Document:-
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Summary record of the 441st meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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441st MEETING

Monday, 12 May 1958, at 3 p.m.

Chairman: Mr. Radhabinod PAL.

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)*

ARTICLE 10 *(continued)*

1. The CHAIRMAN said that a number of suggestions had been made regarding article 10. Mr. Amado had objected to the use of the word " *maître* " in the French text. Exception had also been taken to the expression " widest powers ". Mr. Yokota had proposed that the power of interpretation given to the tribunal be limited to the interpretation of the *compromis*. Mr. Ago had supported Mr. Yokota but proposed that the power be extended to cover the interpretation of other incidental agreements. It had been suggested that any possible conflict between article 10 and the provisions of article 3 and article 36, sub-paragraph (*a*), should be avoided. There seemed to have been general agreement as to the tribunal's power to take decisions as to its own comptence if questioned by one of the parties. However, some members of the Commission were of the opinion that no express provision in that respect was needed.

2. Mr. SCELLE, Special Rapporteur, said that, in deference to the suggestions made by several members of the Commission, he had redrafted article 10 to read:

> " The arbitral tribunal, which is the judge of its own competence, possesses the necessary powers to interpret the *compromis* and the other instruments on which that competence is based."

3. In the French text, the word " *maître* " had been replaced by the less categorical word " *juge* ". The word " necessary " had been substituted for the word " widest ", which had been thought too sweeping.

4. Mr. YOKOTA said that it was doubtful whether an arbitral tribunal was always the judge of its own competence. Articles 3 and 36 limited its powers in that respect. He suggested that a separate vote be taken on the words " which is the judge of its own competence ".

5. Sir Gerald FITZMAURICE said that the power of the arbitral tribunal to decide on its own competence was not in dispute. It had simply been argued that the tribunal was not the sole judge of that matter because of the possibility of an appeal to the International Court of Justice in certain cases. Clearly, some provision concerning the tribunal's powers was needed in the draft; the only question was what form that provision should take, and he doubted that the possible omission of the phrase mentioned by Mr. Yokota would offer a solution.

6. Mr. AMADO said that he was opposed to the deletion of the phrase mentioned by Mr. Yokota. The text of article 10 as redrafted by the Special Rapporteur was acceptable. Under the model draft, the arbitrators were not the representatives of the parties. They exercised judicial functions, and all judicial bodies were judges of their own competence.

7. Mr. LIANG, Secretary to the Commission, said that if the phrase in question was deleted the arbitral tribunal would be given the necessary powers to interpret the *compromis* without any provision being made for decisions on competence; it could then be argued that the tribunal's powers of interpretation related only to questions other than competence. A reference to article 2 showed that the *compromis* could contain provisions on many subjects other than competence. It was therefore apparent that a reference to the arbitral tribunal's powers to decide on its own competence was necessary.

8. Mr. SCELLE, Special Rapporteur, said that it was a general principle of law that a court was the judge of its own competence.

9. Mr. TUNKIN said that Mr. Scelle's statement was absolutely correct in municipal law, but a different conclusion would probably be reached if the problem was viewed in the light of existing international law.

10. The deletion of the phrase mentioned by Mr. Yokota would improve the article. An arbitral tribunal was set up by an agreement between States and it could only interpret the instruments by virtue of which it had been set up. It could decide on its own competence, provided that it did so by interpreting those instruments. He had serious doubts concerning any provision which seemed to give an arbitral tribunal the power to go beyond the interpretation of those instruments in deciding issues of competence. Provisions of that character would seem to place the arbitral tribunal above the States which had set it up.

11. Mr. VERDROSS said that general agreement could perhaps be reached if article 10 was re-drafted along the lines of Article 36, paragraph 6, of the Statute of the International Court of Justice. He suggested the following text:

> " In the event of a dispute as to whether the arbitral tribunal has jurisdiction, the matter shall be settled by the decision of the tribunal on the basis of the *compromis* and of the other instruments on which its competence is based."

