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Summary record of the 438th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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62. Mr. AMADO quoted from the *Commentary on the Draft Convention on Arbitral procedure*,[5] to show that practice was somewhat uncertain concerning the effect of the withdrawal of an arbitrator, and that the opinions of writers also indicated a lack of unanimity. It was impossible to allow for all contingencies in a model draft. The proper place for provisions on the resignation of arbitrators was in the *compromis*.

63. Mr. VERDROSS, referring to Mr. Bartos' remark concerning remedies in case of the improper withdrawal of an arbitrator, suggested that the best remedy in cases of withdrawal of an arbitrator under pressure from his State of nationality would be to stipulate that if an arbitrator withdrew without the consent of the tribunal, the tribunal's proceedings would continue without him.

64. The CHAIRMAN pointed out that the Special Rapporteur had withdrawn article 7 and that no member of the Commission had proposed its restoration. The article was therefore to be regarded as deleted. It merely remained to agree on any possible addendum to article 6.

ARTICLE 6 (*continued*)

65. Mr. EL-ERIAN suggested the following new paragraph to be added to article 6:

> " If, however, an arbitrator should wish to resign, he shall consult with the president of the tribunal before tendering his resignation."

66. Mr. AGO remarked that the suggested addendum should read " with the president or members of the tribunal ", since the president himself might wish to resign.

67. Mr. SCELLE, Special Rapporteur, did not think it possible to provide for a remedy along the lines suggested. He understood the Commission to be generally opposed to the idea that the proceedings before the tribunal should continue despite the withdrawal of an arbitrator.

68. Mr. FRANÇOIS said that he could not see the point of Mr. El-Erian's suggestion. The Commission's object had been to protect an arbitrator against pressure from his State of nationality. To stipulate that he must consult the other members of the tribunal would provide no such safeguard. He must be able to tell his Government that it was impossible for him to resign. An effective remedy against improper resignation would be to fill the vacancy thus created in a manner unfavourable to the State of nationality of the resigning arbitrator, namely by requesting the President of the International Court of Justice to appoint a new arbitrator.

69. Mr. EL-ERIAN, replying to the CHAIRMAN, said that he did not wish to press his suggestion.

70. The CHAIRMAN put to the vote the proposal (para. 54 above) that the words " on account of the death or the incapacity of an arbitrator " should be amended to read " on account of the death, incapacity or resignation of an arbitrator ".

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

The meeting rose at 1 p.m.

[5] United Nations publication, Sales No.: 1955.V.1., pp. 28-30.

438th MEETING

Wednesday, 7 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Communication from the Secretary-General (A/CN.4/L.74)

1. Mr. LIANG, Secretary to the Commission, drew attention to the communication dated 2 May 1958 from the Secretary-General of the United Nations to the Chairman of the Commission, regarding the establishment of the United Arab Republic (A/CN.4/L.74).

The Commission took note of the communication.

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

[Agenda item 2]

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

ARTICLE 5 (*continued*)

2. Mr. SCELLE, Special Rapporteur, read out the revised text of article 5 (see 437th meeting, para. 1).

3. Article 5 assumed that the arbitral tribunal had already been constituted in accordance with article 4, and he hoped that no difficulty would arise from the fact that the decision on article 4 had been deferred. The matters dealt with in paragraph 3 had not been fully discussed, but he believed that the article as a whole was acceptable to the Commission.

4. The CHAIRMAN observed that, since there had been no objection during the previous discussion to paragraph 1, the first sentence of paragraph 2 and paragraph 4 of the article, as revised by the Special Rapporteur, he assumed that the Commission was disposed to adopt them.

It was so agreed.

5. Mr. AMADO said that he was not in favour of the words " save in exceptional circumstances " in paragraph 3 of the article. Though he realized that the draft was merely a model and not a convention, he still found the phrase altogether too subjective. In the absence of any indication of what was meant by " exceptional ", the phrase had little meaning in law.

6. Mr. EDMONDS considered that the second sentence of paragraph 2 was inconsistent with article 6 as

approved at the previous meeting (437th meeting, paras. 45 and 70). One article provided that an arbitrator might not be replaced during the proceedings and another stated that he could be replaced on account of death, incapacity or resignation.

7. Sir Gerald FITZMAURICE did not think that there was any inconsistency between article 5 and article 6. Article 5 dealt with the changing of arbitrators who were still in office, while article 6 dealt with the replacing of arbitrators who had ceased, owing to one of the reasons specified, to perform their functions.

