Document:-
A/CN.4/SR.440

Summary record of the 440th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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(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

had voted on the several paragraphs of article 4 but not on the article as a whole.

6. The CHAIRMAN said that article 4 as a whole would be voted upon after it had been considered by the Drafting Committee.

ARTICLE 8 (*continued*) [1]

7. The CHAIRMAN said that, at the 438th meeting (para. 78), the decision on paragraph 3 of article 8 of the 7953 draft, appearing as paragraph 2 of article 8 in the model draft (A/CN.4/113), had been deferred until the Commission had disposed of article 4. In consequence of its decision concerning article 4, the Commission was now in a position to vote on article 8, paragraph 3.

Paragraph 3 was adopted by 12 votes to 1, with 1 abstention.

Article 8, as a whole, as amended, was adopted by 12 votes to 2.

ARTICLE 9

8. Mr. SCELLE, Special Rapporteur, introduced article 9, which he described as one of the key articles of the model draft. The basic idea underlying the whole draft was that the undertaking to arbitrate constituted a treaty. In conformity with that idea, article 9 treated the original undertaking to arbitrate as the basis of the arbitration, and not the *compromis* or other instrument drawn up by the parties pursuant to that undertaking.

9. Mr. EDMONDS said that there appeared to be a gap in the provisions of article 9. The second sentence of paragraph 1 covered the case in which one of the parties refused to answer an application on the grounds that the provisions contained in the undertaking to arbitrate, or any supplementary agreement, were insufficient for the purpose of a *compromis*. Nothing was said, however, regarding the case of a party refusing to answer the application without stating any such grounds.

10. Mr. SCELLE, Special Rapporteur, said that in his opinion the second sentence of paragraph 1 applied also to the second of the cases mentioned by Mr. Edmonds.

11. Sir Gerald FITZMAURICE said that one of the principal questions arising in connexion with arbitration was the definition of the nature of the dispute.

12. It was often difficult to draw up a *compromis* because so much depended on the manner in which the case was stated; on occasion, months and even years had been spent in attempts to define a dispute for the purpose of drawing up a *compromis*. It had also occurred that an arbitral award had been materially influenced by the manner in which the dispute had originally been defined in the *compromis*.

13. If the parties were unable to arrive at a definition of the dispute, article 9 gave the arbitral tribunal itself powers to define that dispute, on which it would render its award at a later stage. It was difficult for a tribunal to take such action without to some extent prejudging its decision, because, in order to state the issues involved in a case, it was necessary to go to some extent into its merits. The tribunal would thus have to form a view on the issues of the case without having yet heard any argument from the parties. The consequence might well be that the issue was prejudged in an undesirable manner, and that at least one of the parties would be placed at a disadvantage.

14. Mr. AMADO said that the provisions of The Hague Convention of 1907,[2] empowering the Permanent Court of Arbitration to draw up a *compromis*, could not be used as an argument in support of article 9 of the draft.

15. In the first place, the Convention of 1907 was binding on those States which had ratified it, whereas the draft before the Commission was intended as a model only.

16. In the second place, article 53 of the Convention of 1907, in giving the Permanent Court of Arbitration powers to settle the *compromis*, employed terms which were much narrower than those of article 9 of the model draft.

17. Mr. SCELLE, Special Rapporteur, said, in reply to Sir Gerald Fitzmaurice, that in all the cases covered by article 9 there would be an application on the merits of the case by the party desiring to pursue the matter to an arbitration award. In that application, the claimant party would give a definition of the dispute. It was interesting to compare the provisions of article 9 with those of article 29 dealing with the case of the non-appearance of one of the parties, or its failure to defend its case.

18. He added that the point raised by Mr. Amado should be considered in the light of the provisons concerning the arbitrability of the dispute.

19. Mr. LIANG, Secretary to the Commission, said that article 9 of the draft, like article 10 of the 1953 draft,[3] by giving the arbitral tribunal itself the power, in the last resort, to draw up the *compromis*, could lead to a somewhat unsatisfactory situation. The same tribunal which was ultimately going to decide on the merits of the case would be called upon to define the character and scope of that case.

20. In preparing it *Commentary on the Draft Convention on Arbitral Procudure*,[4] the Secretariat had been unable to find any precedent for such a provision in existing arbitration treaties or in any *compromis*. In some cases, it was provided that the arbitral tribunal could take a decision on the merits of the case in the

[1] Resumed from 438th meeting.

[2] Convention for the Pacific Settlement of International Disputes, The Hague, 1907. See *The Reports to the Hague Conferences of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), pp. 292 ff.

