Document:-
A/CN.4/SR.194

Summary record of the 194th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1953 , **vol. I**

Unless his text were accepted, the parties would be able to repudiate earlier agreements.

91. Mr. PAL said that the criticism levelled against Mr. Scelle's proposal was unjustifiably severe. Such a provision would assist the parties in the peaceful settlement of the dispute and should therefore be supported by those who regarded that as the purpose of arbitration. If Mr. Scelle were prepared to abandon the clause relating to the intervention of a third State, the text would be preferable to Mr. Alfaro's.

92. Mr. ALFARO, endorsing Mr. Pal's remarks, said that the reason why he had withdrawn his text was that the Special Rapporteur had taken into account the proviso contained in the opening words of article 9, namely, "Unless there are prior provisions on arbitration which suffice for the purpose".

93. In drafting his own text, his main concern had been to eliminate the delays allowed in the original text of article 10. In the new version proposed by Mr. Scelle that danger had been removed, and any delay which would now occur would be the outcome of the mutual consent of the parties.

94. Mr. SANDSTRÖM proposed the addition at the end of Mr. Scelle's text of the words "taking due account of agreements between the parties".

95. Mr. SCELLE accepted Mr. Sandström's amendment, and moved the closure of the debate on article 10.

96. Mr. LAUTERPACHT said that the discussion had not been exhausted. If a vote were taken immediately on Mr. Scelle's version of article 10 he would have to vote against it, though for reasons other than those expounded by Mr. Kozhevnikov and Faris Bey el-Khouri. He would be placed in an embarrassing position if Mr. Scelle's motion were put to the vote without a further opportunity for discussion.

97. Mr. KOZHEVNIKOV expressed surprise at the Special Rapporteur's motion, which was highly inappropriate in a discussion between scholars. He failed to see the reason for haste on so important a question.

98. Mr. SCELLE observed that the matters being dealt with by the Commission had been discussed at great length and inconclusively by many authorities in the past. In truth, Mr. Kozhevnikov was opposed to allowing the tribunal to draw up the *compromis* itself, as decided by the Commission three years ago.[5]

99. Mr. KOZHEVNIKOV said that it was not the Commission's task merely to confirm the Special Rapporteur's own views.

100. Mr. SCELLE reiterated that he had referred to a decision taken by the Commission.

101. Mr. ZOUREK moved that further discussion on article 10 be deferred until the next meeting.

Mr. Zourek's motion was carried by 7 votes to 2.

The meeting rose at 1.15 p.m.

[5] See *Yearbook of the International Law Commission, 1950*, vol. I, 73rd meeting, paras 1-51, and 80th meeting, paras. 5-16.

194th MEETING

Monday, 15 June 1953, at 2.45 p.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*concluded*)

ARTICLE 10 (*concluded*)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 10, said that it still had before it Mr. Yepes' amendment, whereby the Special Rapporteur's text would read:

"Once the Tribunal has been constituted, either Party may submit the dispute to it by direct citation. If one of the Parties refuses to answer the citation and calls for the preparation of a *compromis*, the Tribunal shall fix a reasonable time-limit, in accordance with the circumstances of the dispute, for the Parties to conclude a *compromis*, either by direct agreement between themselves or through the good offices of a third State. On the expiry of this time-limit, the Tribunal may draw up the *compromis* within a reasonable time which it shall itself determine."

2. Since the previous meeting Mr. Alfaro had also submitted a new text reading:

"1. When the undertaking to arbitrate contains provisions which seem sufficient for the purpose of a *compromis* and the tribunal is constituted, either party may submit the dispute to the tribunal by direct citation. If the other party refuses to answer the citation on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the points set forth in article 9 to enable it to examine the case forthwith. In the affirmative case the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case the tribunal shall order the parties to conclude a *compromis* within such time-limit as the tribunal may consider reasonable, according to the nature of the litigation.

"2. If the parties fail to agree on a *compromis* within the time-limit fixed in accordance with the preceding paragraph, the tribunal shall draw up the *compromis*.

"3. If neither party claims that the provisions of the undertaking to arbitrate are sufficient for the purposes of a *compromis* and they fail to agree on a *compromis* within three months after the date on which one of the parties has notified the other of its readiness to conclude the *compromis*, the tribunal, at the request of the said party, shall draw up the *compromis*."