8. The CHAIRMAN, speaking as a member of the Commission, observed that no provision appeared to have been made for the changing of umpires appointed by agreement between the arbitrators themselves.

9. Mr. SCELLE, Special Rapporteur, thanked the Chairman for raising a point which had not been covered in that or previous drafts. It posed the fundamental question whether arbitrators appointed by the parties were to be regarded as agents of the States concerned or to be considered, once appointed, as independent authorities. In his opinion, the latter view was correct, and hence an umpire chosen by arbitrators as independent authorities was not removable at the will of the parties. He would, however, welcome the views of other members on that point.

10. Replying to Mr. Amado, he said that the parties to a dispute could not be denied the right to change the " neutral " arbitrators on the tribunal. However, as Mr. Ago had said, changes of that kind should be quite exceptional, since such arbitrators might play a considerable part in producing the final award. To specify in the draft what was meant by " exceptional circumstances " would be far too complicated and lengthy a business. The clause was after all only a recommendation.

11. Mr. AMADO cited the writings of learned jurists in support of the view that arbitrators once appointed ceased to be agents of the State which had appointed them.

12. Mr. EL-ERIAN said that, since the second sentence in paragraph 3 f article 5 was entirely dependent on article 4, paragraph 2, no decision could be taken on the former until article 4 had been adopted.

13. Mr. SANDSTRÖM remarked that another case which had not been discussed was that where all the arbitrators had been appointed by agreement between the parties.

14. Mr. YOKOTA said that the Chairman's point might be covered by inserting the words " or between the arbitrators " after the words " between the parties " in the first sentence of paragraph 3. He wished to propose an amendment to that effect.

15. Mr. FRANÇOIS said that, since the Commission had decided to dispense with article 7, the second sentence of paragraph 2 of article 5 was of little practical value. What was the point of stipulating that an arbitrator appointed by a party could not be replaced, if there was no safeguard against the arbitrator's being compelled to resign by the State which had appointed him ?

16. Referring to paragraph 3, he said that the parties to a dispute should have the right to change any arbitrator or umpire by agreement between them. The confidence of the parties in the arbitrators being the very basis of arbitration, he would even go further and say that the parties must have the right to change even an arbitrator appointed by the President of the International Court of Justice under article 4, paragraph 2.

17. Mr. SCELLE, Special Rapporteur, said that, if an arbitrator was appointed by an authority other than the parties to the dispute, the decision of that authority should be respected, and the arbitrator could not therefore be changed by the parties. Were the contrary the case the effect of article 4 might be vitiated.

18. Sir Gerald FITZMAURICE agreed with the Special Rapporteur. It would be quite illogical and contrary to good order if an umpire appointed by the arbitrators, who might well be the president of the tribunal, could be changed after appointment. One might well wonder in such a case why the arbitrators appointed by the parties had agreed to appoint him in the first place. Similar considerations applied when the arbitrator was appointed by an outside authority, such as the President of the International Court of Justice.

19. He could not agree with Mr. François that it was unnecessary to make provision for the replacement of an arbitrator, since in any case he could not be forced to continue. The Commission had admittedly failed to provide any safeguard against an arbitrator's being compelled to resign by the State which appointed him, but at least it should not go further and encourage such improper conduct by making it impossible to replace an arbitrator by any other means.

20. Incidentally, he thought that the word " umpires " was not a particularly happy term in the context. He proposed that the word " arbitrators " should be used instead.

21. Mr. FRANÇOIS did not consider that it would destroy the whole procedural system if the parties were allowed to replace by agreement an arbitrator appointed by the President of the International Court of Justice. The parties might find the President's choice of arbitrator unfortunate, and if they finally agreed on another candidate so much the better. An arbitrator of their choice was preferable to one imposed on them. Far from destroying anything, such a provision would merely help to re-establish the ideal state of affairs in which arbitration was based on the agreement of the parties and the arbitrators enjoyed their confidence. Nor did he consider that such a change would in any way detract from the prestige of the President of the Court. He thought, however, that there should be a time limit on such changes.

22. Mr. BARTOS agreed with Mr. François. The fact

that an arbitrator was appointed by the President of the International Court acting in lieu of one of the parties did not alter the arbitrator's position in the least; he still sat on the tribunal as though he had been appointed by the party itself and could therefore be changed by agreement between the parties. He also considered that such a change would not affect the prestige of the President of the Court, for the latter would not be acting in his official capacity.

23. Mr. HSU said that he, too, was not satisfied with the words " save in exceptional circumstances " in paragraph 3 of the article. They constituted an imperfection inconsistent with what was meant to be a model draft. Like Mr. François, he saw little point in the second sentence of paragraph 2, in view of the Special Rapporteur's decision to withdraw article 7, a concession which he regretted.

24. Mr. EL-ERIAN still maintained the view that no decision should be taken on article 5, paragraph 3, until article 4 had been adopted. The provision that the President of the International Court might be requested to appoint an arbitrator was based on the supposition that the parties could not agree on the appointment themselves. If, however, they later reached agreement, their agreed choice was much to be preferred to an imposed appointment, since the agreement of the parties and their confidence in the arbitrators was the very basis of arbitration.

25. Mr. AGO could not agree with those members who thought that, article 7 having been dispensed with, the second sentence in paragraph 2 of article 5 no longer served any useful purpose. He could see no reason for deleting a clause which at least constituted a safeguard against improper manoeuvring by States.

26. With reference to Mr. François' comment concerning the second sentence of paragraph 3, he thought, first of all, that the case of an agreement between the parties to replace an arbitrator appointed by the President of the International Court of Justice was a highly theoretical one. It was most improbable that the parties, after having long failed to agree on the appointment of arbitrators, would suddenly find themselves in complete accord immediately after the President of the Court had made the appointment in consequence of the previous lack of agreement between the parties. Moreover, to allow the parties not to accept the decision of the President of the Court and to replace an arbitrator appointed by him would result in the undermining of his authority. It should be a rule that, if the parties failed to agree on the appointment of arbitrators and the President of the Court had to make the appointment in their stead, they thereby lost the right to partake in the appointment.

27. Sir Gerald FITZMAURICE also disagreed with Mr. François. A request to the President of the International Court to appoint arbitrators would be made only after protracted negotiations and a considerable lapse of time. The President, moreover, would also devote much thought to the appointment and almost certainly consult both parties, which would be free until the very last moment to appoint the arbitrators themselves. It therefore seemed inconceivable to permit them at that late stage to turn round and reject as unsuitable an arbitrator appointed by the President of the Court. To permit such behaviour would undermine the prestige of the President of the International Court.

28. Mr. VERDROSS fully agreed with Mr. Ago and Sir Gerald Fitzmaurice, and pointed out that even though the changing of an arbitrator appointed by the President of the Court might not undermine the prestige of the Court, since the President was not acting in his official capacity, it would undoubtedly be damaging to the dignity of the person of the President.

29. Mr. AMADO was in favour of leaving paragraph 3 as it stood. The Commission could only proceed on the assumption that all concerned, namely, the parties and the President of the Court, would act in good faith throughout.

30. Mr. PADILLA NERVO said that the situation in practice was perhaps not quite as simple as had been suggested. In the first place, article 4, paragraph 2, made it possible for one of the parties to request the designation of arbitrators by the President of the International Court of Justice against the wishes of the other party. In the second place, the three-month period specified in that article could well prove insufficient. Negotiations beyond that time limit could result in an agreement between the parties concerning the choice of arbitrators.

31. In addition, the arbitral tribunal might conceivably consist of five members. In that case, there would be more scope for the parties to agree on the replacement of one of the members of the tribunal.

32. He agreed with Mr. François that the agreement between the parties afforded the best assurance that the dispute would be settled by arbitration. It was therefore important not to place any obstacles in the way of the agreement between the parties.

33. Mr. BARTOS said that there appeared to be a conflict between the desire to safeguard the prestige of international authorities and the need to ensure the peaceful settlement of disputes. For his part, he thought that the peaceful settlement of disputes should be the overriding consideration.

34. It was open to the parties, by agreement, to dispense with the undertaking to arbitrate altogether. They were free to do so at any time if they considered that diplomatic negotiations were preferable, and it was in the interests of the international community that their freedom of action should remain unquestioned. If, then, the parties were at liberty to substitute, by agreement, some other form of pacific settlement for arbitral procedure, *a fortiori* they had the right, on condition of course that they were agreed, to replace an arbitrator appointed by the President of the International Court of Justice by another.

35. The CHAIRMAN called for a vote on the second

sentence of paragraph 2, as revised (see 437th meeting, para. 1).

