Document:-
A/CN.4/SR.446

Summary record of the 446th meeting

Topic:
Arbitral Procedure

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

446th MEETING

Tuesday, 20 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 28

1. Mr. TUNKIN thought that the inclusion of the word "normally" in the first part of the article tended to detract from the prestige of the *compromis*. Since the rest of the article made it clear that the principle was open to exceptions, there seemed no need for the word at all.

2. The CHAIRMAN pointed out that the word "normally" did not appear in the corresponding article (article 23) in the Commission's 1953 draft.[1]

3. Mr. SCELLE, Special Rapporteur, said that he had inserted the word "normally" precisely in order to emphasize that the general principle was that the award should be rendered within the period fixed by the *compromis* and that the rest of the provision was purely exceptional.

4. The CHAIRMAN put article 28 to the vote.

Article 28 was adopted by 16 votes to 1.

ARTICLE 29

5. Mr. SCELLE, Special Rapporteur, introducing article 29, said that he did not regard paragraph 3 as absolutely essential.

6. Mr. VERDROSS said that he was in favour of retaining paragraph 3, which very closely corresponded to Article 53, paragraph 2, of the Statute of the International Court of Justice.

7. Mr. YOKOTA expressed some doubts regarding the wording of paragraph 3. It seemed to imply that the tribunal had the power to render an award but was under no obligation to do so. If that construction was correct, the paragraph would conflict with the provision in paragraph 1 that the other party could call upon the tribunal to decide in favour of its claim. He would have thought that the tribunal, once requested by the other party to make an award, was bound to do so, provided that it had satisfied itself that the claim was well founded. He was, however, in favour of retaining the paragraph in a modified form.

8. Mr. SCELLE, Special Rapporteur, said that the word "*pourra*" in the French text should be taken in the sense of the English "can" rather than "may".

9. Mr. MATINE-DAFTARY inquired whether in paragraph 3 the Special Rapporteur had in mind an award by default or an award reached with both parties present. If it was the former, the fact should be stated, since such an award was challengeable.

10. Mr. SCELLE, Special Rapporteur, said that he would add the words "by default" after "award", since that was what he had had in mind.

11. Mr. SANDSTRÖM doubted whether the Commission had really envisaged the possibility of a challenge. He was opposed to introducing the idea, for the essence of arbitral procedure was that it should be rapid and that the award should be executed without delay. He did not consider it necessary to model the rules of arbitral procedure in all particulars on those of judicial procedure.

12. He would prefer "*rendra*" to "*pourra rendre*" in the French text of paragraph 3, for he had always interpreted the verb "*pourra*" in the context as equivalent to the English "may". He would also suggest using in paragraph 3 a similar formula to that in paragraph 1, namely, "decide in favour of the other party's claim", instead of "render an award".

13. Mr. SCELLE, Special Rapporteur, thought that the verb "*rendra*" would make the sentence too categorical. The tribunal must have time in which to reflect on the case. On the other hand, he saw no objection, apart from a stylistic one, to using the same formula in paragraph 3 as in paragraph 1.

14. Mr. AMADO suggested that the words "before rendering the award" should come at the beginning and not at the end of paragraph 2. He was not opposed to paragraph 3.

15. Mr. EL-ERIAN said that he agreed in principle with the article. Of the three points made in the article, the first two, namely, the tribunal's power to render an award by default and its power to grant the defaulting party a period of grace, should not be expressed in an imperative form. The third point, the duty of the tribunal to satisfy itself that it had jurisdiction and that the claim was well founded, should, however, be expressed in mandatory terms. He suggested wording paragraph 3 as follows: "On the expiry of this period of grace, the tribunal, before rendering an award, must satisfy itself..."

16. Mr. ZOUREK said that the article appeared to be based on the assumption that the award would always be made in favour of the non-defaulting party which called upon the tribunal to decide in favour of its claim. If, however, the tribunal found that its claim was not well founded, then, though bound to make an award, it must repect the party's application. The case was perhaps a rather hypothetical one, but in a model draft meant to cover all eventualities, it was impossible

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

to exclude such a possibility. He accordingly preferred the phrase " render an award " to that proposed by Mr. Sandström.

17. Mr. SANDSTRÖM said that paragraph 3 really covered two points : the obligation to render an award and the question of the content of that award. Although the tribunal must in all cases render an award if so requested, that award did not necessarily have to be favourable to the party requesting it.