3. Mr. ALFARO said that he had sought in his text to cover the points made by the Special Rapporteur and Mr. Lauterpacht, as well as those contained in his own original proposal. He had not introduced any new elements.

4. Mr. YEPES emphasized that his amended version of Mr. Scelle's text was radically different from the original, since it made it obligatory upon the parties to conclude a *compromis*. As he saw it, the *compromis* was the cornerstone of all arbitral procedure and it ought not to be permitted to dispense with it save in exceptional cases.

5. Mr. SCELLE (Special Rapporteur) said that Mr. Alfaro's text, which was both comprehensible and clearly expressed, was acceptable to him, and he would withdraw his proposal in its favour.

6. Mr. ZOUREK was unable to understand the reasons for a provision of the kind contained in article 10. Either an undertaking to arbitrate was specific, and contained all the essential elements of a *compromis*, thus enabling the tribunal to open proceedings at once, or it was entirely general, and required the conclusion of a special *compromis* if a particular matter was to be submitted to arbitration. In the latter case it would be totally inadmissible to allow the tribunal itself to formulate the *compromis*. Nor could it be argued that a precedent existed in article 53 of the Hague Convention for the Pacific Settlement of International Disputes of 1907, since that applied only in those cases when the parties had agreed to have recourse to the Permanent Court of Arbitration for the purpose. He could not therefore subscribe to the theory underlying article 10, or to the amendments thereto.

7. Mr. SCELLE said that article 10 was no new departure. Numerous treaties provided for the conclusion of the *compromis* by the tribunal if the parties failed to agree.

8. Mr. SANDSTRÖM said that Mr. Scelle's original amendment to article 10 was superior to Mr. Alfaro's new text, which made submission of a dispute by direct citation conditional upon there being in the undertaking to arbitrate provisions which seemed sufficient for the purpose of a *compromis*. Mr. Alfaro's text would complicate the procedure.

9. Mr. SCELLE considered that there was no essential difference between the two texts, since according to his proposal, one party could contest the right of the other to submit the dispute by direct citation.

10. Mr. PAL considered that the Special Rapporteur had been right in withdrawing his own proposal in favour of Mr. Alfaro's, which not only covered all points dealt with in the former, but was also more consistent with other articles of the draft on arbitral procedure.

11. The CHAIRMAN first put to the vote Mr. Yepes' amendment as being farthest removed from the original.

Mr. Yepes' amendment was rejected by 9 votes to 1, with 2 abstentions.

12. Mr. YEPES asked that Mr. Alfaro's text be put to the vote paragraph by paragraph, as he had an amendment to propose to paragraph 3.

Paragraph 1 of Mr. Alfaro's text for article 10 was adopted by 8 votes to 2, with 2 abstentions.

Paragraph 2 was adopted by 8 votes to 4.

13. Mr. YEPES proposed the substitution of the words "a reasonable time-limit fixed by the tribunal" for the words "three months", in paragraph 3. As he had explained at the previous meeting, the time-limit for the conclusion of the *compromis* must be determined according to the circumstances attending the case.[1] There could not be a uniform time-limit for all *compromis*. Some were very easy to draw up and for those a very short time-limit was sufficient, but for others the suggested time-limit of three months might prove too short.

14. Mr. ALFARO pointed out that Mr. Yepes' point was covered by the last sentence of paragraph 1. Paragraph 3 dealt with the case of one party refusing to co-operate with the other in preparing the *compromis*. In that instance a definite time-limit must be established.

15. Mr. YEPES failed to see the difference between

[1] See *supra*, 193rd meeting, para. 85.

the contingency envisaged in paragraph 1 and that dealt with in paragraph 3. In each case the time-limit should be determined by the same criteria.

16. Mr. SCELLE considered Mr. Yepes' objection to be well-founded.

17. Mr. SANDSTRÖM supported Mr. Alfaro's views. Mr. Yepes' amendment would give the tribunal the delicate task of having to decide what was a reasonable time-limit to impose upon the parties for concluding the *compromis*.

18. Mr. ALFARO said that acceptance of Mr. Yepes' amendment would involve modification of the whole procedure laid down in paragraph 3.

19. The CHAIRMAN suggested that some of the objections to Mr. Yepes' amendment might be removed if the words "at the request of one of the parties" were added to it.

