Document:-
**A/CN.4/SR.450**

# Summary record of the 450th meeting

Topic:
**Arbitral Procedure**

Extract from the Yearbook of the International Law Commission:-
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representation formed part of its diplomatic mission. He knew of no such treaty that stipulated otherwise.

71. It was likewise the practice to regulate the question of the privileges and immunities enjoyed by trade representatives in the same bilateral treaties. He was not sure whether any great difficulty on that point had arisen during the negotiation of the treaty of commerce between the Soviet Union and Japan and did not think that the matter had presented any problem in recent years.

72. Mr. ZOUREK considered that the Commission should avoid conveying the impression that trade was entirely divorced from the diplomatic function. For decades quite the opposite had been true; economic and trade matters formed the very essence of the activities of diplomatic missions, as evidenced by the appointment of commercial attachés often assisted by a large number of officials. The question whether a State wished its trade officials to form part of its diplomatic mission was, he thought, a matter of the internal organization of the mission.

73. Mr. PADILLA NERVO said there appeared to be some confusion, for it was not clear what the Netherlands Government meant by "a trade representation". If the reference was to activities promoting trade relations performed by a member of the embassy staff or by the embassy itself, there was no difficulty. If the Netherlands Government had in mind *ad hoc* commercial missions, the matter would have to be treated under the heading of *ad hoc* diplomacy. If, on the other hand, it meant a permanent office set up for the purpose of engaging in trading activities, the status of that office and its staff should be regulated by prior agreement between the two States concerned.

74. Mr. BARTOS remarked that in many countries "trade representation" was a technical term describing an office through which a State in which foreign trade was a government monopoly conducted its trade operations in another State through agents who were permanently domiciled in the other State. Such agents thus combined the functions of commercial attaché and business man. In the United States of America most of the cases of that kind that had arisen had been regulated by special treaty in which the agents were accorded a mixture of diplomatic and non-diplomatic status. In the Treaty of Commerce and Navigation of 1940 between Yugoslavia and the Soviet Union, the head of the trade mission and his two deputies had been accorded diplomatic privileges and immunities but the office had been accorded no diplomatic protection and the premises and goods therein were not immune from attachment or execution. A trade mission was thus an institution *sui generis* not corresponding to the institution of commercial attaché.

75. Some countries tended to merge the functions of commercial attaché and trade representative, conducting trade operations through their commercial attaché, under the seal and title of the embassy. In Yugoslavia, however, all such transactions were void under commercial law in any case in which they were effected on behalf of foreign private firms. There was a clear and absolute distinction between commercial attachés who where the advisers to the diplomatic mission on commercial affairs and representatives engaging in trading operations on behalf of foreign private firms. The former enjoyed diplomatic status but trade representatives did not, although they were accorded some privileges and immunities by special treaty. The whole question was, however, rather vague and practice differed somewhat from State to State.

76. Mr. AMADO considered that the question of extending privileges and immunities to permanent trade missions should be dealt with in the draft in an appropriate article. Temporary trade missions should, however, be dealt with under the heading of *ad hoc* diplomacy.

77. The CHAIRMAN proposed that the Special Rapporteur should be asked to submit a text on the subject for consideration by the Commission.

*It was so agreed.*

The meeting rose at 1.5 p.m.

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## 450th MEETING

*Tuesday, 27 May 1958, at 3 p.m.*

*Chairman:* Mr. Radhabinod PAL.

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### Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)* [1]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 36

1. Mr. SCELLE, Special Rapporteur, introducing article 36, said that the problem of the annulment of awards was one of the most difficult in international law. The Commission had accordingly refrained at its previous sessions from going into detail on the matter, contending itself with listing three general grounds on which the validity of an award might be challenged. Experience in a recent case showed that the reference to corruption in sub-paragraph (*b*) was by no means superfluous. With regard to sub-paragraph (*c*), he said that failure to state the reasons for the award was but one example of a serious departure from a fundamental rule of procedure. He added that it might be better to reverse the order of grounds (*b*) and (*c*).

2. Mr. SANDSTRÖM said that he would prefer the existing order. He approved of the article, apart from what he considered the rather excessive emphasis placed on total or partial failure to state the reasons for the award. After all, in the United Kingdom it was

[1] Resumed from 448th meeting.

customary for arbitrators not to state the grounds for an award.

3. Mr. MATINE-DAFTARY, recalling his previous observations (446th meeting, para. 92), suggested that the epithets "serious" and "fundamental" were vague. A mere departure from rules of procedure was not generally considered ground for challenging the validity of an award. The departure must have been such as to exert a direct influence on the award, and he suggested that the Special Rapporteur might consider amending the clause on those lines.