The second sentence of paragraph 2 was adopted by 13 votes to none, with 2 abstentions.

36. Mr. FRANÇOIS said that he had abstained from voting on the second sentence of paragraph 2 of article 5 because the relationship of its provisions to those of article 6, as adopted by the Commission, was not quite clear. For his part, he considered that the provisions of article 6 should prevail over those of the sentence in question.

37. Mr. AMADO said that he had voted in favour of the second sentence of paragraph 2 because its provisions were consistent with the principle of the immutability of the tribunal.

38. The CHAIRMAN said that the Commission had before it an amendment by Mr. Yokota (see para. 14 above) which would add in the first sentence of paragraph 3 as revised a reference to arbitrators co-opted by agreement between the arbitrators.

39. Mr. SCELLE, Special Rapporteur, said that Mr. Yokota's amendment was not in its proper context in the first sentence of paragraph 3. It would be more appropriate to discuss that amendment in connexion with the second sentence of the same paragraph; co-opted arbitrators were judges and could not be treated in the same manner as arbitrators appointed by agreement between the parties. On the contrary, they should be treated similarly to arbitrators appointed in the manner provided for in article 4, paragraph 2.

40. Mr. YOKOTA said that he saw no difference between an arbitrator appointed by agreement between the parties and an arbitrator appointed by agreement between the arbitrators appointed by the parties. He therefore pressed for a vote on his amendment at that stage.

41. The CHAIRMAN called for a vote on Mr. Yokota's amendment to the first sentence of paragraph 3.

The amendment was rejected by 6 votes to 3, with 6 abstentions.

42. The CHAIRMAN called for a vote on the first sentence of paragraph 3 as revised, with the substitution of the word " Arbitrators " for the word " Umpires ".

The first sentence of paragraph 3, as amended, was adopted by 12 votes to 1, with 2 abstentions.

43. The CHAIRMAN said that the second sentence of paragraph 3, which contained a reference to article 4, paragraph 2, would be voted upon after the Commission had disposed of article 4.

ARTICLE 8

44. Mr. SCELLE, Special Rapporteur, introduced article 8, dealing with the question of the disqualification of an arbitrator. Its provisions made it clear that disqualification could not be proposed by reason of facts existing before the constitution of the tribunal and known at the time.

45. Mr. VERDROSS said that he was in agreement with the substance of article 8, paragraph 1. As a drafting change, he proposed the deletion, in the last sentence, of the phrase " and particularly in the case of a sole arbitrator ". The commencing words " In all cases " rendered the phrase in question unnecessary.

46. He also proposed the insertion of the words " at the request of one of the parties " at the end of the last sentence.

47. Mr. SCELLE, Special Rapporteur, accepted the two suggestions put forward by Mr. Verdross.

48. Mr. SANDSTRÖM said that article 8 of the 1953 draft [1] left the decision on the disqualification of an arbitrator to the other members of the arbitral tribunal. He asked the Special Rapporteur why the new draft proposed a different procedure.

49. Mr. SCELLE, Special Rapporteur, said that it was a very delicate matter for the members of the tribunal to deal with the disqualification of one of their own colleagues. It seemed preferable to leave the decision to an independent body of unquestioned authority.

50. The CHAIRMAN, speaking as a member of the Commission, said that the change introduced by the Special Rapporteur had taken into account some of the suggestions made by Governments. Other suggestions had, however, also been made. One Government had suggested that the parties should first be given an opportunity to settle the matter by mutual agreement.[2] Another had suggested that jurisdiction should be vested in the Court only at the request of both parties.[3] The Netherlands Government had suggested that the vacancies resulting from disqualification should be filled by the method laid down for the ordinary appointment.[4]

51. Mr. EL-ERIAN said that he shared Mr. Sandström's doubts regarding the last sentence of paragraph 1, and suggested that the following words be added at the end of that sentence: " except where the parties agree on a different procedure ". An amendment along those lines would leave intact the principle of the recourse to the International Court of Justice, but would give the parties an opportunity to settle the matter by means of some other procedure if they could agree upon it.

52. Mr. AMADO said that in his considerable practical experience of arbitration he could not recall any instance of a proposal for the disqualification of an arbitrator. Furthermore, he could hardly imagine that States would submit a question of that character to the International Court of Justice.