12. Mr. AGO said that in consequence of the addition of the words " and the other instruments on which that competence is based " in the Special Rapporteur's redraft, the phrase " which is the judge of its own competence " had became unnecessary. Once the article empowered the tribunal to interpret the instruments whereby its competence had been established, the fact that the tribunal could decide on questions relating to its own competence became self-evident.

13. Mr. YOKOTA proposed that article 10 should consist of two paragraphs, of which the first would set forth the tribunal's powers to interpret the *compromis* and other similar instruments, while the second would deal with the question of competence in the following terms :

> " The arbitral tribunal shall decide on its own competence subject to the provisions of these articles."

14. Mr. GARCIA AMADOR said that, as a question not of form but of principle was involved, the Commission should decide by a vote whether article 10 should contain a provision stating that the tribunal was the judge of its own competence.

15. Mr. ZOUREK agreed with Mr. Garcia Amador.

16. The CHAIRMAN said that he would put to the vote the question whether article 10 should contain a provision stating that the arbitral tribunal was the judge of its own competence, on the understanding that if the decision was in the affirmative, the drafting of the provision would be left to the Drafting Committee.

The Commission, by 13 votes to 2, with 3 abstentions, answered the question in the affirmative.

Article 10, as a whole, as redrafted, was adopted by 16 votes to none, with 2 abstentions, subject to drafting changes.

ARTICLE 11

17. Mr. SCELLE, Special Rapporteur, introduced article 11, the provisions of which were intimately related to those of article 12 which precluded findings of *non liquet.*

18. Mr. EL-ERIAN asked why article 11 referred only to Article 38, paragraph 1, of the Statute of the International Court of Justice and not also to the paragraph dealing with decisions *ex aequo et bono.*

19. Mr. SCELLE, Special Rapporteur, said that the question of the parties agreeing to give the tribunal power to decide a case *ex aequo et bono* was covered by the commencing words of article 11, " In the absence of any agreement between the parties concerning the law to be applied . . ."

20. Mr. VERDROSS proposed that the words " shall be guided by " be replaced by the words " shall apply ".

21. Mr. SCELLE, Special Rapporteur, said that the purpose of the expression " shall be guided " was to give the tribunal ample latitude in order that it should not bring in a finding of *non liquet.*

22. Mr. AMADO said that the reference to Article 38, paragraph 1 of the Statute of the International Court of Justice made a finding of *non liquet* practically impossible, because sub-paragraph 1 (*c*) of that Article of the Statute referred to the general principles of law recognized by civilized nations. It was virtually inconceivable that a case could arise which could not be decided by reference to such principles.

23. Mr. YOKOTA said that, in view of the rule against findings of *non liquet* in article 12, the provisions of article 11 were insufficient. If the tribunal could not bring in a finding of *non liquet,* it had to be provided with sufficient criteria to decide all disputes.

24. Article 38, paragraph 1, of the Statute of International Court of Justice contained sufficient criteria for the purpose of decisions in legal disputes, which were precisely the kind of dispute which States tended to submit to the International Court of Justice. Arbitration treaties, however, usually dealt with political or non-legal disputes, in respect of which existing rules of law were insufficient.

25. As an example of the difficulties which could arise, he mentioned the case of the continental shelf. If a dispute concerning a coastal State's claims in respect of the continental shelf were submitted to arbitration, it was difficult to see what criteria the arbitral tribunal would apply. There were no international conventions applicable so long as the parties concerned had not signed and ratified the Convention on the Continental Shelf adopted by the recent United Nations Conference on the Law of the Sea — on the assumption, of course, that that convention had been brought into force by the requisite number of ratifications. There was no international custom nor were there any general principles of law concerning the shelf. Inasmuch as the Conference on the Law of the Sea had adopted certain principles by a large majority, it could reasonably be argued, however, that it would be equitable to admit some right or interest of the coastal State in respect of the continental shelf. But the proposed text of article 11 would not enable such equitable grounds to be taken into consideration by the tribunal. In order, therefore, to complete the provisions of article 11 and make them fully consistent with those of article 12, he proposed that a provision along the following lines should be added at the end of article 11 :