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

[4] United Nations publication, Sales No.: 1955.V.1, pp. 42-44.

absence of a *compromis*. Another system used in practice was to establish a special tribunal to draw up the *compromis*, so that the definition of the dispute was not left to the arbitral tribunal which would ultimately adjudicate upon it. Article XLIII of the Pact of Bogotá [5] empowered the International Court of Justice to draw up the *compromis*: under that system, the arbitral tribunal would adjudicate on the issue as defined by the Court.

21. With reference to the second of the cases mentioned by Mr. Edmonds, he said that the drawing up of a *compromis* suggested that there was at least a constructive agreement between the parties. Mr. Liang doubted whether a judgement by default could be given by the arbitral tribunal in the case in question.

22. The International Court of Justice, when dealing with a case under the optional clause provided for in Article 36, paragraph 2, of the Statute of the Court, could of course define the dispute.

23. Mr. BARTOS said it was extremely doubtful whether an obligation to have recourse to arbitration could be said to exist if there was insufficient agreement between the parties " on the essential elements of the case as set forth in article 2 . . ." The " essential elements " were clearly those described as a " minimum " in the first paragraph of article 2 — the undertaking to arbitrate itself, the subject-matter of the dispute and the method of constituting the tribunal and the number of arbitrators. If the initial instrument did not specify those points, if it was in fact a mere *pactum de contrahendo*, it was difficult to see how, in the absence of an express provision to that effect, it could be held to confer on a not yet existent body the power to substitute its views for the will of the parties. Certainly article 53 of the Convention of 1907 had never, to the best of his knowledge, been interpreted as conferring powers of that sort on the Permanent Court of Arbitration.

24. Mr. EDMONDS said that he did not experience the same difficulty as Sir Gerald Fitzmaurice, probably because it was a common practice in the United States for the court to determine the issues between the parties if they were unable to do so themselves.

25. What seemed to him anomalous in the present text was that paragraph 1 referred to the case where the other party refused to answer the application on the ground that the provisions of the initial instrument were insufficient, but did not refer to the case where that other party simply refused to answer the application without stating any grounds. In other words, a party which did not wish the arbitral procedure to continue could successfully stop the proceedings by simply refusing to answer the application without stating any grounds. He therefore proposed that the words " or refuses to answer it " be inserted before the words " on the ground " so that the first part of the sentence in question would read:

> " If the other party refuses to answer the application or refuses to answer it on the ground that the provisions above referred to are insufficient, . . ."

26. Mr. SCELLE, Special Rapporteur, said he was in fundamental disagreement with Mr. Bartos who appeared to be reverting to the concept of diplomatic arbitration. What created the obligation to have recourse to arbitration was not the *compromis*, but the initial bare undertaking to arbitrate. Throughout the model draft the *compromis* was regarded as a subsidiary instrument, whose provisions the tribunal was, for example, at liberty to disregard if they were such as to prevent it from arriving at an award (article 13). If that was agreed, the question remained what was to be done if the parties failed to draw up the *compromis* themselves; the idea that in that case it should be drawn up for them, so far from being a novel one, had in fact been accepted in The Hague Convention of 1907 and, more recently, in the Pact of Bogotá. He would have been quite content to follow the provisions of the Pact of Bogotá and entrust the task of drawing up the *compromis* to the International Court of Justice, had it not been for the manifest reluctance of many States to provide for recourse to the Court more than was absolutely necessary; in order to take their comments as far as possible into account, he had therefore proposed in his model draft that the task be entrusted to the tribunal itself.

27. Mr. BARTOS thought it was necessary to distinguish between the case where there was a prior undertaking to arbitrate and the case where there was none. In the former, a *compromis* was not strictly necessary. In the latter, the *compromis* itself created the obligation to have recourse to arbitration, but it could only do so if it specified the " minimum " particulars enumerated in the first paragraph of article 2. If it failed to specify those particulars it was not really a *compromis* at all and created no obligation; and no third party could commit sovereign States to a course of action which they had not already expressed their intention of following. In fact, therefore, the difference between him and the Special Rapporteur was not, he thought, as great as the latter supposed.

