Document:-
A/CN.4/SR.2420

Summary record of the 2420th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

2420th MEETING

Tuesday, 18 July 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*)* (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,[1] A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L. 521 and Add.1)

[Agenda item 3]

Draft articles proposed by the Drafting Committee[2] (*continued*)*

1. Mr. GÜNEY said that, when the Commission had decided to provide for a dispute settlement mechanism in the draft articles, it had added to the complexity of an already difficult subject. The path it had chosen was at variance with a well-established practice of the Commission itself, which had in the past, when dealing with subjects that were just as important, generally refrained from providing for such a mechanism, leaving the matter to the conference of plenipotentiaries. Such had been the case, in particular, with the draft articles on the law of treaties.

2. As to substance, the Commission must take State practice into account in its work on the codification and progressive development of international law. The international community had always shown reluctance and apprehension towards compulsory third-party settlement of disputes. The draft under consideration (A/CN.4/L.513) did not take that situation into account, for in addition to introducing compulsory third-party settlement, it would also be establishing a vicious circle of dispute settlement, step by step, culminating in the kind of appeal represented by compulsory judicial settlement.

3. As for the definition of consensus given at an earlier meeting, once one member was firmly opposed to a decision, it was not possible to speak of consensus, whether or not the question was put to a vote.

4. Mr. THIAM said that he had indeed felt some reluctance in the past towards a draft which, by making arbitration compulsory, departed from the traditional rule whereby arbitration should be based only on the parties' consent. However, after a great deal of thought he had come to change his position. The provision contained in article 5 (Arbitration), paragraph 2, should be seen as the counterpart of the realistic decision not to prohibit countermeasures. Since the Commission had decided not to make countermeasures unlawful acts, it had had to provide some guarantee, some compensation, at least morally speaking, for weaker States. The only realistic compensation lay in the compulsory arbitration proposed in article 5, paragraph 2.

5. With regard to article 7 (Judicial settlement), some had wrongly presented it as being aimed at introducing an appeals procedure against arbitral decisions, citing the judgment of ICJ in the case concerning the *Arbitral Award of 31 July 1989* (Guinea-Bissau *v.* Senegal).[3] The plea against the arbitral award in that case had not been an appeal but a remedy against abuse of power, which was the type of remedy laid down in draft article 7. He did not find that provision at all disturbing, although he did think that the wording should make the nature of the remedy clearer. The Court was the judge of its own competence and it knew that an appeal against an arbitral award could not be brought before it.

6. He was therefore in favour of the draft articles, especially article 5, paragraph 2, and article 7.

7. Mr. MIKULKA said that he would like to make three comments. First, whereas parts one and two had been drafted without prejudice to the form that the Commission's work would ultimately take, that is to say whether or not it would be a convention, part three was clearly drafted with a convention in mind since it would be impossible to apply the articles contained in it outside of such a framework.

8. Secondly, he was pessimistic about the chances for such a convention. In such a sensitive matter as State responsibility, it would no doubt be preferable to consider provisions indicating, for example, the link between substantive rules and dispute settlements as a condition for the application of certain substantive rules. He also agreed with Mr. Güney's remark about the Commission's practice with regard to dispute settlement clauses. However, the most important and serious problem, as far as a convention was concerned, was the relationship between the dispute settlement system of the future convention on State responsibility and the systems in other instruments. The Commission should realize that any violation of rules of international law took place not in the abstract, but in a specific area of international law. The Commission could not fail to mention that relationship, and it should add one or two articles to clarify that issue.

9. Thirdly, regardless of any substantive discussion on article 5, paragraph 2, the cost of the mechanisms could not be completely disregarded.

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* Resumed from the 2417th meeting.

[1] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

[2] For the text of the articles of, and the annex to, part three of the draft as proposed by the Drafting Committee, see 2417th meeting, para. 1.

[3] See 2417th meeting, footnote 10.

