Document:-
A/CN.4/SR.444

Summary record of the 444th meeting

Topic:
Arbitral Procedure

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

70. Mr. LIANG, Secretary to the Commission, said that article 15, paragraph 4, of the 1953 draft [3] made a visit to the scene conditional on the requesting party's offering to pay the resulting costs. It was therefore logical to specify that the visit would be ordered " at the request of either party ". In the present draft, the reference to costs having been dropped, there appeared to be no reason to require such a request.

71. Mr. SCELLE, Special Rapporteur, said that there appeared to be no objection to the deletion of the words " At the request of either party ".

72. Mr. MATINE-DAFTARY said that he could not vote in favour of article 21 in its present form.

73. Paragraph 1 provided that the tribunal would be the judge of the admissibility of the evidence presented to it. That provision gave excessive powers to the tribunal and should be deleted; it was sufficient to make the tribunal the judge of the weight of the evidence placed before it.

74. Paragraph 2 appeared to give the tribunal the unusual power to order the parties to produce evidence.

75. Lastly, he could not understand why a particular type of evidence was singled out for reference in paragraph 4. He wondered why the text did not deal also with the other types of evidence, or with evidence in general.

76. Mr. ZOUREK said that a special reference to the procedure envisaged in article 21, paragraph 4, was understandable in the 1953 draft because of the special problem of costs.

77. On the whole, the corresponding text of the 1953 draft was preferable to the present text of article 21, paragraph 4.

78. Mr. SCELLE, Special Rapporteur, said that the question of costs had to be decided ultimately by the tribunal in its award. It was undesirable, from the point of view of the equality of the parties, that a party requesting a specific measure for obtaining evidence should have to bear the costs which that measure involved.

79. In reply to Mr. Matine-Daftary, he said that the question of the admissibility of evidence could only be decided by the tribunal. The tribunal could state that a particular item of evidence was inadmissible or irrelevant to the case. As to article 21, paragraph 2, its provisions did not empower the tribunal to oblige parties to produce evidence; they simply stated that, if one of the parties failed to make evidence available, the tribunal would take note of that failure.

The meeting rose at 1.5 p.m.

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

444th MEETING

Friday, 16 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 21 *(continued)*

1. Mr. ZOUREK said that his doubts concerning the omission of a reference to the question of costs in paragraph 4 of article 21 had not been dispelled. He also still felt that it was necessary to maintain a reference to the decision of the tribunal being made at the request of either party. If, however, the Special Rapporteur did not agree to his suggestions, he would make no formal proposal.

2. Mr. TUNKIN said that, in accordance with article 2, the parties could lay down in the *compromis* rules concerning the admissibility of evidence. In order, therefore, to bring the provisions of paragraph 1 of article 21 into line with those of article 2, he suggested that, at the beginning of that paragraph, a phrase along the following lines should be inserted: " Unless otherwise agreed by the parties in the *compromis* . . ."

3. Article 21, paragraph 3, gave the tribunal the power to call for any type of evidence it might deem necessary. That provision was much too broad; he suggested that the language of Article 49 of the Statute of the International Court of Justice should be used instead. That article empowered the Court to call upon the parties " to produce any document or to supply any explanations ". Similar language was used in article 68 of The Hague Convention of 1907.[1]

4. He agreed with Mr. Zourek's remarks on paragraph 4.

5. Sir Gerald FITZMAURICE said that the reference in article 21, paragraph 1, to the admissibility of evidence was necessary. There was a clear distinction between the admissibility and the weight of the evidence submitted to a court and that distinction was well known both to international and to domestic procedure. There were circumstances in which it was desirable to rule out the submission of certain evidence altogether.

6. Paragraph 3 did not appear to add much to the provisions of paragraph 2, which covered both applications of the parties to submit evidence and measures ordered by the tribunal and connected with the production of evidence. The redundancy could

[1] Convention for the Pacific Settlement of International Disputes, The Hague, 1907. See *The Reports to the Hague Conference of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 304.

perhaps be avoided by means of adequate redrafting, possibly by consolidating paragraphs 2 and 3 into a single paragraph.

7. With regard to paragraph 4, he said that the arbitral tribunal would clearly only order a visit to the scene connected with the case if it considered such a visit necessary; at that stage, the question of costs was irrelevant. It was clear, however, that the scene connected with the case could only be visited by the tribunal with the consent of the party on the territory of which the visit was to take place. If that party failed to co-operate with the tribunal in that regard, the tribunal should take note of that failure.