20. Mr. YEPES accepted the Chairman's suggestion.

Mr. Yepes' amendment, as amended, was rejected by 6 votes to 1, with 5 abstentions.

Paragraph 3 of Mr. Alfaro's text for article 10 was adopted by 6 votes to 4, with 2 abstentions.

21. Mr. YEPES explained that he had voted against paragraph 3 in its present form because it was in flagrant contradiction with paragraph 1.

Mr. Alfaro's text for article 10, as a whole, was adopted by 7 votes to 4, with 1 abstention.

22. Mr. YEPES explained that he had voted in favour of the text as a whole while maintaining his objections to paragraph 3.

New article proposed by Mr. Yepes

(Article 5, para. 3)

23. Mr. YEPES proposed a new article for inclusion in the draft, to read as follows:

> "Wherever this draft refers to the beginning of the proceedings it shall be understood to mean the time when the written memorials are officially received by the president of the tribunal."

24. If the Commission were prepared to accept in principle the necessity for a provision stipulating when the proceedings had begun, he would be ready to consider other suggestions as to the precise moment chosen.

25. Mr. SCELLE was in favour of such a provision, but considered that the proceedings should be regarded as having begun once the tribunal had been constituted, and had convened for the first time to perform some procedural act.

26. Mr. LAUTERPACHT observed that Mr. Scelle had in fact suggested two dates.

27. Mr. SCELLE said he would prefer the second.

28. Mr. LAUTERPACHT pointed out that it might be unnecessary for the tribunal to meet at all before the pleadings began. It was conceivable that the president alone could take the necessary steps to request the parties to make their written submissions. Further, it was not clear from Mr. Yepes' text precisely which stage in the written proceedings he had in mind.

29. Mr. YEPES pointed out that Article 43 of the Statute of the International Court of Justice referred to communications.

30. Mr. SCELLE said that he could not accept Mr. Yepes' proposal since it might make evasion possible. For that reason, he felt that the proceedings should be deemed to have begun once the tribunal acting as a corporate body had taken its first procedural decision.

31. Mr. LAUTERPACHT pointed out that sometimes there were no written proceedings.

32. Mr. SCELLE observed that surely, before taking up a case, the judges always met, even if not in court.

33. Mr. ZOUREK asked the Special Rapporteur at what moment the proceedings would begin if there was a single arbitrator.

34. Mr. SCELLE replied that in that case the proceedings would begin with the first procedural act performed by the arbitrator.

35. Mr. ALFARO said that, so far as he could judge, Mr. Yepes' text should be included in article 7.

36. Mr. YEPES thought that, if such a provision were regarded as generally necessary, it should be inserted at the end of the draft.

37. Mr. SANDSTRÖM expressed doubts as to whether an analogy could be drawn between an arbitral tribunal and the International Court of Justice. The proceedings of the former should be deemed to begin with its convocation.

38. Mr. LIANG (Secretary to the Commission) said that in the light of the provisions of article 7 the Special Rapporteur's suggestion hardly met the case. The opening of the proceedings must have some reference to the parties.

39. It was not easy to decide whether such a provision was necessary at all. Under the terms of article 13 the tribunal itself could determine when its proceedings had begun.

40. Mr. LAUTERPACHT proposed an alternative text reading:

> "The proceedings are deemed to have begun when the President or the sole arbitrator has made the first order concerning written or oral proceedings."

41. Mr. YEPES accepted Mr. Lauterpacht's proposal.

42. Mr. SCELLE, accepting Mr. Lauterpacht's text, asked whether the words "the first order" could be translated by the words "*la première ordonnance*".

43. Mr. LAUTERPACHT replied in the affirmative.

Mr. Lauterpacht's text was adopted by 9 votes to none with 2 abstentions.[2]

GENERAL CLAUSES

44. The CHAIRMAN invited the Commission to take up the question of general clauses. Texts were to be proposed by the Special Rapporteur and by Mr. Sandström.

45. Mr. LAUTERPACHT, on a point of order, said that the Commission would first have to decide whether it was to limit itself to the proposals by Mr. Scelle and Mr. Sandström, or whether it was also to discuss other general clauses such as those dealing with denunciation, reservations and interpretation.