10. Mr. JACOVIDES said that he would like to make a suggestion concerning the title of article 7. Although the article actually dealt with the question of the validity of an arbitral award rather than with judicial settlement, using the expression "judicial settlement" could be justified from the standpoint of a regime which went from negotiation, to mediation, to conciliation, to arbitration. Consequently, the Commission might include the two ideas of "judicial settlement" and "validity of an arbitral award" in the title of article 7.

11. Mr. RAZAFINDRALAMBO said that most of the criticisms were of the compulsory phase of the dispute settlement system in the draft articles.

12. With regard to article 5, paragraph 2, he did not see the objections to settlement, by compulsory arbitration, in particular the fear that it would encourage States to resort to countermeasures. If a State decided to resort to countermeasures, it would deliberately trigger the compulsory arbitration procedure. On the other hand, if the State did not want the dispute to be settled by such a procedure, it would avoid taking countermeasures from the outset, and it would be free to use any of the means of amicable settlement provided in articles 1 to 3 and article 5, paragraph 1.

13. Judicial settlement, in article 7, was not a means of reformation of an arbitral award, but a means of review of the legality of the award, leading either to a rejection of the application or nullification of the award, similar to remedies against abuse of power. In the latter case, the issues in dispute might again be submitted to an arbitral tribunal, which alone could rule on the merits. For that reason, he proposed, on the one hand, that article 7 should be entitled: "Nullification proceedings" and, on the other, that article 7, paragraph 2, should be drafted to read: "In the event of total or partial nullification of the award, the issues in dispute may, at the request of any party, be submitted to a new arbitration."

14. Some drafting suggestions could also be made. He endorsed the idea expressed at a previous meeting that the word "other", in article 2 (Good offices and mediation), should be deleted. The word "negotiations", in article 3 (Conciliation), should be in the singular. Provision should be made in article 4 (Task of the Conciliation Commission), paragraph 4, for exceptions to the three-month deadline in the event of exceptional circumstances. Article 5, paragraphs 1 and 2, should allow for recourse to an arbitral tribunal other than the one constituted in conformity with the annex, such as the Permanent Court of Arbitration. He proposed to add a paragraph 8 to article 2 of the annex, stipulating that the Arbitral Tribunal was empowered to rule on its competence in the case of dispute, as it was envisaged in article 1, paragraph 4, of the annex, for the Conciliation Commission.

15. Lastly, in cases in which the Commission was not able to reach a consensus on draft articles, it should proceed to a vote.

16. Mr. FOMBA said that, unlike articles 1 and 3, article 5 drew a distinction between disputes stemming from the initial taking of measures and those resulting from countermeasures. The question had arisen of whether the article was not likely to encourage powerful States to take countermeasures. In his view, that was not necessarily so. Apart from the fact that smaller States were not always able to resort to countermeasures, the mechanism might be a comparatively effective weapon for restoring international justice when used by smaller States. The underlying philosophy of part three of the draft (Settlement of disputes) was that the purpose of the law was to ensure equality among States, big and small, to turn de facto inequality into compensatory legal equality. Therefore, article 5, paragraph 2, favoured neither the powerful nor the small countries, at least in absolute terms. As for article 7, it was actually concerned with challenging the validity of an arbitral award. It would therefore be preferable to amend the title accordingly, and to state exactly what period of time was allowed to request confirmation or nullification of the award. In any event, paragraph 1 of the article could not be a veiled means of granting ICJ the power to rejudge the substance of the award. Subject to the decision to be taken by the Commission on article 12 of part two, he accepted the draft articles under review and agreed that they should be submitted to the General Assembly.

17. Mr. LUKASHUK pointed out that, although the draft articles proposed by the Drafting Committee were in fact an advance on State practice, the Commission's mandate was very clear about the need for the progressive development of international law. The articles bespoke a high level of professionalism and should therefore be adopted by the Commission and submitted to the General Assembly.