18. Mr. SCELLE, Special Rapporteur, said that the discussion had convinced him of the desirability of keeping article 29 as it stood, subject to minor drafting changes.

19. Mr. BARTOS observed that the article, and Article 53 of the Statute of the International Court on which it was based, marked one step forward in the general progress to be observed in procedural matters. In effect, it abolished the old-fashioned judgement by default, which involved an automatic presumption of the formal justness of a suit for no other reason than the default of the defendant, a judgement which was not based on the conviction of the judges and which was liable to challenge. He agreed with the view just expressed by the Special Rapporteur.

20. Sir Gerald FITZMAURICE remarked that the case aptly mentioned by Mr. Zourek might well arise, especially in cases where neither party was strictly speaking claimant or respondent. The " other party " referred to in the article would not necessarily be the claimant. The whole cause of the confusion was the word " claim ", which was also used in Article 53 of the Statute of the International Court, though there the difficulty was less apparent. He suggested, for the consideration of the Drafting Committee, replacing it by " submission " or " case ".

21. Mr. SCELLE, Special Rapporteur, accepted Sir Gerald Fitzmaurice's suggestion.

22. The CHAIRMAN said that the Commission appeared to be agreed that the scope of the article was to give the tribunal the right not only to rule in favour of the party which appeared but also to dismiss that party's case if it was not well founded. The mere default of a party did not entitle the other party to a decision in its favour. Even *ex parte* evidence might not support the claim.

It was so decided.

Article 29, as modified, was adopted unanimously.

ARTICLE 30

23. The CHAIRMAN recalled the Commission's decision (442nd meeting) to deal with the provisions of article 13, paragraph 2, in connexion with the articles relating to the award. Article 13, paragraph 2, read : " All questions shall be decided by a majority of the tribunal."

24. Mr. SCELLE, Special Rapporteur, said that article 30 appeared to be the appropriate context for such a provision. Referring to the article itself, he said that it contained merely a description of the usual procedure.

25. Mr. AGO observed that paragraphs 1 and 2 of the article gave the impression that it would be the normal proedure for the expression of separate or dissenting opinions to be allowed, unless the *compromis* directed otherwise. Article 2, on the other hand, in listing the possible contents of the *compromis,* gave the impression that it was for the parties to stipulate whether or not dissenting opinions might be attached to the award. There thus appeared to be some contradiction between the two articles. Moreover, provision for the delivery of separate or dissenting opinions by judges was understandable enough in the case of so large a body as the International Court of Justice, but there was far less justification for it in a small arbitral tribunal. It should also be borne in mind that there was a risk that the authority of the award would be impaired if it were made a general rule — instead of a possibility — for arbitrators to express dissenting opinions. In any case, he would like paragraphs 1 and 2 of the article to be brought into line with the system adopted in article 2.

26. Mr. SCELLE, Special Rapporteur, while agreeing that the expression of dissenting opinion by members of a small tribunal might well weaken the force of the award, thought it preferable to leave the arbitrators free to attach their dissenting opinions to the award, unless otherwise provided in the *compromis.*

27. Sir Gerald FITZMAURICE fully agreed with the Special Rapporteur. Though, as he understood it, the delivery of dissenting opinions was not permitted in municipal courts under continental procedure, it was permitted in Anglo-Saxon law. He regarded it as of great importance to allow the attaching of dissenting opinions to the award, in the absence of any contrary stipulation in the *compromis.* Any dissenting opinion, in tribunals consisting of an arbitrator appointed by each party and an independent umpire, was usually held by an arbitrator appointed by one of the parties. The ideal was naturally for the tribunal to be unanimous, but if it were not, the expression of a dissenting opinion might be of psychological value through the assurance it gave to the losing party that its case had been thoroughly considered. A further consideration was that the dissenting opinion might contain statements of considerable value on points of law. He would, therefore, prefer to keep the article as it stood.

28. Mr. AGO agreed that there were arguments for and against giving arbitrators the opportunity of attaching dissenting opinions to an award. Whichever solution was adopted, however, it was necessary to decide definitely whether, in the absence of any relevant provision in the *compromis,* the arbitrators had or had not the right to attach dissenting opinions to the award. It might be inferred from article 2 that they had not the right, whereas article 30 seemed to suggest that they had.