4. He inquired whether, if a tribunal exceeded its powers in respect of only one of several points covered by its award, the entire award or only part of the award would be voidable.

5. Mr. ZOUREK said that he approved of the three grounds listed; he would, however, like another ground to be added which was almost invariably mentioned in academic writings, namely, the invalidity of the *compromis* in *ad hoc* arbitration or of the undertaking to have recourse to arbitration in the case of arbitration clauses (*clauses compromissoires*). Such cases were admittedly extremely rare in practice but the other cases covered by the article might also be quite rare.

6. Mr. SCELLE, Special Rapporteur, agreed with Mr. Zourek that the invalidity of the *compromis,* at least, could be a ground for the annulment of an award and he was not opposed to adding it as a further ground. It was, however, very unlikely that neither party would notice or invoke the invalidity of the *compromis* until after the award had been delivered. In the case of an undertaking to arbitrate, the validity or invalidity of the undertaking would become apparent at quite an early stage, at the time of the decision on the arbitrability of the particular dispute.

7. Replying to Mr. Matine-Daftary, he said that it should be left to the International Court of Justice, to which the application to declare the nullity of the award would be addressed, to decide whether a departure from a rule of procedure was "serious" and whether the rule itself was "fundamental", and also whether the tribunal's exceeding its powers in respect of one of the points covered by the award rendered the entire award or only part of the award voidable.

8. Replying to Mr. Sandström, he drew attention to the stipulation in article 31 of the draft that "The award shall state the reasons on which it is based for every point on which it rules". According to the draft, failure to state those reasons therefore constituted a defect and a ground for challenging the award. Though not all procedures were at one on the point, in French procedure such failure constituted a vital defect and he felt that there were very strong grounds for making it equally so in arbitration between sovereign States.

9. Sir Gerald FITZMAURICE recalled the doubt he had expressed on several points in the article (see 446th meeting, paras. 93-94). Referring to the question of the tribunal's exceeding its powers, he observed that it was generally agreed that every tribunal was the judge of its own competence. If a tribunal could be trusted to decide a case on its merits, it could surely be trusted to be judge of its own competence, too. Since the Commission had taken elaborate precautions to ensure that the arbitral tribunal would enjoy the confidence of the parties it seemed inconceivable that the tribunal would exercise its powers in a way which would support an application for the annulment of its award. Such a case would be so rare as hardly to justify including a provision which offered a very broad ground for challenging the validity of awards.

10. As far as ground (*c*) was concerned, he wondered whether the Special Rapporteur would quote some examples of serious departure from fundamental rules of procedure; to his knowledge such cases were so rare as to make it unnecessary to provide for them. Similarly, it was practically unknown in international arbitration for a tribunal to fail to give the reasons for its award and it seemed, therefore, equally unadvisable, merely for the sake of providing for so remote an eventuality, to leave the way wide open to a possible revival of the dispute by either party.

11. Referring to the question of the invalidity of the *compromis* or of the undertaking to arbitrate as a ground for the annulment of an award, he asked whether Mr. Zourek could give some examples of grounds for the invalidation of the *compromis* or undertaking. The validity of such agreement was, it was true, as much open to challenge as that of any treaty. But cases of annulment, even of general international treaties, were extremely rare, and he knew of no single case of an undertaking to arbitrate or a *compromis* having been declared invalid. He doubted, therefore, whether the inclusion of such a provision was worth while even from the theoretical standpoint.

12. Mr. LIANG, Secretary to the Commission, suggested that it was open to serious doubt whether the obligation to state the reasons for an award was generally accepted as a fundamental rule of procedure, though it was undoubtedly laid down in French law. The problem might perhaps be solved by making subparagraph (*c*) refer only to "a serious departure from a fundamental rule of procedure". The reference to "failure to state the reasons for the award" could then constitute a separate ground, if it was felt necessary to retain it in view of the stipulation in article 31.

13. Referring to the possibility of a serious departure being made from a fundamental rule of procedure, he drew attention to an instance quoted by Goldschmidt where "the tribunal has decided without giving the party any hearing whatever".[2] As Mr. Matine-Daftary had pointed out, however, the terms "serious departure" and "fundamental rule" should be more precisely defined. Though agreeing with Sir Gerald Fitzmaurice that such cases were extremely rare, he was not prepared to say that they did not occur at all.