8. He therefore proposed the addition in paragraph 4 of a provision along the following lines: "The parties shall co-operate with the tribunal in the event of such a decision. If the party concerned does not consent to the visit, the tribunal shall take note of that fact."

9. Mr. SCELLE, Special Rapporteur, said that he could not agree to the deletion of the reference to the admissibility of evidence in article 21, paragraph 1.

10. The provisions of paragraph 2 on the failure of a party to co-operate in carrying out the measures ordered by the tribunal applied to the measure envisaged in paragraph 4. That fact could perhaps be made clearer, either by the addition of a provision along the lines proposed by Sir Gerald Fitzmaurice or by the insertion of a reference to the visit to the scene connected with the case, as well as a reference to the requesting of expert opinions, in the first sentence of paragraph 2. If the latter course was adopted, paragraph 4 would become unnecessary. The choice between those two courses could be left to the Drafting Committee.

11. Mr. AGO proposed the introduction in article 21, paragraph 2, of a reference to oral evidence and to the duty of the parties to facilitate the hearing of witnesses by the arbitral tribunal. The arbitral tribunal required the co-operation of the parties in order to take evidence from witnesses because it had neither the powers which municipal courts enjoyed in that regard nor the machinery which such courts could rely upon.

12. Mr. BARTOS agreed with Mr. Ago. As far as possible, the Commission had to give some indication of the standards which it considered internationally desirable in the matter of procedure. There were no generally accepted principles governing such questions as the rules of evidence, the onus of proof, and the manner in which witnesses should be examined and cross-examined. The rules in force on those subjects differed considerably from one legal system to another, and the Commission would be serving the cause of the peaceful settlement of disputes if it could agree on certain international standards.

13. It could not be stressed too often that there was no obligation upon States to accept the model draft in its entirety. States could decide to dispense with any provisions of the draft which they considered unsuitable for their purposes. Accordingly, the Commission should not hesitate to include in the draft any provisions which the majority of its members considered useful.

14. Mr. SCELLE, Special Rapporteur, said that a mere enumeration of the various means of evidence would not serve the purpose suggested by Mr. Bartos and any attempt to enter into detail would probably require a separate article concerning each type of evidence, with the consequence that the model draft would be extended unduly.

15. In reply to Mr. Tunkin, he said that the provisions of article 21, paragraph 1, did not in any way conflict with those of article 2. Article 2 did not refer to evidence. Of course, article 21, like all the articles of the draft, would only be applied in cases where the parties agreed to apply it to their dispute.

16. He could not therefore agree to the addition, at the beginning of article 21, paragraph 1, of the words proposed by Mr. Tunkin (para. 2 above). That addition was unnecessary.

17. Nor could he agree to Mr. Tunkin's suggestion that article 21, paragraph 3, should use the language of Article 49 of the Statute of the International Court of Justice. The latter article referred to the power of the Court to call upon the agents of the parties to produce any document or to supply any explanations even before the hearing began. Subsequent articles of the Statute, and in particular Article 52, covered all means of evidence.

18. Mr. TUNKIN said that article 2 of the model draft provided, in its second, or optional, paragraph, that "The *compromis* shall likewise include any other provisions deemed desirable by the parties". Those provisions could, of course, include rules on the admissibility of evidence. For that reason, he had suggested that article 21 should commence with a proviso stipulating that it applied only in the absence of agreement of the parties on the question of evidence.

19. He did not, however, have any formal proposal to make, either on that point or on article 21, paragraph 3.

20. Mr. MATINE-DAFTARY proposed the deletion of the words "the admissibility and" in paragraph 1.

The proposal was rejected by 10 votes to 1, with 3 abstentions.

Paragraph 2 was adopted unanimously, subject to drafting changes.

Paragraph 3 was adopted by 12 votes to 1, with 2 abstentions, subject to drafting changes.

21. The CHAIRMAN said that the words "At the request of either party" in paragraph 4 had been deleted by the Special Rapporteur. In addition, the Special Rapporteur had accepted the substance of Sir Gerald Fitzmaurice's proposal (para. 8 above) relating to the same paragraph. He therefore put to the vote paragraph 4 as so amended, subject to the decision of the Drafting Committee concerning its redrafting or ilts amalgamation with paragraph 2.

