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A/CN.4/SR.175

Summary record of the 175th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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64. Mr. SCELLE pointed out that corruption on the part of a member of the tribunal need not necessarily affect the award. He agreed, however, with Mr. Córdova that the time-limit set for applications for annulment on the ground of corruption was far too short, as it was also far too short for applications for revision. He thought, nevertheless, that the Commission could not reconsider those two questions at the present session, but should consider them carefully when it took up the draft again.

65. Mr. LAUTERPACHT suggested that the perfectly valid point made by Mr. Córdova could be met with no great difficulty, by amending the paragraph to read as follows:

"In cases covered by paragraphs (*a*) and (*c*) of article 30, the application must be made within sixty days of the rendering of the award."

66. The CHAIRMAN pointed out that, if no limit were fixed for submitting applications for annulment of the award on the ground of corruption, there was a danger that, in virtue of paragraph 3, one of the parties might stay execution of the award by intimating that it was investigating the possibility of corruption on the part of one of the members of the tribunal.

67. Mr. LAUTERPACHT pointed out that under paragraph 3 it was only the formal application which would result in execution being stayed.

Mr. Lauterpacht's amendment was adopted by 7 votes to none, with 2 abstentions.

68. Mr. CÓRDOVA said that, in view of the point made by Mr. Scelle, the Commission should consider adding to article 30 (*b*) the words "and that such corruption influenced the award".

69. Mr. SCELLE pointed out that article 30 merely provided that the validity of the award could be challenged by either party on one of three grounds. It would be for the tribunal to decide the question, and in doing so it would, in the case of corruption, naturally take into account the question whether that corruption had influenced the award.

Paragraph 3

70. Mr. KERNO (Assistant Secretary-General) said that he felt it his duty to state his view that paragraph 3, already objectionable in that possibly unavoidable delay on the part of the tribunal might delay execution of a just judgment, had been rendered doubly objectionable by the amendment to paragraph 2. He hoped that when the Commission took up the draft again it would consider very carefully the desirability of amending paragraph 3 to read:

"The application shall *not* stay execution unless otherwise decided by the Court."

71. Mr. el-KHOURI said that he did not agree with the Assistant Secretary-General. The practical objections to paragraph 3 were not so great as the objections to an award being executed notwithstanding the filing of an application for annulment.

Article 32 [44]

No observations.

72. The CHAIRMAN pointed out that the Commission had completed its consideration of the Draft on Arbitral Procedure submitted by the Standing Drafting Committee (A/CN.4/L.35). He would now put these articles, as amended and as a whole, to the vote. The Commission would take up the comments to the articles at the next meeting.

The Draft on Arbitral Procedure, contained in document A/CN.4/L.35, was adopted, as amended and as a whole, by 9 votes to 3.

73. Mr. HUDSON, in explanation of his vote against the adoption of the Draft as a whole, stated that he was unable to support many of its provisions, particularly those envisaging limitations on the freedom of the parties resorting to arbitration.

The meeting rose at 1 p.m.

175th MEETING

Wednesday, 30 July 1952, at 9.45 a.m.

CONTENTS

* The number within brackets indicates the article number in the Special Rapporteur's Report (A/CN.4/46).

Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS.

Present:

Members: Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shushi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan 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/L.35) (*continued*)

CONSIDERATION OF THE DRAFT COMMENTS SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to consider the introduction to the Draft on Arbitral Procedure and the comments on the articles in that draft (A/CN.4/L.35).[1]

General

2. Mr. KOZHEVNIKOV asked whether the introduction and comments were intended to reflect the views of the Commission as a whole or merely the views of the special rapporteur. He thought the latter was the case, and that the sole purpose of the present discussion was to provide guidance for the special rapporteur.

3. Mr. SCELLE explained that, in the introduction and comments, he had endeavoured to express not his own views but those of the Commission, as reflected in its decisions.

4. Mr. KOZHEVNIKOV suggested that, even if it were held that the comments ought to represent the views of the Commission as a whole, there was insufficient time for detailed consideration of them. In the circumstances, he thought the Commission should decide that it was not committed to the comments and that they merely represented the special rapporteur's views.