> " In so far as there exist no such rules of international law applicable to the dispute, the tribunal shall decide *ex aequo et bono.*"

26. Mr. GARCIA AMADOR regretted the tendency of the debate to develop into a discussion on the general sources of international law, for experience showed that such discussions produced no positive results. It must, however, be recognized that Article 38, paragraph 1, of the Statute of the International Court of Justice had had a somewhat restrictive effect on the deliberations of the Court in certain cases. For example, in the Colombian-Peruvian asylum case,[1] the Court, despite the existence of principles of international law on the subject, applicable to the Latin American countries, had relied on a treaty which had not been ratified by one of the parties. And instances could be found in the case-law of the former Permanent Court of International Justice where that Court had gone beyond the letter of the provision in its Statute corresponding to Article 38, paragraph 1, of the Statute of the Inter-

[1] *Judgement of November 20th, 1950 : I.C.J. Reports 1950,* p. 266.

national Court of Justice, applying principles of equity not specifically referred to in that paragraph of the Article.

27. Furthermore, if article 11 were drafted in narrow terms it would tend to defeat the purpose of article 12, and in consequence it would become more difficult for the tribunal to avoid bringing in a finding of *non liquet*. He would accordingly prefer the words " shall be guided by " in the existing text of article 11 to the words " shall apply ", since the former allowed for greater flexibility. It should nonetheless be clearly understood that the element of discretion allowed the tribunal was purely a supplementary power enjoyed by it in the absence of any agreement between the parties concerning the law to be applied.

28. Mr. ZOUREK observed that opinion in the Commission seemed to be divided less on the substance than on the form of article 11. The article should follow closely the language of article 2, which mentioned among the possible contents of the *compromis* specific provisions concerning " the rules of law and the principles to be applied by the tribunal ". Since article 11 was only a subsidiary provision to article 2, the words " shall be guided by " seemed a trifle ambiguous and, like Mr. Verdross, he would prefer to see them replaced by " shall apply ". He proposed a wording based on article 28 of the Revised General Act for the Pacific Settlement of International Disputes,[2] namely, " the tribunal shall apply the substantive rules enumerated in Article 38, paragraph 1 . . . " It was essential to give a clear directive to the tribunal on the point, and he could not therefore agree with Mr. García Amador's arguments in favour of greater flexibility. The Commission had always taken the view that the arbitral tribunal should settle disputes on the basis of the law.

29. Though he fully appreciated the purpose of Mr. Yokota's proposal, he was bound to say that it went too far. It was questionable whether all States would be prepared to accept adjudication *ex aequo et bono*. Besides, the proposal conflicted with article 2. In that article it lay entirely in the discretion of the parties to confer on the tribunal in the *compromis* the power to decide *ex aequo et bono*. According to Mr. Yokota's proposal, however, the tribunal would have the right so to adjudicate, even without the prior agreement of the parties, in all disputes to which no existing rules of international law were applicable.

30. Sir Gerald FITZMAURICE said that, although he understood the reasons underlying Mr. Yokota's proposal, he thought that, were it accepted, it would blur the very necessary distinction between arbitral procedure, in which the function of the tribunal was basically to decide by law, and conciliation, in which disputes were settled *ex aequo et bono*. It would be a very novel departure to give an arbitral tribunal a general residual power so to adjudicate, even though the power had not been conferred on it by the parties to the dispute.

31. Mr. Yokota's main reason for making his proposal was apparently to forestall findings of *non liquet*. In fact, however, of all the many hundreds of cases submitted to arbitration there was scarcely one in which a tribunal had returned a verdict of *non liquet*. Though the problem loomed large in the textbooks, it hardly ever arose in practice. It was, moreover, generally accepted by students of the case-law of the International Court of Justice that the reference in Article 38 of the Statute of the Court to " the general principles of law recognized by civilized nations " meant that in legal disputes the Court would never find itself in the position of having to bring in a finding of *non liquet*. That being so, not only did Mr. Yokota's proposal appear unnecessary, but there was a possibility that article 12 might be unnecessary too, though he would prefer to reflect further on that point.