Paragraph 4, as amended, was adopted in substance by 13 votes to none, with 3 abstentions.

Article 21 as a whole, as amended, was adopted by 12 votes to 1, with 1 abstention, subject to drafting changes.

22. Mr. SCELLE, Special Rapporteur, said that he had defended his text of article 21 because it reproduced the provisions adopted b the Commission in article 15 of its 1953 draft.[2]

23. The decision of the Commission was, as he understood it, to adopt the substance of the various provisions of article 21, leaving it to the Drafting Committee to redraft those provisions and to amalgamate, if necessary, certain of the paragraphs of the article in question. In a sense, therefore, the decision was of a provisional character.

24. The CHAIRMAN then put to the vote the proposal that the Drafting Committee should also be instructed to include a reference to expert evidence in article 21.

The proposal was adopted by 13 votes to 9, with 3 abstentions.

ARTICLE 22

25. Mr. SCELLE, Special Rapporteur, said that if the reference to additional claims and counter-claims gave rise to translation difficulties, as he understood it did from the discussion at the previous meeting on article 17, paragraph 4, he would be prepared to omit it. In any case he agreed with Mr. Matine-Daftary that in the French text the comma should be deleted after the word " *demandes* ".

26. Mr. BARTOS said there was no good reason for deleting the reference to additional claims and counter-claims ; the Commission should merely ask the Drafting Committee to bear in mind that there were two types of additional claims : accessory claims relating to the same events as those forming the subject of the main claim, and claims relating to new events connected with but subsequent to those which were the subject of the main claim.

27. Mr. ZOUREK said that article 22 dealt with a matter where practice was by no means uniform ; in several cases since the First World War additional claims or counter-claims had been explicitly excluded from the tribunal's competence. In any case, he shared the Indian Government's view[3] that, as drafted, article 22 (article 16 of the 1953 draft) left too much to the subjective judgement of the tribunal itself ; the words " arising directly out of " were far from precise, and in that connexion he drew attention to the Argentine Government's suggestion[4] that the application of the article should be restricted to counter-claims and that the words " arising directly out of the subject-matter of the dispute " be replaced by the words " relating to questions which necessarily arise out of the subject-matter of the dispute ".

28. Mr. AGO thought the words " arising directly out of " already provided an adequate safeguard against the risk of the tribunal's exceeding its competence.

29. He pointed out that in the International Court of Justice counter-claims at least could not be presented after a certain stage of the written proceedings had been reached. As the model draft laid down no time limits for the presentation of incidental or additional claims or counter-claims, he wondered whether it was in fact the Special Rapporteur's view that they should be presented at any stage.

30. Mr. SCELLE, Special Rapporteur, answered in the affirmative, but pointed out that the question had not been considered by the Commission at the time it prepared its 1953 draft. He doubted its practical importance.

31. Mr. AGO said that the question certainly was of importance as far as counter-claims were concerned. Counter-claims had very serious repercussions on the subsequent proceedings, since their effect was to make the claimant the respondent and the respondent the claimant. He doubted the advisability of permitting the presentation of counter-claims, for example, after the closure of the written proceedings.

32. Mr. LIANG, Secretary to the Commission, said that when the Secretariat had been engaged in preparing the commentary on the 1953 draft, the only clear precedent it had been able to find with regard to counter-claims was article 63 of the Rules of Procedure of the International Court of Justice ; it was clear, however, that that article only applied where proceedings had been instituted by means of an application, not where they were brought by special agreement, as would very frequently be the case in arbitral proceedings.[5]

33. Mr. AGO agreed that it was not really possible to envisage a counter-claim unless the proceedings were instituted by means of a unilateral application. Some additional provision to that effect in article 22 was clearly necessary.

34. Sir Gerald FITZMAURICE thought it was evident from the discussion that the article would have to be modified a good deal. In any case, the Commission should take some decisions on the principles involved. It was quite right that if there were incidental or additional claims or counter-claims, the tribunal should decide on them in order to dispose of all the issues arising directly out of the same subject-matter. However, the article did not indicate the circumstances in which such claims or counter-claims were admissible. In that

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

[3] *Ibid., Tenth Session, Annexes,* agenda item 52, document A/2899 and Add. 1 and 2, p. 6.