[2] Cited 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. 110.

14. Mr. VERDROSS, recalling his previous remarks (446th meeting, para. 95), said that the question how a tribunal which was judge of its own competence could possibly exceed its powers raised a very important problem. He drew attention in that connexion to the part of an award of the Permanent Court of Arbitration in which that Court had stated that excessive exercise of power might consist not only in deciding a question not referred to the arbitrators but also in misinterpreting the express provisions of the *compromis* in respect of the way in which they were to reach their decisions, notably with regard to the legislation or the principles of law to be applied.[3] For an arbitral tribunal to reach its decision, not on the basis of the applicable law but by adjudicating *ex aequo et bono,* when not authorized to do so in the *compromis,* would be a flagrant case of *ultra vires.* Though the tribunal was undoubtedly the judge of its own competence, it was possible for it to exceed its powers; he was accordingly in favour of the Special Rapporteur's text.

15. Mr. SANDSTRÖM also thought that ground (*a*) should be retained. While it was true that the tribunal was the judge of its competence, the question was whether it was the intention of the parties that the tribunal should judge without appeal and that its decision should not be subject to review by a higher tribunal. He did not think that that necessarily followed at all. The tribunal was competent to judge only within the limits set by the parties.

16. He agreed with the Secretary's suggestion that sub-paragraph (*c*) should be divided into two distinct grounds for annulment.

17. Mr. BARTOS was in favour of retaining all the three grounds. If an arbitral tribunal was not competent to judge or went beyond its powers, the validity of its award must be determined by a judicial authority. A provision to that effect would be in keeping with the model draft's insistence on the judicial nature of arbitration and, since cases of excessive exercise of power occurred, provision should be made for them. The tribunal was bound to consider the question of its competence and was authorized to draw conclusions regarding it, but it was not the absolute master of its competence. It might, though not necessarily in bad faith, exceed its powers and he did not think that it diminished either the authority or the competence of the tribunal in any way to provide for annulment on the ground of excessive exercise of power.

18. It had been argued that the case contemplated in sub-paragraph (*c*) was extremely rare. However, the Secretary and Mr. Verdross had both quoted instances of a serious departure from a fundamental rule of procedure. Since it was the duty of the codifier to provide for all eventualities, especially those which had occurred in past experience, he felt it necessary to retain ground (*c*) too.

19. He agreed with Mr. Zourek that the invalidity of the *compromis* or undertaking to arbitrate was a possible ground for the annulment of an award but considered that eventuality to be covered by sub-paragraph (*a*). If the initial agreement was invalid, the tribunal in judging would be exceeding its powers, or, rather, exercising powers not really delegated to it at all. Whether the additional ground proposed by Mr. Zourek should be listed separately or regarded as covered by sub-paragraph (*a*) was merely a question of presentation.

20. Mr. EL-ERIAN said that he shared the Secretary's misgivings regarding the wording of sub-paragraph (*c*). The giving of reasons for an award was not strictly a question of procedure. He proposed that the sub-paragraph should be redrafted in the following terms, which would take account of Mr. François' remarks regarding the inclusion of the words "total or partial" (446th meeting, para. 90):

> "(*c*) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure".

21. Mr. YOKOTA said he would prefer the article to stand as drafted. Cases of annulment of an international award were admittedly very rare but so also were cases of revision of awards, yet the Commission had adopted article 39 for the sake of completeness.

22. Though it might be argued that *ex hypothesi* a tribunal was incapable of exceeding its powers, there was the practical question whether the draft should not provide for an appeal against an award in cases where the tribunal's decision concerning its competence was manifestly inconsistent with the provisions of the *compromis* or of the arbitral agreement. In his opinion the tribunal had the power to decide its competence only in the first instance, so to speak.

23. While agreeing with Mr. Matine-Daftary on the vague and general nature of the terms "serious" and "fundamental", he thought that to leave them out would be no solution and that it would be difficult to find any more precise expressions. It must be left to the International Court of Justice to decide whether a departure was serious or a rule of procedure fundamental.

24. Mr. AMADO said that he was in favour of article 36, although he was strongly opposed to the admission of any form of appeal from an arbitral award. The arbitral award was final, but if the award was to be unchallengeable the title on which it was based had to be valid.

25. The arbitral tribunal was the judge, and not the master, of its competence. Its powers were therefore not unlimited: it could only act within the limits prescribed by the parties in the *compromis.* Hence the parties had to be able to challenge the award if the tribunal exceeded its powers.