5. Mr. SCELLE said that he could not agree to Mr. Kozhevnikov's suggestion, which would be quite contrary to the Commission's previous practice. The whole of document A/CN.4/L.35, including the introduction and comments as well as the articles themselves, was intended to form part of the Commission's report covering the work of its fourth session and, as such, must be approved by the Commission.

6. The CHAIRMAN said that he was in complete agreement with Mr. Scelle that the Commission could only submit to the General Assembly texts which had been approved by a majority of its members. It had been the practice of the Commission that dissenting views of individual members might be reflected in the Commission's reports only by means of appropriate footnotes.

7. Mr. YEPES said that he could not support Mr. Kozhevnikov's suggestion, which was contrary to the Commission's traditions. Moreover, the comments drafted by the special rapporteur appeared to him to reflect faithfully the views of the majority of the Commission.

8. Mr. LIANG (Secretary to the Commission) recalled that the Commission had previously decided:

> "1. That the draft on arbitral procedure, accompanied by explanations, be issued as a Commission document and submitted to the governments for comments and included in the report of the Commission to the General Assembly this year as a provisional draft;
>
> "2. That the special rapporteur be invited to prepare and to present to the Commission at its next session a full commentary on the draft on arbitral procedure, with a view to the submission of the final draft and commentary to the General Assembly in 1953."[2]

It seemed then that the explanations, or "comments" as they were now called, had clearly been intended to be the explanations of the Commission. On the other hand, the Commission's report to the General Assembly with regard to arbitral procedure would, for the present year, be merely a progress report, and it was not to be expected that the General Assembly would discuss the articles, much less the explanations. Furthermore, as was clear from paragraph 2 of the Commission's decision, a full commentary would still have to be prepared by the special rapporteur and approved by the Commission at its next session for submission, in compliance with article 20 of the Commission's Statute, to the General Assembly.

9. Mr. KOZHEVNIKOV said that he did not interpret the Commission's decision in that way. Document A/CN.4/L.35 was made up of two parts, one of which obviously had to be approved by the Commission as a whole, and the other, is his opinion, equally obviously was the work of the special rapporteur. Moreover, his own interpretation of the decision appeared to be fully in accordance with the provisions of article 21 of the Statute, which did not provide that explanations and supporting material attached to the Commission's documents should themselves be approved by the Commission.

10. The CHAIRMAN said that his ruling was that the Commission must adopt the comments, for the reasons which had already been given. It would of course be open to any individual member of the Commission to vote against any part of the comments or against them as a whole.

11. Mr. LAUTERPACHT said that he had some sympathy with Mr. Kozhevnikov's views, not as regards the responsibility for the comments — that, he thought, should lie with the Commission — but as regards the practical question whether the Commission had sufficient time to devote to the comments on each article the critical and exhaustive consideration that would be required before it could adopt them as its own. There was much in the comments with which he could not agree, and much that seemed to him redundant. On

[1] Mimeographed document only. It was incorporated, with drafting changes, in the "Report" of the Commission as chapter II (see vol. II of the present publication). Drafting changes are given in the present summary records.

[2] See summary record of the 156th meeting, paras. 1—29, especially paras. 5 and 18.

the other hand, the comments failed to mention certain questions of importance.

12. He agreed that the Commission should abide by its previous decision that the draft articles should be accompanied by explanations or comments. That did not necessarily mean, however, that those explanations or comments should accompany each article. There was no reason why they should not take the form of an introduction to the draft, explaining its main principles and indicating the innovations it contained. He noted that the special rapporteur had indeed drafted a few introductory paragraphs, in addition to the comments on each article.

13. The Draft on Arbitral Procedure contained in document A/CN.4/L.35 represented an important contribution to international arbitration law. It contained a number of significant innovations. In the first place, it introduced a system of safeguards against the parties frustrating the obligation to have recourse to arbitration, at any stage of the procedure. Secondly, it safeguarded the independence of the arbitral tribunal by laying down the principle of its immutability, i.e. that, once set up, its composition was independent of the will of one party. Thirdly, it provided explicitly that the arbitral tribunal could not bring in a finding of *non liquet* and that it was the judge of its own competence and procedure. Fourthly, it provided for revision and annulment of the award under prescribed conditions. Fifthly, it linked arbitral procedure in certain respects to the International Court of Justice.