[4] *Ibid.,* p. 2.

[5] See *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. 69.

connexion he thought it necessary to distinguish clearly between incidental or additional claims, in other words those presented by the claimant, and counter-claims, in other words those presented by the respondent, not only because the distinction affected the time limit for submission but also because of the very important point raised by the Secretary.

35. Dealing with that point first, he agreed that counter-claims should only be admitted in the very rare case of the proceedings being instituted by unilateral application. For where two parties agreed to refer to arbitration a claim presented by one of them, the other would normally be aware, at the time they did so, of any counter-claim it wished to make arising out of the same subject-matter and should include such counter-claim in the agreement to arbitrate ; if it failed to do so, there was a very strong case for excluding the counter-claim. In the most unlikely event that the respondent did not discover the possible grounds for a counter-claim until subsequently, conclusion of a separate agreement should, he thought, be required.

36. In the case of additional or incidental claims, however, it was much more likely that the claimant might, for example, find he had suffered further damage after the proceedings had begun, even after the oral proceedings had begun ; in his view, therefore, no time limit should be fixed for incidental or additional claims, although provision should perhaps be made for some means whereby the written proceedings could be re-opened in respect of incidental or additional claims which were presented during the oral proceedings, in order that the respondent would not be deprived of the right to make a written reply.

37. Mr. TUNKIN said that, in view of the considerable discrepancies between the French and English texts of article 22, conclusions might differ according to the text under consideration. He fully agreed with Mr. Zourek that the article went too far. In the first place, it went even further than the corresponding provisions of the Rules of Court of the International Court of Justice and, since arbitral procedure differed materially from judicial procedure, that was neither advisable nor justified. The article also gave the tribunal a sort of supra-national character. Though, from the standpoint of *elegantia juris,* the article had some merit, it remained to be seen whether it would be of any practical value in the existing circumstances. He doubted whether it was expedient to take any decisions of principle at that stage and would prefer the text to be referred to the Drafting Committee for revision in the light of the discussion.

38. Mr. AGO said that if the article could be confined to claims (as distinct from counter-claims), it would present virtually no problem, except perhaps for the need to distinguish, even with regard to additional claims, between proceedings instituted by unilateral application and those instituted by joint reference of the two parties. In the case of the former, an additional claim was tantamount to a new application by the claimant. But in a case where the parties had agreed to submit their dispute to arbitration by joint reference, any new application would also have to be made jointly.

39. As to counter-claims, he thought that an express provision thereon in the draft could not be avoided. Though it was more frequent for disputes to be submitted to arbitration by agreement between the parties, submission by unilateral application could occur on the basis of an arbitration treaty or arbitration clause. Furthermore, in view of the provisions approved by the Commission for article 9, the likelihood of arbitration proceedings instituted by unilateral application, and hence also the possibility of counter-claims, had only increased. It must, however, be clearly stated that counter-claims were admissible only if the dispute had been referred to the tribunal by unilateral application and only if they were submitted within a certain time. He suggested that the closing date specified in the Rules of the Court for the submission of the counter-memorial might also apply to the presentation of counter-claims.

40. Since the two matters required separate treatment, he thought that article 22 should deal exclusively with the question of incidental and additional claims and that a separate article should deal with counter-claims.

41. Mr. SANDSTRÖM said that he shared Mr. Zourek's misgivings concerning the phrase " arising directly out of the subject matter " and its French equilavent. During the Commission's discussions of the draft convention on arbitral procedure at its fifth session, it had been explained that the connexion must be " necessary " or " inseparable ".[6] He doubted very much whether the word " directly " conveyed the idea of inseparability.

42. Mr. SCELLE, Special Rapporteur, agreed with Sir Gerald Fitzmaurice and Mr. Ago on the soundness of drawing a sharp distinction between additional claims and counter-claims, though the point had not been mentioned at the Commission's fifth session. He was afraid, however, that it would prove difficult to redraft the article on the lines suggested, because a variety of cases would have to be provided for. He thought that probably the problem was covered by the provision in article 36 that an award might be challenged on the ground that the tribunal had exceeded its powers.