18. Mr. BARBOZA said that he supported the draft articles proposed by the Drafting Committee, because he saw them as a significant step forward that followed the current trend in multilateral conventions to provide for a dispute settlement mechanism and even impose mandatory conciliation procedures. The strongest objections had been to compulsory arbitration in cases of disputes arising subsequent to countermeasures (art. 5, para. 2), but how could it be thought that the weak countries would see that provision as being anything other than a guarantee, indeed the only guarantee, available to them? As for article 7, it filled a gap that would have made the system inoperative and was in fact a practical provision intended to prevent States evading the arbitral award, and not a form of appeal. A clause of that type was often introduced by the parties themselves, in an arbitration compromise. Perhaps the title should be changed, to bring out the fact that the validity or nullity of the arbitral awards was at issue and to make the articles as a whole clearer by listing the grounds for nullification in the commentary.

19. Mr. VILLAGRÁN KRAMER, referring to article 5, paragraph 2, pointed out that, under the European Union instruments, the possibility of reprisals was excluded between member States but not towards non-member States. Similarly, article 18 of the Charter of OAS[4] prohibited economic and political reprisals between Latin American States but not towards African or European States, for example. The constituent instrument of WTO provided for a dispute settlement mecha-

[4] See 2407th meeting, footnote 6.

nism that prohibited reprisals.[5] There were obviously areas in which reprisals were subject to limitations and others in which no legal regime applied in that regard. The draft articles should therefore be placed in the context of those realities, that is to say they filled gaps where no rules were applicable. They were all the more deserving of support in that they provided the weaker countries with a right they could decide whether and in what conditions they wanted to exercise.

20. With regard to article 7, in the case of a dispute over an arbitral award, was it better to let tensions build up and relations turn sour, or on the contrary to provide for a mechanism to find legal solutions? The three best-known cases in that respect, that of the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* (Honduras *v.* Nicaragua), settled in 1960 by ICJ,[6] that of the proposal of the Mediator (specifically His Holiness Pope John Paul II) of 12 December 1980 concerning the Beagle Channel[7] and that of the *Arbitral Award of 31 July 1989* (Guinea-Bissau *v.* Senegal), mentioned earlier, clearly showed that the draft articles responded to legal and political realities and deserved to be firmly supported and submitted to the General Assembly, where the Latin American countries would certainly not fail to support them just as firmly.

21. Mr. EIRIKSSON said that he wondered whether the debate over the title of article 7 was not based on a misunderstanding, since the Drafting Committee had actually agreed that the title should be "Validity of the arbitral award".

22. Mr. YANKOV (Chairman of the Drafting Committee) said that the title chosen by the Drafting Committee for article 7 was in fact the one indicated by Mr. Eiriksson, but the proposals made during the debate for changing it were interesting, inasmuch as the structure of the seven articles as a whole should be preserved by maintaining the expression "Judicial settlement". Perhaps article 7 should be entitled: "Judicial settlement concerning the validity of the arbitral award".

23. Mr. AL-BAHARNA said that he endorsed the draft articles, which he considered to be a consensus text, but would like to comment on a few details concerning both substance and drafting. In the case of article 4, paragraph 3 should indicate whether the Conciliation Commission, at its discretion, might also comment on the explanation given of the "exceptional reasons" referred to in paragraph 2. Paragraph 4 stipulated that the Conciliation Commission might specify the period within which the parties were to respond to its recommendations, but the idea of a time-frame was missing from paragraph 5, which should therefore begin with, "If, after the end of the period specified in paragraph 4, the response by the parties". Finally, paragraph 5 should state that, in the event that one of the parties had accepted the Commission's recommendations but the other had not, mention should be made of that in the final report.

24. Article 5, paragraph 2, did not seem to raise a real problem of the relationship between weak and strong States, but since it introduced the right to unilaterally submit the dispute to a tribunal, the same right might be accorded in paragraph 1, by replacing the expression "by agreement" with the word "unilaterally".

25. The phrase used in paragraph 2, "where the dispute arises between States Parties to the present draft articles" was not really needed, for everyone knew that the settlement procedure in question applied only to the States parties to the draft articles under review. Instead of repeating it each time, it might be better to insert, as a "chapeau", before article 1, at the very beginning of the draft, a sentence indicating that the dispute settlement procedure applied to the parties to the present draft articles.