32. With regard to Mr. Yokota's observations on the state of international law with respect to the continental shelf, he said that, though he did not wish to dwell upon them, realizing that they had been brought in merely as an illustration, he could not agree that no rules of customary international law existed on the subject. That, at least, had not been the view of the Commission when preparing its draft on the law of the sea. Though conscious that it was dealing with a very new field in which custom had not had much time to establish itself, it had considered that there was a very general consensus among nations on the subject of the continental shelf, and that rules none the less existed which were not merely proposals *de lege ferenda*. The continental shelf was, in fact, a good example of a subject which, even though not perhaps governed by customary rules of international law, was yet not entirely unprovided for in the " general principles of law recognized by civilized nations ". Indeed, it was largely from such principles that the rules which had come to be accepted as governing the continental shelf had been evolved. And he was certain that in other similar cases it would be possible for a tribunal to settle the dispute on the same basis without having to bring in a finding of *non liquet*. He therefore regretted that he did not favour the additional provision proposed by Mr. Yokota.

33. Mr. EL-ERIAN noted that article 11 referred only to Article 38, paragraph 1, of the Statute of the International Court of Justice and not to paragraph 2, whereas the corresponding article 18 of the Revised General Act, the wording of which Mr. Zourek preferred, mentioned Article 38 as a whole. Though it might be argued that reference to Article 38, paragraph 2, of the Statute of the Court was unnecessary since article 11 applied " in the absence of any agreement between the parties concerning the law to be applied ", he must point out that an agreement between the parties concerning the applicability of a certain law sometimes referred only to specific rules. For instance, in the case of the conditions governing the acquisition of sovereignty over territory by prescription — a subject in which the rules were quite clear except in the matter of the duration of the period of prescription —

[2] United Nations, *Treaty Series*, vol. 71, 1950, No. 912.

arbitration agreements often specified a duration, frequently fifty years, as the criterion on which the arbitral tribunal should base its award. Thus, such agreements between the parties concerning the law to be applied did not necessarily cover cases where the tribunal was to adjudicate *ex aequo et bono*. He would for those reasons prefer the wording of article 18 of the Revised General Act, and proposed that the draft be amended accordingly.

34. Mr. AMADO said that the reference to Article 38, paragraph 1, of the Statute of the International Court of Justice had been introduced precisely to counter the constant danger that arbitration might degenerate into mere adjudication *ex aequo et bono*, and that the tribunal, arguing by analogy and not by legal reasoning, might depart from the rules and sources of law and obscure the true legal nature of the dispute. Adjudication *ex aequo et bono*, which was the last resort of parties anxious to settle a dispute at all costs, represented a departure from the rules of law, and was moreover unnecessary since the possibility of recourse to the general principles of law made it practically impossible for a tribunal to be compelled to bring in a finding of *non liquet*. He could not therefore accept Mr. El-Erian's proposal.

35. He was in favour of retaining the Special Rapporteur's text with the sole change of the words " shall be guided by " to " shall apply ", for, despite Mr. García Amador's plea for flexibility, he thought it essential that article 11 should be quite specific as to the law to be applied by the tribunal.

36. The CHAIRMAN, speaking as a member of the Commission, observed that under article 2, the power to adjudicate *ex aequo et bono* could be conferred on the tribunal by agreement of the parties. Article 38, paragraph 2, of the Statute of the Court equally safeguarded the Court's power to decide *ex aequo et bono*, if the parties agreed thereto. Article 11 was intended to provide for the guidance of the tribunal as to the law to be applied in the absence of any agreement between the parties in that respect. Unless, therefore, there was any idea of extending the power to decide *ex aequo et bono* even if the parties did not agree, as in article 28 of the General Act for the Pacific Settlement of International Disputes of 1928,[3] he did not see why it should be necessary to add to article 11 any clause regarding decisions *ex aequo et bono*, either directly or by extending the reference to Article 38 of the Statute of the Court.