14. The introductory paragraphs drafted by the special rapporteur barely mentioned some of those important innovations.[3] They should therefore be redrafted, and that might best be done by a small drafting committee, which should include the special rapporteur and the general rapporteur.

15. If the introductory paragraphs were expanded in that way, it would be unnecessary, for the purposes of the report on the present session, to retain the comments on the individual articles. He attached great importance, however, to a full commentary on each article being prepared for the next session, in accordance with paragraph 2 of the Commission's decision recited by the Secretary. In his view the Secretariat had the available resources to prepare such a full commentary, which would round off in a fitting manner the Commission's work on one of the first topics of international law it had selected for codification.

16. Mr. SCELLE said that all the innovations to which Mr. Lauterpacht had referred were, without exception, indicated either in the introduction or in the comments on the individual articles.

17. In the past, when the Commission had adopted a text, it had defined what it meant. That, as he had indicated, was the sole purpose of the comments he had drafted. Mr. Lauterpacht's suggestion amounted to putting into abbreviated form what would be stated at length in the commentary which was to be prepared for the next session, and he could not support it.

18. Mr. KOZHEVNIKOV said he had understood that the Commission was discussing only the question of procedure. As Mr. Lauterpacht had given his view on the comments as a whole, however, he (Mr. Kozhevnikov) wished to say, in all frankness, that in his opinion, the draft articles did contain certain important

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[3] See summary record of the 180th meeting, para. 64. Paras 1—4 of document A/CN.4/L.35 are identical to paras. 11—14 of the "Report.".

The other paragraphs read as follows:

"5. With regard to the Draft on Arbitral Procedure, the Commission wishes to record certain general observations.

"6. First, governments undertake to resort to arbitration in two different ways: either in respect of an actual dispute arising between them at a given time; or in an abstract manner, in advance, through an undertaking to resort to arbitration if disputes should arise between them in a particular matter or even in any matter. This is what is called the arbitration clause, which may be found in any bilateral or multilateral treaty or form the subject of a general or special treaty on arbitration. In either case, the undertaking to resort to arbitration or "undertaking to arbitrate" constitutes, between the governments signing it, a legal bond of which either may demand execution.

"7. Secondly, it often happens that the obligation to arbitrate cannot be carried out because the governments in respect of which it is invoked have numerous means of evasion. They may first claim that the obligation has lapsed; that the circumstances in which it was contracted have changed; that the obligation assumed has not the scope attributed to it by the plaintiff, etc.; in short, that the circumstances of the dispute are not, or are no longer, arbitrable. A recalcitrant government may also multiply the difficulties and impede the drafting of the *compromis,* refuse to agree on the choice of judges, the procedure to be followed, the rules of law to be applied, etc. Examples of this kind are innumerable.

"(*a*) the arbitrability or non-arbitrability of the dispute, i.e. the binding nature of the prior undertaking to arbitrate can be determined by a judicial body whose decision shall be binding on the parties.

"(*b*) the arbitrator or tribunal competent to settle the dispute can always be constituted and be able to deliver judgment;

"(*c*) the arbitral tribunal or arbitrator will be competent to draft the *compromis* if necessary, where the parties are unable to do so, and can thus issue the necessary orders for proceedings to continue up till, and including, the award.

"9. Of course, if the parties are themselves able to agree in the *compromis* on all the above questions, they remain absolutely free to do so and the action described above will not be necessary. But it should be pointed out that, although the undertaking to resort to arbitration may be based on the *compromis,* it is also frequently anterior thereto (even in the case of a current and concrete dispute). The undertaking to arbitrate then derives from a *nudum pactum* and is not extinguished by the inability of the parties to reach agreement on the terms of the *compromis.* It is this undertaking which constitutes the legal bond, and the *compromis* is merely its execution.