46. Mr. SCELLE introduced his proposal, which read:

"This Convention shall enter into force as soon as it has been signed and ratified by two States.

"In the absence of express reservations made at the time of signature, ratification or accession to this Convention, its provisions shall be binding on the signatory States, in respect both of prior undertakings to arbitrate and undertakings given subsequent to the entry into force of the Convention.

"Nevertheless, where arbitration proceedings are already in progress before a constituted tribunal or a designated arbitrator, or where a definitive *compromis* has been concluded, any signatory State shall have the right to stipulate that the proceedings shall be carried through to completion in accordance with the procedure previously laid down."

47. It would be remembered that at the fourth session the Commission had not contemplated the inclusion of general clauses. He had put forward his text in the light of the considerations raised at the present session concerning retrospective effect. He had sought to be as liberal as possible. If the Commission went into too much detail on the matters referred to by Mr. Lauterpacht, it would be unable to reach any final conclusion for a considerable time.

48. Mr. SANDSTRÖM said that he was not wholly in agreement with Mr. Scelle, but if Mr. Scelle were prepared to withdraw his proposal, he would also withdraw his own.[3]

49. Mr. LAUTERPACHT said that he had expected that any discussion of the proposals for general clauses submitted by Mr. Scelle and Mr. Sandström would lead to a discussion of the general issue of final clauses. Several possibilities were open to the Commission. In the present instance the Statute of the Commission was somewhat difficult to apply, since the decision must depend on whether the Commission had been engaged on the task of codification or on the progressive development of international law. Assuming that the Commission agreed that its draft on arbitral procedure fell within the category of codification, then article 23 of the Commission's Statute applied, and for his part he would hope that the Commission would be able to recommend to the General Assembly that it recommend the draft to Member States with a view to the conclusion of a convention.

50. Mr. YEPES said that the Commission had prepared a draft on arbitral procedure which could be framed as a convention if the General Assembly so decided. Approaching the problem from that angle, it would follow that no final clauses were necessary, since such questions as ratification were no concern of the Commission's. He suggested accordingly that the Commission's Draft should be given the title "Statute of Arbitral Procedure".

51. He was under the impression, moreover, that the United Nations had a standard formula for the final clauses of conventions.

52. Mr. SCELLE supported Mr. Yepes.

53. Mr. LIANG (Secretary to the Commission) thought that it would be appropriate for the Commission to consider whether it wished to apply sub-paragraph (*c*) of paragraph 1 of article 23 of its Statute in transmitting the draft on arbitral procedure to the General Assembly. The latter would then take an appropriate decision.

54. He was inclined to agree that it was not absolutely necessary to draft final clauses. As to the standard clauses to which Mr. Yepes had referred, they had been drawn up by the Secretariat as a piece of research, and there was no suggestion that any attempt should be made to persuade governments to use them.

55. Mr. Scelle's proposal actually went beyond the traditional framework of final clauses. He would consequently suggest that appropriate reference be made to the question of reservations and retrospective effect in the Commission's report, which would be submitted, together with the draft, to the General Assembly.

56. Mr. SCELLE withdrew his proposal.

57. Mr. LAUTERPACHT assumed that the Commission would transmit the draft to the General Assembly with a recommendation on the lines of sub-paragraph (*c*) of paragraph 1 of article 23 of its Statute.

58. There was one general point which he wished to mention, namely: the articles which the Commission had examined at the fourth and present sessions were

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[2] This text later became paragraph 3 of article 5.

[3] The text of Mr. Sandström's proposal read as follows:

"This Convention shall enter into force as soon at it has been signed and ratified by two States.

"It shall replace as between the parties bound by it any general convention on arbitral procedure, except where proceedings have already been instituted at the date of its entry into force.

"It shall also be applicable to proceedings instituted in virtue of undertakings to arbitrate entered into prior to its entry into force, except where express stipulations are laid down in the undertaking."

entitled "Draft on Arbitral Procedure". That was not entirely accurate. Though certain articles did relate to arbitral procedure, the draft actually prescribed the steps which should be taken in order to make arbitral procedure effective. From the practical point of view, parties drafting a *compromis* would find nothing in the draft to guide them except certain articles dealing with procedure.