26. With regard to article 7, paragraph 1 stipulated that ICJ might declare the total or partial nullity of the award, but paragraph 2 began with "The issues in dispute left unresolved" and therefore concerned only partial nullity. Paragraph 2 should therefore be reformulated and divided into two subparagraphs, the first to stipulate that, in the case of total nullity, the dispute would be resubmitted to arbitration, and the second to contain existing paragraph 2 preceded by "For partial nullification,".

27. With regard to the annex, for the sake of clarity it would be preferable to have not a single annex comprising two articles but two different annexes, the first entitled, "Rules relating to the Conciliation Commission" and the second "Rules relating to the Arbitral Tribunal". On another matter, the second sentence of article 1, paragraph 1, of the annex spoke of "every State which is a Member of the United Nations or a Party to the present articles". In his opinion, the word "or" should be replaced by "and", for the articles obviously did not apply to States that were not parties to them.

28. The expression "present and voting" should be added at the end of article 1, paragraph 5, and the second sentence of article 2, paragraph 7, should read: "Decisions of the Arbitral Tribunal shall be made by a majority vote of the five members present and voting." Article 2, paragraph 1, stated: "The three other arbitrators ... shall be chosen by common agreement from among the nationals of third States", whereas the Commission generally used the term "agreement" and not "common agreement". Furthermore, only one of the two formulations, "from among the nationals of third States", in paragraph 1, and "shall be of different nationalities" in paragraph 2, should be used. Lastly, the word "may", in the last sentence of paragraph 2, should be changed to "shall".

29. Mr. ROSENSTOCK said that he had been one of the two members of the Drafting Committee to express reservations about the dispute settlement procedure. It might indeed be questioned whether it was for the Commission, at the present stage, to decide in favour of a treaty-based instrument and whether the decision to include a part three was not a political decision that should be taken by a conference. The risk of conflict between those provisions and other dispute settlement systems should also be borne in mind, as had been pointed out earlier.

[5] See 2417th meeting, footnote 9.

[6] *Judgment, I.C.J. Reports 1960*, p. 192.

[7] "Mediación de la Santa Sede sobre el Canal de Beagle", *Revista Española de Derecho Internacional*, vol. XXXVII, No. 1 (1985), p. 291.

30. Despite those doubts, however, he believed it useful to give States indications of what such a dispute settlement system might be like, to provide them with a model, as it were. Article 5, paragraph 1, naturally left States free to act and gave them the opportunity, if they wished, to submit their dispute to an arbitral tribunal. Paragraph 2, however, went far beyond a mere suggestion, and it would therefore be useful to learn the General Assembly's reaction to it.

31. He was not entirely convinced by article 7, but it went without saying that States were free to accept or reject the proposed system. Accordingly, he would not object to the draft articles being submitted to the General Assembly in their present form.

32. Mr. TOMUSCHAT said he, too, thought it would be preferable not to include part three in the draft articles on State responsibility, but on the whole the proposed provisions had their merits; he would therefore be prepared to support them. Nevertheless, article 1 raised a basic problem, for the expression, "the interpretation or application of the present draft articles" was ambiguous. In particular, it raised the question of the link with the underlying dispute over primary rules, inasmuch as the draft articles dealt with secondary rules. Obviously, the dispute would never involve the draft articles on State responsibility alone. That problem had been raised in the Drafting Committee, and it had been clear that it would not be possible to keep to secondary rules and that the actual substance of the dispute would have to be examined. In that case, there would be a conflict between the general dispute settlement system under discussion and the particular systems provided for in specific treaties, as Mr. Mikulka had pointed out. How could that conflict be resolved and which system would prevail? It was a real difficulty that deserved careful consideration.

33. As for article 5, the principle set forth in paragraph 2, whereby the State against which countermeasures had been taken was entitled unilaterally to submit the dispute to an arbitral tribunal, would be particularly useful for smaller and weaker States, as Mr. Barboza had rightly pointed out. Hence, the objections to that paragraph were not very convincing. As far as the arbitral tribunal was concerned, he would have preferred it to be a standing body, given the practical, material and financial difficulties entailed in establishing a special tribunal of that type. Lastly, at the present stage in the work, namely four days from the end of the session, the Commission was not in a position to take all of Mr. Al-Baharna's proposals into account. It might none the less take note of them and use them as a basis for discussion when it came to consider the draft articles on second reading.