28. Sir Gerald FITZMAURICE concurred in the view that the area of disagreement was narrower than might at first sight appear. He was not entirely satisfied by the Special Rapporteur's explanations. Mr. Scelle had referred to a bare undertaking to arbitrate, but such an undertaking must at least indicate, even if only in general terms, the subject-matter of the dispute. Frequently, the parties felt that initial instrument to be insufficient and in a subsequent agreement in which they also fixed the number of arbitrators and other particulars, defined the subject-matter of the dispute more precisely. On occasion, they might wish to do so but fail; and in such a case he agreed with the Secretary that the tribunal which would later have to decide the dispute should not be asked to define its subject-matter. As Mr. Edmonds had said, that might be normal practice in municipal law, but it would be

[5] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series*, vol. 30, 1949, No. 449.

most undesirable in international proceedings, where circumstances were rather different. For, in defining the subject-matter, the tribunal could not help to some extent prejudging it; he therefore agreed that if a *compromis* were required and the parties failed to draw it up, the task should be entrusted to some quite separate organ such as the International Court of Justice. But it was by no means always necessary that the subject-matter of the dispute should be defined more precisely than in the initial instrument, any more than an agreed definition was required when a case was brought before the Court by unilateral application. The model draft, however, only provided for the case where a *compromis* was required. He therefore proposed that article 9, paragraph 3, be amended to read as follows:

> "If both parties consider that the elements available to the tribunal are insufficient for the purpose of a *compromis* but are themselves unable to draw up a *compromis*, the tribunal may within three months after the parties report failure to agree (or after the decision, if any, on the arbitrability of the dispute) proceed to hear and decide the case on the application of either party, unless one of them requests the International Court of Justice to establish the *compromis* through its summary procedure."

The proposed wording was based on article 27 to the Revised General Act[6] and on article XLIII of the Pact of Bogotá.

29. Mr. SCELLE, Special Rapporteur, said that though it was not only common but the usual practice for one and the same tribunal to define the subject-matter of the dispute and to decide on its merits, he saw no objection to Sir Gerald Fitzmaurice's proposal; in fact he preferred it and, as he had already pointed out, had only proposed that the task of drawing up the *compromis* in the absence of agreement between the parties be entrusted to the tribunal in view of the reluctance of certain States to provide for recourse to the Court more than was strictly necessary.

30. He had never claimed that a mere undertaking to arbitrate sufficed to define the dispute. In such an undertaking the parties might for example agree to refer to arbitration any disputes relating to the continental shelf. But that was clearly quite a different thing from defining the subject-matter of the specific dispute which had arisen.

31. Mr. ZOUREK said he agreed with the Special Rapporteur that the undertaking to have recourse to arbitration was the basis of the arbitral proceedings in all cases of institutional arbitration. It was, however, necessary to define the essential elements of such an undertaking; in his view it implied not only agreement to refer the dispute in question to arbitration, but also agreement, at least in general terms, on its subject-matter and on the way in which the tribunal should be constituted. An instrument which did not specify those essential elements was a mere *pactum de contrahendo*, and it would be contrary to the basic principles of arbitration, which rested on the will of the parties, to allow an outside authority to substitute itself for their joint expression of will in such a case. He could not therefore accept the last sentence of paragraph 1, more especially since what the Commission was preparing was not a convention but a set of model rules which should be compatible with international law.

32. In any case article 9 was based on the assumption that the arbitral tribunal had already been constituted. If so, it must have been constituted under a prior agreement; and he could not imagine that such an agreement would not specify the essential elements, at least in general terms. He could not therefore see how the necessity of concluding a *compromis* could arise at that stage.

33. In cases where the parties were not bound by a prior undertaking, it was clear that their joint will could only be manifested in the *compromis*. If the *compromis* failed to specify the essential elements listed in the first paragraph of article 2, there was no obligation. In that connexion, he pointed out that paragraph 2 of article 9 in the draft did not envisage the case where there was no prior undertaking to arbitrate, since in such a case the tribunal could only be constituted by virtue of the *compromis* itself and the words "agree on" were therefore inappropriate.

34. Mr. EL-ERIAN thought that the clause entrusting to the tribunal the task of drawing up the *compromis*, if the parties failed to agree on it or to complete it, was a rather strange provision, though he noted the Special Rapporteur's reasons for introducing it (A/CN.4/113, para. 14).

35. He approved of Sir Gerald Fitzmaurice's amendment to paragraph 3 (see para. 28 above) but would propose adding the words "or unless the tribunal wishes to appoint a commission from the Permanent Court of Arbitration to draw up the *compromis*". That would deal both with the objections to the tribunal's performing the task itself and with those to the establishment of a kind of dependence between the International Court of Justice and the Permanent Court of Arbitration.

36. Mr. AMADO, referring to the Special Rapporteur's introductory remarks to article 9 (A/CN.4/113, para. 14), pointed out that few States had ratified the Pact of Bogotá, and even those few had made many reservations. He was not in favour of a provision under which the International Court of Justice would draw up the *compromis*.