26. Mr. ZOUREK said that he could quote, as an instance of an invalid arbitral award, the Vienna Award of 2 November 1938 by the then Foreign Ministers of

[3] The Orinoco Steamship Company case between the United States of America and Venezuela, decided 25 October 1910. See *The Hague Court Reports,* James Brown Scott (ed.) (New York, Oxford University Press, 1916), p. 232.

Germany and Italy, Herr von Ribbentrop and Count Ciano, regarding the frontier between Hungary and Czechoslovakia, an award which had really been an act of aggression under the cloak of legality. It had been found necessary to include in the Treaty of Peace with Hungary of 1947 a provision declaring that so-called award null and void. That provision was contained in article 1, paragraph 4 (*a*) of that treaty; article 1, paragraph 2 contained a similar provision regarding the Vienna Award of 30 August 1940 concerning the frontier between Hungary and Romania.[4]

27. The case of the nullity of the *compromis* was not covered by the provision in article 36, sub-paragraph (*a*), of the model draft. That provision concerned the case where the tribunal had exceeded its powers under a valid *compromis*. It did not cover the case where the *compromis* itself was totally invalid.

28. It was not difficult to imagine examples of an arbitral tribunal exceeding its powers. An arbitral tribunal, called upon to render a decision on a specific sector of the frontier between two countries, might give a ruling on a greater length of the frontier than that specified in the *compromis*. An arbitral tribunal, called upon to give a decision on the existence of a claim but not on the amount due, might wrongfully award a specific amount instead of merely deciding the question of liability as such.

29. Mr. SCELLE, Special Rapporteur, said that the challenge of the validity of an award on the grounds that the tribunal had exceeded its powers was not a question of interpretation of the *compromis*. A tribunal could exceed its powers in one of two ways. Firstly, it might give a mistaken ruling on its own competence. Secondly, it might make use of its competence for a purpose other than that for which that competence had been given to it by the parties. The second case was analogous to the typical case of excès de pouvoir in French administrative law.

30. Since the articles were intended to constitute a model draft, the Commission would be leaving a serious gap in the model if it did not include a provision dealing with the cases in which the validity of an award could be challenged. The fact that such cases would perhaps occur only rarely was no argument for neglecting them.

31. He had no objection to the suggestions made by Mr. El-Erian, and by the Secretary of the Commission, regarding article 36, sub-paragraph (*c*). Those suggestions could be referred to the Drafting Committee.

32. He accepted Mr. Zourek's proposal for the insertion of a provision regarding the invalidity of the *compromis* itself, although he had some doubts with regard to that proposal.

33. Sir Gerald FITZMAURICE said that his doubts regarding article 36 had not been dispelled by the explanations given by the Special Rapporteur and other speakers. He would therefore abstain when the article was put to the vote.

34. It was important not to make it too easy for the parties to challenge the arbitral award. It had been suggested that article 36 was necessary because the arbitral tribunal might err with regard to its powers, but the arbitral tribunal could also err with regard to the merits of a case and yet no provision for appeal was made in the model draft. Both types of mistake on the part of the tribunal would raise questions of law and of interpretation and there appeared to be no reason for making it possible to challenge the validity of the award when no provision for appeal was made.

35. Mr. SANDSTRÖM said that the ground of invalidity of the *compromis* could only be regarded as included in the provision in sub-paragraph (*a*) if the wording was given an unduly broad interpretation. Normally, the words "that the tribunal has exceeded its powers" could only be understood by reference to the powers specified in the *compromis*. If the *compromis* itself was successfully challenged, the whole basis of the powers of the tribunal would disappear.

36. A provision along the lines proposed by Mr. Zourek was therefore necessary and he would vote in favour of Mr. Zourek's proposal.

37. Mr. SCELLE, Special Rapporteur, said that he agreed with Sir Gerald Fitzmaurice that the arbitral award should settle the dispute definitively and without appeal. The arbitral award should therefore not be challengeable save in exceptional cases, and it was precisely the purpose of article 36 to make provision for those exceptional cases.

38. Mr. MATINE-DAFTARY said that precisely because the model draft made no provision for appeal it was all the more necessary to maintain article 36 which dealt with the validity of the award. That article would alone make it possible to test the validity of an arbitral award.

39. Sir Gerald FITZMAURICE said that the remarks of Mr. Matine-Daftary illustrated the dangers underlying the provisions of article 36. Precisely because no appeal existed, the losing party, seeking some means of challenging the award, might be tempted to argue that the tribunal had exceeded its powers or had departed in a serious manner from a fundamental rule of procedure. Generally, it would not be too difficult for the losing party to make out a plausible case along those lines.

