Document:-
A/CN.4/SR.228

Summary record of the 228th meeting

Topic:
<multiple topics>

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

69. Mr. Scelle said that the Commission had taken the view that arbitral procedure must include all those provisions which would make certain that arbitration was carried out effectively; hence, it transcended the mere rules of procedure adopted by or before the arbitral tribunal itself. He wondered whether the mention in the last sentences of paragraph 6, of detailed rules of procedure and the suggestion that a model code of such rules be prepared, implied that Mr. Lauterpacht thought that the Committee should have adopted a narrower interpretation of the term "arbitral procedure".

70. Moreover, as the report purported to be an account of the Commission's work, it should not contain suggestions for future action. In any event, the preparation of a model code of rules of arbitral procedure, in the narrower sense of the term, was essentially a substantive issue that the Commission itself should deal with, if necessary in a supplementary report. The last part of the paragraph, from the sentence beginning: "Such detailed rules of procedure are liable to vary...", should therefore be deleted.

71. Mr. LAUTERPACHT said that, to the extent that the Commission's definition of the term "arbitral procedure" differed somewhat from the connotation usually given to the term, it would be reasonable to include in the report the sentences concerning detailed rules of arbitral procedure in the narrow sense, the deletion of which Mr. Scelle had suggested.

72. It would, however, be more consonant with his (Mr. Lauterpacht's) intention if the phrase: "A model code of rules of", were replaced by the phrase: "A collection of texts on".

73. He agreed with the suggestion that the regulations drafted by the Commission should be entitled "Draft code on arbitral procedure".

74. He was unable, however, to follow the Secretary's reasoning when he suggested that the phrase descriptive of the wider sense of the term arbitral procedure, reading "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties" be amended; for, to his mind, that phrase accurately described the Commission's conception of arbitral procedure.

75. Mr. KOZHEVNIKOV agreed with Mr. Scelle that it was inappropriate to suggest that the Secretariat should draw up a model draft of rules of arbitral procedure, for that was a task proper to the Commission itself. He thought also that the regulation should be referred to as "*Draft articles on arbitral procedure*" rather than "Final draft on arbitral procedure".

76. Arbitral procedure was a term with a precise meaning; there was no question of its having a wider or a narrower sense. The "effectiveness of arbitration engagements" derived from treaties and similar agreements. The text as it stood seemed to him authoritarian, and the draft itself to have been conceived on the wrong lines.

77. The CHAIRMAN drew attention to Mr. Lauterpacht's suggestion that the Secretariat might be asked to prepare a collection of texts rather than a model code.

78. Mr. LIANG (Secretary to the Commission) reverted to his objection to the first clause describing arbitral procedure in its wider sense as including "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties". A generally accepted definition of arbitral procedure was "the body of rules and practice relating to arbitration", and a distinction was normally drawn between arbitral procedure in that sense and the procedure adopted by or before arbitral tribunals.

79. The last sentence of the paragraph reading "It may be a matter for consideration whether the commentary to be prepared by the Secretariat and referred to in paragraph 5 of this report should not contain as an annex a model code of rules of arbitral procedure in the sense referred to above" was inadequate, as it failed to state who was to consider the matter.

80. The CHAIRMAN asked the General Rapporteur to prepare a revised text of paragraph 6 for consideration at the next meeting.

The meeting rose at 1 p.m.

228th MEETING

Friday, 31 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, 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.

Date and place of next session

(*resumed from the 227th meeting*)

1. The CHAIRMAN reported on his conversation with the President of the Economic and Social Council who had explained that the need for preparing the documents on the results of its work in time for presentation to the

General Assembly made it impossible for the Council to postpone the opening date of its summer session. The Council Committee on the Calendar of Conferences would, however, be meeting shortly and the Secretary of the Commission would inform it of the Commission's views.

Point of order raised by Mr. Scelle on the Commission's method of work

2. Mr. SCELLE hoped that his proposal, which had been circulated, was self-explanatory. It read as follows:

> "To ensure that the discussion of the general report on the current session of the Commission, and of the articles of the draft conventions on statelessness still outstanding, is completed, it is proposed that instead of the Commission continuing the reading of the report in full, any member desirous of submitting amendments to specific passages in the report should do so in writing, the right of each member of the Commission, including the author, to speak on such amendments being limited to a single statement of not more than ten minutes' duration."