"10. The Commission is aware that its task, even in so traditional a field, is not only to codify international practice but to develop the law, and it first endeavoured to make use of legislative material already long accepted by the international community and by public opinion. But it did not deny itself the right to make innovations. Its progressive work consists mainly in the logical adaptation of such traditional materials: the classical method of their utilization has sometimes been changed, but the essential characteristics of arbitral procedure have not been overlooked.

innovations, but innovations did not always mean progress. He did not regard it as progress when the Commission departed from the principles of international law, in particular, the principle of national sovereignty; he did not regard it as progress when the Commission attempted to substitute a supra-national authority for the sovereignty of States; and he did not believe that public opinion would regard such innovations as progress either.

19. He did not think, therefore, that the Commission could take any very great pride in the articles it had adopted. In that connexion, he felt bound to state that the introduction appeared to reflect the views and aspirations of the special rapporteur, rather than those of the Commission as a whole. If the Commission was to consider and approve the introduction and the comments, despite the reasons he had given against such a course, he would suggest that consideration of the introduction be deferred until it had taken a decision on the comments on the individual articles.

20. Mr. LIANG (Secretary to the Commission) recalled, with regard to what had been said by Mr. Lauterpacht, that it had been the Commission's practice in the past to accompany texts it had finally adopted with explanations. Thus, in the Commission's report on its first session, the Draft Declaration on Rights and Duties of States had been accompanied by a number of explanatory paragraphs entitled " Guiding Considerations ", " Summary of Contents " and " Observations concerning the Draft Declaration ". The special rapporteur had pointed out that he had indicated the guiding considerations underlying the Draft on Arbitral Procedure, either in the introduction or in the comments. Other members of the Commission might consider, however, that those indications were not detailed enough. In that case they could submit amendments to the paragraphs in question.

21. Mr. Lauterpacht had suggested that the introduction be re-examined by a small drafting committee, and he (Mr. Liang) thought the suggestion an excellent one. If the introduction were expanded, it would presumably take in much of the substance at present contained in the comments on the individual articles, and in those circumstances it might be thought unnecessary to have any comments on the individual articles included in the report on the present session. The subject matter of those comments, as at present drafted, could of course be included in the full commentary which was to be prepared for the next session, and which Mr. Lauterpacht had suggested should be drafted by the Secretariat. The Secretariat would be ready to undertake that task, under the general supervision of the special rapporteur, provided it was given sufficient time.

22. The CHAIRMAN thought that the Commission would save time by considering the comments on the individual articles first, as Mr. Kozhevnikov had suggested.

23. Mr. SCELLE agreed that that would be the most practical course. He himself would have a number of amendments to suggest, in consequence of the changes which had been made to the text of the articles at the two preceding meetings.

24. Mr. HSU recalled that the special rapporteur had indicated that there was some inconsistency between certain of the articles. He hoped the Chairman would permit the special rapporteur to draw attention to such inconsistencies and to make suggestion for their elimination.

25. The CHAIRMAN said that, whenever attention was drawn to an apparent inconsistency, the Commission would first have to decide whether such inconsistency really existed. If so, it would then have to decide what action to take, if any.

26. He invited the Commission to proceed to consideration of the comments on the individual articles contained in document A/CN.4/L.35.

Comment on article 1 [1]

First paragraph

27. Mr. LAUTERPACHT asked whether the statement that article 1 was " not purely declaratory " meant that it was not purely declaratory of existing international

" 11. The freedom of governments is not affected, since the proposed draft convention will not bind them unless they have subscribed to it. The acceptance of any convention involves a restriction of sovereignty.

" 12. As was to be expected, two currents of opinion have arisen in the Commission. They have in fact always existed among jurists.

" One view is that arbitration should be essentially a diplomatic method of settling disputes, and hence that the parties should be allowed as much latitude as possible in the procedure followed, and the option of breaking it off at any point. This principle of so-called diplomatic arbitration hardly seems compatible with the definition given in article 37 of The Hague Convention of 1907 for the pacific settlement of international disputes, under which settlement of disputes by arbitration should be on the basis of respect for law. But this method does take the fullest account of the interests of States. It is also calculated to prejudice the legal authority of the institution and its traditional role as a source of law.