34. Mr. VARGAS CARREÑO said that the proposed draft articles properly codified the applicable rules and practice concerning dispute settlement. Mr. Tomuschat's remark regarding article 1 was entirely relevant and should certainly be included in the commentary, but in the case at hand, the proposed dispute settlement mechanism related essentially to disputes over the interpretation or application of the draft articles under consideration.

35. Articles 2, 3 and 5 reflected existing practice, since many other conventions provided for identical systems, and they were therefore wholly appropriate. Article 5, paragraph 2, laid down a fundamental rule. Countermeasures were essentially exceptional in nature, and it was normal for the State against which countermeasures had been taken to be able, as proposed in the article, unilaterally to submit the dispute to an arbitral tribunal constituted in conformity with procedures set out in the annex. Although he fully approved of the idea expressed in article 7 and the way it was formulated, he agreed with other members that it would be better to amend the title and replace "Judicial settlement" by "Challenge to the validity of an arbitral award".

36. The provisions in the annex concerning the Conciliation Commission and the Arbitral Tribunal were entirely acceptable, especially since it was not the time to make changes. Any necessary amendments might be considered when the articles were considered on second reading.

37. The CHAIRMAN, speaking as a member of the Commission, said that he had no real objections to the proposed draft articles being adopted in their present form and being referred to the General Assembly. He would like to point out, however, that countermeasures were at best an attempt to "force the hand" of the law and at worst a threat to world public order. He would also point out that it was essential for the draft articles to be adopted by consensus. Any other approach would create more problems than it would solve.

38. Mr. PELLET said it was regrettable that some members of the Commission did not respect the views expressed by others. Those who tried to give "elementary" lessons in law should not make too many mistakes themselves. Thus, failure to join a consensus should not be confused with a veto. He had no intention of exercising a veto; he simply could not join a consensus on the proposed draft articles. He was prepared to endorse the views of Mr. Bowett, who shared his feelings about the danger inherent in article 5, paragraph 2, which encouraged the use of countermeasures, but he did not oppose a consensus, provided it was clearly indicated that part three of the draft was optional or at least that the Commission intended to consult States on whether the part should be made optional or compulsory. He was convinced that the provisions of part three posed a serious threat to the acceptability of the draft as a whole, but in particular of part one, to which he personally was very attached. That was basically why he was opposed to them.

39. He would point out to Mr. Thiam, who had challenged him on the point, that article 5, paragraph 2, indirectly but very clearly encouraged States to resort to countermeasures, which everyone knew were the weapon of the strong and only the strong; what was more, as Mr. Mikulka had also pointed out, the cost of arbitration was an aggravating factor for the poor States. He added that he agreed with Mr. Mikulka's proposal to the effect that at least one article should spell out the relationship between the system envisaged and other existing dispute settlement mechanisms, as he himself had suggested, unsuccessfully, in the Drafting Committee.

40. If, as Mr. Bowett had said, it would be nonsense to specify the conditions under which ICJ might be seized, the precautions taken by the Commission in 1958 to

limit and carefully specify the conditions for going to ICJ regarding the validity of arbitral awards were also nonsense. In his opinion, it would be wise to provide an exhaustive list of those conditions, as Mr. Barboza had proposed.

41. If, unfortunately, the draft were adopted, it would be useful at least to change the title of article 7 to read as Mr. Bowett or Mr. Razafindralambo had suggested. He was also in favour of the amendment proposed by Mr. Bennouna to limit the time-frame for recourse to ICJ.

42. The argument put forward by those in favour of the draft articles was that they were "for" the compulsory settlement of disputes. He too favoured such settlement, but he did not feel vested with the powers of a legislator to make a judgement in favour of the system that appeared to him the best in the abstract. The Commission's essential tasks were the codification and progressive and reasonable development of international law. However, the proposed draft articles were not reasonable. Accordingly, he requested that the text should be put to a vote. If the Commission refused, he was prepared to accept it, provided the report to the General Assembly clearly stated that the Commission had not been able to adopt the draft articles by consensus, a consensus to which he was firmly opposed, and that the arguments of the opponents, even if they were a minority, appeared in the report.