3. The Commission was so zealous in the performance of its duties that its discussions tended to range far and wide and were consequently protracted, but only two weeks remained for the session and several items on the agenda had still to be completed. In particular it was essential, if the Commission was to avoid criticism, for it to be able to present some completed work to the General Assembly. The draft on Arbitral Procedure, if the report could be finished in time, would be the first draft convention that the Commission had been able to present to the General Assembly.

4. Mr. LAUTERPACHT said that Mr. Scelle's proposal would accelerate the Commission's proceedings, but it did not go far enough. He had calculated that, if only one amendment were made to each paragraph and if only half the members of the Commission spoke for ten minutes each on each paragraph, the discussion of the chapter on arbitral procedure would take about three weeks. His own, more drastic, suggestions were that all amendments should be presented in writing, that they should, if necessary, be introduced by statements of not more than five minutes and that only the General and Special Rapporteurs should be permitted to comment. If experience showed that such measures were inadequate, he would suggest that amendments should be voted upon without discussion.

5. Mr. YEPES opposed Mr. Scelle's proposal which he regarded as self-contradictory. It was essential for the report to be read aloud; that would only take one or two minutes for each paragraph. The Commission had, in fact, decided that the report should be so read and a two-thirds majority would be required to reconsider that decision.[1] On the other hand, statements of three or four minutes were quite long enough.

6. Mr. SANDSTRÖM supported Mr. Scelle's proposal in principle, but thought the time allowed for each speaker should be not more than five minutes. He was not against a rule that all amendments should be presented in writing but pointed out that it could only begin to operate the following day. It was essential that amendments should be introduced and explained by their proposers.

7. Mr. ALFARO sympathized with Mr. Scelle's motives but considered that the requirement that all amendments be presented in writing was more likely to cause delay than expedition. He therefore suggested that Mr. Scelle's proposal be amended to read:

> "... any member desirous of submitting an amendment to any specific passage in the report should do so in writing unless it should consist of a proposal for deletion or for the changing or addition of not more than five words, the right of each member..."

In his experience it was reasonable and practical to limit the length of single statements to a maximum of five minutes.

8. Mr. KOZHEVNIKOV considered that the method so far adopted by the Commission had been fruitful. Some members, of course, thought the draft report so perfect that there was no need to discuss it. Others, however, did not take that view and should be enabled to criticize the report.

9. Mr. Scelle's proposal seemed to him inconsistent, for although its object was to enable the Commission to discuss exhaustively the material before it, it would in fact limit discussion; and though it was intended to expedite consideration of the report, its requirement that amendments should be submitted in writing would involve delay on account of the necessity of furnishing translation and so on. He agreed, however, that it was unnecessary to read each paragraph aloud.

10. Mr. SCELLE said he would gladly accept an amendment to his proposal limiting single statements to a maximum of five minutes.

11. Mr. CÓRDOVA doubted if such a limitation on statements was practical. He suggested that the Commission should have two meetings daily.

12. Mr. HSU said that in his view reading the paragraphs of the draft report aloud was not a waste of time. On the other hand, it might be desirable to limit the number of speakers to the proposer and one other speaker in favour and two speakers against each amendment, giving the Chairman the power to allow general discussion when that seemed appropriate. He agreed that members liked to have a full record of the positions they adopted, but their points of view were already summarized in the records of previous meetings.

13. Mr. SPIROPOULOS thought that the chief need was goodwill if the Commission's discussions were to be shortened. Given such goodwill the rules of procedure of the General Assembly provided all that was required. For example, rule 79 prescribed that amendments should normally be submitted in writing, but that the Chairman might permit a discussion of amendments submitted orally if he thought fit. The Commission should follow

[1] See *supra*, 226th meeting, para. 9.

that rule; but he agreed also with Mr. Scelle that a time limit of perhaps five minutes, subject to revision in the light of experience, should be imposed on speakers. As a last resort, afternoon, and, perhaps, evening, meetings might be held.

14. Mr. ZOUREK thought it necessary to go into the reasons which made its discussions on the draft report so long. At its fourth as well as its present session, the Commission had been asked to take decisions on suggestions made in the draft report on the session that had not been presented previously; it was only natural that a discussion should ensue. Indeed, generally speaking, the draft report did not in some members' opinion truly represent the discussions that had taken place and was accordingly bound to be criticized at length. He felt that if the report had given an objective account of the Commission's discussions and decisions it could have been adopted in two or three days. Indeed, if the Commission had seen fit to allow dissenting opinions to be annexed to the report, the debate on the draft report would have been considerably shortened; as it was, members who dissented from the majority view were forced into the position of having to ensure that their opinions were fully recorded in the summary records.

