

Document:-
A/CN.4/SR.152

Summary record of the 152nd meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1952 , vol. I

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152nd MEETING

Friday, 27 June 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 6) (continued)

ARTICLES 42 TO 44¹

1. The CHAIRMAN, inviting the Commission to continue its consideration of the Second Preliminary Draft

¹ Article 42 read as follows:

"Any challenge of the validity of the award, whatever the defect alleged, must be submitted to further judicial proceedings by the party alleging invalidity.

"Such appeal must be lodged within a very short time after the making of the award (one month or six weeks, at the most) and shall not stay execution unless the new tribunal or the new arbitrator to whom the case is referred decides otherwise by ordering the necessary provisional measures."

Article 43 read as follows:

"Any party challenging the validity of an arbitral award must propose to its adversary the appointment of a new arbitrator or the constitution of a new tribunal, which shall take place in the manner provided in the present regulations.

"The parties may also refer the matter directly to the ICJ or the PCA. In the event of disagreement between the parties, the matter may be referred to the ICJ by the appellant by direct application."

Article 44 read as follows:

"The tribunal to which the objection is referred shall first decide whether there are grounds for a fresh hearing, and if so shall decide: either to review the judgment (appeal) or to pronounce it null and void (cassation). In the latter case, the parties shall by order of the tribunal revert to the legal and, where possible, material *status quo ante*.

"In either case, they must agree either to constitute a new arbitral tribunal or to empower the court to which the question of admissibility is referred to re-examine the case. If agreement between them is not reached within the period assigned to them for this purpose in the decision on admissibility, the ICJ shall be competent to give final judgment on the merits of the dispute."

on Arbitration Procedure (annex to document A/CN.4/46) contained in the special rapporteur's second report, said that he wished to make some preliminary remarks before the Commission took up the last chapter of the special rapporteur's draft relating to remedies.

2. That chapter, and the doubts that Mr. Scelle himself had expressed on the question of legal remedies and the nature of appeal and *cassation* against arbitral awards, prompted him to make a few observations on the advisability of including such remedies in the draft procedure.

3. Eminent authorities on international law had expressed concern at the evil caused by arbitral decisions rendered *ultra vires*, or involving gross errors of law or fact, as a result of which one party suffered injustice. That concern had earlier inspired jurists to consider the possibility of conferring on the Permanent Court of International Justice the power to review arbitral judgments as a court of second instance. He himself believed such concern to be justified, but also felt that it was neither feasible nor desirable to adopt such a remedy.

4. No litigant, whether an individual or a State, admitted that the judgment rendered against his or its claims was right and just. The losing party might abide by the adverse decision, but would continue to believe that a mistake or an injustice had been committed. That feeling would not be removed by the existence of a jurisdiction of second instance.

5. He could not reconcile the concepts of appeal and *cassation* with international arbitration, since appeal presupposed the simultaneous and permanent existence of courts of first and second instance. The latter were considered to afford a certain guarantee, in that they were capable of remedying any error of the inferior courts by modification of their judgments or by a decision *a contrario imperio*. *Cassation* constituted in fact a third instance, but was concerned only with substantive or procedural errors of law, the judgment of the court of appeal being declared null and void if it were found that such errors had been committed by that court.

6. It seemed self-evident that those two remedies generally offered under municipal law were extraneous to international arbitration. It was hard to envisage the latter process as jurisdiction of first instance, because such a conception was contrary to the nature of things. International jurisdiction and arbitration were recognized as two different methods of achieving the peaceful settlement of disputes between States. One or the other might be preferred in particular cases, but the possibility of having recourse to either would be destroyed if arbitration were subordinated to international jurisdiction by means of a system of appeals against arbitral awards. Such a procedure would be tantamount to making arbitral tribunals part of the machinery of the International Court of Justice. They would thus become courts of first instance subject to appeal or *cassation* before the International Court acting as a court of second instance. That would be to disregard the nature of arbitration itself.

7. The essence of arbitration was that the litigants submitted their dispute to judges of their own choice. It would be manifestly inconsistent for the parties to place their confidence not in the judges they chose themselves, but in the possibility of an appeal from the decision of those judges. It was imperative, therefore, as a matter of principle, to treat arbitral tribunals as courts of single instance whose decisions were final. The only possible remedy would be revision by the same tribunal. The Commission had already adopted provisions relating to revision and its task might well stop there.