29. Mr. VERDROSS agreed with Mr. Ago.

30. Mr. BARTOS said that, though an award undoubtedly carried more weight if no dissenting opinion were expressed, the arguments were stronger in favour of permitting the expression of dissenting opinions. Since such opinions were in the nature of a criticism of the award, the realization that they would be made public tended to give tribunals a greater sense of responsibility and to make them more careful in drawing up the award. He, too, was therefore in favour of the article as it stood, on the understanding that no dissenting opinions could be attached to awards in the case of adjudication *ex aequo et bono*.

31. A separate, though relevant, question which might be considered was whether, as was the practice in the International Court of Justice, judges voting for an award on different grounds from the rest of the tribunal could give a special explanation of their reasons.

32. He noted that the question of the safe keeping of the records of arbitral proceedings, a matter which followed on from article 30, had not been dealt with anywhere in the draft. Presidents of arbitral tribunals were generally regarded as bound to preserve the records of proceedings for some years. That, as was shown by the loss of the records of a Latin-American arbitration case with the private baggage of the president of the tribunal, was not a very satisfactory arrangement. The Commission might consider whether such records might, for instance, be deposited with the Registrar of the International Court of Justice, the International Bureau of the Permanent Court of Arbitration or the Secretary-General of the United Nations for safe keeping.

33. Mr. AMADO said that he remained faithful to the traditional principle that the purpose of arbitration was to put an end to disputes ; that purpose could best be served by discouraging the practice of separate or dissenting opinions. On the whole, the provisions of article 30 took into account the position of those jurists who, like himself, favoured the traditional system. If those provisions were retained, however, it would be necessary to redraft article 2, sub-paragraph 8.

34. Mr. LIANG, Secretary to the Commission, said that sub-paragraph 8 of article 2 was in the second, or optional, section of the article. It was not essential for the *compromis* to contain a clause concerning the right of members of the tribunal to attach dissenting opinions to the award.

35. Under the provisions of article 30, it was clear that, if the parties did not exercise the option contained in article 2, sub-paragraph 8, the members of the tribunal had the right to attach dissenting opinions to the award. In order to make the meaning clearer, it was desirable to use in article 30, paragraph 2, the same language as in the second sentence of article 30, paragraph 1. Paragraph 2 would then begin as follows : " Unless the *compromis* excludes the expression of separate or dissenting opinions, any member of the tribunal may attach . . ."

36. There was, however, a gap in the model draft to which the Drafting Committee could perhaps devote its attention. In accordance with article 9 as adopted by the Commission, the tribunal could render a decision in the absence of a *compromis*, on the unilateral application of one of the parties. It was desirable to state whether dissenting and separate opinions would be allowed in that event.

37. The CHAIRMAN said he saw no serious contradiction between the provisions of article 30 and those of article 2, sub-paragraph 8. Under article 2, sub-paragraph 8, it was optional for the parties to incorporate in the *compromis* a clause on the subject of dissenting or separate opinions. If they did not do so, then they would not be excluding separate or dissenting opinions and, in accordance with article 30, the expression of such opinions was permissible.

38. In a case where the arbitral tribunal adjudicated in the absence of a *compromis*, the position would be the same, since there was of course no provision on the subject of dissenting or separate opinions; the expression of such opinions was thus permissible.

39. Mr. EL-ERIAN said that he favoured the text of article 30 as proposed by the Special Rapporteur, which constituted a satisfactory compromise between the Anglo-Saxon and the Civil Law systems of procedure.

40. Separate opinions constituted a rich source of literature on international law and should not therefore be discouraged.

41. It was interesting to note that the " Civil Law " countries had subscribed to Article 57 of the Statute of the International Court of Justice, thus recognizing the necessity of permitting dissenting or separate opinions in international courts, although their own systems of judicial procedure did not allow the expression of such opinions.

42. Mr. FRANÇOIS said that the judicial procedure of his country did not permit judges to express separate or dissenting opinions ; he therefore preferred a formulation stating that separate or dissenting opinions could be expressed only if the parties, by the *compromis*, expressly permitted such opinions to be given.

43. If the expression of dissenting opinions was allowed, a " national " arbitrator would feel under an obligation to express such an opinion in every instance in which the award was adverse to his country, with the consequence that the authority of the award would suffer.