37. Mr. BARTOS said that, according to standard practice, all treaties concluded under the auspices of the United Nations contained a clause providing for arbitration in disputes with regard to the interpretation and application of the treaty in question. Where such

[6] Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly of the United Nations on 28 April 1949, United Nations, *Treaty Series*, vol. 71. 1950, No. 912.

an arbitration clause existed, it was certainly possible but not at all necessary to have a *compromis* to implement the clause.

38. Replying to the CHAIRMAN, Mr. BARTOS said that he did not propose the actual deletion of the last sentence in paragraph 1, but thought that it should be modified so as not to give the tribunal the absolute right to order the parties to complete or conclude the *compromis*. He wondered whether the Special Rapporteur would consider including a phrase such as " if the parties have given the tribunal such a right ".

39. Mr. AGO said that he entertained grave reservations with regard to the power given to the tribunal in paragraph 2 of the article to draw up the *compromis* — which was a typical agreement between parties — instead of the parties, if the latter were unable to do so. Perhaps the same solution could be adopted in paragraph 2 as was proposed by Sir Gerald Fitzmaurice in the case of paragraph 3, and the two clauses could then be combined in a single one.

40. Sir Gerald FITZMAURICE endorsed Mr. Ago's suggestion. His own amendment would, in fact, be more fittingly applied to paragraph 2, which would then read as follows :

> " 2. If the parties fail to agree on or to complete the *compromis* within the time-limit fixed in accordance with the preceding paragraph, the tribunal may within three months after the parties report failure to agree (or after the decision, if any, on the arbitrability of the dispute) proceed to hear and decide the case on the application of either party, unless one of them requests the International Court of Justice to establish the *compromis* through its summary procedure."

In such a case paragraph 3 could be dispensed with altogether.

41. He was also willing to accept Mr. El-Erian's proposal (para. 35 above). He would, in fact, go further and suggest that, since there was so much difficulty about the drawing up of the *compromis* by the tribunal or a third jurisdiction, it would suffice to state that if the parties failed to agree on or to complete the *compromis* within the specified time limit, the tribunal might proceed to hear and decide the case on the application of either party. The dispute would then be treated in exactly the same way as a case brought before the International Court of Justice, without any special agreement, the issues being gradually defined in the course of the written and oral procedure.

42. Mr. SCELLE, Special Rapporteur, said that Sir Gerald Fitzmaurice's latest proposal seemed acceptable.

43. Mr. EL-ERIAN withdrew his amendment accordingly.

44. The CHAIRMAN invited the Special Rapporteur to redraft the article in the light of the discussion. Mr. Edmonds' proposal (para. 25 above) still stood and could be voted upon as an amendment.

It was so agreed.

ARTICLE 10

45. Mr. SCELLE, Special Rapporteur, said that article 10 enunciated an axiomatic rule. The Commission had discussed the article at length at previous sessions and had settled on the existing wording.

46. Mr. AMADO thought it was hardly correct to describe the article in its existing, rather grandiloquent form as axiomatic. The tribunal was undoubtedly judge of its own competence, but the description of it as " *maître* " of its competence was contested by some learned jurists. The arbitrator, though judge of his own competence, was not the master of it. Though in municipal law it might not be a very serious matter, because of the remedies provided, for a tribunal to exceed its powers, it constituted a very real danger in international arbitration where no such safeguards existed.

47. Mr. VERDROSS agreed with Mr. Amado. Though he naturally accepted the principle underlying the article, he could not agree to the way in which it was expressed, as it seemed to give the tribunal excessively broad powers. He proposed instead a text modelled on article 73 of The Hague Convention of 1907 in the following terms :

> " The tribunal is authorized to declare its competence in interpreting the *compromis*, as well as the other papers and documents which may be invoked, and in applying the principles of law."

48. Mr. ZOUREK said that he agreed with the two previous speakers and merely wished to add, in support of their views, that the article had been much debated at the Commission's fifth session and had been finally adopted by a majority of only two. It had also been criticized by a number of Governments, five of which objected to the use of the word " *maître* " in the French text.

49. Mr. LIANG, Secretary to the Commission, agreed with the members of the Commission who had just spoken, but wished to view the text from another standpoint. The purpose of the article was essentially to deal with the jurisdiction of the tribunal. As the article was worded, however, that object did not clearly emerge. The text seemed to be a proclamation of the standing of the tribunal, and it was as such that it had been criticized. The chief trouble was the failure to indicate the purpose of the tribunal's interpreting the *compromis*. In the counterpart of the article in The Hague Convention of 1907, quoted by Mr. Verdross, that purpose was made clear, the tribunal being authorized to interpret the *compromis* from two points of view, that of determining its competence, and that of applying the principles of law. Though he thought the latter affirmation hardly necessary, since that was precisely what a tribunal was for, he did think it essential to bring out the point that the tribunal had full power to interpret the *compromis* in determining its competence.