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

[2] *Ibid., Tenth Session, Annexes*, agenda item 52, document A/2899 and Add. 1 and 2, sect. 12.

[3] *Ibid.*, sect. 1.

[4] *Ibid.*, sect. 13.

53. The interesting suggestion made by Mr. El-Erian would provide a way out of the difficulty.

54. Mr. BARTOS said that the principle contained in article 8, paragraph 1, was a sound one, but could give rise to practical difficulties. Article 36, paragraph 2, of the Statute of the International Court of Justice did not give that Court jurisdiction to decide on the disqualification of an arbitrator. The Court had consistently taken the view that it could only deal with disputes coming within its jurisdiction under a specific provision of its Statute. For his part, he would have taken a broader view of the jurisdiction of the Court, but it was certainly not inconceivable that the Court itself might disclaim jurisdiction in respect of disqualification proceedings.

55. He would prefer the question of the disqualification of an arbitrator to be decided by the other members of the arbitral tribunal. It was only where one of the parties challenged the decision of the other arbitrators that it was appropriate to bring the matter to the International Court of Justice as a matter involving the interpretation of a treaty.

56. With regard to article 8, paragraph 2, he considered that, on the disqualification of an arbitrator, the party which had appointed him should be given the choice of appointing a new arbitrator in his place. He was prepared, however, to accept the decision of the Commission with regard to the question of filling vacancies resulting from disqualification.

57. Mr. SCELLE, Special Rapporteur, said that he had been impressed by the misgivings expressed by Mr. Bartos on the basis of Article 36, paragraph 2, of the Statute of the International Court of Justice. Those misgivings would, however, appear less serious if it was remembered that the acceptance by the parties to a dispute of a provision along the lines of article 8, paragraph 1, would be equivalent to the recognition of the jurisdiction of the Court in disqualification proceedings.

58. A proposal for the disqualification of an arbitrator could only be made by one of the parties to a dispute ; it was inconceivable that both parties should jointly request such a disqualification.

59. Mr. VERDROSS said that the undertaking of the parties to arbitrate constituted a treaty, and Article 36, paragraph 1, of the Statute of the International Court of Justice gave the Court jurisdiction in matters provided for in treaties. There could therefore be no doubt regarding the competence of the International Court of Justice.

60. Mr. LIANG, Secretary to the Commission, said that technically the view expressed by Mr. Verdross on competence was undoubtedly correct. In practice, however, it would be an elaborate and embarrassing process for the International Court of Justice to deal with cases concerning disqualification.

61. For his part, he preferred the formulation contained in article 8 of the 1953 draft which left the decision on the disqualification of an arbitrator to the other members of the tribunal, and only called for action by the International Court of Justice in the case of a sole arbitrator. The provision for such action in that particular case was an innovation introduced by Mr. Scelle in order to remedy a deficiency in the original draft on arbitral procedure submitted to the Commission.

62. The *Commentary on the Draft Convention on Arbitral Procedure* prepared by the Secretariat cited certain opinions and precedents [5] in support of the system embodied in the 1953 draft.

63. Mr. SCELLE, Special Rapporteur, said that he fully agreed with the Secretary of the Commission. He also preferred article 8 of the 1953 draft. He had introduced some changes only in order to take into account certain Government comments.

64. He therefore withdrew article 8 of the latest draft and replaced it by the text of article 8 of the 1953 draft.

65. The CHAIRMAN thought that most of the objections voiced concerning article 8, paragraph 1, of the model draft did not apply to the text of article 8, paragraphs 1 and 2 of the 1953 draft. On the other hand, it would be necessary to defer a decision on paragraph 3 until agreement had been reached on article 4.

66. Mr. BARTOS suggested that the words " in the absence of agreement between the parties " should be added to paragraph 2 since, as he had already pointed out, it would be very difficult to ask the International Court of Justice to decide the question unless there was at least the semblance of a dispute.

67. Sir Gerald FITZMAURICE said he had some doubts on a point which, he thought, bore indirectly on that raised by Mr. Bartos. The International Court of Justice was only competent to decide legal questions, and he was not sure that the question of disqualification of an arbitrator was a strictly legal question. It might therefore be preferable that the question should be decided by the President of the International Court of Justice in his personal capacity.

68. Mr. YOKOTA said he was inclined to agree with Sir Gerald Fitzmaurice. If one party proposed disqualification of the arbitrator and the other party agreed, no dispute could be said to exist.