43. He had no objection to an amendment stressing the inseparable connexion between an additional claim or a counter-claim and the principal claim, though he could hardly perceive any difference in meaning between such an amendment and the text he had drafted. In either case the clear intention was to describe a situation in which the dispute could not be decided without a decision on the additional claim or counter-claim. On balance, he considered that the article, though admittedly not perfect, should be left as it stood. It might be referred to the Drafting Committee, but he doubted if the latter could produce a better text for the article. In striving for a more perfect wording the Commission might forfeit the chance of working out a text commanding general agreement.

---

[6] See A/CN.4/SR.188, paras. 44-75.

44. Mr. ZOUREK remarked that, as the Special Rapporteur himself appeared to recognize, there were serious objections to the article as it stood. There was, furthermore, a question of terminology. The term "*demandes incidentes*" had different meanings in different legislations. In French procedure, he understood it to include *demandes additionelles, demandes reconventionelles* and even *demandes en intervention.*

45. Since the article was to be offered as part of a model draft, he thought that the Special Rapporteur should be requested to produce a fresh text amended in the light of the discussion.

46. Mr. BARTOS said that the concepts of *indivisibilité* and of *connexité* were by no means identical. A case could be divided by limitation of the subjects even when they arose from one and the same cause. Many codes of civil procedure contained elaborate provisions concerning the concept of "indivisibility".

47. Nor did the expressions "incidental claim" and "additional claim" mean the same thing. In certain countries of central Europe an "incidental claim" was a subsidiary claim.

48. As for counter-claims, he said that if all reference to them was excluded from the article, the tribunal might be powerless to settle the dispute. Counter-claims formed an integral part of a dispute. Indeed, it sometimes happened that a counter-claim, by a reversal of the position of the parties, became the principal claim. If, for instance, a State, after tolerating an illicit situation for years, ceased to do so, the other State might claim that the situation originally tolerated had been consistent with international law. The tribunal on the other hand might decide that, on the contrary, the first State had a just claim against the other because of the illicit state of affairs which it had originally tolerated, and the counter-claim would thus become the principal claim.

49. Though he agreed that the tribunal must be given the means of settling the whole of the dispute, he had some misgivings regarding the powers given to the tribunal in the article. The parties might themselves agree to exclude all additional claims, if, for example, a State merely wished to obtain recognition of the justice of its attitude without claiming any reparation.

50. In view of the complex problems of terminology involved, he proposed that the Drafting Committee should be asked to produce a new text, in collaboration with the Special Rapporteur.

51. The CHAIRMAN said that, though it appeared to be generally agreed that an additional claim and a counter-claim were not on the same footing and that it might not be possible to deal with them in the same paragraph, he did not think it advisable to take any final decision at that stage.

52. He put to the vote the proposal that article 22 be referred to the Drafting Committee for redrafting in the light of the discussion.

The proposal was adopted by 15 votes to none, with 1 abstention.

ARTICLE 23

53. Mr. SCELLE, Special Rapporteur, introducing article 23, pointed out that it was modelled on Article 41, paragraph 1, of the Statute of the International Court of Justice.

54. Mr. VERDROSS said that the draft article represented a twofold advance on the corresponding provision of the Statute of the International Court. In the first place, it gave the president of the tribunal, subject to confirmation by the latter, the power to prescribe any necessary provisional measures. The second improvement was the use of the word "prescribe", instead of the vague term "indicate" used in the Statute.

55. Mr. EL-ERIAN inquired why the words "and if circumstances so require" appearing in the 1953 version of the article (article 17 of the 1953 draft) had been omitted.

56. Mr. YOKOTA observed that the words "at the request of one of the parties" did not figure in Article 41 of the Statute of the International Court. He proposed that the words should be deleted from article 23 as they had been, in similar circumstances, from article 21, paragraph 4, so that the tribunal would have the power to prescribe provisional measures on its own initiative as well as at the request of the parties.

57. Mr. SCELLE, Special Rapporteur, replying to Mr. El-Erian, said that the word "necessary" qualifying the words "provisional measures" served the same purpose as the phrase "if circumstances so require".

58. Replying to Mr. Yokota, he said that provisional measures taken in disputes between States might involve important political questions and it should therefore be for the parties to judge whether they were necessary. If neither party saw the need for provisional measures, no such safeguard would be required.

