Document:-

A/CN.4/L.37

Alternative Text for Paragraphs 5-15 of Document A/CN.4/L.3 Submitted by Mr. Georges Scelle

Topic:

Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-

1952, vol. I

interpretation of the award. He accordingly proposed the substitution of the word " incidentally " for the word " again ".

It was so agreed.

89. Mr. HUDSON proposed the deletion of the word " automatically " in the second sentence; that expression went too far.

90. The CHAIRMAN said that he would vote in favour of Mr. Hudson's proposal unless, as an alternative, the word " automatically " were replaced by the words " ipso facto ".

91. Mr. YEPES opposed Mr. Hudson's proposal.

4 votes were cast in favour of Mr. Hudson's proposal and 4 against, with 4 abstentions; it was accordingly rejected.

92. Mr. SCELLE proposed that reference to the Standing Drafting Committee in the third sentence be eliminated by the deletion of the words " referred this article to the Drafting Committee to be put into final form, and the Committee " after the words " The Commission ".

It was so agreed.

93. Mr. YEPES said that the reference to article 3 was unnecessary; he proposed the deletion of the words " it was impossible to apply article 3 of the preliminary draft, which involved too much delay for completion of the proceedings within a reasonable time ".

94. Mr. HUDSON proposed the substitution of the words " it was necessary to provide for recourse to the International Court of Justice, unless the parties should agree otherwise " for the words " it was impossible to apply . . . hence the recourse to the International Court of Justice ".

95. Mr. LAUTERPACHT suggested that Mr. Hudson's amendment went no further than to repeat the provisions of article 28.

96. Mr. YEPES proposed the deletion from Mr. Hudson's amendment of the words " unless the parties should agree otherwise ".

97. Mr. SCELLE said he could accept Mr. Hudson's amendment as amended by Mr. Yepes. He had only referred to article 3 of the preliminary draft because it contained provisions on the constitution of the tribunal.

98. The CHAIRMAN thought that, if Mr. Yepes' amendment were accepted, there was a danger of inconsistency between article 28 and its comment.

Mr. Yepes' amendment to Mr. Hudson's text was rejected by 6 votes to 2, with 1 abstention.

Mr. Hudson's amendment was adopted.

The meeting rose at 6.10 p.m.

180th MEETING

Tuesday, 5 August 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 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/L.35, A/CN.4/L.36, A/CN.4/L.37) (*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 29 [30, 39 and 40] [2]

First paragraph

2. Mr. HUDSON suggested that the word " strongly " be deleted from the first sentence.

It was so agreed.

[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 three paragraphs of the comment read as follows:

" With regard to the validity of the award and " remedies " for its shortcomings, the Commission was strongly in favour of allowing the award to be revised or an application to be made for its annulment (cassation), but deliberately ruled out appeals on the grounds of misapplication of the law. The Commission accordingly followed the traditional practice by which an arbitral award is final, subject, however, to the

3. Mr. HSU suggested that, in that case, the word " deliberately " be also deleted.

It was so agreed.

4. Mr. HUDSON suggested that, in the English text of the second sentence, the word " accordingly " be either deleted or replaced by the word " thus ".

It was agreed that the word " accordingly " should be replaced by the word " thus " in the English text.

5. Mr. LIANG, Secretary to the Commission, suggested that, in order to bring the English text of the second sentence into line with the French, the words " by which an arbitral award is final " be replaced by the words " that an arbitral award should be final ".

It was so agreed.

6. Mr. HUDSON suggested that the assertion " — a recent conquest made by jurisdictional arbitration over diplomatic arbitration " was open to question and should be deleted.

It was so agreed.

7. Mr. LAUTERPACHT pointed out that the whole of the first paragraph applied to article 30 as well as to article 29. He suggested therefore that the first clause be amended to read simply :

" With regard to the remedies against the award,"

It was so agreed.

Second paragraph

8. Mr. LAUTERPACHT suggested that the words " Application for " be deleted from the English text.

It was so agreed.

9. Mr. HUDSON suggested that the words " was accepted as self-evident by practically all the members of the Commission " be replaced by the words " was considered essential by the Commission ".

It was so agreed.

10. Mr. SCELLE pointed out that the reference to article 9 (*g*) should now be to article 9 (*h*).

11. Mr. HUDSON suggested that the whole of the second sentence be deleted. As it read it was incorrect ; article 9 (*h*) did in fact give the parties the option of ruling out the possibility of revision in the *compromis*.

12. Mr. LAUTERPACHT presumed that the special rapporteur attached importance to that sentence, and would wish it to be retained. He too considered that it should be retained, though he felt that the words " It was decided " were perhaps too strong ; the drafting could be improved in certain other respects too.

13. Mr. YEPES agreed that the second sentence should be retained, as it concerned one of the fundamental points of the whole draft. It was quite clear from the summary records that the Commission had been of the view that the parties should not have the option of ruling out the possibility of revision.

14. After some discussion, Mr. LAUTERPACHT proposed that the second sentence be amended to read as follows :

" The sense of the Commission was that, with regard to both revision and annulment of the award, the provisions of the draft on the subject are of such importance as to prevent the parties from excluding recourse to these remedies, notwithstanding the discretion which article 9 (*h*) leaves to them in the matter of the procedure of revision and annulment."

15. Mr. HUDSON said that he would vote against Mr. Lauterpacht's proposal, which, in his view, did not correspond with the texts the Commission had adopted.

Mr. Lauterpacht's proposal was adopted by 6 votes to 1 with 3 abstentions.

Third paragraph

16. Mr. HUDSON proposed the deletion of the second sentence, which he regarded as an inaccurate statement.

17. Mr. LAUTERPACHT agreed that the second sentence was controversial. In his view a judgment was final as soon as it had been rendered, although the question of its finality could be subsequently re-opened. The words " or rather that there really is no judgment " were also a possible source of confusion. He supported the proposal that the sentence be deleted.

18. Mr. SCELLE said that he had no objection to the deletion. For all who were familiar with the concept of arbitration, the principle laid down in article 29 was self-evident.

It was agreed to delete the second sentence of the third paragraph.

Fourth paragraph

19. Mr. SCELLE and Mr. HUDSON suggested the deletion at the end of the paragraph of the words " rather than to the procedure laid down in article 3 of the preliminary draft, which was much too lengthy ".

It was so agreed.

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possibility of its revision or annulment — a recent conquest made by jurisdictional arbitration over diplomatic arbitration.

" Application for revision, as laid down in Article 61 of the Statute of the International Court of Justice, was accepted as self-evident by practically all the members of the Commission. It was decided not even to allow the parties the option of ruling out the possibility of this in the *compromis* (see Article 9 (g)).