50. As for the phrase " the widest powers ", there was a natural tendency to associate it with the idea of a liberal interpretation as opposed to a narrow one. In other words, the phrase might conceivably encourage the tribunal to decide, in case of doubt, that a matter lay within its jurisdiction rather than outside. The phrase was, in fact, equivocal and had naturally inspired some misgivings. He did not regard it as a necessary device for enhancing the standing of the tribunal. It was grandiloquent, as Mr. Amado had pointed out, but it did not have the precision required for the purpose of determining the competence of the tribunal.

51. Mr. YOKOTA thought that the rule could be put in a much simpler form. The objectionable passages were not at all essential. He thought it would fully express the intention if the article were revised to read:

> " The arbitral tribunal has the power to interpret the *compromis*."

52. Mr. GARCIA AMADOR said that, of the two expressions criticized, only that concerning the tribunal's interpretative powers involved a question of substance. But, he submitted, the draft would be incomplete unless it provided that the tribunal had the power to interpret the *compromis*, though he agreed that that power should not perhaps be described in the sweeping terms employed in the Special Rapporteur's draft. He suggested that the article should be revised to read:

> " The arbitral tribunal, being the judge of its own competence, has the power to interpret the *compromis* "

53. Mr. AGO also thought that article 10 should be worded more simply. Mr. García Amador's suggestion was acceptable, but he would prefer the text suggested by Mr. Yokota, which conveyed the same idea but was not marred by the unnecessary repetition of the same idea. The tribunal's interpretative powers must not, however, be confined to interpreting the *compromis,* but should extend to the undertaking to have recourse to arbitration and to any other instruments pursuant to the undertaking. He therefore proposed the addition, after the word " *compromis* ", of the words " and the other instruments on which its competence is based ".

54. Mr. SCELLE, Special Rapporteur, said that he had no objection to the use of the word " *juge* " instead of " *maître* " in the French text; in his opinion, the terms were synonymous.

55. As for the danger of the tribunal's exceeding its powers, that eventuality was provided for in article 36. Article 10 did not imply that the tribunal might exceed its competence, but merely stated that it had the right to exercise it. He was still in favour of the phrase " the widest powers ", and indeed would have used an even stronger phrase had one existed. He was even tempted to add that the tribunal might, in some cases, modify the *compromis*. International law, like other branches of law, lived on case-law, and not merely on the literal interpretation of texts; and case-law could modify the law if the social situation demanded. International law, in fact, was as much derived from arbitration cases as from any other source.

56. Mr. Ago's suggestion (para. 53 above) that documents other than the *compromis* should also be mentioned in article 10 seemed acceptable.

57. Mr. YOKOTA also agreed to the addition suggested by Mr. Ago. However, he still doubted the advisability of retaining the phrase " which is the judge of its own competence ". Since the Commission had decided that some aspects of arbitral procedure might be referred to the International Court of Justice, the competence of the tribunal would, in some cases, be restricted.

58. Mr. PADILLA NERVO agreed with the suggestions made by Mr. Ago and Mr. Yokota. Though the Special Rapporteur was quite right in giving the tribunal the widest powers of interpretation, the problem was to ascertain the exact extent of those powers. In his opinion the test was the intention of the parties in vesting jurisdiction in the tribunal. The tribunal must constantly bear in mind the intention of the parties, as expressed in the *compromis* or agreement, when determining its competence.

59. Mr. VERDROSS thought the Commission should accept Mr. Ago's suggestion. There might well be no *compromis* at all but only an arbitration agreement. The tribunal could interpret whichever of the documents existed, and if both existed could interpret both. He said that in that respect Mr. Ago's suggested text was similar to the text which he had proposed, modelled on article 73 of The Hague Convention of 1907.

60. As for the phrase " the widest powers ", he said that if the danger of the tribunal's exceeding its powers was acknowledged, it seemed impossible to give the tribunal unlimited power. Its powers were, in fact, delimited by the common will of the parties.

61. Mr. AGO said that he could not agree with the Special Rapporteur's implication that reference should also be made in the article to the tribunal's right to interpret international law in general. It certainly had that right, but rather with reference to the substance of the dispute, whereas article 10 dealt exclusively with the question of the tribunal's competence, which was based on specific instruments.

62. Mr. SCELLE, Special Rapporteur, said that the tribunal could not be prevented from interpreting customary international law.

63. Mr. AGO agreed, but pointed out that that was another question, to be dealt with in a different article.

The meeting rose at 1.10 p.m.