37. Mr. AGO said that he agreed with previous speakers that the power to adjudicate *ex aequo et bono* must derive from an explicit agreement of the parties. Even so, from the standpoint of drafting, he thought that some separate provision on the subject should be added to article 11, since the initial qualification in that article regarding the absence of agreement between the parties concerning the law to be applied would not, strictly speaking, cover the case of adjudication *ex aequo et bono*. Perhaps it would satisfy Mr. Yokota if the following sentence were added to article 11 : " If the agreement between the parties so provides, the tribunal may also adjudicate *ex aequo et bono*."

38. As to the proposed amendments of the passage " the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice ", he thought that it would be difficult to say either that the tribunal " shall apply the rules " or that it " shall apply the sources " mentioned in Article 38, paragraph 1. That paragraph spoke not only of " rules " but also of principles and of means for the determination of those rules and principles. Furthermore, the use of the term " sources " would give rise to some obvious difficulties of a scientific nature. In an endeavour to find a phrase more specific than " shall be guided by Article 38, paragraph 1 " and yet more accurate than " shall apply Article 38, paragraph 1 " — since application *stricto sensu* was a matter solely for the Court — he would tentatively suggest the wording " . . . the tribunal shall comply with Article 38, paragraph 1, . . . "

39. Mr. YOKOTA said that, although not completely convinced by previous speakers, he wished to withdraw his proposal in favour of that made by Mr. Ago.

40. Mr. EL-ERIAN explained that he had proposed that article 11 should refer also to Article 35, paragraph 2, of the Statute of the International Court of Justice precisely because that paragraph made the power of the Court to decide a case *ex aequo et bono* dependent upon the agreement of the parties. He, too, wished to withdraw his proposal in favour of that of Mr. Ago.

41. Mr. VERDROSS, Mr. TUNKIN and Sir Gerald FITZMAURICE also expressed preference for Mr. Ago's proposal.

42. Mr. AMADO said that, since the Commission wished to use the language of the provisions which governed the judicial powers of the Court, he could not see why the phrase " shall apply " should not be used. He was not in favour of Mr. Ago's proposal.

43. Mr. ZOUREK pointed out that the wording of article 18 of the Revised General Act had the advantage of being very clear and of having been accepted by States. Normally, an international tribunal could apply only the substantive rules referred to in Article 38, paragraph 1, of the Court's Statute, and solely in case of uncertainty could it resort to doctrine in order to discover what the rules were. He thought that the task of finding a satisfactory expression could be left to the Drafting Committee.

44. Mr. SCELLE, Special Rapporteur, said that he would agree to the words " shall be guided by " being replaced by " shall apply " ; the other problems could be solved if article 11 referred to the whole of Article 38 of the Statute of the Court instead of to paragraph 1 only. Incidentally, he considered that articles 11 and 12 belonged together and should form a single article, as in

[3] League of Nations, *Treaty Series*, vol. XCIII, p. 343.

the Commission's draft on arbitral procedure of 1953.[4]

45. Mr. PADILLA NERVO observed that there was general agreement that the tribunal could not adjudicate *ex aequo et bono* unless the parties gave it the power to do so. That being so, he considered it unnecessary for article 11 to repeat what was already said in the second paragraph of article 2. It seemed illogical moreover to refer to a matter which required the agreement of the parties in an article beginning " In the absence of any agreement between the parties ".

46. The CHAIRMAN thought that perhaps what some members of the Commission had in mind was that, even if the parties failed to give the tribunal the power to adjudicate *ex aequo et bono* in the *compromis,* they might wish to do so at some later stage. Article 11, according to them, would be the proper place to provide for such a case.

47. He put to the vote the proposal that a provision be inserted in article 11 relating to the power of the tribunal to adjudicate *ex aequo et bono* if the parties so agreed ; the drafting of such a provision could, he thought, be left in the first instance to the Drafting Committee.

The proposal was adopted by 11 votes to 4, with 3 abstentions.

Article 11 was approved by 11 votes to 1, with 5 abstentions, on the understanding that the Drafting Committee would make the agreed changes.

