to be taken. It would therefore be advisable to keep paragraph 3 in some form or other, even though it might involve placing a difficult task on the President of the Court. The Commission should, however, try to change the wording to provide for the case in which no *compromis* or similar document existed, and might well adopt the wording of the 1953 draft, namely, "In the absence of such provisions..."

43. Mr. AMADO said that, if the parties could not agree on so important a point as the constitution of the arbitral tribunal, he could not see why they should not refer the dispute directly to the International Court of Justice under Article 36 of its Statute. Indeed, in so strange a situation, it could only be assumed that it was the unavowed intention of at least one of the parties to refer the dispute directly to the Court. Such a case might be abnormal, but was not entirely impossible.

44. If the Commission left paragraph 3 as it stood, parties to a dispute might be tempted to make no provision for the constitution of the tribunal, and leave the task to the President of the Court.

45. Mr. BARTOS said that, while provision for the constitution of the tribunal was one of the essential elements in a *compromis*, it was conceivable that the parties, instead of specifying the composition of the tribunal, might delegate the task of forming it to an outside authority such as the President of the International Court of Justice. But the delegation must be explicit. If such was the intention of the Special Rapporteur, he saw no contradiction between article 4, paragraph 3, and article 2 or article 9, which latter merely dealt with the addition to the *compromis* of elements other than those relating to the constitution of the tribunal. His whole attitude to the paragraph depended on the interpretation placed on the text by the Special Rapporteur, for if the Special Rapporteur had not such an explicit delegation of powers in mind, then the paragraph represented a return to what he had previously criticized as "blank cheque" arbitration, which he could not accept.

46. Mr. SCELLE, Special Rapporteur, said that he was prepared to accept drafting amendments to article 4, paragraph 3, but he was opposed to any changes affecting substance.

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

47. The CHAIRMAN said that the Commission was now in a position to take decisions on all the paragraphs of article 4 except paragraph 3.

Paragraph 1 was adopted unanimously.

Paragraph 2 was adopted by 15 votes to none, with 1 abstention.

Paragraph 4 was adopted unanimously.

48. Mr. SANDSTRÖM proposed the deletion from paragraph 5 of the last sentence, namely, " They may call upon experts ", on the understanding that a provision along those lines could be introduced elsewhere in the draft.

49. The CHAIRMAN called for a vote on Mr. Sandström's proposal to delete the last sentence of paragraph 5.

The proposal was adopted by 13 votes to none, with 2 abstentions.

Paragraph 5, as amended, was adopted unanimously.

50. The CHAIRMAN asked the members of the Commission whether paragraph 3 could be accepted subject to drafting changes.

51. Mr. BARTOS said that the second sentence of paragraph 3 would have to be redrafted so as to bring it into line with the provisions of article 2. In his opinion, the sentence in question could only refer to the case in which the parties themselves expressly delegated to the President, or to another member of the International Court of Justice, the power to decide on the composition of the arbitral tribunal.

52. Mr. AGO said that, if Mr. Bartos' view was the correct one, then the second sentence of paragraph 3 would be unnecessary, because the first sentence of that same paragraph, which stated in general terms that the composition of the tribunal would be determined by the provisions of the *compromis* or other similar instrument, covered cases where the power to determine the composition of the tribunal had been delegated to a third party. If the Commission was agreed on the substance, it could perhaps leave it to the Drafting Committee to decide whether the sentence in question was actually necessary.

53. Mr. SCELLE, Special Rapporteur, said that it was essential to cover the case of an undertaking to arbitrate which was not followed by a *compromis* or any other instrument. It was possible that the parties might be unable to agree not merely on the choice of arbitrators but even on the number of arbitrators. In such an event, it was necessary to enable each of the parties to ask the President of the International Court of Justice to determine the composition of the arbitral tribunal.

54. Sir Gerald FITZMAURICE said that, in order to cover the case of the absence of a *compromis* or other like instrument, it was necessary to make use of terms similiar to those of the 1953 draft, namely, " In the absence of such provisions . . ." The expression " In so far as these texts contain no rules " was inadequate, because there might be no texts of the nature envisaged. He therefore proposed that, so far as the second sentence of paragraph 3 was concerned, the Commission should revert to the language of the 1953 draft.

55. Mr. SCELLE, Special Rapporteur, said that the amendment proposed by Sir Gerald Fitzmaurice seemed acceptable.

56. Mr. ZOUREK said that a provision such as that embodied in the second sentence of paragraph 3 would be understandable in a draft convention on arbitral procedure. The provision would then have been binding on States ratifying the convention. The Commission had, however, decided that its draft would be merely a model ; in the circumstances, there would necessarily have to be an agreement in each case, and that agreement would no doubt determine the composition of the arbitral tribunal or delegate to an outside authority the power to determine that composition. In either case, the second sentence of paragraph 3 was unnecessary and he proposed its deletion.

57. Mr. AGO said that if the intention was to cover the case where the undertaking to arbitrate was not followed by the signing of a *compromis* or other similar instrument, then a provision going so far as to envisage the possibility that that instrument might be drawn up by a third party would become an extremely important one and could not be left in the form of a mere passing reference. If the Commission really wished to adopt a provision along those lines, it should do so in the form of a separate article vesting the President of the International Court of Justice, or the judge acting in his place, with the responsibilities in question. In article 4, however, the second sentence of paragraph 3 should, in his opinion, be deleted or amended.