69. Mr. SANDSTRÖM said that in his view the question of disqualification was a legal question, quite different in nature from the administrative questions which the Commission had already agreed might appropriately be referred to the President of the Court in his personal capacity.

70. Mr. FRANÇOIS said he agreed entirely with Mr. Sandström, and very much doubted whether the President of the Court would be prepared to discharge an entirely novel function which was, at any rate, of a quasi-judicial nature.

[5] See United Nations publication, Sales No.: 1955.V.1, pp. 31-33.

71. Mr. VERDROSS said he was in complete agreement with Mr. Sandström and Mr. François. In any case he did not share Sir Gerald's view that the Court was only competent to decide purely legal questions. It was only Article 36, paragraph 2, of the Court's Statute which referred to " legal disputes " ; in Article 36, paragraph 1, it was clearly stated that the Court's jurisdiction comprised " all cases which the parties refer to it ".

72. Mr. SCELLE, Special Rapporteur, agreed with Mr. Verdross. There might be some slight doubt in the matter, but no more so than in the case of various other articles in which provision was made for recourse to the International Court of Justice.

73. He pointed out, however, that it was not only in the case of a sole arbitrator that recourse to the International Court of Justice might be necessary. For example, it would also be most desirable to make provision for such recourse if the arbitrator whose disqualification had been proposed was the president of the tribunal.

74. Sir Gerald FITZMAURICE said he still thought that the proposed procedure was not entirely satisfactory since it might well give rise to unnecessary embarrassment and delay, but he appreciated the objections to referring the matter to the President of the International Court of Justice and would not therefore press the point further.

75. Mr. BARTOS said he could not altogether accept Mr. Verdross's interpretation of Article 36, paragraph 1, of the Statute of the International Court of Justice. If that clause was read in conjunction with Chapter III, it became perfectly clear that by " case " the Statute meant " case in dispute ". Moreover the Court itself, when referring to disputes of which it was seized, always referred to them as " cases ".

76. He agreed, however, that it would be difficult to ask the President of the International Court of Justice in his personal capacity to settle what was, in Mr. Bartos' opinion, indubitably a legal question.

77. Mr. SCELLE, Special Rapporteur, recalled that he had already indicated his willingness to amend article 8 of the model draft in the manner originally suggested by Mr. El-Erian. To take account of that point and of the point which he himself had raised in his previous statement, he suggested that article 8, paragraph 2, of the 1953 draft be amended to read as follows :

> " In the case of a sole arbitrator or of the president of the tribunal, the question of disqualification shall, in the absence of agreement between the parties, be decided by the International Court of Justice on the application of either party."

78. The CHAIRMAN called for a vote on article 8 of the 1953 draft.

Paragraph 1 was adopted unanimously.

Paragraph 2, in the amended form suggested by the Special Rapporteur (para. 77 above), was adopted by 13 votes to none, with 1 abstention.

Further consideration of paragraph 3 was deferred to a later meeting.

ADDITIONAL ARTICLE PROPOSED BY MR. AGO (*continued*)

79. Mr. AGO said he thought his proposal (437th meeting, paras. 33 and 47) had been sufficiently explained at the previous meeting.

80. Mr. AMADO said he was still not convinced that there was any real need for the words " or one of the parties " in Mr. Ago's proposal and accordingly proposed their deletion.

81. Mr. YOKOTA recalled that he had submitted an alternative proposal on the same subject (437th meeting, para. 42). In his view it was a general principle of international arbitration that procedural points of detail should, in the absence of agreement between the parties, be settled by the tribunal itself. That principle was reflected in article 13, paragraph 1, of the model draft. It would be not only in accordance with that provision but also the most objective and fair way of reaching a decision in the matter, if the responsibility for deciding whether it was necessary to recommence the oral proceedings was entrusted to the tribunal itself. If the newly appointed arbitrator was given that responsibility, the consequence might be that the oral proceedings would be recommenced unnecessarily ; but provided that the new arbitrator's request was well founded, there was no reason why the tribunal should respect it.

82. Mr. AGO said he could not agree with Mr. Yokota. The question whether the oral proceedings should be recommenced or not in the event of the replacement of an arbitrator was not a minor point but a fundamental question, and Mr. Yokota's reference to article 13 was therefore irrelevant in that connexion.