44. He wished to refer to the question raised by Mr. Bartos regarding the keeping of the records of the arbitral proceedings and the original of the award. As Secretary-General of the Permanent Court of Arbitration, he (Mr. François) had received a number of requests for the keeping of such records in the archives of that court. In particular, Mr. Max Huber had made such a request, fearing that the records of certain important cases in which he had acted as arbitrator might be lost after his death. It had also been suggested that the International Bureau of the Permanent Court of Arbitration might make it known that it was

prepared to receive in the future records of arbitration proceedings for purposes of safe keeping.

45. Although The Hague Convention of 1907 did not contain any provisions on the subject, he had acceded to some special requests, and he intended to propose to the Administrative Council of the Permanent Court of Arbitration that it should decide to accept all such deposits and make its decision known. If the International Law Commission expressed itself in favour of the idea of giving custody of the records of arbitral proceedings to the Permanent Court of Arbitration, the Administrative Council would be still more likely to give its consent to that proposal.

46. Mr. YOKOTA said that there was no real contradiction between article 30 and article 2, sub-paragraph 8. There might have been such a contradiction if article 2, sub-paragraph 8 had simply referred to the right to attach dissenting opinions to the award ; that provision, however, referred to " the right of the tribunal to attach or not to attach dissenting opinions to the award ".

47. There was, however, some slight discrepancy in the wording of the two provisions. Thus article 2, sub-paragraph 8 only referred to dissenting opinions, whereas article 30 also mentioned separate opinions. There were other discrepancies in the corresponding French texts. The attention of the Drafting Committee should be drawn to those matters.

48. Mr. ZOUREK said that article 25 of the 1953 draft, which stated that, subject to any contrary provision in the *compromis,* any member of the tribunal could attach to the award his separate or dissenting opinion, had not given rise to any comment by Governments.

49. He strongly favoured retaining the substance of that provision as incorporated in article 30.

50. Mr. AGO said that all the members of the Commission agreed that the expression of dissenting or separate opinions should not be prohibited. The question to be decided was whether such opinions should be expressed only if the *compromis* explicitly allowed them, or whether they could be expressed even if there was no reference to the subject in the *compromis.* He thought it was undesirable to encourage the practice of dissenting or separate opinions, which could lead to three different opinions being expressed by the three members of an arbitral tribunal and to a consequent weakening of the moral authority of the award. If the Commission preferred to adopt the criterion set forth in article 30, however, he would not object, provided that the contradiction between the text of the article and that of article 2, sub-paragraph 8 was eliminated.

51. The CHAIRMAN put to the vote the substance of the provision that, subject to any contrary provision in the *compromis,* any member of the tribunal could attach to the award a separate or dissenting opinion. Questions of drafting, including those concerning article 2, sub-paragraph 8 would be dealt with by the Drafting Committee.

The substance of the provision was adopted by 11 votes to none, with 5 abstentions, subject to drafting changes.

Article 30 as a whole was adopted unanimously, subject to drafting changes.

ARTICLE 31

52. The CHAIRMAN said that there had been no comments by Governments on article 31.

Article 31 was adopted unanimously.

53. Mr. BARTOS, in explanation of his vote, said that he had voted in favour of article 31 with the reservation that in cases where the parties empowered the tribunal to decide *ex aequo et bono,* it was not necessary that the award should state the reasons with respect to every point on which it had ruled.

ARTICLE 32

54. The CHAIRMAN said that there had been no comments by Governments on article 32.

Article 32 was adopted unanimously.

ARTICLE 33

55. Mr. SCELLE, Special Rapporteur, said that article 33 was the original work of the Commission and dealt with the question of the rectification of material errors. There had been no comments by Governments on that article.

Article 33 was adopted unanimously.

ARTICLE 34

56. Mr. SCELLE, Special Rapporteur, introduced article 34, which stated that the arbitral award should settle the dispute definitively and without appeal.

57. Mr. VERDROSS suggested the introduction of a proviso along the following lines at the commencement of the article : " Unless otherwise provided in the *compromis* . . ."

58. He was, in principle, in favour of the provision proposed by the Special Rapporteur, but it was clear that States could not be prevented from including in the *compromis* a clause making provision for appeal.

59. Mr. SCELLE, Special Rapporteur, said he could not accept the amendment suggested by Mr. Verdross. It was the basic purpose of arbitration to bring the dispute to an end once and for all.