58. Mr. BARTOS said that the action of the parties in agreeing on the composition of the arbitral tribunal, or in delegating powers to determine that composition, constituted an expression of the sovereign will of the States concerned.

59. In accordance with article 2, sub-paragraph (*c*), the parties had to decide on the composition of the arbitral tribunal, even if only by delegating the power to determine that composition to the President of the International Court of Justice. But in the absence of any agreement, that power could not, he thought, be given to the President of the Court. He would therefore vote against the second sentence of article 4, paragraph 3. He was, however, in agreement with the first and third sentences of that paragraph.

60. Mr. AMADO said that it was difficult to conceive of a case of arbitration in which the parties were not in agreement concerning the composition of the tribunal.

61. The CHAIRMAN put to the vote the first sentence of paragraph 3 of article 4.

The first sentence of paragraph 3 was adopted unanimously.

62. The CHAIRMAN put to the vote the proposal

(see para. 56 above) that the second sentence of paragraph 3 should be deleted.

The proposal was rejected by 7 votes to 5, with 3 abstentions.

63. The CHAIRMAN put to the vote the proposal (see para. 54 above) that the second sentence of article 4, paragraph 3 should be replaced by the second sentence of article 3, paragraph 3, of the 1953 draft.

The proposal was adopted by 10 votes to none, with 5 abstentions.

The third sentence of article 4, paragraph 3, was adopted by 13 votes to none, with 2 abstentions.

Article 4, paragraph 3, as a whole, as amended, was adopted by 10 votes to 1, with 4 abstentions.

64. Mr. ZOUREK said that he had voted against paragraph 3 as a whole because he was opposed to its second sentence.

ARTICLE 5 (*continued*)

65. The CHAIRMAN said that at the previous meeting (438th meeting, para. 43) the Commission had deferred taking a decision on the second sentence of paragraph 3 of article 5 as revised by the Special Rapporteur (437th meeting, para. 1) until the Commission had disposed of article 4.

The second sentence of paragraph 3 as revised by the Special Rapporteur was adopted by 9 votes to 6.

66. Mr. SCELLE, Special Rapporteur, introduced a third sentence in the following terms : " The same rule shall apply to arbitrators co-opted by the other members of the tribunal ". The introduction of that sentence was necessary in view of the Commission's decision (438th meeting, para. 41) to reject Mr. Yokota's amendment to the first sentence of paragraph 3 (*ibid.*, para. 14).

67. Mr. ZOUREK said that the Commission's decision to reject Mr. Yokota's amendment did not imply a decision to adopt a provision along the lines proposed by the Special Rapporteur.

68. Mr. EL-ERIAN said that the sentence proposed by the Special Rapporteur would place co-opted arbitrators on the same footing as arbitrators appointed by the President of the International Court of Justice. The main argument in favour of the non-replacement of arbitrators appointed by the President of the Court was the need to safeguard the President's authority ; no such reason could be invoked in the case of co-opted arbitrators.

69. The CHAIRMAN said that the matter could be clarified by a vote on Mr. Scelle's proposed additional sentence. He put the proposed sentence to the vote.

The proposed additional sentence was not adopted, 7 votes having been cast in favour and 7 against, with 1 abstention.

70. Mr. SCELLE, Special Rapporteur, said that the decision just taken by the Commission was inconsistent with the one taken at the previous meeting regarding Mr. Yokota's amendment.

The meeting rose at 1.05 p.m.

440th MEETING

Friday, 9 May 1958, at 9.45 a.m.

Chairman : Mr. Radhabinod PAL.

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 5 (*continued*)

1. The CHAIRMAN said that it now remained for the Commission to vote on the revised text of paragraph 3 of article 5, as a whole (see 437th meeting, para. 1), as amended at the 438th meeting (para. 42), namely :

> " 3. Arbitrators appointed by agreement between the parties may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 4, paragraph 2, may not be changed even by agreement between the parties."

Paragraph 3 as a whole, as amended, was adopted by 6 votes to 3, with 3 abstentions.

Article 5 as a whole, as amended, was adopted by 9 votes to 2, with 2 abstentions.

2. Mr. YOKOTA wondered if the sense of the Commission was really not to regulate the question of co-opted arbitrators at all.

3. Sir Gerald FITZMAURICE said that it was a frequent occurrence for an umpire or presiding arbitrator to be co-opted by the other arbitrators. The text of article 5 as approved by the Commission was silent on the position of the presiding arbitrator, and to that extent the draft was therefore incomplete. At a suitable moment, perhaps during the second reading of article 5, he intended to move the reopening of the discussion on the second sentence of article 5, paragraph 3.

4. The CHAIRMAN said that paragraph 1 laid down the general principle of the immutability of the tribunal ; all the other paragraphs of article 5 related to exceptions to that general principle. It followed therefore that, in the absence of a specific provision, co-opted arbitrators were irremovable.

ARTICLE 4 (*continued*)

5. Mr. ZOUREK said that, at its previous meeting (439th meeting, paras. 47, 49 and 63), the Commission