83. It should be borne in mind that in most systems of municipal law the oral proceedings were, in comparable circumstances, recommenced as a matter of course. The Commission would therefore be very progressive in providing that the proceedings should carry on from the point they had reached at the time the vacancy occurred unless the newly appointed arbitrator requested that they be recommenced. But it could not go further. It would surely not be conducive to obtaining an entirely fair award and to respecting the principle of the equality of the parties if one of the arbitrators could be deprived by a majority vote of his right to hear the entire proceedings.

84. In reply to Mr. Amado, he recalled that he had inserted the words " or one of the parties " only in deference to an observation of Mr. Edmonds. For his own part, he agreed that that observation related to a very remote contingency and he was quite prepared to accept Mr. Amado's proposal and return to the text he had originally proposed.

85. The CHAIRMAN accordingly put the additional article proposed by Mr. Ago (437th meeting, paras. 33 and 47), without the words " or one of the parties ".

The additional article was adopted by 11 votes to 1, with 2 abstentions.

86. The CHAIRMAN said that in consequence of the vote it would be unnecessary to vote on Mr. Yokota's proposal.

The meeting rose at 1 p.m.

439th MEETING

Thursday, 8 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Communication from the Asian-African Legal Consultative Committee

1. Mr. LIANG, Secretary to the Commission, brought to the attention of the Commission a communication from the Secretariat of the Asian-African Legal Consultative Committee, informing the Commission that the second session of that Committee would be held at Colombo, Ceylon, from 14 to 26 July 1958, and that under its rules the Committee had authority to admit observers from international organizations.

2. The provisional agenda for the second session of the Committee included some items relating to the work of the International Law Commission.

3. Mr. LIANG suggested that the communication might be discussed by the Commission when it dealt with matters relating to co-operation with other bodies. Meanwhile, he would inform the Asian-African Legal Consultative Committee that its communication had been brought to the attention of the Commission.

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 4

4. Mr. SCELLE, Special Rapporteur, introduced article 4 of the model draft, the text of which followed very much the same lines as articles 3 and 4 of the 1953 draft.[1]

5. Mr. ZOUREK proposed that article 4 be amended to read:

" 1. Immediately after the request made for the submission of the dispute to arbitration or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, within the time limit and in the manner agreed upon between the parties, in order to arrive at the constitution of the arbitral tribunal.

" 2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision on the arbitrability of the dispute, the appointment of the arbitrators not yet designated shall, at the request of either party, be made in conformity with the provisions of article 45 of the Convention for the Pacific Settlement of International Disputes, Signed at The Hague in 1907.

" 3. If one of the parties should refuse to follow the procedure specified in paragraph 2, the appointment of the arbitrators not yet designated shall, at the request of either party, be made by the President of the International Court of Justice.

" 4. The appointments referred to in paragraph 3 shall be made in accordance with the provisions of the *compromis*, or of any other instrument containing the undertaking to arbitrate, and after consultation with the parties. In so far as these texts contain no rules with regard to the composition of the tribunal, the composition of the tribunal shall conform to the provisions of article 45 of the Convention for the Pacific Settlement of International Disputes, 1907.

" 5. Where provision is made for the choice of a president of the tribunal, or of other arbitrators, by the arbitrators already designated, the tribunal shall be deemed constituted when all the arbitrators and the president of the tribunal have been selected. If the president and the other arbitrators have not been chosen within two months of the appointment of the arbitrators designated by the parties to the dispute, they shall be appointed in the manner described in paragraphs 2 and 3.

" 6. The time limits specified in the present article shall apply only if longer time limits have not been fixed by common consent between the parties.

" 7. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law."

6. The main object of his proposal was to offer a possible answer to some of the objections raised by Governments to the procedure described in the corresponding provisions of the 1953 draft, particularly the objection that that procedure gave excessive prominence and discretionary power to the President of the International Court of Justice and hence conflicted with the principle of the autonomy of the parties in international arbitration.[2] He therefore proposed, in paragraph 2, that if the tribunal was not constituted within the specified period, recourse should be had to the procedure laid down in article 45 of the 1907 Convention for the Pacific Settlement of International Disputes, which provided for the intervention of a third party or third parties chosen by the parties to the dispute, and, in the last resort, for determining the matter by lot.[3] Mr. Zourek said that that procedure, while more complicated than the one provided for in

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

[2] See document A/CN.4/L.71, under article 3, sect. B.

[3] *The Reports to the Hague Conference of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 300.