8. He did not fail to recognize the gravity of the problem created by awards rendered *ultra vires*, or involving error or injustice, for any reason. But the problem created by the reverse situation, namely, that of the losing party alleging nullity of the award without legal grounds, must also be taken into consideration. In international disputes, exacerbated national sentiment might impel a government to resort to any allegations and any means of invalidating, evading or rendering inoperative the adverse decision of an arbitral tribunal. Who then was to judge whether it was the tribunal and the winning party, or the party which alleged *ultra petita*, corruption, prejudice or errors of any other kind, that was in the right?

9. Once again the nature of things might be used as a safe guide. If a nation which had pledged its national honour to carrying out an arbitral award failed to do so, alleging, with or without reason, in good or in bad faith, that the award was legally invalid, a new conflict came into being. The remedy was to resort to a new arbitration if the matter could not be settled between the parties direct.

10. For those reasons, he felt that, before embarking on its substantive discussion on articles 42 to 44, the Commission might wish to discuss in principle the question whether it was desirable to include a special chapter on legal remedies other than revision.

11. Mr. SCELLE was in agreement with many of the points made by the Chairman. Remedies was a subject concerning which he (Mr. Scelle) felt some hesitation. He agreed that to establish a system of courts of second instance would be a distortion of arbitration, since appeal to such a court would be equivalent to opening a new case. Revision was, of course, in an entirely different category.

12. However, one matter connected with jurisdiction of second instance must be considered, namely, the possibility of the parties not agreeing to submit a dispute to arbitration for the second time.

13. He entirely agreed with the Chairman that it was for the Commission first to decide whether or not to deal with the question of remedies at the present stage.

14. Mr. LAUTERPACHT expressed disagreement with the proposal put forward by the Chairman. It was essential to consider the question of nullity. Arbitral procedure, as an item on the Commission's agenda, was, on the face of it, a somewhat theoretical subject, since no major dispute had been submitted to arbitration for forty years. In his view, therefore, the main

justification for considering the matter at all was in order to deal with an issue which had done so much to bring discredit upon international law, namely, that of excess of jurisdiction and nullity of awards. It was precisely that subject which the Chairman was now suggesting the Commission might leave on one side. Perhaps some of the difficulties arising from the Chairman's remarks were due to the fact that he had failed to distinguish clearly enough between nullity because of excess of jurisdiction and appeal on the ground of a wrong application of international law.

15. Excess of jurisdiction was constantly occurring, and was a problem which must be faced. There was no reason why the parties should be deprived of an adequate remedy against it. The matter was particularly crucial, in so far as excess of jurisdiction, if proved, meant that there was no legal obligation on the parties to comply with the award. The subject had been considered in great detail during the time of the League of Nations, and there was much accumulated literature and experience on the matter of which the Commission should make use.

16. Appeal from an award on grounds of a wrong application of the law was another matter, and many of the Chairman's remarks were very pertinent to it. He agreed that there were persuasive reasons why there should be no appeal on that ground, and why the award should be final unless specific provisions to the contrary were embodied in the *compromis*.

17. In conclusion, he urged the Commission to maintain a clear distinction between challenge on grounds of excess of jurisdiction and appeal on the ground of a wrong application of the law, and to consider the whole matter in detail with a view to formulating the necessary provisions.

18. Mr. SCELLE said that if the Commission decided to include in the draft a chapter on remedies, the relevant discussions might take several weeks. It would be remembered that the subject had been examined in great detail by the First Committee of the League of Nations Assembly, and by a number of eminent authorities, whose works he had mentioned in paragraph 100 of his first report on arbitration procedure (A/CN.4/18).²

19. Mr. KERNO (Assistant Secretary-General) said that in his view a characteristic feature of arbitration was the finality of the arbitral award. He accordingly considered that in principle appeal was contrary to the whole spirit of arbitration, though he recognized that an appeal on grounds of nullity was in a different category, and must be allowed.