40. He would not vote against article 36, because the article had some theoretical justification, but he would abstain from voting in favour of it because he did not feel that that theoretical justification compensated for the disadvantage of offering the losing party a whole series of ways of challenging the award.

41. The CHAIRMAN put to the vote Mr. Zourek's proposal (para. 5 above) that a provision enabling the parties to challenge the validity of the award on the ground of the nullity of the *compromis* or of the under-

[4] See Treaty of Peace with Hungary, signed at Paris on 10 February 1947, in United Nations, *Treaty Series*, vol. 41, 1949, p. 170.

taking to arbitrate should be added in article 36, on the understanding that the drafting of the provision would be left to the Drafting Committee.

*The proposal was adopted by 11 votes to none, with 2 abstentions.*

42. The CHAIRMAN put to the vote Mr. El-Erian's proposal (para. 20 above) that sub-paragraph (*c*) be redrafted in the following terms:

"(*c*) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure".

*The proposal was adopted by 12 votes to none, with 2 abstentions.*

*Article 36 as a whole, as amended, was adopted by 14 votes to none, with 1 abstention, subject to drafting changes.*

43. Mr. EDMONDS, explaining his vote, said that he had voted in favour of article 36 because its provisions seemed desirable in principle, but he entertained serious doubts regarding the drafting. The provisions in question were very ambiguous and would prove difficult to apply. Almost any party defeated in an arbitration would appear to be able to take advantage of them.

44. He hoped that the Drafting Committee would clarify some of the uncertainties in the text.

ARTICLE 37

45. Mr. SCELLE, Special Rapporteur, introduced article 37; he pointed out that the reference in paragraph 2 to sub-paragraphs (*a*) and (*c*) of the preceding article would have to be modified in view of the addition made to article 36 on the proposal of Mr. Zourek (see para. 41 above).

46. Mr. YOKOTA pointed out that under paragraph 1 as drafted it would on occasion be possible for the losing party to evade execution of the award by challenging its validity and spinning out the discussions with the other party regarding the court which was to decide the question of nullity. As a precaution against such a contingency, a time limit should be fixed within which the parties must reach agreement on referring the question to another court, failing which it would be referred to the International Court of Justice. He therefore proposed the insertion of the words "within three months" after the words "if the parties have not".

47. Mr. MATINE-DAFTARY said that in his view there was some inconsistency between article 37, paragraph 3, and article 32, which laid down that the award should be carried out immediately. In municipal law a foreign arbitral award was not enforceable until declared enforceable by a municipal court. The model draft provided for no such procedure, and he wondered precisely what the Special Rapporteur thought would happen in practice.

48. Mr. SCELLE, Special Rapporteur, thought that Mr. Matine-Daftary had made a valid point. Theoretically there did appear to be some inconsistency between the two articles. In practice, however, the word "immediately" was always interpreted in a somewhat liberal fashion.

49. Mr. SANDSTRÖM agreed with the Special Rapporteur that the inconsistency between the two articles was only apparent. As a special provision, article 37 naturally prevailed over article 32, which laid down the general principle, though for clarity's sake a suitable proviso might perhaps be inserted in article 32.

50. An addition should also be made to article 37 to cover the point previously raised by Mr. Matine-Daftary (para. 4 above), in other words to make clear that if only part of the award was challenged on the ground that the tribunal had exceeded its powers, only that part could be declared null.

51. Mr. SCELLE, Special Rapporteur, thought it might be difficult to devise a form of words which would cover all such questions of detail, which could, in his view, be left to the discretion of the International Court of Justice or whatever other court the parties had agreed upon.

52. Mr. SANDSTRÖM proposed that, in order to cover the particular case, the words "in whole or in part" be added after the words "to declare the nullity of the award" in article 37, paragraph 1.

53. Mr. FRANÇOIS supported the observation of the Netherlands Government to the effect that the time limit for an application for annulment on grounds of corruption should operate in the same manner as the time limit for an application for revision.[5] He therefore proposed the addition of the following words at the end of paragraph 2: "of the discovery of the corruption and in any case within ten years of the rendering of the award."

54. Mr. ZOUREK supported Mr. François's proposal; a time limit of six months from the rendering of the award was much too short for challenges on the ground of corruption.