59. He wondered whether the draft should not include some text on the lines of the proposals made by Mr. Carlston.[4]

60. Mr. SCELLE said that he had been under the impression that the Commission had practically concluded its work on arbitral procedure. If the whole discussion were to be started all over again, he would request the Commission to appoint another Special Rapporteur.

61. Mr. LIANG (Secretary to the Commission) agreed with Mr. Lauterpacht that the draft did not contain detailed procedural rules. It followed the precedents set by the relevant Hague conventions. As to Mr. Carlston's proposals, to which Mr. Lauterpacht had referred, he (the Secretary) took the view that they dealt with the procedure to be applied by arbitral tribunals as distinct from the procedure to be followed by States in regard to arbitration in general. The distinction was subtle, but tenable. He would in that connexion draw attention to article 13 of the draft, whereby the tribunal was empowered to formulate its rules of procedure. To illustrate the distinction, he would suggest that the Commission's draft might be compared to the Statute of the International Court of Justice, the detailed rules of procedure to be applied by tribunals then corresponding to the Court's rules.

62. The CHAIRMAN considered that Mr. Lauterpacht should have raised the issue at the fourth session and drew attention to the fact that no government had referred to it.

63. Mr. LAUTERPACHT said that he was not making a formal proposal, since it was obviously impossible for the Commission to embark on the subject at the present stage.

64. Mr. AMADO considered that the Commission was approaching the end of its work on arbitral procedure, and that its Statute gave clear guidance in article 23 as to what the next step should be. It was for the General Assembly to pursue the matter further.

65. Mr. YEPES moved that no fiscal clauses be included in the draft.

66. The CHAIRMAN said that the issues raised in the proposal which Mr. Scelle had just withdrawn, especially the question of retrospective effect, would be mentioned in the introduction to the Commission's report.

67. Mr. SCELLE indicated his agreement with such a course of action.

68. Mr. ZOUREK wished to make the following general comments. First, he considered that the draft on arbitral procedure duplicated existing instruments. Secondly, assuming that the draft were, with certain inevitable modifications, accepted by governments as a convention, what would be the relationship between it and prior treaties relating to arbitration? Two different views had been expressed on that point, some members of the Commission holding that all prior instruments would be invalidated, others maintaining that they would remain in force except in the case of articles where the contrary was explicitly stated.

69. Mr. SCELLE considered that the question was perfectly simple. Some governments would accept the draft, others would not. The former would thus have adhered to a new law, subject always to any reservations that might be made. It was a generally accepted principle that a new law superseded the old. The same was true of treaties, except that no treaty could be imposed on any State. So long as a State which was a party to the General Act for the Pacific Settlement of International Disputes did not adhere to another instrument it was bound by the General Act. When, however, a State adhered to the present draft, the General Act would thereby be invalidated in so far as that State was concerned.

70. The CHAIRMAN asked the Commission whether it was prepared to adopt Mr. Yepes' proposal, and whether it would agree that reference be made in the report to Mr. Scelle's proposal on the general clauses, with special references to retrospective effect.

The Commission adopted Mr. Yepes's proposal by 8 votes to 1, with 3 abstentions, and agreed that reference be made in its report to Mr. Scelle's proposal on the general clauses, with special reference to retrospective effect.

71. Mr. KOZHEVNIKOV proposed that the Commission decide what action it should take on the draft on arbitral procedure only after it had finally adopted the draft.

It was so agreed.

72. Mr. SANDSTRÖM drew attention to the comments by the Government of Sweden (A/CN.4/68, No. 7 or A/2456, Annex I, No. 8), to which no reference had been made in the course of the Commission's discussions. What was the Special Rapporteur's attitude to the statement that the Commission's draft seemed to apply to both legal and non-legal disputes?

73. Mr. SCELLE said that his opinion on that issue formed part of his general conception of law. He had not alluded to the Swedish Government's comments because they raised issues which lawyers had been discussing for centuries and which the Commission could discuss endlessly. He did not himself believe that any distinction was possible between political and legal

[4] See Kenneth S. Carlston, "Codification of international arbitral procedure", *American Journal of International Law*, vol. 47 (1953), pp. 203-250.

disputes. All disputes could be settled on the basis of law, and the silence of the law simply meant that a party was free to decide as it wished. Indeed, the Commission had decided, in article 12, that judgement could not be withheld on the ground of the silence or obscurity of international law or of the *compromis*. In that event, it was for the parties to decide whether the dispute should be solved according to rules of law or *ex aequo et bono*.