48. Sir Gerald FITZMAURICE, explaining his vote, said that although he had voted in favour of including in article 11 a reference to adjudication *ex aequo et bono,* he agreed with Mr. Padilla Nervo that, in view of the terms of article 2, no such provision was really necessary. Nevertheless, as some members of the Commission thought differently — owing no doubt partly to the reference to Article 38 of the Statute of the International Court of Justice and partly to the words " concerning the law to be applied " — it seemed to him safer to avoid any possible misunderstanding, even at the cost of what was after all a harmless repetition.

49. Mr. AGO said he had voted in favour of the proposal for the reasons given by Sir Gerald, with whose remarks he associated himself.

50. Mr. ZOUREK said he had voted against the proposal, since it would involve an entirely unnecessary repetition in the text of the draft.

51. Mr. AMADO said he had voted against the proposal, not only because it would involve unnecessary repetition, but also because its adoption would involve the Commission in serious practical difficulties in dealing with many other articles of the draft.

52. Mr. BARTOS said that, although a provision relating to the tribunal's power to adjudicate *ex aequo et bono* was not strictly necessary in article 11, such a provision was desirable for it would remove all doubt on the matter. Several of the points which were being referred to the Drafting Committee, however, were not really points of drafting but of substance, and he had abstained from voting in order to reserve his right to comment on the actual text proposed.

ARTICLE 9 (*continued*)

53. The CHAIRMAN said that the Special Rapporteur and Sir Gerald Fitzmaurice proposed the following text to replace paragraphs 2 and 3 of article 9, paragraph 1 remaining unaltered :

> " If the parties fail to agree or to complete the *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal, within three months after the parties report failure to agree — or after the decision, if any, on the arbitrability of the dispute — shall proceed to hear and decide the case on the application of either party."

54. He also recalled Mr. Edmonds' proposal that the words " or refuses to answer it " should be inserted before the words " on the ground that " in the second sentence of paragraph 1 (440th meeting, para. 25).

55. Sir Gerald FITZMAURICE said that he and the Special Rapporteur had considered Mr. Edmonds' proposal, but had felt it was unnecessary in view of article 29, paragraph 1, which dealt in general with what happened when one party failed to appear before the tribunal or to defend its case.

56. Mr. EDMONDS said that he had not overlooked article 29 ; but that article related to the tribunal's decision on the merits of the case. Article 9 dealt with a specific question which had to be settled before the tribunal even considered the merits of the case. In his view, there was no reason why a party which refused to answer the other party's application on the ground that the provisions of the *compromis* were insufficient should be treated differently from a party which simply refused to answer the application without stating any grounds.

57. Mr. BARTOS said he agreed with Mr. Edmonds that the general question of judgement by default was distinguishable from the case in point. Refusal by one party to answer the other party's application, whether it gave grounds or not, obliged the tribunal to decide the question of its competence.

58. Sir Gerald FITZMAURICE said he still felt that Mr. Edmonds' proposal was unnecessary. If one party refused to answer the other party's application without giving any grounds, it would, in his view, be refusing to answer on the merits of the case.

59. Mr. EDMONDS said he was by no means convinced that the question referred to in article 9 could be regarded as a question concerning the merits of the case. It would at all events be better to add the words he proposed, in order to avoid any possible misunderstanding.

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

60. Mr. ZOUREK recalled that he had pointed out (440th meeting, para. 31) that the last sentence of paragraph 1 was unacceptable, for if there was insufficient agreement between the parties on the essential elements of the case as set forth in article 2, there was no basis on which the tribunal could make the order referred to in the sentence in question ; the tribunal could not proceed as though the parties were agreed to arbitrate when in fact they were not. Moreover, as the present text now seemed to recognize that in the last resort the tribunal could proceed without a *compromis* fulfilling the conditions laid down in the first paragraph of article 2, the sentence in question was quite unnecessary, and he accordingly proposed its deletion.