60. Mr. AMADO said that the notion of appeal was contrary to the whole spirit of arbitration. Article 81 of The Hague Convention of 1907,[2] like article 54 of the 1899 Convention,[3] stated that the arbitral award settled the dispute definitively and without appeal.

[2] See *The Reports to The Hague Conference of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 306.

[3] *Ibid.,* p. 85.

Those provisions of the 1899 and 1907 Conventions set forth the basic philosophy of arbitration.

61. Sir Gerald FITZMAURICE said that all the provisions of the model draft were subject to the agreement of the parties. The point raised by Mr. Verdross was therefore already covered.

62. The Drafting Committee should consider whether the general principle that the model draft was subject to the agreement of the parties was in any way prejudiced by such specific references to their agreement as those contained in article 30.

63. Mr. BARTOS said that in principle he agreed with the Special Rapporteur and with Mr. Amado. In practice, however, cases could occur in which the parties concerned established a system of arbitration in two stages. That system had been adopted in particular for disputes of a technical character and for minor political disputes. The system of arbitration at the local level with the right to appeal to a central arbitral body had been incorporated, for example, in the frontier agreements between Yugoslavia and its neighbours.

64. It was necessary to make some reference to the international practice which had thus developed and which constituted an exception to the general rule that arbitral awards were final. A central arbitral body to which the parties could appeal, particularly in cases where a treaty provision had been infringed, had proved useful. The local arbitration boards had to deal with a considerable number of disputes, and the central arbitral body served to maintain a certain consistency in the decisions.

65. If the Special Rapporteur did not accept the amendment suggested by Mr. Verdross, he would have to abstain when article 34 was put to the vote.

66. Mr. MATINE-DAFTARY said that past experience with appeals in the matter of arbitral awards pointed to the undesirability of arbitration in two stages. He strongly supported the text proposed by the Special Rapporteur.

67. Mr. SCELLE, Special Rapporteur, said that the cases to which Mr. Bartos had referred were not really cases of appeal. What had happened was that treaties had sometimes made provision for a single process of arbitration which was, however, in several stages.

68. Mr. SANDSTRÖM said that, speaking from his own experience, he agreed with Sir Gerald Fitzmaurice that the parties to arbitral proceedings could on occasion provide for an appeals procedure. For the reasons already indicated, they would, however, be free to do so even if the present text of article 34 was retained. It would, in his view, be quite sufficient to indicate in the commentary that, notwithstanding the wording of article 34, it was open to the parties to institute an appeals procedure by agreement if they so desired.

69. If the Commission inserted some such words as " Unless the parties agree otherwise " in article 34, it would have to re-examine the whole draft in order to find out in what other articles the same words should also be inserted.

70. Mr. HSU agreed that as the Commission was laying down rules for sovereign States, it was unnecessary to insert any such proviso anywhere in the draft. The Commission had inserted the proviso in particular places because it had had a specific reason for doing so ; but in the present case, it was not its purpose to encourage the parties to provide for an appeals procedure, and hence no such proviso should be added.

71. The CHAIRMAN said he understood that Mr. Verdross did not wish to press his suggestion provided it was agreed that there was nothing to prevent the parties from providing for appeals by agreement if they so desired.

72. Mr. EL-ERIAN agreed that it would be sufficient to say in the commentary that article 34 laid down the general principle but that States were free to depart from it by agreement if they wished.

73. Mr. AGO said that it would in any case be desirable to delete the words " and without appeal ". The word " definitively " itself conveyed the meaning clearly. Moreover, the Commission could not be sure that it would not in fact become the normal practice to provide for an appeals procedure in international arbitration.

74. Mr. BARTOS supported Mr. Ago's suggestion.

75. Sir Gerald FITZMAURICE also supported the suggestion ; he suggested furthermore that the remainder of the article might be amended to read : " The arbitral award shall be final ", which was the wording normally employed in a *compromis*.

76. The CHAIRMAN put to the vote Mr. Ago's proposal (para. 73 above), on the understanding that the commentary would indicate that States were of course free to provide for appeals by agreement if they so desired.

On that understanding, the proposal was adopted unanimously.

Article 34, as amended, was adopted, subject to any further changes proposed by the Drafting Committee.

ARTICLE 35

77. The CHAIRMAN, introducing article 35 in place of the Special Rapporteur who had been obliged to retire from the meeting, said that it was virtually the same as article 28 of the 1953 draft.