" The second view, that of so-called jurisdictional arbitration, aims in the opposite direction — at removing arbitration from the political sphere — and brings into the foreground the principle of removing the cause of the dispute by adopting a legal solution. Obviously this is calculated to restrict government action and the importance of the *compromis* in favour of the arbitral tribunal with powers which necessarily tend to resemble those of a court in the ordinary sense and to get further and further away from the method of conciliation or mediation.

" 13. Hence the present text involves frequent recourse to the International Court of Justice wherever disagreement between the parties seems likely to obstruct the proceedings. It is for this reason too that the text rejects the practice of *non liquet* and provides for revision and appeal for annulment of the arbitral award. The Commission is alive to the fact that to give jurisdiction to a tribunal in this way is calculated to curtail the frequency of recourse to arbitration. But the majority of the members felt that as in monetary matters, it was preferable to ensure that the institution should be efficient and sound rather than risk the danger of inflation."

law. If so, the second sentence implied that, under existing international law, the undertaking to arbitrate did not have binding force when it was unaccompanied by any provisions on procedure.

28. Mr. SCELLE said that the statement that the article was not purely declaratory meant only that it did not affirm a self-evident fact. Under existing international law, the undertaking to have recourse to arbitration, the *nudum pactum* of Roman law, did constitute a legal obligation, even in the absence of a *compromis*.

29. Mr. LIANG (Secretary to the Commission) pointed out that the words "is not purely declaratory", in the English text, were not an exact equivalent of the words "*n'est pas de nature purement énonciative*" in the French text, which would be more accurately rendered by "is no mere assertion".

30. Mr. LAUTERPACHT expressed himself satisfied with the explanations which had been given.

Second paragraph

31. With regard to a point raised by Mr. HSU concerning the last sentence of the comment on article 1, Mr. FRANÇOIS pointed out that that sentence was wrongly rendered in English.[4] The correct meaning was that the official record of the Council's meeting would serve as proof of the parties' acceptance of the Council's resolution.

32. Mr. HSU pointed out that it frequently happened that the parties did not accept a resolution at the meeting at which it was adopted, but accepted it later in writing. He suggested, therefore, that the last sentence be deleted, since even in the French text, it did not correspond with the facts.

33. Mr. LIANG (Secretary to the Commission) pointed out that, if the last sentence were deleted, there would remain no reference to the form of the undertaking to arbitrate, which was the crux of paragraph 2. He agreed, however, that the last sentence, as at present worded, even in the French text, did not cover the great majority of cases.

34. Mr. YEPES suggested that the last two sentences be deleted.

35. Mr. LAUTERPACHT felt that, if the last two sentences were deleted, the meaning of the sentence preceding them would not be clear.

36. Mr. SCELLE said that the last two sentences gave merely one example and did not, therefore, perhaps threw much light on the preceding sentence. He could accept Mr. Yepes' suggestion that they be deleted.

Mr. Yepes' suggestion was rejected by 5 votes to 3 with 2 abstentions.

[4] That sentence read as follows: "The official record of the Council's meeting would provide the authentic text of any such resolution."

37. Mr. HUDSON suggested that the last sentence be amended to read as follows:

"The official records of the United Nations would provide the authentic text of the undertaking."

38. Mr. SCELLE doubted whether the parties' acceptance would always be recorded in the official records of the United Nations.

Mr. Hudson's suggestion was adopted by 8 votes to none with 4 abstentions.

Comment on article 2 [2]

First paragraph

39. Mr. LAUTERPACHT proposed the deletion of the words "as compared with the preliminary draft" after the words "important innovation" in the first sentence, and suggested, in the interests of improved drafting, that the words "sanction the legally binding force of the mere" be replaced by the words "secure the effectiveness of the" in the second sentence.

It was so agreed.

40. Mr. LAUTERPACHT proposed the deletion of the word "really" before the word "covered" in the third sentence.

It was so agreed.

41. Mr. LIANG (Secretary to the Commission) asked whether the word "prior" in the second sentence was strictly necessary.

42. Mr. HUDSON replied in the affirmative, since it was essential to make clear that a previous undertaking to resort to arbitration was meant.

Second paragraph

43. Mr. SCELLE said that he hoped he had succeeded in bringing out the important points in article 2, which was a crucial one. He had wished to focus attention on the issue of "arbitrability", and in that connexion had referred to the provisions in a number of general treaties of arbitration concluded by the United States with other countries for the constitution of commissions of enquiry for deciding that issue. Paragraph 15 in his first report on arbitral procedure (A/CN.4/18) had dealt with that subject.

44. Mr. HUDSON said that, to his regret, he must contest the accuracy of that statement. No commission of enquiry had ever been convened to decide on the question of arbitrability arising from a particular treaty, although the United States was party to some thirty treaties incorporating a provision of that kind.

45. Mr. SCELLE said that he had never claimed that the commissions of enquiry had functioned; he had merely referred to the fact that provision had been made for their being set up. He had also wished to underline the fact that it had been the consistent policy of the United States Department of State, whatever the political party in power, to have such a provision

included in arbitration treaties. The fact that it had no practical effect was a separate issue.

46. However, to meet Mr. Hudson's objections, he was prepared to substitute the words "provided for" for the word "had" after the words "American diplomacy has" in the second sentence.

47. Mr. YEPES proposed that the words "American diplomacy" be replaced by the words "The practice of the United States".

Mr. Scelle's and Mr. Yepes' amendments were adopted.

48. Mr. LAUTERPACHT proposed the substitution, in the fourth sentence, of the word "view" for the word "desire", of the words "and not" for the words "itself and not merely", and of the words "is the suitable organ" for the words "should be called upon".

It was so agreed.

Third and fourth paragraphs

No observations.

Comment on article 3 [3]

First paragraph

49. Mr. LAUTERPACHT proposed the deletion of the first paragraph, which appeared superfluous.[5]

It was so agreed.

Second paragraph

50. Mr. LAUTERPACHT suggested the deletion of the inverted commas round the word "necessary" in the fourth sentence.

It was so agreed.

51. Mr. SCELLE said that he was prepared to withdraw the last sentence, which to a considerable extent expressed his personal view.

52. Mr. KOZHEVNIKOV was in favour of that deletion: it was inappropriate for the special rapporteur to advance his personal views in a commentary, which should give an objective account of the consensus of opinion in the Commission.

53. Mr. CÓRDOVA thought the last sentence served a useful purpose, since it was necessary to state the position of an arbitral tribunal in international law.

54. Mr. ZOUREK contended that the last sentence touched on a most controversial point in the theory of arbitration and embodied a view which was certainly not that of most of the members of the Commission. It was one held by a particular school of international lawyers. Such subjective expressions of opinion should not be included in the commentary. He was therefore in favour of the deletion of that sentence.

It was decided by 5 votes to 4 with 3 abstentions to retain the last sentence in the second paragraph.

55. Mr. LAUTERPACHT proposed the deletion of the word "two" in the last sentence of the second paragraph, since more than two States might be parties to a dispute. He also proposed the substitution of the word "States" for "nations".

It was so agreed.

Third paragraph[6]

56. Mr. SCELLE said that the third paragraph required amplification by the substitution of the words "the terms 'arbitral tribunal' or 'the tribunal' mean" for the words "the term 'arbitral tribunal' means".

It was so agreed.

57. Mr. CÓRDOVA suggested that, in order to obviate confusion, the opening words of the third paragraph should read: "In this Draft".

58. Mr. KOZHEVNIKOV considered that, in view of the nature of the draft, the word "preliminary" ought to be retained.

59. Mr. SPIROPOULOS suggested that the point was a minor one. All that it was important to specify in the third paragraph was the meaning of the terms "arbitral tribunal" and "tribunal". The opening phrase could be deleted without danger of misunderstanding.

60. Mr. KERNO (Assistant Secretary-General) thought that if the opening phrase were deleted it might be concluded that the definition of the terms mentioned in the third paragraph only held good for article 3.

61. The point raised by Mr. Kozhevnikov was covered by the explanation in paragraph 4 of the introduction.

Mr. Córdova's amendment was adopted.