20. On the other hand, it might perhaps be argued that, in considering the special rapporteur's draft, the Commission was not attempting to regulate arbitral procedure in all its aspects, but merely trying to deal with its most essential elements. If it were decided not to include a chapter on remedies that would not mean

² See printed French text in *Yearbook of the International Law Commission*, 1950, vol. II, p. 145.

that appeal would be impossible, since provision could be made for it in the *compromis* under the provisions of article 12, paragraph (g). If no such provision were inserted in the *compromis*, it would mean that the parties had full confidence in the tribunal and would regard its decision as final.

21. Mr. SANDSTRÖM considered that an appeal on the ground of a wrong application of law should not be allowed, but agreed with Mr. Lauterpacht that a challenge on the ground of excess of jurisdiction must be admissible. It could be dealt with either as an appeal, or as a subject for a new arbitration conducted in the usual manner. He had no particular preference for either method. He did not consider, however, that the Commission could leave the whole question in the air.

22. Mr. AMADO paid tribute to the moral and intellectual integrity of the special rapporteur, whose whole draft was permeated with the conviction that arbitration was a legal and not a political process. On the other hand, those who believed that arbitration provided States with an outstanding method of settling disputes felt that arbitral awards must be final. Little purpose would be served by sacrificing the feasible on the altar of legal perfectionism. He agreed with those who felt that a system of remedies would undermine the confidence of the international community in arbitration.

23. Mr. HSU observed that the process of appeal could be set about with a whole series of guarantees to prevent abuse.

24. The Commission had in fact to make a choice between two evils; the possible prolongation of litigation, and a bad settlement. Surely the former was the lesser of the two?

25. Mr. FRANÇOIS considered that there should in principle be no appeal against an arbitral award, and that it should be accepted by the parties for better or for worse. But, as Mr. Lauterpacht had argued, there were certain cases in which resort to a court of second instance must be allowed. Some provision must clearly be made to protect the parties from excess of jurisdiction, since that was one of the greatest dangers to the proper development of arbitration. If no remedy against that evil were provided, the consequences would indeed be serious, since many governments held the view that when excess of jurisdiction occurred it was their sovereign right to decline to recognize the award: a matter of which they evidently regarded themselves as the sole judge. That to him was totally unacceptable. If no provision was made in the *compromis* to the contrary, some remedy must be devised to allow for appeal on those grounds. He accordingly subscribed to the views put forward by Mr. Lauterpacht.

26. Mr. SCILLE appealed to members of the Commission first to decide the issue whether or not a chapter on remedies was to be included in the draft. If the Commission decided against inclusion, he would have to devote a section in his final report explaining the reasons for that decision.

27. Mr. KOZHEVNIKOV agreed with Mr. Scelle's earlier remark that so complex and delicate a problem as remedies could not be dealt with in haste. In view of the Commission's responsibilities, such matters must be given mature consideration.

28. He did not believe, however, that the problem of remedies was of prime importance, or as vital and topical as some of the other problems with which the Commission had already dealt—to his mind unsatisfactorily. There was clearly a very profound difference of opinion within the Commission based on two diametrically opposed conceptions of arbitration. In his view, one of the cornerstones of international law was the principle of sovereignty and of non-interference in the domestic affairs of States. Others seemed to believe that progress could only be made by creating international organs in the face of the opposition of States. He could not but regard such a view as retrograde, and was convinced that those provisions so far adopted which were designed directly or indirectly to impose certain obligations on the parties against their will were contrary to the fundamental principles of international law. Accordingly, he would be able to accept only those provisions on remedies that were based on respect for the will of the parties.

29. Mr. SANDSTRÖM formally moved that the Chairman put to the vote the question whether or not a chapter on remedies be included in the draft.

30. Mr. el-KHOURI considered that if the draft contained no chapter on remedies the chance of States adhering to the final instrument would be greatly diminished.

31. Under Islamic law States were forbidden to submit issues affecting their vital national interests to the decision of irresponsible parties, and he would apply that term to an arbitral tribunal in the sense that it was not answerable to any other body.

32. He recognized, of course, that the question of remedies was extremely complex and would require detailed discussion. That discussion might accordingly be deferred until the next session to allow the special rapporteur to prepare more material on it.