43. Mr. ARANGIO-RUIZ (Special Rapporteur), referring to Mr. Pellet's comment about the need for the report to the General Assembly to state clearly that part three was only optional in character, pointed out that everything the Commission submitted to the General Assembly and to Governments was ultimately optional in that it would be ultimately for States to decide whether given provisions of a project should be optional or compulsory. Accordingly, there was no point in saying so. One member had expressed concern about the scope of the draft articles and he would point out that disputes would plainly involve not only secondary rules but also primary ones. It was apparent from article 1 that the interpretation or application of the draft articles inevitably involved primary rules. As to the relationship with dispute settlement systems in other conventions, articles 3 and 5 expressly stated that a dispute could be submitted to conciliation or arbitration if it had not been settled "by agreement" or "failing an agreed settlement" and "no mode of binding third-party settlement has been instituted". Accordingly, if other settlement procedures did exist and had proved their worth, there was no reason not to use them. Obviously, it was "*lex specialis*" that would apply.

44. Some members had expressed reservations about article 7 because it did not specifically establish the period of time in which a party to a dispute could challenge the validity of an arbitral award. In his opinion, it did not lie with the Commission to establish the period. Only the Court could determine whether it was too late to challenge the validity of an arbitral award. The Commission should only be concerned with establishing the rules that were to apply when the challenge was initiated.

45. Lastly, with reference to the change proposed by Mr. Al-Baharna to paragraph 2 of article 7 for the purpose of drawing a distinction between complete and partial nullification of the award, he would suggest, to settle the problem, that the words "The issues in dispute" should be replaced by "Any issue in dispute", which would allow for every possibility.

46. Mr. YANKOV (Chairman of the Drafting Committee) thanked all members who had taken part in the discussion for their useful and constructive criticism and for their suggestions. The proposals made could be classed in three groups. First, there were proposals for drafting changes that could be accepted immediately; secondly, proposals that could take the form of observations in the commentary; and thirdly, proposals and observations that it would be more useful to consider on second reading of the draft. The summary records could be useful in obtaining an accurate idea of the proposals made in connection with each article.

47. Generally speaking, he would point out, more particularly to Mr. Rosenstock, that part three had not been invented by the Drafting Committee. It was the result of a decision taken by the Commission itself several years earlier and approved by the General Assembly. Consequently, it was too late to go back on it. Moreover, it should be remembered that the articles were being discussed on first reading and it would be advisable to await the reaction of Governments. Perhaps it would prove necessary, as Mr. Mikulka had suggested, to insert a general clause clarifying the relationship between the draft and other multilateral conventions.

48. Considering article by article the comments and proposals made during the debate, he said that, in regard to article 1, he had duly noted Mr. Tomuschat's comment about the ambiguity of the phrase "the interpretation or application of the present draft articles". However, it seemed difficult at the present stage to reformulate the article entirely and he therefore proposed that either the commentary should include explanations about possible problems concerning the distinction between primary and secondary rules or to revert to the matter on second reading.

49. In regard to article 2, he welcomed the proposal by Mr. Idris to delete the word "other", which was redundant. Article 3 had not given rise to any special comment.

50. As far as article 4 was concerned, he could not agree to the proposal by Mr. Idris to delete the words "or otherwise" from paragraph 1. As the Drafting Committee had explained in its report, inquiry was not the only means the Conciliation Commission could use to collect information. It could also request reports, examine documents, hear witnesses, and so on. The words "or otherwise" served a purpose and could be clarified in the commentary.

51. With reference to article 5, Mr. Al-Baharna's proposal that the words "by agreement" should be deleted from paragraph 1 and replaced by "unilaterally" was not anodyne. It was a substantive change that concerned the entire philosophy of arbitration. The matter in hand was conventional arbitration, which presupposed an agreement.