62. Mr. YEPES pointed out that the English and French texts of the third paragraph did not tally, as the words "*l'organe judiciaire*" did not appear in the former. He believed the French text should be regarded as the authentic one, particularly since the tribunal was referred to as a judicial body in the last sentence of the second paragraph.

63. The CHAIRMAN said he was doubtful whether it was appropriate to refer to an arbitral tribunal as a judicial body.

64. Mr. SCELLE said that there was no substantial difference between the two texts and there was no need to amend the English version.

The third paragraph as amended was approved by 9 votes to none with 2 abstentions.

Fourth paragraph

No observations.

[5] This paragraph read as follows:

"This article begins a second chapter of the preliminary draft."

[6] The third paragraph read as follows:

"In the text of the preliminary draft, the term 'arbitral tribunal' means either a single arbitrator or a body consisting of several arbitrators."

Comment on article 4 [5 and 6][7]

First paragraph

65. Mr. KOZHEVNIKOV, referring to the special rapporteur's admission to having included a personal expression of view in his comment on the previous article, said that the statement in the first sentence, that article 4 represented a "very liberal" solution, was a subjective statement and had an inappropriate polemical tinge.

66. Mr. SCELLE said he was prepared to delete the words "very liberal" if they shocked any member of the Commission, although he believed them to be an accurate description of the effect of the Commission's decision to delete a provision that the sole arbitrator or the majority of the arbitrators should be chosen from among nationals of States having no special interest in the case. That decision would result in the parties, enjoying a wide freedom of choice. Indeed, its ultimate effect might be that the tribunal would no longer be a judicial body as he understood it, but rather a conciliation commission. He had been struck by the latitude of article 4 as it now stood. Indeed, in its present form it was diametrically opposed to his whole theory of arbitration.

67. He must repudiate Mr. Kozhevnikov's allegation that he had been guilty of subjectivity in his comment, but was prepared to modify the first paragraph so as to indicate plainly that the Commission had recognized the full freedom of the parties to appoint the members of the tribunal, and had not even indicated a preference for the provision in article 22 of the Revised General Act for the Pacific Settlement of International Disputes of 1949, according to which an arbitral tribunal was to be composed of five members, so as to ensure a majority from States which were not parties to the dispute.

68. Mr. FRANÇOIS said there was no ground whatsoever for describing the provisions of article 4 as "very liberal". The rights recognized had never been questioned.

69. Mr. LIANG (Secretary to the Commission) suggested that there was another objection to the first sentence of paragraph 1, in that, article 4 did not appear to have very much in common with article 22 of the General Act.

70. He also felt that the statement in the third sentence should be substantiated, since otherwise it was difficult to discern its relevance.

71. Mr. HUDSON suggested it should be made clear that the provisions of article 4 applied even when there was no prior undertaking to arbitrate and that the article as a whole, therefore, had a wider application than article 3.

72. Mr. ZOUREK suggested that no reference should be made to the theory of "non-political" arbitration, since it was impossible to remove arbitration altogether from the sphere of politics. It was unnecessary to mention that very questionable theory, since there was general agreement in the Commission that arbitration provided for the settlement of disputes, on the basis of respect for law. On the other hand there was a fundamental difference of opinion in the Commission on the second principal feature of arbitration, which was the freedom of the parties to choose the arbitrators, and it was desirable that the comment on article 4 should reflect faithfully and objectively the discussions on that point.

73. Mr. SCELLE pointed out that the theory of "non-political" arbitration had been very fully discussed in the Commission and reference to it could hardly be omitted from the comment.

74. Mr. LAUTERPACHT expressed the hope that Mr. Scelle would refer to that theory somewhere in the commentary since many members of the Commission attached importance to it.

75. He also hoped he would not be too much influenced by the suggestion that a distinction be drawn between cases where there was a prior undertaking to arbitrate and cases where there was not. The whole draft was based on the assumption that there was a prior undertaking to arbitrate.

Second paragraph

No observations.

Third paragraph

76. Mr. SCELLE said that he would substitute the words "liable to degenerate into purely political disputes" for the words "by important political personages or heads of State".