15. The CHAIRMAN said that the Commission had become alarmed at its slow rate of progress, as a consequence of which Mr. Scelle had proposed certain changes in procedure and Mr. Lauterpacht had proposed other, even more drastic changes. He (the Chairman) thought that the Commission's fears were exaggerated. The intention had been to allow one week for the discussion of each chapter in the Commission's draft report. Certainly the Commission was a little behind its timetable, but then it had given some time, even during the current week, to the discussion of other subjects. Also, at the beginning of any discussion it was normal for members to be perhaps over-eloquent. The Commission had another two weeks before it, and its experience was not so discouraging that in his view it was immediately necessary to adopt a more rigid procedure than that adopted during the fourth session. It was, however, open to question how far the Commission was still justified in not meeting on Saturdays at a time when there was no need to use the weekends for the study of documents.

16. It was of course possible to limit the length of statements, but it was only rarely that statements exceeded five minutes. Further, it was desirable for amendments to be presented in writing whenever possible, but a rigid rule was inappropriate. The introductory section of the chapter on arbitral procedure was the only section which it had so far been decided should be read aloud; he agreed with those members who thought that it was unnecessary to read the remainder of the report aloud.

17. He was entirely in agreement with Mr. Spiropoulos that the Commission's progress depended largely on the goodwill of its members. He did not think that that goodwill was lacking and he therefore suggested that the paragraphs in the report should not be read aloud and that members should be limited to one statement on each paragraph.

18. Mr. SCELLE said that he agreed with the Chairman's suggestion.

The Chairman's suggestion was adopted by 10 votes to none, with 2 abstentions.

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 227th meeting*)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45) * (*resumed from the 227th meeting*)

Paragraph 6 (14) ** (continued)

19. The CHAIRMAN, inviting a continuation of the discussion of paragraph 6, recalled that Mr. Lauterpacht had proposed the replacement of the phrase "a model draft of detailed" in the fourth sentence and the phrase "a model code of" in the last sentence by the phrase "a collection of", and that the Secretary to the Commission had suggested the replacement in the first sentence of the phrase "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties" by the phrase "provisions relating to arbitration engagements in general accepted by the parties".

20. Mr. SANDSTRÖM said that he was willing formally to propose the amendment suggested by the Secretary.

21. Mr. LAUTERPACHT said that the phrase in the draft was essential for its understanding, as the term "arbitral procedure" had never been used previously in the special sense in which the Commission had used it.

22. Mr. SANDSTRÖM thereupon withdrew his proposal.

23. Mr. ZOUREK said that the majority of the Commission had adopted a definition of the term "arbitral procedure" very much wider than the usual one; but, even if that definition were finally adopted, there were parts of the draft on Arbitral Procedure, for example in articles 16, 17 and 30, that could not be comprehended in it.

Paragraph 6 was then approved by 10 votes to 2, the phrase "this Final Draft" in the first sentence being replaced by the phrase "this draft" [2] *and the last two sentences* [3] *being modified to read:*

---

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter II. (See vol. II of the present publication).

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[2] The same change was made accordingly throughout Chapter II, "the present draft" being sometimes used in preference to "this draft".

[3] The original last two sentences read as follows:

"On the other hand, it is probable that the parties may find it useful in some cases to have before them a model draft of detailed rules of arbitral procedure in the more limited and technical sense of the term. It may be a matter for consideration whether the commentary to be prepared by the Secretariat and referred to in paragraph 5 of this report should not contain as an annex a model code of rules of arbitral procedure in the sense referred to above."

"On the other hand, it is probable that the parties may find it useful in some cases to have before them a collection of rules of arbitral procedure in the more limited and technical sense of the term. The Commission considers it desirable that the commentary prepared by the Secretariat and referred to in paragraph 5 of this report should contain as an annex a collection of rules of arbitral procedure in the sense referred to above."

Paragraph 7 (15)

24. Mr. ZOUREK said that a point he had raised in the general discussion was particularly relevant to paragraph 7, namely, his objection to the analytical nature of the report which divided the articles in the draft on Arbitral Procedure into those representing a codification of existing law and those which were in the nature of a formulation, *de lege ferenda,* of what were considered to be desirable developments. Not only did the latter articles make the draft into something other than a draft on arbitral procedure — it had become more akin to a draft on international justice in general — but the report gave a particular interpretation of the draft to which in his view it was in order for members to object.

25. The CHAIRMAN, referring to the last sentence of the paragraph in which the Commission was stated to consider of the utmost importance the differentiation in its functions between the codification and the development of international law, asked whether it was always possible to make that differentiation "both in general outline and in detail", as was suggested.