" The definition of " new fact ", which by now has become classic, has been inserted in Article 29. It implies that the judgment cannot become final — or rather that there really is no judgment — unless account is taken of the principle of law contained in the English dictum : " Nothing is settled until it is settled right ". The Commission was anxious, however, that the time-limit for revision should be very short (six months), even though the new fact might only come to light after the expiry of this period."

Fifth paragraph [3]

20. Mr. HUDSON said that he was by no means sure that paragraph 3 of article 29 really left the tribunal the option of combining the two essential stages of the revision procedure.

21. Mr. SCELLE said that it was not entirely clear from the summary records what had been the Commission's intention on that point. He would be perfectly prepared to accept the opposite interpretation of paragraph 3 to that which he had placed on it. It was indeed contrary to French procedure that the two stages should be combined. The simplest way out of the difficulty would be to delete the fifth paragraph of the comment.

22. Mr. LAUTERPACHT observed that the effect of its deletion would be to leave the question of interpretation open. There was however no great disadvantage in that course.

It was agreed to delete the fifth paragraph.

Comment on article 30 [42]

First paragraph [4]

23. Mr. SCELLE proposed that the first paragraph be deleted as unnecessary.

24. Mr. YEPES thought it was important to note that the Commission had accepted the principle of applications for annulment. He proposed, therefore, that the first paragraph be replaced by the following text:

> "The Commission accepted the principle of applications for annulment, although this principle is hardly compatible with the practice of diplomatic arbitration."

25. Mr. LAUTERPACHT said that he could not support Mr. Yepes' proposal, because he did not think there was any agreement on what was meant by the term "diplomatic arbitration". In his view arbitration had been largely judicial in nature since the beginning of the nineteenth century.

26. Mr. LIANG (Secretary to the Commission) suggested that the text proposed by Mr. Yepes would only have been necessary if the Commission had based its draft on the principles of diplomatic arbitration.

27. Mr. ZOUREK pointed out that the term "diplomatic arbitration" was defined neither in the articles themselves, nor in the comments, nor, indeed, in any of the special rapporteur's reports. He personally agreed that diplomatic arbitration, as he understood the term, had gone out with the Middle Ages. Under present arbitration law, all arbitration rested on the basis of the existing law.

28. Mr. KOZHEVNIKOV felt that the distinction between diplomatic arbitration and judicial arbitration was somewhat artificial. It was not to be found either in the Charter of the United Nations or in any international convention. He accordingly agreed that use of the term "diplomatic arbitration" was inappropriate.

29. Mr. SCELLE observed that in a number of comparatively recent cases of so-called arbitration, the Casablanca dispute between France and Germany in 1908 for example, the element of diplomatic settlement had been preponderant. The distinction between diplomatic arbitration and judical arbitration had been clearly stated by Politis. He still felt, however, that it was preferable to delete the whole of the first paragraph.

30. Mr. YEPES said that, although to his mind the question was clear, he realized that the Commission had not time to discuss it. He therefore withdrew his amendment.

It was agreed that the first paragraph be deleted.

Second and third paragraphs [5]

31. Mr. LAUTERPACHT proposed that the second and third sentences of the second paragraph be deleted as unnecessary.

32. The third paragraph was misleading. The Commission had refrained from listing any other grounds for annulment in order to avoid distracting attention from the three it had listed. He proposed, therefore, that the third paragraph be amended to read as follows:

> "It was considered that other causes of annulment, such as the nullity of the *compromis*, were not of sufficient importance to necessitate express inclusion in the draft."

33. Mr. HUDSON agreed that the second and third sentences of the second paragraph should be deleted.

34. He would propose, however, that the third paragraph be not amended but deleted altogether, since it had no bearing on the text.

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[3] The fifth paragraph read as follows:

"Paragraph 3 indicates the two essential stages of the revision procedure, but leaves the tribunal the option of including in one and the same award the judgment as to admissibility and the judgment on the substance of the case."

[4] The first paragraph read as follows:

"Just as the Commission declined to allow appeals although some of its members took a contrary view, it would seem to have been a concern for formal and traditional logic which induced it to accept the principle of applications for annulment, a principle hardly compatible with the practice of diplomatic arbitration."

[5] These paragraphs read as follows:

"The Commission recognized only three causes justifying annulment: action *ultra vires*, corruption on the part of an arbitrator, and violation of a fundamental rule of procedure. Moreover, it carefully refrained from trying to define what these various grounds of annulment might cover — and rightly so, since in the preliminary draft, only the question of procedure is involved. Hence the judges are left complete latitude in regard to the decision.

"It may be noted that the Commission purposely excluded from the grounds for annulment the possibility of the *compromis* being declared null and void."

35. Mr. YEPES pointed out that, if the second and third sentences of the second paragraph were deleted, the first must be deleted too, since it merely repeated the text of the article. Consequently, before the Commission voted on the deletion of those two sentences, he wished to draw its attention to the likely effect on public opinion of there being no comment on one of the most important articles in the whole draft.

The proposal to delete the second and third sentences of the second paragraph was adopted by 6 votes to 3, with 2 abstentions.

36. In answer to Mr. Yepes, the CHAIRMAN pointed out that, if Mr. Lauterpacht's amendment to the third paragraph were adopted, his text could quite appropriately be preceded by the first sentence of the second paragraph. He must, however, first put to the vote Mr. Hudson's proposal that the third paragraph be deleted.

Mr. Hudson's proposal was rejected by 7 votes to 2, with 2 abstentions.

37. The CHAIRMAN said that he would next put to the vote Mr. Lauterpacht's amendment to the third paragraph.

38. Mr. SCELLE pointed out that the question of the nullity of the *compromis*, referred to in Mr. Lauterpacht's amendment, had not been discussed by the Commission, for the very good reason that it was a general question bound up with the law of treaties.

39. Mr. CÓRDOVA felt that Mr. Lauterpacht's amendment implied that the only reason for excluding nullity of the *compromis* as a ground for annulling the award was the one stated. In his view, that was not so.

40. Mr. LAUTERPACHT said that several earlier drafts on arbitral procedure had provided for annulment of the award on the grounds of nullity of the *compromis*. The only reason why the Commission had not so provided was in fact the reason he had given.

41. Mr. HUDSON said he thought it most unlikely that a State would challenge the validity of the *compromis* after the whole procedure had been followed and the award rendered against it.

42. Mr. SCELLE recalled that it was an essential feature of the whole draft that the importance of the *compromis* should be limited. There was no reason why nullity of the *compromis* should affect the subsequent procedure at all.

43. Mr. LAUTERPACHT said that, as his amendment appeared to be giving rise to a lengthy discussion, he would withdraw it.

44. Mr. HSU expressed his regret that Mr. Lauterpacht had withdrawn his amendment, and sponsored it himself.

The amendment was rejected by 4 votes to 3, with 3 abstentions.

45. The CHAIRMAN observed that, as both Mr. Hudson's proposal and Mr. Lauterpacht's amendment had been rejected, the third paragraph remained as it stood.

46. Mr. KERNO (Assistant Secretary-General) pointed out that there was nothing in rule 130 of the rules of procedure of the General Assembly to preclude the Commission from rejecting a text when put to the vote as a whole after parts of it had been approved.

47. Mr. CÓRDOVA said he was opposed to the third paragraph because it implied that the tribunal was empowered to declare the *compromis* null and void.

48. Mr. SCELLE agreed with Mr. Córdova and felt that his point might be met if the third paragraph were redrafted in such a way as to indicate that the Commission did not include nullity of the *compromis* among the grounds for annulment. If some such wording found no favour it would be best to delete the whole paragraph.

49. Mr. LIANG (Secretary to the Commission) referred Mr. Córdova to the second sentence in the second paragraph and suggested that his objections to the third paragraph were unfounded.

50. Mr. KERNO (Assistant Secretary-General) suggested that the real obstacle to Mr. Córdova's inability to accept the third paragraph was the use of the word " declared ".

51. The CHAIRMAN suggested the following wording for the third paragraph :

" It may be noted that the Commission excluded from the grounds for annulment the nullity of the *compromis.*"

52. Mr. LAUTERPACHT doubted whether such a text would serve any useful purpose. On the other hand the omission of any comment at all on article 30 would be a grave defect since that article offered a solution to a problem which had been troubling governments and international lawyers for a whole generation. In comparison the question of the nullity of the *compromis* was of very minor importance.

The Chairman's suggested wording for the third paragraph was accepted.

53. Mr. YEPES said it was inadmissible that the Commission should submit article 30 without any comment. He therefore proposed that the second paragraph be replaced by the following text :

" The Commission recognized only three causes justifying annulment : action *ultra vires*, corruption on the part of an arbitrator and violation of a fundamental rule of procedure. However, since the draft deals solely with arbitral procedure, the Commission did not attempt to define what these various grounds of annulment might cover. Hence the judges are left complete latitude in regard to the decision to be taken."

54. Mr. LAUTERPACHT suggested that the second sentence in Mr. Yepes' amendment was unnecessary; the three grounds for annulment listed in article 30 did not require definition.

55. Mr. SCELLE said that Mr. Yepes was right in drawing attention to the fact that the draft related to procedure only; it was for the tribunal to decide on the substance of a claim for annulment.

56. Mr. ZOUREK suggested that all that needed to be made clear in the comment on article 30 was whether the grounds enumerated in it were exhaustive or not. It would be remembered that the Commission had agreed that the parties were free to provide in the *compromis* for other grounds for annulment.

Mr. Yepes' amendment to the second paragraph was adopted by 5 votes to 1, with 4 abstentions.

57. Mr. ZOUREK pointed out that several members of the Commission had voted against Mr. Hudson's proposal for the deletion of the third paragraph in the hope that a more satisfactory text would be evolved. As that hope had been disappointed he moved the reconsideration of the third paragraph.

Mr. Zourek's motion was carried.

58. Mr. ZOUREK proposed the deletion of the third paragraph.

59. Mr. LAUTERPACHT said he was opposed to the third paragraph because, as at present worded, it was misleading.

60. Mr. SCELLE supported Mr. Zourek's proposal on the ground that the substance of the third paragraph was already covered in Mr. Yepes' text adopted to replace the second paragraph.

Mr. Zourek's proposal for the deletion of the third paragraph was adopted.

Comment on articles 31 and 32 [43 and 44] [6]

61. Mr. SCELLE said he wished to withdraw the comment on articles 31 and 32 in favour of the following text:

> "The Commission decided in favour of making the period for application by either party for annulment of the award a very short one. But it decided that this very short period should apply only to the grounds of annulment stated in sub-paragraphs (*a*) and (*c*) of article 30. Consequently, no time-limit is prescribed for an application for annulment on the ground of corruption on the part of an arbitrator.
>
> "The discussions made it clear that the parties would at all times be free, provided they were in agreement, not to proceed with the execution of the award."

His purpose was to explain the Commission's decision concerning the scope of article 31, paragraph 2, taken after Mr. Lauterpacht had pointed out that corruption of a member of the tribunal might become apparent much later than sixty days after the rendering of the award.

62. He had purposely not commented on article 31, paragraph 3, because many members had felt that provision to be an unfortunate one.

63. Article 32 did not call for comment.

The special rapporteur's new text for the comment on articles 31 and 32 was accepted.

Introduction to the Draft on Arbitral Procedure

64. The CHAIRMAN invited the Commission to take up the introduction to the Draft on Arbitral Procedure. In document A/CN.4/L.35, paragraphs 1 to 4 dealt with purely procedural matters whereas paragraphs 5 to 13 contained a commentary on the scope and purpose of the draft.[7] The Commission had before it two texts (A/CN.4/L.36 and A/CN.4/L.37)[8] submitted by Mr. Lauterpacht and Mr. Scelle to replace the latter paragraphs.

65. Mr. KOZHEVNIKOV wondered whether it was appropriate for the introduction to deal with certain general matters already referred to in the detailed comments on individual articles. The introduction should be confined to a brief factual account of the Commission's work on arbitral procedure. He did not, however, intend to make a formal proposal in that sense.

66. The CHAIRMAN stated that the introduction formed part of the commentary on the draft. He pointed out that paragraphs 1-4 were to be found in document A/CN.4/L.35.

[6] The comment read as follows:

"These two articles might equally be fused into one.

"The Commission decided in favour of making the period for the application by either party for annulment of the award a short one (60 days).

"The discussions made it clear that the parties would at all times be free, provided they were in agreement, not to proceed with the execution of the award. Obviously it would be out of place for the litigants to set aside a judgment rendered by their judges; but there is no reason why they should not agree to refrain from applying it.

"The Commission felt that the application for annulment should stay execution, unless otherwise decided by the International Court of Justice, the judicial body designated to deal with the application (cf. Article 61 of the Statute of the International Court of Justice, which adopts the contrary procedure). By this decision either of the parties can stay execution of the award, possibly for a long time, and it may appear to conflict with article 27. The obligation under article 32 to set up a new tribunal, and if necessary to make use for this purpose of article 3 of the preliminary draft, would make it possible for the party losing the case to stay execution of the award indefinitely, unless the Court takes appropriate action."

[7] For text of the introduction in document A/CN.4/L.35, see summary record of the 175th meeting, footnote to para. 14.

[8] Mimeographed documents only. Document A/CN.4/L.36 was issued in English only. Document A/CN.4/L.37 was issued in French only. They were almost identical and were incorporated, with drafting changes, in the "Report" of the Commission as paras. 15—24 of Chapter II (see vol. II of the present publication). Drafting changes are given in the present summary records.

Paragraphs 1-3 [11-13] *

No observations.

Paragraph 4 [14]

67. Mr. el-KHOURI said that paragraph 4 rightly referred to the " secondary preliminary draft on arbitral procedure " presented by the special rapporteur. But the adjective " preliminary " should not be used to describe the draft adopted by the Commission, since governments could not be expected to submit definitive comments on a preliminary draft.

68. Mr. KOZHEVNIKOV disagreed. As the special rapporteur had indicated on several occasions, the present draft did not represent a final text. It should therefore be described as " this preliminary draft " throughout the report.

69. Mr. LIANG (Secretary to the Commission) said that according to article 21 of the Commission's Statute it transmitted " drafts ", not " preliminary drafts ", to governments for their comments. Mr. el-Khouri's argument was therefore well-founded.

70. Mr. ZOUREK asked how it would be possible to distinguish between the text adopted by the Commission at its present session and the final one adopted after consideration of comments by governments.

71. The CHAIRMAN pointed out that any danger of confusion between the different drafts was obviated by the explanation to be found in the final sentence of paragraph 4.

72. Mr. SCELLE considered that the Commission ought to adhere to the terminology of its Statute.

It was so agreed.

Introductory discussion on paragraphs 5 to 14 [15-24]

73. Mr. LAUTERPACHT said that his proposed alternative text (A/CN.4/L.36) for paragraphs 5 to 14 required some verbal amendments.

74. Paragraph 5 should refer to article 20, not article 24, of the Commission's Statute.

75. In paragraph 12, the word " some " should be inserted after the words " as well as in ".

76. In paragraph 14, the words " governing authority " should be replaced by the words " increasing activity ".

77. Mr. SCELLE said that he had accepted Mr. Lauterpacht's text almost in its entirety. The text (A/CN.4/L.37) issued under his own name departed from it only in paragraphs 8 and 11.

78. He accepted paragraph 14 in Mr. Lauterpacht's text, which had not been prepared in time for insertion in his own.

79. The CHAIRMAN proposed that the Commission examine the two texts before it, paragraph by paragraph.

Paragraph 5 [15]

No observations.

Paragraph 6 [16]

80. Mr. LIANG (Secretary to the Commission) noted a slight discrepancy between the two texts in the third sentence, where Mr. Scelle had omitted the word " essentially ".

81. Mr. SCELLE said he had done so in order to attenuate Mr. Lauterpacht's text. Indeed he would have preferred to omit all mention of provisions *de lege ferenda,* since he considered that none of the provisions in the draft were new. All had been borrowed from existing texts.

82. Mr. HUDSON proposed that paragraphs 5, 6, 9 and 10 in Mr. Lauterpacht's text (15, 16, 19 and 20 in the "Report ") be accepted without further discussion, since the special rapporteur seemed in general agreement with them.

Mr. Hudson's proposal was adopted by 9 votes to none with 2 abstentions.

Paragraph 7 [17]

83. Mr. ZOUREK proposed the insertion of the words " and by arbitrators of their own choice " after the words " in accordance with law ", since that was the second distinctive feature of arbitration.

84. Mr. SCELLE drew the attention of Mr. Zourek to the provisions of article 3, according to which in certain circumstances members of the tribunal were not designated by the parties.

85. Mr. ZOUREK pointed out that that was a remedy to be applied only in extreme cases. The provisions of article 3 did not invalidate his argument.

86. Mr. SCELLE said that, if Mr. Zourek's amendment were adopted, the words " subject to article 3 " would have to be added to it.

87. Mr. ZOUREK pointed out that such an addition would be quite inappropriate ; the first sentence of paragraph 7 referred to the general practice of arbitration.

88. Mr. SCELLE observed that the purpose of paragraph 7 was to draw a distinction between arbitration and conciliation, not to define arbitration.

89. Mr. LAUTERPACHT said he would not support Mr. Zourek's amendment, which detracted from the argument and purpose of paragraph 7.

3 votes were cast in favour of Mr. Zourek's amendment and 3 against, with 4 abstentions; it was accordingly rejected.

* The number within brackets indicates the paragraph number in the " Report ".

Paragraph 8 [18]

90. Mr. SCELLE said that though there was no fundamental difference between the two texts of paragraph 8, he could not accept the wording of Mr. Lauterpacht's, which was neither explicit nor sufficiently authoritative.[9]

91. The paragraph dealt with three essential issues. First, that the obligation to arbitrate did not necessarily derive from the *compromis* but was often anterior to it; second, the question of arbitrability and third, the choice of arbitrators. He wished all three issues to be placed in sharp relief.

92. He was prepared to meet an objection raised by Mr. HUDSON to the expression " nudum pactum " by substituting for it the word " pacte ".

93. Mr. LAUTERPACHT said that he had tried to eliminate the speculative and authoritative elements in Mr. Scelle's text, which he was reluctant to accept owing to the way in which the points had been elaborated. He wondered, for example, how the expression *" le lien juridique liant les parties résultait souvent d'un engagement arbitral pur et simple "* could be conveyed in English.

The meeting rose at 1.10 p.m.

[9] Para. 8 of Mr. Lauterpacht's text (A/CN.4/L.36) read as follows:

" 8. On the other hand, it has been considered that, in the light of experience, it is necessary to adopt provisions for rendering the undertaking to arbitrate — and the arbitral procedure in general — as effective as possible. Thus in the past the efficacy of the undertaking to arbitrate has often been impaired as the result of the absence of legal machinery for determining whether a particular dispute is covered by the treaty of arbitration or in consequence of the inability of the parties to agree on the terms of the *compromis* or the constitution of the tribunal. The Articles of the first two Chapters of the present draft are intended to meet difficulties of this nature."

181st MEETING

Wednesday, 6 August 1952, at 9.45 a.m.

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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 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/L.35, A/CN.4/L.36, A/CN.4/L.37, A/CN.4/L.39) (*continued*)

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

INTRODUCTION TO THE DRAFT ON ARBITRAL PROCEDURE (*continued*)

Paragraph 8 [18] (continued)

2. Mr. LAUTERPACHT reminded the Commission that Mr. Scelle had declared his readiness to amend the second sentence of his alternative text (A/CN.4/L.37), by substituting the word *" pacte "* for the words *" nudum pactum "*. Thus amended, however, the sentence would make very little sense. He hoped the special rapporteur would agree to withdraw it.

3. Mr. HUDSON agreed that the second sentence in Mr. Scelle's text should be deleted, but the remainder had the advantage of being more detailed and explanatory than Mr. Lauterpacht's alternative text (A/CN.4/L.36).[1]

4. Mr. SCELLE withdrew the second sentence in paragraph 8 of his text.[2]

Paragraph 8 of Mr. Scelle's text as amended was adopted by 7 votes to 2.

Paragraph 11 [21]

5. Mr. SCELLE said that there were no substantial differences between the two alternative texts for paragraph 11. He had accepted the last sentence of Mr. Lauterpacht's text, though with some hesitation since it dealt with a matter which the Commission had only considered very superficially.

Mr. Scelle's text for paragraph 11 was adopted by 7 votes to none with 2 abstentions.

* The number within brackets refers to the paragraph number in the " Report ".

[1] See summary record of the 180th meeting, footnote to para. 90.

[2] This sentence read as follows: " Elle a considéré que le lien juridique liant les parties résultait souvent d'un engagement arbitral pur et simple, et que le compromis n'était parfois que la conséquence de ce ' nudum pactum '."

Proposal by Mr. Zourek of two new paragraphs (A/CN.4/L.39) to replace paragraphs 12 and 13 [22 and 23] of the introduction (A/CN.4/L.35)

6. Mr. ZOUREK pointed out that neither of the two alternative texts before the Commission (A/CN.4/L.36 and A/CN.4/L.37) mentioned the two concepts of arbitration, a matter which had been dealt with in the original text of paragraph 12. In order that the report might be both complete and objective, he considered it essential to indicate that there had been two trends of opinion in the Commission. That was all the more important because the commentary did not reflect the differences of view which had emerged during the discussions. To remedy that deficiency he proposed the inclusion in the introduction of two new paragraphs which might conveniently be inserted between paragraphs 5 and 6. The text read as follows :

" As was to be expected, two currents of opinion have arisen in the Commission :

" The first follows the concept of arbitration corresponding to contemporary international law, according to which the sole basis of international arbitration is the agreement of States, which are only amenable to jurisdiction when, and insofar as, they have so agreed. This concept is based on long-standing international practice and follows from numerous international treaties, in particular The Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. According to this view, international arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law, and is an international institution having the following characteristics :

(*a*) the voluntary nature of arbitration,

(*b*) the choice of arbitrators by the parties to the dispute,

(*c*) the determination by the parties of the rules of law to be applied.

" The second concept, which might be called that of judicial arbitration, tends to assimilate arbitral tribunals to true courts of law, by making them as independent as possible of the will of the parties. This is obviously calculated considerably to restrict action by governments, their influence on arbitral procedure and the importance of the *compromis*, in favour of the arbitral tribunal, whose powers become considerably wider than in previous practice.

" The majority of the Commission supported the second view. Hence the present text prescribes compulsory recourse to the International Court of Justice in all cases where the arbitrability of the dispute is contested by the parties and provides for compulsory constitution of the arbitral tribunal even if agreement cannot be reached on the *compromis*. This is also the reason why the text makes frequent provision for recourse to the International Court of Justice when the parties are in disagreement and why it rejects the practice of *non liquet* ".[3]

7. Mr. LAUTERPACHT said he could not support Mr. Zourek's proposal because it was based on the inaccurate contention that the Commission had accepted a new concept of arbitration. Surely the whole draft was based on recognition of the three elements which Mr. Zourek claimed were characteristic of diplomatic arbitration. In fact, they were the characteristics of judicial arbitration. The only innovation contained in the draft was that, in cases of deadlock between the parties, it provided machinery for rendering the existing obligation to arbitrate as efficacious as possible.

8. Mr. SCELLE said that it was less easy for him to criticize Mr. Zourek's text because its content had been dealt with in the original text of paragraph 12 (A/CN.4/L.35).[4] He had decided to exclude that topic from his second text because of its somewhat controversial tinge. The draft articles accepted by the Commission represented a compromise between two trends of opinion which had inevitably arisen in the Commission, but in his opinion there was no need to mention that in the introduction. The Sixth Committee of the General Assembly was composed of persons who were fully competent to choose between the two.

9. Mr. KOZHEVNIKOV supported Mr. Zourek's proposal, which would amplify the introduction and increase its objectivity. It would give readers of the report a more accurate idea of what had taken place in the Commission.

10. Mr. HUDSON agreed with the aim of Mr. Zourek's amendment, since it was necessary to state in plain words the nature of the two trends implicit in the draft. He could not accept, however, the first sentence of the second paragraph, which seemed to go too far. It would be preferable to substitute the words " to some extent independent " for the words " as independent as possible ".

11. Mr. YEPES also considered that some mention should be made in the introduction of the two concepts of arbitration.

12. Mr. FRANÇOIS said he could not accept Mr. Zourek's text as at present formulated, since it could not be claimed that the three characteristics of arbitration listed in the first paragraph were confined to diplomatic arbitration.

13. Mr. ZOUREK disagreed with Mr. François. If the present draft were accepted and took the form of an international convention, arbitration would lose some of its essential features and assume the character of obligatory jurisdiction, somewhat on the lines of that exercised by the International Court of Justice by virtue of the Optional Clause.

14. Mr. SCELLE said that, as Mr. Zourek's proposal had given rise to sharp differences of opinion, he would

[3] This proposal was later issued as doc. A/CN.4/L.39.

[4] See text in summary record of the 175th meeting, footnote to para. 14.

re-introduce paragraph 12 of his original text (A/CN. 4/L.35)[5] amended by the deletion of the second, third and fourth sentences of the second paragraph, beginning: "This principle of so-called diplomatic arbitration"... and ending: "as a source of law", since they implied a criticism of diplomatic arbitration.

15. The text as thus amended expressed no preference for either of the two concepts of arbitration. If it were not accepted he would be forced to vote against Mr. Zourek's proposal on the ground that it failed to recognize the advance made in recent years in the practice of arbitration.

16. Mr. LAUTERPACHT said that another criticism of Mr. Zourek's proposal was that it seemed to imply a contradiction between traditional and judicial arbitration. In his (Mr. Lauterpacht's) opinion, however, the only difference between the two was, that possibly the traditional concept of arbitration was based on the view that there must be agreement between the parties at *every stage* of the dispute in order to make the obligation to arbitrate effective. The Commission had rejected that view.

He then submitted an alternative text for that of Mr. Zourek.

The text read as follows:

"Two currents of opinion were represented in the Commission: the first follows the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, is based on the necessity of provision being made for the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking".

17. Mr. SCELLE and Mr. FRANÇOIS accepted Mr. Lauterpacht's text.

18. The CHAIRMAN considered that the Commission had agreed not to refer in the report to the two concepts of arbitration, since they could not be precisely defined and had certain purely academic features. However, there was nothing to prevent the Commission from reconsidering the matter.

19. Mr. HUDSON said that he had no recollection of the Commission having reached any such decision.

20. Mr. KOZHEVNIKOV suggested that the original text of paragraph 12 might be amplified by Mr. Zourek's proposal.

21. Mr. SCELLE thought it would be difficult to evolve a harmonious whole out of the original text of paragraph 12 and Mr. Zourek's proposal. He would prefer the Commission to adopt Mr. Lauterpacht's new text, which brought out clearly that the whole draft was designed to place the obligation to arbitrate above the will of the parties. Not only did it reflect more accurately than paragraph 12 the discussions and decisions of the Commission but also it was more subtle and achieved finer shades of meaning. Nothing in it could be regarded as controversial.

22. Mr. KERNO (Assistant Secretary General) wondered whether Mr. Zourek might be prepared to withdraw his proposal in favour of Mr. Lauterpacht's text. If not, perhaps it might be possible to agree on a compromise text.

23. Mr. el-KHOURI supported Mr. Lauterpacht's text.

24. Mr. YEPES moved that the Commission first decide the question whether or not mention should be made in the introduction of the two concepts of arbitration.

The question was decided in the affirmative by 6 votes to none with 3 abstentions.

25. The CHAIRMAN *ruled* that further discussion on Mr. Zourek's proposal and Mr. Lauterpacht's text be deferred until the latter had been circulated.

Paragraph 12 [22]

26. Mr. SCELLE said that he had accepted Mr. Lauterpacht's text for paragraph 12.

Mr. Lauterpacht's text was adopted by 8 votes to 2.

Paragraph 13 [23]

27. Mr. SCELLE said that he had accepted Mr. Lauterpacht's text for paragraph 13.

28. Mr. HUDSON, referring to the second sentence, said he doubted whether "most" of the provisions of the draft were qualified by the recognition of the admissibility of alternative solutions agreed upon by the parties. He proposed that the word "many" be substituted for the word "most".

29. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Hudson's amendment conformed entirely with Mr. Scelle's text for that sentence.

Paragraph 13, as amended, was adopted by 8 votes to none, with 2 abstentions.

Paragraph 14 [6]

30. Mr. SCELLE said that he accepted Mr. Lauterpacht's text for paragraph 14.

[5] *Ibid.*

[6] Paragraph 14 of document A/CN.4/L.36 read as follows: "14. The Commission deems it at present premature to express an opinion as to the various methods contemplated in Articles 17 and 23 of the Statute, for giving formal sanction to the final draft which may emerge from the deliberations of the Commission and the General Assembly. Yet it believes that the adoption of the draft code of arbitral procedure is bound to be of usefulness. Such approval need not, in the first instance, assume the form of a convention. Even if approved through some less formal text or procedure, the draft — which is based both on past practice and the

31. Mr. HUDSON proposed the deletion of paragraph 14. It was altogether premature at the present stage to express any opinion as to the final form which the draft would take.

32. Mr. KOZHEVNIKOV agreed with Mr. Hudson. Paragraph 14 was entirely inappropriate in the introduction. Even if it were possible to endorse such an evaluation of the work done, it was neither timely nor proper for the Commission to do so. Furthermore, as the Commission was aware, he regarded the draft as marking a retrogression rather than an advance.

33. Mr. SCELLE contended that such a paragraph would be useful, since the Commission should not remain indifferent to the fate of its work. The introduction should close on a hopeful note, and it was fitting for the Commission to declare now that the draft represented an advance in international law.

34. Mr. LIANG (Secretary to the Commission) suggested that it was necessary to substantiate the argument in paragraph 14 that the adoption of the draft was bound to be useful. Again, the text might be modified in order to avoid confusion between the present and final drafts on arbitral procedure. That could be done by the substitution of the word " a " for the word " the " before the words " draft code ", and the insertion of the words " along the lines of this document " after the words " arbitral procedure " in the second sentence.

35. Mr. FRANÇOIS said that he had no objections to the substance of paragraph 14. The view stated in the third sentence was perhaps too modest. The decisions of the Commission itself had a certain weight even if they did not result in the adoption of an international convention. However, he did not believe that the inclusion of such a paragraph in the introduction was opportune at the present stage in the Commission's work. To express enthusiasm for the results so far achieved would be premature. That could only be done when the work had been completed.

36. Mr. LAUTERPACHT observed that no one had raised substantial objections to paragraph 14, except Mr. Kozhevnikov and Mr. Hudson, who had dissociated themselves from the draft as a whole. The purpose of the paragraph was to place the subject in historical perspective and to record that the Commission had not merely produced a repetition of existing international instruments.

37. He accepted the Secretary's amendments to the second sentence, and also proposed the insertion of the word " eventual " before the word " adoption " in the same sentence.

38. In order to meet Mr. François' objection to the third paragraph, he proposed that the opening of the fourth sentence be redrafted to read: " Whether approved or not by some less, etc.".

39. Mr. SCELLE, replying to Mr. François, said that paragraph 14 struck a note of optimism but certainly not of enthusiasm. It was surely not inappropriate for the Commission to express a hope that the draft would be useful.

40. Mr. KERNO (Assistant Secretary-General) said that it would be premature to adopt paragraph 14 in its present form. The Commission could not at present decide what was to be recommended to the General Assembly.

41. Mr. FRANÇOIS said that, as the report was to be circulated to Governments for comment, it was hardly fitting for the Commission to express the view that the draft it contained was bound to be useful.

42. Mr. ZOUREK considered that it would be presumptuous for the Commission to put forward any opinion on the value of a draft which was essentially provisional and would have to be reconsidered in the light of comments by governments.

43. Mr. el-KHOURI felt that there was little point in paragraph 14, since the General Assembly was not going to examine the present draft. Governments should be left to form their own views on it.

44. Mr. LAUTERPACHT felt that paragraph 14 was of little value unless it was generally approved by the Commission. In the circumstances, therefore, he would withdraw it, if Mr. Scelle agreed. He would, however, point out to Mr. François that he did not think it was presumptuous for the Commission to ask governments to devote the necessary time to examining the draft articles it had prepared and to state at the same time that, in its view, the adoption of a code of arbitral procedure would be useful.

45. Mr. SCELLE agreed with Mr. Lauterpacht that paragraph 14 would only serve a useful purpose if it reflected the general view of the Commission. In the circumstances he agreed, albeit regretfully, that it should be withdrawn.

Proposal by Mr. Zourek of two new paragraphs (A/CN.4/L.39) to replace paragraphs 12 and 13 of the Introduction (A/CN.4/L.35) (resumed from paragraph 25 above)

46. The CHAIRMAN drew attention to the texts proposed by Mr. Zourek (A/CN.4/L.39) and Mr. Lauterpacht.[7] Mr. Zourek had now withdrawn the third sentence of the first paragraph of his proposal and agreed to amend the words " as independent as possible ", in the fourth sentence, to read " very largely independent ".

lessons to be derived from it — may be of distinct utility as affording a guide for the drafting and interpretation of instruments creating the obligation to have recourse to arbitration. In conjunction with the governing authority and authority of the International Court of Justice, some such codification and development of the law of arbitral procedure is bound to serve the cause of international justice."

[7] See paras. 6 and 16 above.

47. He asked whether Mr. Zourek and Mr. Lauterpacht had been able to agree on a joint text.

48. Mr. LAUTERPACHT replied in the negative.

49. Mr. ZOUREK said that there was a fundamental difference between his text and that proposed by Mr. Lauterpacht. Mr. Lauterpacht appeared to take the view that both currents of opinion reflected existing international law. He (Mr. Zourek) could not agree. It seemed clear to him that existing international law did not provide, for example, for compulsory recourse to the International Court of Justice in all cases where the arbitral nature of the dispute was contested, for compulsory constitution of the arbitral tribunal in the event of there being no agreement on the *compromis*, or for interim measures of protection other than at the request of the parties. As the special rapporteur himself had often stressed, many of the provisions contained in the draft articles were *de lege ferenda*, and could only be binding on States which accepted them.

50. Mr. el-KHOURI agreed that it was impossible to combine the texts proposed by Mr. Zourek and Mr. Lauterpacht. The former's views were basically opposed to the concept underlying the whole draft. For that reason he would vote in favour of Mr. Lauterpacht's text.

51. Mr. KOZHEVNIKOV also agreed that the two texts could not be reconciled. One of the two currents of opinion which had been represented in the Commission was in accordance with existing international law, the other one against it. His own views were based on existing international law, and he believed that it would be wrong for the Commission to depart from it.

52. The CHAIRMAN put Mr. Zourek's proposal, as amended, to the vote.

Mr. Zourek's proposal was rejected by 7 votes to 3, with 1 abstention.

53. The CHAIRMAN then put Mr. Lauterpacht's proposal to the vote.

Mr. Lauterpacht's proposal was adopted by 8 votes to 2, with 1 abstention.[8]

54. The CHAIRMAN indicated that the Commission had completed its consideration of the comments and the introduction contained in document A/CN.4/L.35. He would next put the comments and introduction, as amended, to the vote as a whole.

The comments and introduction, as amended, were adopted by 8 votes to 2, with 1 abstention.

Request by Mr. Hudson for insertion of footnote in the Commission's Report to the General Assembly

55. Mr. HUDSON asked the Commission's permission to append, at an appropriate place in the Commission's Report to the General Assembly covering the present session, a footnote reading as follows:

> "In explanation of his vote against the adoption of this draft as a whole, Mr. Hudson stated that he was unable to accept many of its provisions, in particular those envisaging limitations on the freedom of the parties resorting to arbitration."

56. At the request of Mr. HSU and Mr. FRANÇOIS, Mr. LIANG (Secretary to the Commission) read out the relevant parts of the summary record of the Commission's discussion of a similar request at its previous session,[9] from which it appeared that Mr. François had expressed the hope that "the Commission would decide, from that day on, it would no longer accept detailed explanations, but merely a statement to the effect that for the reasons given in the summary records, one member was opposed to the adoption of a particular passage in the report". The Assistant Secretary-General had suggested that a standard formula might be used, reading as follows: "Mr. X. voted against this passage in the Report, for the reasons given in the summary record of the... meeting, page...". Mr. François' proposal had finally been adopted by 7 votes to 5.

57. The CHAIRMAN observed that the Commission must accordingly consider Mr. Hudson's request in the light of that decision.

58. Mr. LAUTERPACHT pointed out that the wording of Mr. Hudson's request did in effect contain an explanation of his grounds for opposing the draft. It contained a controversial argument to which the majority had no opportunity to reply. The inference which Mr. Hudson clearly meant to be drawn was that the draft, in his view, placed undue restrictions on the parties' freedom of action.

59. Mr. HUDSON said that he agreed that footnotes indicating individual members' dissent from the Commission's decisions should not contain explanations of their reasons. He had been careful not to include any such explanations in the wording he had proposed, and he submitted that what he said did not amount to an explanation.

60. Mr. el-KHOURI proposed that Mr. Hudson's request be granted, but that in order to avoid the difficulties to which such requests gave rise, the Commission should decide that no requests for the inclusion of footnotes expressing the attitude of individual members be granted in future.

61. Mr. KOZHEVNIKOV submitted that the meaning of the decision taken by the Commission at the previous session was not clear. It should therefore re-consider the whole question of principle involved. It was his view that any member of the Commission had the right to request insertion in the Commission's report to the General Assembly of any brief footnotes, explaining his views, which he desired.

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[8] This proposal became para. 24 in the "Report".

[9] See summary record of the 128th meeting, paras. 31—56.

62. The CHAIRMAN said there was no doubt that the Commission was bound, for the present, by the decision it had taken at the previous session. If the Commission wished to adopt another rule for the future, as proposed by Mr. el-Khouri, that question would have to be considered later. He then put to the vote the question whether the Commission should grant Mr. Hudson's request.

The question was decided in the affirmative by 4 votes to 3, with 2 abstentions.

63. Mr. YEPES, explaining his vote, recalled that at the previous session he had expressed the view that members of the Commission should be allowed a certain latitude in explaining their attitudes in footnotes to the Commission's reports. His view had not been supported by any other member of the Commission. In those circumstances he had not felt called upon to vote either for or against Mr. Hudson's request.

64. Mr. el-KHOURI said that he had voted in favour of granting Mr. Hudson's request, but that he intended to propose that no footnotes be allowed in future.