[7] The comment on article 4 read as follows:

"The very liberal solution here adopted is similar to that provided by Article 22 of the General Act on Arbitration. The Commission has here subscribed to the theory of "non-political" arbitration implicit in Article 37 of the 1907 Convention for the Pacific Settlement of International Disputes. The arbitral award must be rendered "on the basis of respect for law". It was with this end in view that the two paragraphs of the article were adopted.

"The rule thus laid down is not, however, absolutely inflexible. The Commission did not wish to exclude cases in which the technical nature of the issue might lead the parties to choose judges not exactly fulfilling the requirements of the last part of paragraph 2. This is the sense of the introductory words "with due regard to the circumstances of the case".

"During the long discussion on this paragraph, the majority of the Commission was against arbitration by important political personages or heads of State; but it did not wish to prohibit such appointments.

"The Commission also implicitly sanctioned the system of "national arbitrators". It had previously adopted a third paragraph providing that the sole arbitrator or the majority of the members of the tribunal should be chosen from among nationals of States having no special interest in the dispute. The Drafting Committee thought it better to omit this provision which might make it impossible to appoint tribunals consisting of two or three arbitrators.

"Moreover the Commission was unwilling to follow the provisions of the General Act by stating a preference for a tribunal of *five* members."

77. Mr. YEPES said that he preferred the original text of the third paragraph, which reflected more accurately the Commission's discussions. It would be remembered that it was he who had drawn attention to the disadvantages of selecting heads of State to act as arbitrators.

78. Mr. SCELLE said that he had not been absolutely certain as to what the sense of the Commission had been on that issue and had noted that Mr. Amado, Mr. François, Mr. el-Khouri and Mr. Lauterpacht had all raised objections to the argument developed by Mr. Yepes.

79. Mr. KERNO (Assistant Secretary-General) pointed out that if Mr. Scelle's amendment were adopted, the final phrase of the third paragraph, reading "but it did not wish to prohibit such appointments", would have to be omitted.

80. Mr. FRANÇOIS considered that the appointment of heads of States to act as arbitrators must not be excluded.

Fourth paragraph

81. Mr. FRANÇOIS suggested that it would be inappropriate to refer in the commentary to action by the Standing Drafting Committee. All references to it should be replaced by the word "the Commission".

82. Mr. SCELLE agreed.

83. He then declared that he would submit a new text for the comment on article 4 in the light of the observations made in the Commission.[8]

Fifth paragraph

No observations.

The meeting rose at 1.15 p.m.

[8] See summary record of the 177th meeting, paras. 1—25.

176th MEETING

Thursday, 31 July 1952, at 9.45 a.m.

CONTENTS

* The number within brackets indicates the article number in the Special Rapporteur's Report (A/CN.4/46).

Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS.

Present:

Members: Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shushi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan 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/L.35) (*continued*)

CONSIDERATION OF THE DRAFT COMMENTS SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the comments on the articles in the Draft on Arbitral Procedure (A/CN.4/L.35).[1]

Comment on article 5 [7]

First paragraph

2. Mr. LAUTERPACHT proposed the deletion of the first sentence which seemed to him unnecessary.[2] The paragraph would then open with the words: "This article is based etc.".

Mr. Lauterpacht's proposal was adopted.

3. Mr. SCELLE said that, if the reference to the case of the Hungarian Optants seemed either unnecessary or undesirable, he would be quite prepared to omit it.

It was agreed to delete at the end of the paragraph the words "the scandalous possibilities of which were revealed by the celebrated case of the Hungarian Optants".

4. Mr. ZOUREK proposed the deletion of the words "as opposed to diplomatic or political arbitration", which implied that hitherto all arbitration had been of a diplomatic or political character — a highly questionable thesis. Nor was the comment on article 5 the proper place for emphasizing the distinctive features of the present draft in relation to existing law and practice.

5. Mr. SCELLE said that if those words were deleted the whole sentence must be dropped. The purpose of a number of articles in the draft was to foster a development in the dircction of judicial arbitration, which had

[1] Mimeographed document only. It was incorporated, with drafting changes, in the "Report" of the Commission as Chapter II (see vol. II of the present publication). Drafting changes are given in the present summary records.

[2] The first sentence read as follows: "This article, again, is of undoubted doctrinal and practical importance."