59. Mr. EL-ERIAN said that he thought the words "if circumstances so require" better emphasized the exceptional nature of provisional measures. If, however, the Commission found the word "necessary" adequate, he would not object to it. He was in favour of retaining the phrase "at the request of one of the parties".

60. Mr. ZOUREK thought that the article went too far. It was inadvisable to give the president sole power, subject to subsequent confirmation, to take a step of such gravity as the prescribing of provisional measures in disputes between States. In view of the rapidity of modern communications, there was really no justification for that provision, which might render the article unacceptable to many States. He proposed that the passage "or in case of urgency its president, subject to confirmation by the tribunal" should be deleted.

61. The CHAIRMAN put to the vote Mr. Yokota's proposal (para. 56 above) that the words " at the request of one of the parties " should be omitted from article 23.

The proposal was rejected by 12 votes to 1, with 2 abstentions.

62. The CHAIRMAN put to the vote Mr. Zourek's proposal (para. 60 above) that the words " or in case of urgency its president, subject to confirmation by the tribunal " should be deleted.

The proposal was rejected by 11 votes to 3, with 2 abstentions.

63. The CHAIRMAN put article 23 as a whole to the vote.

Article 23 was adopted by 12 votes to 3, with 2 abstentions.

The meeting rose at 1.5 p.m.

445th MEETING

Monday, 19 May 1958, at 3 p.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 24

1. The CHAIRMAN, in the absence of the Special Rapporteur, pointed out that there had been no comments on article 18 of the 1953 draft,[1] which corresponded to article 24, paragraph 1, of the model draft. Paragraph 2 was new, and related to the discovery of new evidence during the period after the proceedings had been closed but before the award had been rendered. An earlier article (article 20) dealt with the case of earlier discovery ; article 39 would deal with later discovery.

2. Mr. LIANG, Secretary to the Commission, referring to Sir Gerald Fitzmaurice's remarks (443rd meeting, para. 9) on the archaic nature of some of the wording taken over from The Hague Convention for the Pacific Settlement of International Disputes of 1907,[2] said he had certain doubts regarding the words " subject to the control of the tribunal " in paragraph 1 and feared they might give rise to misunderstanding. The purpose of those words was, he thought, to give the tribunal the power, if it so wished, not to declare the proceedings closed even if the agents and counsel had completed their presentation of the case ; but, in the English text at least, they failed to convey that meaning and all they seemed to mean was that the case should be presented in accordance with whatever directions were issued by the tribunal, which really went without saying.

3. Mr. FRANÇOIS thought the Commission's aim, in including the words in question, had been to prevent the agents or counsel from frustrating the proceedings by prolonging their presentation of the case unnecessarily. Some provision to that effect should be retained, even though it might be better expressed.

4. Mr. LIANG, Secretary to the Commission, agreed that some such provision might be desirable, but repeated that that was neither the apparent present meaning of paragraph 1 nor what he believed to be its real intention. The drafting committee might wish to consider whether the real intention would not be conveyed more clearly by adopting a wording similar to that used in article X, paragraph 6, of the rules of procedure of the United States-Mexican General Claims Commission, namely :

> " When a case has been heard in pursuance of the foregoing provisions, the proceedings before the Commission shall be deemed closed unless otherwise ordered by the Commission." [3]

5. Mr. AGO agreed with the Secretary in his criticism of paragraph 1. In connexion with what Mr. François had said, he felt that something more specific should be said about the oral proceedings than was said in article 18, paragraph 4. Normally the oral proceedings comprised a pleading, a counter-pleading, and possibly a reply and a counter-reply. If the Commission was silent on the matter, did that mean that in its view the parties could go on exchanging arguments indefinitely ?

6. The CHAIRMAN suggested that the Commission instruct the Drafting Committee to propose a wording to meet the point raised by Mr. François.

It was so agreed.

On that understanding, paragraph 1 was adopted, subject to any further drafting changes proposed by the Drafting Committee in the light of the discussion.

7. Mr. AGO (referring to the French text) said that in his view paragraph 2 gave a rather dangerous amount of latitude to the parties. It would be difficult in practice to prove that the new evidence it was desired to present had not been newly discovered or was not of such a nature as to have a decisive influence on the tribunal's decision.

8. In fact, only in extremely rare cases should the

---

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

[2] See *The Reports to The Hague Conferences of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), pp. 292-309.

[3] 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. 75.