26. Mr. LAUTERPACHT said that that differentiation was important to students of international law and others who followed the Commission's work. He thought, however, that the sentence in question should be qualified by the insertion of a phrase such as "as far as possible" or "as far as convenient". In the case of a recent arbitration, considerable discussion was devoted to the question whether certain solutions adopted by the Commission were *de lege lata* or *de lege ferenda.*

27. Mr. KOZHEVNIKOV pointed out that in paragraph 7 the General Rapporteur had again laid undue stress on the "progressive development of international law" as one of the Commission's functions.

28. Mr. SANDSTRÖM suggested the deletion of the last part of the last sentence of paragraph 7 "and that, with regard to each individual topic, it should state both in general outline and in detail, in what respects the Commission considers itself to be fulfilling either of these functions."

29. Mr. LAUTERPACHT agreed with that suggestion, to which no other members had raised any objection.

Paragraph 7, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 8 (16)

30. Mr. KOZHEVNIKOV again regretted that he could not agree with the suggestion that the draft on Arbitral Procedure was no more than a codification of existing law.

31. Mr. ZOUREK said that his attitude was identical.

32. Referring to the last sentence of the paragraph which stated that the free determination by the parties applied to the competence of the tribunal, the law to be applied and the procedure to be followed by the tribunal, he said that in his view that principle was basic to international arbitral procedure, but that the statement in the draft report was at variance with the draft on Arbitral Procedure itself.

33. Mr. SCELLE paid a tribute to the General Rapporteur's scientific honesty of purpose in making a distinction between the codification of the law of arbitral procedure and the development of international law. As regards the fundamentals of arbitral procedure, he had no doubt that the draft on Arbitral Procedure was a codification of existing law. The text of the draft report was thus correct.

34. Mr. LAUTERPACHT agreed that there were articles in the draft on Arbitral Procedure which limited the absolute freedom of the parties; they were, however, articles not relating to basic features of the law, in respect of which the draft was no more than a codification. He assured Mr. Zourek that he had done his best to reflect in the draft report the basic features of the draft on arbitral procedure.

Paragraph 8 was approved by 9 votes to 2, with 1 abstention.

Paragraph 9 (17)

35. The CHAIRMAN said that at the beginning of the third sentence of paragraph 9 the reference to article 2 should be changed to article 3.

36. Mr. YEPES said that, as far as he could see, the statement in the second sentence that "article 1 of the draft lays down that the obligation to arbitrate results from an undertaking voluntarily accepted..." was not accurate.

37. Mr. LAUTERPACHT pointed out that all three paragraphs of article 1 referred specifically to the undertaking to arbitrate, which was assumed to be an undertaking voluntarily entered into.

38. Mr. KOZHEVNIKOV, referring to the sentence reading "respect for the will of the parties... is an essential requirement of arbitration", said that there was an implication that that respect was maintained in the provisions of the draft on Arbitral Procedure. That, however, was untrue, as it was laid down in article 2 that a party could involve another party in an alleged dispute contrary to the latter's will.

39. Mr. LAUTERPACHT regarded it as an evident requirement of arbitration that on such matters a party might have to submit to a decision with which it did not agree. The object of the draft was, however, to safeguard the free will of *both* parties to a dispute; for if one party was in a position, for example by refusal to appoint an arbitrator, to frustrate the agreed will of

both, as demonstrated by an agreement to arbitrate, then the sovereignty or free will of the other party was violated. The essence of the draft on Arbitral Procedure was that its provisions were intended to preserve the sovereignty of *both* parties. He was sure that that was in accordance with Mr. Kozhevnikov's basic thesis.

40. Mr. KOZHEVNIKOV said that it was clearly an abuse of sovereignty and free will for a party to be able to drag another party into a dispute against its will.

41. Faris Bey el-KHOURI said that the majority of the Commission had adopted the basic principle that once an undertaking to arbitrate had been established, the parties to that undertaking lost their authority to govern the proceedings; neither party was to be permitted to obstruct or frustrate the previous undertaking. Some members of the Commission, including himself, had not agreed with that principle, considering that an arbitration should be in accordance with the free will of both parties from beginning to end.

42. The draft report accurately reflected the majority view in the Commission. He thought, however, that it had been intended that the general report should give an account of the difference of opinion and of the voting in the Commission on the various articles of the draft on Arbitral Procedure, and by that means to avoid the necessity of publishing a minority report. That intention had not been fulfilled and he would therefore abstain from voting.