33. Mr. YEPES did not believe that, after four years work, the Commission could report to the General Assembly that it had decided not to discuss the vital problem of remedies. Surely the time had now come to do so, and for the Commission to face up to its responsibilities. A draft without a chapter on remedies would be incomplete and virtually void of meaning, since it would consecrate the theory of the infallibility of arbitral awards, which would not be accepted by world public opinion and would be harmful to the development of arbitration as a whole. It was impossible to ignore the fact that numerous cases of excess of jurisdiction had occurred and some protection against it must therefore be provided.

34. He could not agree with the thesis put forward by the Chairman that no nation would ever recognize itself to be in the wrong.

35. An arbitral award tainted with the fault of excess of jurisdiction was not strictly speaking an award, and the parties could not be obliged to execute it. He therefore strongly urged that the Commission consider the problem of remedies and insert the necessary provisions in the draft. If it failed to do so, it would lay itself open to justifiable criticism.

36. Mr. ZOUREK said that the system of remedies envisaged in the special rapporteur's draft was contrary to the essence of arbitration, namely, the voluntary choice of arbitrators by the parties. Furthermore, it would transform arbitral tribunals into courts of first instances whose decisions would be subject to the jurisdiction of the International Court of Justice.

37. In his view, if an award gave rise to dispute that dispute should be settled either by normal diplomatic processes or by a new arbitration.

38. Mr. LIANG (Secretary to the Commission) suggested that the Commission might find it difficult in its report to justify the leaving-aside of the important and persistent problem of legal remedies in arbitration. The argument that that problem lay outside the field of arbitral procedure was open to question. Certainly the general public and legal experts would expect the Commission at least to discuss the problem and to give expression of its views thereon. The task of codifying procedure in that respect might prove impossible in the course of one or two meetings. But there was no particular urgency about finishing the Commission's work on arbitral procedure within a definite time-limit. What was important was that all essential problems should be examined. He did not believe, however, that the discussion of legal remedies would take so long as Mr. Scelle feared; after all, the history of the subject was well known to all members of the Commission.

39. Mr. SCELLE said that it had been his wish to limit the Commission's discussion of legal remedies to the purely procedural aspect of the question. He persisted in the belief that if it embarked on a discussion of the substantive aspect the discussion would be very protracted. Moreover, the question of what constituted grounds for nullifying an arbitral award was immaterial to a draft on arbitration procedure. On the other hand, it was essential to include provisions governing the procedure for nullification, for example, the time-limit for the submission of challenges of the validity of the award, the tribunal by which the matter was to be decided and so on.

40. Mr. YEPES wished to point out that the Institute of International Law had prepared a draft on arbitration procedure which contained a provision that the award might be rescinded in certain specified cases.³ What he proposed was that a similar provision should be included in the draft the Commission was now preparing.

41. He also recalled that in article 23 of his draft the special rapporteur had provided that failure to observe

the principle of equality of the parties before the rules of procedure could void the award. It had been agreed that that provision should be deleted from article 23, but that it should be re-inserted at some later point in the draft.⁴

42. The CHAIRMAN said that he would put to the vote the issue whether the question of legal remedies should be discussed by the Commission, and whether proposed texts relating to that question should be discussed and put to the vote.

That issue was decided in the affirmative by 10 votes to 2.

43. Mr. SCELLE explained that he had voted in the affirmative because he had already stated that he would support the views of the majority, and it was obvious that the majority was in favour of including provisions on legal remedies in the draft.

44. Mr. el-KHOURI said that he had voted in the affirmative against his belief that it would be impossible to bring the discussion of the question of legal remedies in all its aspects to a conclusion at the present stage.

45. The CHAIRMAN said that now that that question of principle had been settled, he would open discussion on the various proposals which had been submitted to the Chair. Mr. Lauterpacht had proposed that article 42 be replaced by the following text:

"The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on the ground of excess of jurisdiction or of a fundamental fault of procedure. The application must be made within sixty days of the rendering of the award."