55. As was clear from the survey prepared by the Secretariat (A/CN.4/L.71), the article under discussion (article 31 of the 1953 draft) had been criticized by many Governments. In his view those criticisms were justified as the article tended to weaken the authority of the award as *res judicata*. To lay down in a model set of rules an elaborate procedure for dealing with challenges to the validity of the award as if such challenges were to be expected in the normal course of events would only encourage the losing party to invoke a provision which must find a place in the draft, since the right to challenge the validity of the award could not be excluded altogether, but which should only be invoked in quite exceptional circumstances.

56. Mr. AMADO said he entirely agreed with what Mr. Zourek had said. The same consideration applied no less in the case of applications for revision.

[5] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 52, document A/2899 and Add.1 and 2, sect. 13.

57. The CHAIRMAN put to the vote Mr. Sandström's proposal (para. 52 above) that the words "in whole or in part" should be inserted after the words "to declare the nullity of the award" in paragraph 1.

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

58. The CHAIRMAN put to the vote Mr. Yokota's proposal (para. 46 above) that the words "within three months" should be inserted after the words "if the parties have not" in paragraph 1.

*The proposal was adopted by 12 votes to none, with 2 abstentions.*

*Paragraph 1, as amended, was adopted by 12 votes to 2, with 2 abstentions.*

59. The CHAIRMAN put to the vote Mr. François' proposal (para. 53 above) that the words "of the discovery of the corruption and in any case within ten years of the rendering of the award" should be added at the end of paragraph 2.

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

60. The CHAIRMAN proposed that, in paragraph 3, the words "Notwithstanding the provisions of article 32" should be added to meet the point raised by Mr. Matine-Daftary.

*It was so decided.*

*Paragraph 3, as so amended, was adopted by 12 votes to 2, with 2 abstentions.*

61. Mr. HSU said that although he had voted in favour of the articles relating to the annulment and revision of arbitral awards, he still had some doubts whether they should be retained as they seemed to have gone somewhat beyond the fundamental aim of the draft, which was to hold the parties to their undertaking to arbitrate and prevent them from frustrating the proceedings. Moreover, by providing for annulment and revision the Commission had been obliged to provide for recourse to the International Court of Justice in more cases than would otherwise have been necessary, and had thus laid the draft open to more criticism from States than it need otherwise have done. In his view the very rare cases where occasion for applications for annulment or revision arose should be treated as new disputes, and referred to arbitration as such.

62. The CHAIRMAN observed that the Commission had completed its consideration of the draft articles in the Special Rapporteur's model draft. Further consideration of item 2 of the Commission's agenda would therefore be deferred pending receipt of the Drafting Committee's report.

The meeting rose at 5.50 p.m.

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## 451st MEETING

*Wednesday, 28 May 1958, at 9.45 a.m.*

*Chairman:* Mr. Radhabinod PAL.

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**Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72)** *(continued)* [1]

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 3

1. Mr. SANDSTRÖM, Special Rapporteur, said that he proposed no changes in article 3. He drew attention, however, to the view expressed by the Governments of Chile (A/CN.4/114/Add.1) and Finland (A/CN.4/114/Add.2) to the effect that the *agrément* was only required in the case of ambassadors and ministers. In his view the *agrément* should always be obtained for the head of a mission, even if he was only a *chargé d'affaires.*

2. He also drew attention to the fact that in the General Assembly the Philippine delegation had proposed the addition of a second paragraph stating that the receiving State could not refuse to give the *agrément* except on reasonable grounds (see A/CN.4/L.72); that point had, however, been debated at length at the ninth session of the Commission.

3. Sir Gerald FITZMAURICE said that while it was true that the *agrément* was not sought for a *chargé d'affaires ad interim,* the situation was otherwise with *chargés d'affaires ad hoc,* appointed, for example, pending the establishment of formal diplomatic relations between two States. It was, he thought, inconceivable that in such a case the *chargé d'affaires* would be sent to the receiving State unless his name had been submitted in advance and something at least very similar to the *agrément* procedure completed. He was therefore in favour of retaining article 3 as it stood, except that the word "accredit" might be replaced by the word "send", in order to cover the case of *chargés d'affaires.*

4. Mr. HSU, Mr. VERDROSS and Mr. ZOUREK agreed that article 3 should be retained as it stood.

*Article 3 was adopted, subject to any changes proposed by the Drafting Committee.*

ADDITIONAL ARTICLE (ARTICLE 3 A)

5. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his proposal (A/CN.4/116/Add.1) for a new article designed to meet a point raised by the United States Government in its observations on article 1 (A/CN.4/116).

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[1] Resumed from 449th meeting.