61. Sir Gerald FIZMAURICE said that, far from being superfluous, the last sentence in paragraph 1 seemed to him to constitute a logical stage in the whole procedure. A *compromis* might not always be necessary, but he thought the Commission agreed it was always desirable, and the main object of article 9 as a whole was to ensure that there was one if possible. If there was no *compromis* by the time the tribunal was constituted, the latter could, if necessary, order the parties to complete or conclude one ; and it was only if they failed to do so that the provisions of paragraph 2 came into effect. From Mr. Zourek's own point of view, therefore, he would have thought it preferable to retain the last sentence of paragraph 1, since it ensured that the parties had every chance to put their wishes into as precise a form as they desired.

62. Mr. AGO pointed out that there was some inconsistency between paragraph 1 and paragraph 2 as revised ; according to paragraph 2 the tribunal would, in certain cases, be able " to proceed " to hear and decide the case even though there was not, according to paragraph 1, " sufficient agreement between the parties on the essential elements of the case as set forth in article 2 to enable it to proceed." He proposed therefore that the words " to enable it to proceed " should be deleted from the second sentence of paragraph 1.

63. The CHAIRMAN put to the vote Mr. Edmonds' proposal (440th meeting, para. 25) that the words " or refuses to answer it " should be inserted before the words " on the ground " in the second sentence of paragraph 1.

The proposal was rejected by 6 votes to 4, with 7 abstentions.

64. The CHAIRMAN called for a vote on Mr. Ago's proposal (para. 62 above) that the words " to enable it to proceed " in the second sentence of paragraph 1 should be deleted.

The proposal was adopted by 11 votes to none, with 5 abstentions.

65. The CHAIRMAN called for a vote on Mr. Zourek's proposal (para. 60 above) that the last sentence of paragraph 1 should be deleted.

The proposal was rejected by 11 votes to 4, with 2 abstentions.

66. The CHAIRMAN put to the vote paragraph 1, as amended.

Paragraph 1, as amended, was adopted by 14 votes to 1, with 3 abstentions.

67. The CHAIRMAN put to the vote paragraph 2 in the modified form proposed by the Special Rapporteur and Sir Gerald Fitzmaurice (para. 53 above).

Paragraph 2, in the modified form, was adopted by 14 votes to none, with 4 abstentions.

68. The CHAIRMAN put to the vote article 9, as a whole, as amended.

Article 9, as a whole, as amended, was adopted by 14 votes to 1, with 2 abstentions.

ARTICLE 12

69. Mr. VERDROSS said he realized that in practice there was very rarely any need for the tribunal to bring in a finding of *non liquet* since the parties did not usually place any limit on the rules which were to be applied. He therefore did not wish to propose any change in the text of article 12, but would merely point out that the parties might, for example, stipulate that the case should be decided on the basis of existing treaties only ; in such a case, if the treaties contained no provisions covering the dispute, the tribunal might have no choice but to bring in a finding of *non liquet*.

70. Sir Gerald FITZMAURICE and Mr. LIANG, Secretary to the Commission, thought the type of case which Mr. Verdross had in mind would not be covered by article 12, which referred to " the silence or obscurity of international law or of the *compromis* ".

71. Mr. FRANÇOIS said that in a situation such as Mr. Verdross envisaged, the proper course would be for the tribunal to repect the application.

72. Mr. TUNKIN pointed out that the parties might stipulate that the tribunal should decide the case on the basis of specified treaties. If those treaties did not in fact provide a juridical basis for a decision, was it seriously contended that the tribunal should ignore them and proceed as it thought fit, without paying any regard to the express will of the parties? In his view article 12 was unnecessary and not in keeping with the principles governing international arbitration.

73. Mr. ZOUREK agreed that the article certainly required further consideration. He did not share Mr. François' view that in the kind of situation Mr. Verdross envisaged the tribunal's proper course would be to reject the application. It might also happen that the parties had expressly stipulated that the tribunal should not adjudicate *ex aequo et bono* ; it seemed illogical that the tribunal should have to reject an application which it might have granted if it had been empowered to adjudicate *ex aequo et bono*. The question was not so simple as Mr. François appeared to think.