74. Mr. ZOUREK was not convinced by Mr. Scelle's arguments. The question of a new law superseding the old was not perfectly straightforward in international law, particularly in regard to multilateral treaties. Existing practice was far from clear.

75. He would, however, not insist further on the point, since it fell outside the framework of the Commission's tasks.

The CHAIRMAN declared the discussion closed.

76. *It was agreed* that Mr. Scelle's drafting amendment to paragraph 2 of article 5 be considered by the Drafting Committee. The amendment consisted in making the following slight changes in the first sentence:

"A party may only replace an arbitrator appointed by it, if the Tribunal..."

77. *It was also agreed* that the Drafting Committee consider the Secretary's suggestion that a general reference to paragraph 2 of Article 35 of the Statute of the International Court of Justice be included in the draft[5] and Mr. Alfaro's proposal that articles 26, 27 and 28 be re-numbered, article 27 to follow article 25.[6]

78. The CHAIRMAN said that the Commission must now set up a Drafting Committee. Experience suggested that such a body should be as small as possible, and he would therefore propose that it be composed of himself, the General Rapporteur, the Special Rapporteur and Mr. Alfaro, whose great experience of drafting would be most useful.

It was so agreed.

COMMENTARY ON THE DRAFT ON ARBITRAL PROCEDURE (A/CN.4/L.40)

79. The CHAIRMAN asked the Commission to express its views on what action should be taken on the commentary on the draft on arbitral procedure (A/CN.4/L.40) prepared by the Secretariat. The last sentence of the introductory note by the Secretariat (A/CN.4/L.40) read as follows: "It will be for the Special Rapporteur and the Commission to consider the commentary and revise it wherever they deem necessary or desirable." Actually, the commentary applied to the text of the draft adopted by the Commission at the fourth session. He feared that neither the Commission nor the Secretariat had time to revise it at the present session.

80. In the circumstances, would the correct solution not be for the General Rapporteur to append the commentary to the Commission's report, stating that the Commission had taken note thereof?

81. Mr. SCELLE said that he had read the commentary in the course of its preparation by the Secretariat, and could express appreciation of its objectivity. He would urge that the Commission approve it, since merely to take note of an excellent piece of work was hardly sufficient.

82. Mr. AMADO asked what was the usual procedure. He doubted whether the Commission could approve the commentary.

83. Mr. LIANG (Secretary to the Commission) said that the Secretariat had not taken the initiative of asking for approval of a document compiled on the Commission's instructions in pursuance of article 20 of its Statute, which laid down that the Commission should prepare its drafts in the form of articles and submit them to the General Assembly together with a commentary. It had been thought at the preceding session that the commentary should accompany the draft on arbitral procedure, and that, indeed, was why the Secretariat had been requested to undertake the task. The commentary was not a working document, and it was for the Commission to decide whether it wished to apply, in that specific instance, the provisions of article 20 of its Statute.

84. Mr. SANDSTRÖM drew attention to sub-paragraphs (*a*) and (*b*) of article 20, which gave details of the type of information which a commentary should include. The Commission should approve the document.

85. Mr. LAUTERPACHT was inclined to the view that the Commission should not decide the issue forthwith. For his part, he had not thought that the subject would come up, and was not therefore prepared to express a definite opinion in the matter. He would, however, say that he was not sure whether he agreed with the Secretary's interpretation of article 20, which dealt with the presentation of a preliminary, not a final, draft. Stipulations regarding the latter were laid down in article 22, and were applicable in the present instance. Article 22 contained no reference to a commentary, and it was therefore not certain that the Commission need submit one.

86. He agreed that the commentary was a valuable piece of work, but would hesitate to say that it was the best of which the Secretariat was capable. He did not see how the Commission could approve it as being part of its own work or include it in its report to the General Assembly as a product of its own deliberations.

87. In view of those considerations, he believed that it would be best to defer a final decision on the matter.

88. Mr. YEPES proposed that the Commission adopt the commentary as one of its own documents; it had been complied by the Secretariat on the Commission's behalf, and clearly illustrated the course of the discussions on arbitral procedure. It went without saying

[5] See *supra*, 185th meeting, para. 111.

[6] See *supra*, 190th meeting, para. 67.

that certain changes would have to be made in the text in the light of the changes made in the draft at the present session. That, however, in no way detracted from the value of the document, which had been prepared scientifically and objectively and was a credit to the Secretariat.

89. Mr. LIANG (Secretary to the Commission) said that the commentary was objective in so far as it supported the spirit and the guiding considerations of the draft adopted by the Commission at the fourth session. He would not venture to say whether the presentation was adequate, but he thought that Mr. Lauterpacht was mistaken in his interprepation of article 20 of the Statute. Only the final draft was to be transmitted to the General Assembly and that draft should be accompanied by a commentary on the lines set forth in article 20 of the Statute. The origin of the matter was clearly set out in paragraph 14 of Chapter II of the Commission's report on its fourth session.[7] The Secretariat had acted in conformity with the Commission's instructions, which were based on the decision that a commentary should be attached to the draft.

90. Mr. YEPES had already pointed out that no radical modification of the commentary need be undertaken to make it a final draft, although certain changes had been adopted by the Commission in the draft code as approved at the fourth session. In fact, the Secretariat, in preparing the commentary, had not entered into a discussion of the individual parts of the articles, but had confined its comments to a presentation of the theory and practice in international law in relation to the general problems dealt with by each article of the draft agreed upon at the fourth session.

91. Mr. KOZHEVNIKOV wished to offer some preliminary observations on the matter. He considered that it was articles 16 and 22 of the Statute that were applicable in the present instance. Those articles required the Commission to prepare a final draft and explanatory report, submitting it with its recommendations to the General Assembly. Article 20 stipulated that the Commission should prepare its drafts in the form of articles, adding thereto commentaries containing the elements defined in sub-paragraphs (*a*) and (*b*).

92. First of all, the Commission could not on its own behalf submit commentaries prepared by the Secretariat. Should the Commission decide to do so, and thus assume responsibility, the question of the contents of the commentary would immediately arise. He feared that the position in so far as the relationship of the commentary to article 20 was concerned would be unsatisfactory. He was unable to join in the chorus of praise. True, the commentary had certain merits, but it fell far short of the proviso of article 20 that an adequate presentation should be given of the divergencies and disagreements, as well as of arguments invoked in favour of one or another solution.

93. He would draw attention to paragraph 24 of Chapter II of the Commission's report on its fourth session,[8] where it was clearly stated that two currents of opinion were represented in the Commission. The Secretariat's commentary was wholly silent about the conception of arbitration according to which the agreement of the parties was 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. Indeed, the whole issue had been so framed as to suggest that the only possible solution was that advocated in the draft, that was, the solution favoured by the Special Rapporteur. That could hardly be described as objective. Several governments, among them those of Belgium and the Netherlands, had expressed their opposition to the conception of arbitration reflected in the draft, but no reference was made to their views in the commentary. The discussions at the present session had also shown serious divergencies. Was the Commission justified in concealing the situation from the General Assembly, which, if the terms of article 20 were to be fulfilled, must be given full information?

94. He must also express doubts about some of the examples and precedents quoted in the commentary, and about the attempt that had been made to lend a political gloss to certain events and documents, for instance the interpretation of peace treaties and advisory opinions of the International Court of Justice.

95. To sum up, he maintained that in its present form the commentary could not be transmitted to the General Assembly even if the Commission gave it the seal of its approval. The first requirement was that it should be redrafted in the light of article 20 of the Statute.

96. The CHAIRMAN ruled that further discussion be postponed to a later meeting.

97. While the Commission proceeded to other business, he would ask members to think about the commentary and also about the Special Rapporteur's comments on each article. What form should those comments take? His own view was that the Special Rapporteur should limit his comments strictly to the modifications made in the draft at the present session, and leave untouched the comments adopted by the Commission at its previous session, and recorded in its report thereon (A/2163).

98. In his (the Chairman's) opinion the draft on arbitral procedure prepared by the Commission was not a work of codification, but one of development of international law. Article 20 of the Statute was therefore not applicable in the present case, and there was no need for a detailed commentary as described in that article.

The meeting rose at 6.10 p.m.

[7] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), p. 2. Also in *Yearbook of the International Law Commission, 1952*, vol. II.

[8] *Ibid.*, p. 3.