46. Mr. Sandström had proposed that article 42 be replaced by the following text:

"Unless otherwise agreed by the parties, there shall be no right of appeal against the award except in the following cases:

"1. If the arbitrators gave the award without the dispute having been referred to them by the parties;

"2. If the award was obtained by fraud or corruption;

"3. If, through no fault of the party, a procedural irregularity occurred calculated to influence the decision, provided that the party did not take part in the proceedings without pointing out such irregularity or otherwise making it clear that it did not intend to plead it."

47. Mr. Hudson had proposed that articles 42 to 44 be replaced by the following single article:

"If a party challenges the validity of the award of a tribunal on the ground of *excès de pouvoir* or on the ground of bad faith on the part of a member of the tribunal, and if the parties fail to reach an agreement on the matter, the dispute may be submitted to the International Court of Justice by either party,

³ See text in *Annuaire de l'Institut de droit international*, vol. 33 (1927), t. II, pp. 634—641.

⁴ See summary record of the 148th meeting, paras. 9—12.

and the International Court of Justice may pronounce the nullity of the award."

48. Mr. YEPES' proposal, on the other hand, was that the following text should be inserted under the heading "Remedies", before article 42:

"The award may be rescinded at the request of the injured party in the following cases:

"(a) If the tribunal has exceeded its powers;

"(b) If corruption is proved against an arbitrator;

"(c) If there has been any serious departure from the rule of equality of the parties in arbitration proceedings. A technical irregularity may not be invoked for the purposes of this article;

"(d) If the *compromis* is null and void;

"(e) If there has been fraud or collusion in the production of evidence."

49. Mr. SANDSTRÖM felt that the Commission should confine itself to deciding three further questions of principle, namely: first, whether the cases in which an appeal could be made should be enumerated, and if so, what those cases should be; secondly, to what jurisdiction the appeal should be addressed; and thirdly, within what time-limit it should be made. It could then be left to the Standing Drafting Committee to prepare a text.

50. Mr. LAUTERPACHT felt that the Commission should first resolve a question of terminology. Mr. Sandström had referred to "appeals", but what the Commission was really considering, in his (Mr. Lauterpacht's) opinion, was claims for nullification of the award.

51. Mr. HUDSON said that he was opposed to any mention of appeals; what was meant was challenges to the validity of an award.

52. Mr. SCELLE said that he did not agree, but that the question was one for the Commission to decide.

53. After some discussion, the CHAIRMAN noted that a majority of the Commission was in favour of the cases in which nullification of the award could be claimed being enumerated in the draft convention, and therefore invited comment, first on the introduction proposed by Mr. Yepes to the chapter on remedies.

54. Mr. ZOUREK proposed that the introduction read as follows:

"The award shall be null in the following cases";

55. Mr. HUDSON suggested that if the question of grounds for nullity were to be dealt with in a separate article, the introduction thereto should be worded as follows:

"The validity of an award may be challenged by either party on one or more of the following grounds:"

Mr. Zourek's proposal was rejected by 8 votes to 2.

Mr. Hudson's suggestion was adopted by 11 votes to none, with 1 abstention.

56. The CHAIRMAN then invited discussion on paragraphs (a) to (e) of Mr. Yepes' proposal.

Paragraph (a) was adopted by 10 votes to none, with 1 abstention.

57. Mr. el-KHOURI proposed that in paragraph (b) the word "corruption" be replaced by the word "partiality". Partiality, by which he meant a flagrant departure from the principles of international law and justice in favour of one of the parties, was more far-reaching and easier to prove than corruption.

58. Mr. YEPES disagreed. Partiality was a subjective question and exceedingly difficult to prove. Corruption was an objective question and comparatively easy to prove.

Mr. el-Khoury's proposal was rejected by 10 votes to 1, with 1 abstention.

59. Mr. HUDSON suggested that paragraph (b) of Mr. Yepes' proposal be amended to read:

"The corruption of a member of the tribunal".

60. Mr. YEPES accepted that proposal.

Paragraph (b) was unanimously adopted as amended.

61. After some drafting discussion, Mr. YEPES agreed that paragraph (c) should be amended to read:

"If there has been a serious departure from a fundamental rule of procedure".

Paragraph (c) was unanimously adopted in that form.

62. Mr. HUDSON, supported by Mr. SANDSTRÖM, proposed that paragraph (d) be omitted. It was not clear how the question of nullity of the *compromis* could arise.