52. Mr. AL-BAHARNA said he had not asked for the text to be changed. He had simply tried to draw a parallel with article 5, paragraph 2, and specify that, failing an agreement, either party could submit the dispute to an arbitral tribunal.

53. Mr. YANKOV (Chairman of the Drafting Committee) said that he took note of Mr. Al-Baharna's explanation. Again, with reference to article 5, Mr. Razafindralambo had proposed the addition at the end of each of the article's two paragraphs of a formulation specifying that the parties were free to choose the kind of arbitral tribunal to which they submitted their disputes. That was not necessary. It went without saying that the parties had such freedom of choice. The most one could do would be to emphasize it in the commentary.

54. Unlike article 6, on which no proposal had been made, article 7 had been the subject of much comment. To begin with, he suggested that the title should be changed to the one previously adopted by the Drafting Committee, namely "Validity of an arbitral award", for that was what the whole article was about. As to the proposal by Mr. Bennouna and several other members to insert a time-frame after the word "If", in the first line of paragraph 1, he would suggest that the idea could be developed in the commentary. However, it was his understanding that several members wanted to make further comments on that point.

55. Mr. AL-BAHARNA said it might be better to clarify the meaning of the word "timely", which was employed in article 7, paragraph 1.

56. Mr. ROSENSTOCK said that a clarification might be given in the commentary.

57. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, to make the paragraph more logical and specify the time from which the period of three months was to commence, the word "award", in the second line, could be replaced by "challenge".

58. Mr. PELLET said that, in his opinion, it was a substantive change and he could not agree to it.

59. The CHAIRMAN suggested that the existing formulation should be adopted. Every word had been weighed carefully by the Drafting Committee.

60. Mr. BENNOUNA, supported by Mr. ROSENSTOCK, said that the Special Rapporteur's proposal would indeed have the merit of making things more logical. It would be clear that the three-month period commenced when the award was challenged. However, the challenge itself should not take place too long after the award was made, but that could be explained in the commentary.

61. Mr. EIRIKSSON said that, in view of the Special Rapporteur's explanations, he saw no reason why the word "award" should not be replaced by "challenge". It was in fact a minor drafting change.

62. The CHAIRMAN said that, if he heard no objection, he would take it that members agreed to the change. He invited the Chairman of the Drafting Committee to continue his summing-up of the discussion.

63. Mr. YANKOV (Chairman of the Drafting Committee) said that two points had arisen in connection with paragraph 2 of article 7. The first was a drafting matter. Further to the comments by Mr. Al-Baharna, supported by a number of other members, the Special Rapporteur had suggested that, at the beginning of the paragraph, the words "The issues in dispute" should be replaced by "Any issue in dispute". The change seemed to command unanimity and he would take it that the Commission had agreed to it.

64. A second, more important, point concerned the reference to article 6 at the end of the paragraph. It had been pointed out that the reference could well lead to confusion and that it would be better to refer to article 2 of the annex. Mr. Razafindralambo, on the other hand, had thought it preferable to reformulate the paragraph. The proposal was attractive, but it could raise further problems. Accordingly, in view of the fact that the Commission would revert to the draft articles on second reading, he would suggest that, for the time being, the Commission should take note of Mr. Razafindralambo's comments so that they would be borne in mind at the next session and that only the first drafting change proposed for the paragraph should be adopted.

65. Mr. AL-BAHARNA said that, for greater clarity, it would be better to replace the words "The issues in dispute" by "Any issues in dispute". In addition, if the Commission decided to replace "award" by "challenge", that should be taken into account in the title of the article, which should then logically read "Challenge to the validity of an arbitral award".

66. Mr. BENNOUNA said that the French version of article 7, paragraph 1, was clumsy. The words "*par l'une ou l'autre*" should be replaced by "*du fait de l'une ou de l'autre*".

67. The CHAIRMAN said that he endorsed the proposal by the Chairman of the Drafting Committee to revert to Mr. Razafindralambo's suggestion on second reading of the draft articles. At that time, Mr. Al-Baharna's comments could also be looked at more closely.

The meeting rose at 1 p.m.

2421st MEETING

Tuesday, 18 July 1995, at 3.15 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda,