

Document:-
A/CN.4/SR.180

Summary record of the 180th meeting

Topic:
Arbitral Procedure

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

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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.

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* 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 CORDOVA, 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. SCALLE 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 ;

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.”

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. SCALLE 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. SCALLE 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.

*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. SCALLE 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. SCALLE 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. SCALLE 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 judicial 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.

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. CORDOVA 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. CORDOVA 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. SCALLE 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. SCALLE 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. SCALLE said he wished to withdraw the

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."

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.

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-Khouris 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 CORDOVA, 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'."