63. Mr. YEPES explained that it could happen that the parties could conclude a *compromis* which was null, but that the nullity was not discovered until the award had been made; alternatively, they might conclude a *compromis* which was not ratified by their legislatures.

64. Mr. LAUTERPACHT agreed that cases could exceptionally arise where nullity of the *compromis* would entail nullification of the award, but hoped that Mr. Yepes would withdraw paragraph (d) in order not to detract attention from paragraph (a), which was by far the most important.

65. Mr. YEPES agreed to withdraw paragraph (d).

66. Mr. LAUTERPACHT hoped that Mr. Yepes would also withdraw paragraph (e), for the reasons which he (Mr. Lauterpacht) had already advanced in connexion with paragraph (d), and also because the cases referred to in paragraph (e) were covered by article 38, which provided for revision in the event of the discovery of some new fact.

67. Mr. YEPES said that he would agree to withdraw paragraph (e), provided it was understood that the cases referred to therein were covered by the provision referred to by Mr. Lauterpacht.

The article proposed by Mr. Yepes was adopted, as

amended, by 8 votes to none, with 3 abstentions. The text read as follows:

"The validity of an award may be challenged by either party on one or more of the following grounds;

"(a) If the tribunal has exceeded its powers;

"(b) The corruption of a member of the tribunal;

"(c) If there has been a serious departure from a fundamental rule of procedure".

The meeting rose at 1 p.m.

153rd MEETING

Monday, 30 June 1952, at 2.45 p.m.

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Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 7) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitral Procedure (annex to document A/CN.4/46) contained in the special rapporteur's second report.

ARTICLE 43

2. Mr. LAUTERPACHT said that, in view of the Commission's decision to enumerate in article 42 the grounds on which an award might be challenged he wished to amend the text he had proposed at the previous meeting¹ to read:

"The International Court of Justice shall be competent, on the application of either party, to declare

the nullity of the award on any of the grounds set out in the preceding article.

"The application must be made within sixty days of the rendering of the award."

3. The CHAIRMAN reminded the Commission that it also had before it the text² proposed by Mr. Hudson at the previous meeting to replace articles 42-44 in the special rapporteur's draft, which read:

"If a party challenges the validity of the award of a tribunal on the ground of *excès de pouvoir* or on the ground of bad faith on the part of a member of the tribunal, and if the parties fail to reach an agreement on the matter, the dispute may be submitted to the International Court of Justice by either party, and the International Court of Justice may pronounce the nullity of the award."

4. Mr. SCELLE asked whether the implication of Mr. Hudson's text was that the parties were free to agree that an award was null and void. If so, he could not accept it.

5. Mr. HUDSON said that Mr. Scelle's interpretation of his text was correct.

6. Mr. SANDSTRÖM supported Mr. Hudson's text. In his view, in as much as the parties were free to agree to submit a dispute to arbitration, they should be equally free to nullify an award.

7. Mr. CORDOVA pointed out that when the parties agreed to nullify an award that was a new agreement and not a part of the original arbitral proceedings.

8. Mr. LAUTERPACHT agreed with Mr. Córdova.

9. Mr. SCELLE said that it was inadmissible that parties which undertook to resort to arbitration should reserve the right to act subsequently as a superior tribunal and declare an award null. That seemed to him so contrary to common sense that he had not even envisaged the issue being raised. Annulment could only be pronounced by a superior tribunal set up by the parties or by the International Court of Justice. There was no legal system in the world which allowed the parties themselves to annul a judicial decision.

10. Mr. el-KHOURI considered Mr. Scelle's arguments to be pertinent to criminal jurisdiction under municipal law, but felt that in international arbitration the parties must have full freedom to nullify an award.

11. Mr. KOZHEVNIKOV considered that there was nothing to prevent the parties from agreeing to nullify an award, provided they did so by common consent. It was unthinkable that a tribunal should enforce an award in the face of the opposition of both parties to the original dispute. He would have no objection, provided that both parties were agreed, to a challenge of the validity of an award being submitted to the International Court of Justice. He would accordingly propose that in Mr. Lauterpacht's amendment the words "on the

¹ See summary record of the 152nd meeting.

² *Ibid.*, para. 47.