He drew attention to the statement by Politis to the effect that " in the event of the considerations of fact or law submitted to him not providing adequate data upon which to base a decision, he [the arbitrator] has not only the right, but the duty to refuse to render judgement ".[5] The Special Rapporteur himself, in his comments on the model draft (A/CN.4/113, para. 17), admitted that the problem of *non liquet* was complex and controversial. In particular the reference in article 12 to the silence of the *compromis* would raise serious practical difficulties.

74. Mr. AGO agreed with Mr. Verdross that the present text of article 12 would give rise to difficulties if the parties — unwisely — limited the rules of international law which were to be applied. It might perhaps be possible to find some means of prohibiting the parties from inserting in the *compromis* such an absurd limitation on the rules of international law which the tribunal could apply. Clearly, however, the whole matter required further consideration.

The meeting rose at 6.10 p.m.

[5] Quoted in the *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No.: 1955.V.1), p. 50.

442nd MEETING

Tuesday, 13 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 12 *(continued)*

1. Mr. VERDROSS said that there were various courses open to the Commission in dealing with article 12. It could dispense with the article altogether, or it could preface the article by the words " In principle ", or, lastly, it could leave the article as it was but point out in a commentary that the article was based on the assumption that the tribunal had the power to apply all international law. He advocated the third course.

2. Sir Gerald FITZMAURICE found it difficult to agree with Mr. Verdross. Even when the tribunal was bound by the parties to reach its decision on the basis of a specific treaty, there could never be any question of its bringing in a finding of *non liquet*. There seemed to be some confusion as to the exact connotation of the term *non liquet*. Article 12 did not mean that when the law was silent or obscure the tribunal was entitled to indulge in invention; it simply meant that the tribunal must render a decision.

3. Mr. VERDROSS, intervening, pointed out that in a case concerning sovereignty over a disputed territory, the tribunal, if instructed to deliver its judgement on the basis solely of existing treaties, would be bound to bring in a finding of *non liquet* if the treaties gave no guidance.

4. Sir Gerald FITZMAURICE said that it was precisely his point that in such a case the tribunal was not constrained to do any such thing. In arbitration cases a question of sovereignty would hardly be put to the tribunal in the abstract; in cases such as that mentioned by Mr. Verdross there would always be a party claiming a right under a treaty or complaining of encroachment by the other party on its rights under that treaty. If the treaty was silent on the point, the tribunal would have to give a decision against the complaining party because the latter had not established its case. Fundamentally, the question was: had the complainant discharged the onus of proof? There was always one party which had to establish its case and if it failed to do so the tribunal was bound to rule against it. The reason why it had failed to establish its case — whether because the law was obscure or because no rules of law existed on the matter — was immaterial. The provisions of article 12 were perfectly justified for they meant that there would always be a decision, even if for no other reason than that the rules were silent.

5. He made a comparison with the situation which arose when a proposal was the subject of a tied vote in the Commission. A tied vote did not mean that the matter remained unsettled; it did not constitute anything analogous to a finding of *non liquet*. On the contrary, it constituted a decision against the maker of the proposal who had not, as it were, made out a sufficient case.

6. Mr. LIANG, Secretary to the Commission, said that the case mentioned by Mr. Verdross was actually the reverse of those dealt with in article 12, since in the hypothesis of Mr. Verdross the *compromis* was neither silent nor obscure but so clear as to prevent any misunderstanding. Indeed, it was only in cases where the parties allowed the tribunal to apply or resort to the whole of international law in reaching its decision, or when the parties failed to agree on the law to be applied, that it was thought theoretically possible for a tribunal to bring in a finding of *non liquet* after consulting the sources of international law — as, for example, those set out in Article 38, paragraph 1, of the Statute of the International Court. Even so, a finding of *non liquet* had never been brought in either by the Permanent Court of International Justice or by its successor, the International Court of Justice. It could not be denied that both Courts had, tacitly, resorted to " the general principles of law ".

7. A finding of *non liquet* was often confused with a nonsuit. When the parties agreed that specific rules of law should be applied, as very frequently happened in arbitration cases, no question of *non liquet* was involved, for if the tribunal found that the claimant State did not