65. The CHAIRMAN, speaking as a member of the Commission, said that he had voted against Mr. Hudson's request since he did not consider it acceptable under the terms of the decision taken at the previous session.

66. Mr. SPIROPOULOS said that he had not been present when the vote was taken. He wished, however, briefly to express his opinion. He recalled that at the previous session he had requested permission to include a brief statement of his views in the Report. His request had not met with favour, and he had been obliged to withdraw it. He did not think it was consistent, therefore, for the Commission to accept similar requests.

67. Mr. FRANÇOIS felt that those who had voted in favour of granting Mr. Hudson's request had done so not because they considered it to be in accordance with the decision taken at the previous session, but only because they wished to depart from that decision, either in the particular case under consideration, or as a general rule.

68. The CHAIRMAN recalled that he had clearly indicated before the vote that the Commission was bound by its previous decision.

69. Mr. LAUTERPACHT said that he had abstained because he had understood that the vote was on the question whether Mr. Hudson's request should be granted by way of an exception to the rule established by the Commission at its previous session. If he had understood that the vote was on the question whether the text proposed by Mr. Hudson was in accordance with that rule, he would have voted against, since he thought it was obvious that it was not.

70. Mr. KOZHEVNIKOV said that he had voted in favour of the principle which he had already stated.

71. Mr. HUDSON said that, in view of the discussion to which his request had given rise, he would withdraw it in favour of the following :

> " Mr. Hudson wished to state that he had voted against the adoption of this draft as a whole."

His only object had been to protect himself against the charge that he was opposed to all the provisions in the draft. He was opposed to some, and in favour of others. In particular, he was opposed to many of those which restricted the liberty of the parties having recourse to arbitration ; he was not, however, opposed to them all.

Mr. Hudson's new request was granted unanimously.[10]

Question of the inserton of footnotes in the Report of the Commission

72. The CHAIRMAN invited comment on Mr. el-Khouri's proposal that in future no requests for the insertion in the Commission's reports to the General Assembly of footnotes indicating the attitude of individual members of the Commission should be granted.

73. Mr. KOZHEVNIKOV said that he also intended to request the inclusion of a footnote in the Commission's report indicating his attitude on the draft. Would adoption of Mr. el-Khouri's proposal prevent him from doing so or did it refer only to future sessions ?

74. Mr. KERNO (Assistant Secretary-General) said that it seemed only fair to apply the same rule to all members of the Commission. As Mr. Hudson's request had been granted, Mr. el-Khouri's proposal could surely relate only to future sessions.

75. The CHAIRMAN agreed.

76. Mr. HUDSON said that he was firmly opposed to Mr. el-Khouri's proposal. Individual members of the Commission should be permitted to indicate what provisions they objected to, so as to avoid being saddled with the responsibility for something with which they did not agree.

77. Mr. SPIROPOULOS felt that there was much to be said on both sides in the question. He recalled that at the first session he had supported Mr. Koretsky's request for insertion of a footnote indicating his attitude, as he regarded it was the legitimate right of all members of the Commission. After discussion, the Commission had acceded to Mr. Koretsky's request, but the right had been subsequently abused. For that reason, and in order to avoid the lengthy discussions to which such requests seemed inevitably to give rise, he (Mr. Spiropoulos) now agreed with Mr. el-Khouri that no such footnotes should be permitted in future. The attitude of individual members of the Commission could be ascertained from the summary records.

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[10] Footnote 4 in the " Report ".

78. Mr. FRANÇOIS drew Mr. Spiropoulos' attention to the fact that the summary records did not normally show how individual members of the Commission voted.

79. The CHAIRMAN pointed out that, if any member particularly wished it to be recorded how he or some other member of the Commission had voted on a question, he could always request a roll-call vote.

80. Mr. ZOUREK said that he also intended to request the insertion of a footnote indicating his attitude. He had therefore been about to ask the same question as Mr. Kozhevnikov. If the Assistant Secretary-General's view was accepted, he was satisfied.

81. On the question of principle, he felt that it would be inadmissible that an individual member of the Commission should not be able to request insertion in the Commission's report of, at the very least, a bare indication that he disagreed with the Commission's decision on a matter of importance. The Commission could always refuse individual requests if it felt that the right was being abused, but it surely could not deprive members of that right altogether.

82. Mr. LAUTERPACHT agreed with Mr. Hudson that members of the Commission should be able to protect themselves against being saddled with responsibility for a text with which they did not agree. He did not see how there could be any possibility of that right being abused, so long as explanations were not permitted.

83. Mr. HSU feared that Mr. el-Khouri's proposal was too restrictive. He agreed with Mr. Lauterpacht that the existing rule, established at the previous session, was sufficient to prevent abuse.

84. Mr. el-Khouri said that his main desire was to avoid weakening the Commission's reports in the eyes of governments and the General Assembly. It was common knowledge to all who read the Commission's reports that its decisions were not necessarily unanimous ; that was surely sufficient to give individual members the protection they desired. He did not agree that the rule established at the previous session made abuse impossible.

85. Mr. KOZHEVNIKOV said that he could not support Mr. el-Khouri's proposal, which appeared to be based on a desire to conceal the true facts from public opinion.

Mr. el-Khouri's proposal was rejected by 5 votes to 3, with 1 abstention.

86. The CHAIRMAN noted that the Commission would therefore continue to be bound by the rule it had established at the previous session.

Nationality, including, statelessness (item 6 of the agenda)

87. The CHAIRMAN said that, in pursuance of the Commission's decision to accept Mr. Hudson's resignation as special rapporteur on nationality, including statelessness, he had drafted the following letter :

" Dear Judge Hudson,

" On the occasion of your resignation from the position of special rapporteur on Nationality including Statelessness, which the Commission accepted on 4 August 1952, may I, on behalf of the Commission, express the most sincere regret that your present state of health should have made such a step necessary.

" As you will recall, the Commission had been most reluctant to lose the benefit of your learning and ability as special rapporteur and had expressed the earnest hope that you would reconsider your position and find it possible, by readjusting your many undertakings, to carry on the task which you had been requested to assume. The Commission accepted your resignation only when you persisted in the desire to be relieved. It has done so with the utmost regret.

" The Commission deeply appreciates the valuable contributions which you have made on the subject of nationality including statelessness and hopes that you will soon be restored to full health.

" With warm regards,

" I am,

" Yours sincerely."

The draft prepared by the Chairman was approved.

The meeting rose at 1.10 p.m.

182nd MEETING

Thursday, 7 August 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO

Rapporteur : Mr. Jean SPIROPOULOS.