78. Mr. FRANÇOIS pointed out that the second sentence of paragraph 1 applied to both paragraphs. He therefore proposed that it be made a separate paragraph, which would become paragraph 3.

79. Mr. BARTOS supported Mr. François' proposal, but suggested that the Drafting Committee should endeavour to make it clear that execution should be stayed only in respect of that part of the award regarding which an interpretation had been requested.

80. Mr. AGO agreed with Mr. Bartos that the text as it stood was very dangerous. Execution of the whole award would be stayed, under the article as drafted, if one party raised even a small point of interpretation concerning a minor part of the award. There would thus be a risk that requests for interpretation might become common, as a means of delaying the execution of the award. The question whether there should be a stay of execution should be decided by the tribunal to which the request for interpretation was referred, which might, if it saw fit, treat it as a question calling for an urgent decision.

81. Mr. MATINE-DAFTARY supported that suggestion, though it should be made clear that execution should in no case be stayed in respect of parts of the award which were not in dispute.

82. Mr. FRANÇOIS and Mr. ZOUREK pointed out that in very many cases the award was an indivisible whole and that disagreement on the interpretation of any part of it necessarily affected the whole. In their view, the only practical course in case of such disagreement would be to stay execution of the whole award.

83. The CHAIRMAN, speaking as a member of the Commission, said that in cases where the award could be divided into separate parts and the execution of one part did not depend on the interpretation of another, execution should, in his view, be stayed with regard to such parts only as were in dispute. In order to make that clear, however, he agreed that the present text would have to be modified.

84. Sir Gerald FITMAURICE thought a strong case could be made out for leaving the matter of stays of execution to the tribunal to which a request for interpretation was made. On the assumption that Mr. François' proposal would be adopted, he accordingly proposed that the new paragraph 3 should read :

> " In the event of a request for interpretation, it shall be for the tribunal or for the International Court of Justice, as the case may be, to decide whether and to what extent execution of the award shall be stayed pending a decision on the request."

85. The CHAIRMAN put to the vote Mr. François' proposal (para. 78 above) that the second sentence of paragraph 1 should be made a separate paragraph, which would become paragraph 3.

The proposal was adopted unanimously.

86. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal (para. 84 above).

The proposal was adopted by 14 votes to none, with 2 abstentions.

87. Mr. ZOUREK said that he agreed with the comment by the Netherlands Government (A/CN.4/L.71, under article 28) that the time limits fixed in paragraphs 1 and 2 should be the same. In his view, the period of one month, as proposed in paragraph 1, was much too short. He therefore proposed that it be replaced by three months, as in paragraph 2.

The proposal was adopted unanimously.

88. Mr. TUNKIN requested that paragraphs 1 and 2 be put to the vote separately, since although he could vote for paragraph 1, which was consistent with normal arbitral procedure, he could not vote for paragraph 2, the effect of which would be to make the arbitral tribunal, as it were, a court of first instance to the International Court of Justice.

Paragraph 1, as amended, was adopted unanimously.

Paragraph 2 was adopted by 13 votes to 2, with 1 abstention.

Article 35 as a whole, as amended, was adopted by 14 votes to none, with 2 abstentions.

ARTICLE 36

89. The CHAIRMAN, introducing article 36, said that the text was virtually identical with that of article 30 in the 1953 draft.

90. Mr. FRANÇOIS pointed out that the Special Rapporteur had inserted the words " total or partial " under sub-paragraph (*c*). His reason for doing so was obvious, but it might be more accurate to amend the clause in question to read : " including failure to state the reasons for the award or any part thereof ".

91. Mr. LIANG, Secretary to the Commission, said he was somewhat doubtful as to whether failure to state the reasons for the award could be described as " a serious departure from a fundamental rule of procedure ". If the Commission agreed, it might wish to replace the word " including " by the word " or ".

92. Mr. MATINE-DAFTARY said he also had certain doubts regarding sub-paragraph (*c*). There was no clear indication anywhere in the draft what the fundamental rules of procedure were. In any event, departure from the rules of procedure should not, in his view, be regarded as sufficient ground for voiding the award unless the departure had been so material as to exert a direct influence on the award.

93. Sir Gerald FITZMAURICE agreed with Mr. Matine-Daftary. The fundamental rules of procedure in international arbitration were well known and the parties usually adhered to them. It was, in fact, difficult to see what was meant by " a serious departure from a fundamental rule of procedure ".

94. He also had some doubts regarding sub-paragraph (*a*). The tribunal was the judge of its own competence, and any questions that had arisen in that connexion would have arisen and been decided in the opening stages of the proceedings. The provision appeared, in effect, to give a party which for any reason felt aggrieved by the award the right of subsequent appeal against the tribunal's preliminary decision on the question of its competence, and that would surely be most undesirable.

95. Mr. VERDROSS agreed that it was for the tribunal to determine its own competence, but pointed out that it could do so only on the basis of the *compromis* and such other instruments as were applicable. If it acted in an arbitrary manner, for example, if it rendered a decision *ex eaquo et bono* when the *compromis* explicitly debarred it from doing so, it could, he thought, hardly be denied that it had thereby exceeded its powers.

96. Mr. FRANÇOIS agreed with Sir Gerald Fitzmaurice that there was a danger of the parties abusing the right to challenge the validity of an award on the ground that the tribunal had exceeded its powers. In the model draft, however, that danger was minimized by the fact that the challenge was referred to the International Court of Justice. Deletion of sub-pragraph (*a*) from article 36 would not be acceptable to the great majority of States.

97. Mr. AGO thought that in principle Mr. François was undoubtedly correct. The fact remained, however, that sub-paragraph (*a*) might give rise to serious difficulties, since the expression *excès de pouvoir* meant widely different things in different legal systems.

98. He also had certain doubts regarding the wording of sub-paragraph (*b*). For example, much surely depended on the time at which the corruption was discovered, and he thought it advisable to make the text more explicit.

99. He also agreed that the references in sub-paragraph (*c*) to "a serious departure" and "a fundamental rule" introduced two subjective criteria, which would be bound to give rise to difficulties and disputes.

100. As the Special Rapporteur attached great importance to articles 36 and 37, however, he suggested that further consideration of both articles be deferred until Mr. Scelle's return.

It was so agreed.

The meeting rose at 1 p.m.

447th MEETING

Wednesday, 21 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 38

1. The CHAIRMAN, in the continued absence of the Special Rapporteur, introduced article 38, which corresponded to and was almost identical with article 32 of the 1953 draft.[1]

Article 38 was adopted by 10 votes to 1, with 1 abstention.

ARTICLE 39

2. The CHAIRMAN introduced article 39, which corresponded to article 29 of the 1953 draft and followed it very closely except that two of the paragraphs had been broken up and the words "whenever possible" inserted in what had been the first sentence of paragraph 4 and a reference to the Permanent Court of Arbitration in what had been the second sentence.

3. Mr. YOKOTA noted that the time limits imposed in paragraph 2 were the same as those laid down in Article 61, paragraphs 4 and 5, of the Statute of the International Court of Justice. As was clear from the commentary on the 1958 draft,[2] in cases where an arbitral *compromis* had provided for revision, such as the *Pious Fund of the Californias* and the *North Atlantic Coast Fisheries* cases, the time limit for applications for revision had always been much shorter, in the cases cited eight days and five days respectively. The arbitral procedure which the Commission was engaged in formulating could not, of course, be compared to the procedure followed in such cases, but even in the case of arbitration based on an arbitration treaty such as the Pact of Bogotá[3] the time limit for applying for revision had been only one year. There was, in his view, good reason for the great discrepancy which existed in the matter as between the judicial procedure of the International Court of Justice, which was a permanent organ, even if its members changed, and arbitral procedure, where it would be exceedingly difficult to reconvene the tribunal after a lapse of years. Furthermore, arbitration depended essentially on the will of the parties and it was doubtful, to say the least, whether their will and their relations toward each other would remain unchanged for so long a period. In his view any question which arose as late as ten years after the rendering of the award should be regarded as a new dispute and should be submitted to a new tribunal. He therefore proposed that in paragraph 2 the words "within ten years" be replaced by, say, "within five years".

4. Sir Gerald FITZMAURICE drew attention to a discrepancy between the English text of article 39, paragraph 1, which referred to "some fact of such a nature as to have a decisive influence on the award" and the English text of Article 61, paragraph 1, of the Statute of the International Court of Justice, which

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

[2] *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. 101.

[3] American Treaty on Pacific Settlement (Pact of Bogotá), signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series,* vol. 30, 1949, No. 449, p. 55.