43. Mr. LAUTERPACHT said that, as the draft report of the chapter on arbitral procedure did not deal with the draft on Arbitral Procedure article by article, it was not convenient to record the vote of the Commission on each article.

44. The CHAIRMAN suggested, and Faris Bey el-KHOURI agreed, that consideration of the matter should be deferred until examination of the chapter on arbitral procedure had been completed.

45. Mr. ZOUREK, referring to the first sentence of the paragraph in which it was stated that certain features of the traditional law of arbitral procedure had been preserved in the draft on Arbitral Procedure, said that those features had been so surrounded by new features, *de lege ferenda,* that their meaning had been altered. It could not be supposed, for example, that the traditional concept of the *compromis* was unaffected by the provision that the tribunal, which itself might be appointed by the International Court of Justice, might draw it up. Similarly, the traditional view that an arbitral award vitiated by excess of powers was null and void was not the same as the view expressed in paragraph 9 that "excess of such powers, when duly declared by an impartial authority to have taken place, is a cause of nullity". That sentence should be deleted.

46. Mr. LAUTERPACHT disagreed. The sentence in question expressed one of the essential features of the draft on Arbitral Procedure.

47. Mr. CÓRDOVA said that excess of powers was always a cause of nullity; but unless it had been duly declared it could have no effect on the award.

48. Mr. YEPES agreed in substance with Mr. Zourek. In his view excess of powers was a cause of nullity whether it had been declared or not. As the author of the amendment relating to excess of powers, he regarded himself as particularly qualified to interpret the article on that subject as approved by the Commission.

49. Mr. SCELLE said that Mr. Zourek had raised the objection that since some of the provisions of the draft on arbitral procedure were new developments in international law, all the other features which derived from existing law were so altered that the result of the codification was a valueless distortion. He disagreed with that view, for, as he had said previously, law was a living entity: its existence and survival depended on its development.

50. He did not understand Mr. Zourek's objection to the sentence in the draft report concerning excess of powers. It was evident that excess of powers rendered an award null, but if there was no means of judging whether there had been an excess then one party to an arbitration might have the power to frustrate the efficacy of the award.

51. Mr. SANDSTRÖM thought that the objections to the sentence on excess of powers concerned its drafting. He suggested that it might perhaps read:

> "excess of such powers is a case of nullity but it should be duly declared by an impartial authority if the award is to be set aside".

52. Mr. ZOUREK said that the implication of such a sentence was that an excess of powers agreed to be such by the two parties would not be a cause of nullity in the absence of an independent declaration.

53. Mr. CÓRDOVA pointed out that there was clearly no problem when the two parties were in agreement: the impartial authority was necessary when they were in disagreement.

54. Mr. LAUTERPACHT said that the draft would foil an attempt by one party unilaterally to set aside an award. He accepted Mr. Sandström's suggestion for a re-draft of the sentence as a basis for a text which could subsequently be agreed between them.

55. Mr. YEPES pointed out a discrepancy between the English and French texts of the sentence in question, the former reading "Excess of such powers..." and the latter reading "*L'excès de pouvoir en cette matière*". He would be satisfied with Mr. Sandström's suggested text provided that in the French version the phrase "*en cette matière*" was omitted.

It was agreed by 9 votes to none, with 2 abstentions, that a text on the lines of Mr. Sandström's suggestion should be drafted by Mr. Lauterpacht and Mr. Sandström to replace the sentence reading:

> "excess of such powers, when duly declared by an impartial authority to have taken place, is a cause of nullity".[4]

[4] However this sentence was left unchanged in the "Report".

Paragraph 9 as modified was approved by 9 votes to 2, with one abstention.

Paragraph 10 (18)

56. Mr. SANDSTRÖM felt that the last sentence, which stated that the Commission had devised machinery "calculated to prevent frustration by either party of the obligation..." contained an element of censure which was not always justified.

57. Mr. KOZHEVNIKOV said that he could not accept paragraph 10 for three reasons. It was not the case that the Commission was not "expressly departing from any established rule"; the provisions in question were not "by way of developing international law" but by way of a step backwards; and it was inappropriate to insert any such moral condemnation of governments as was implied by the words to which Mr. Sandström had referred.

58. The CHAIRMAN suggested that the words "to prevent the frustration by either party" be replaced by the words "to safeguard the effectiveness".

59. Mr. SANDSTRÖM and Mr. LAUTERPACHT accepted that suggestion.

60. Mr. KOZHEVNIKOV agreed that that suggestion was an improvement. It did not, however, entirely remove his objections to that part of the text and it did not, of course, touch upon his objections to the other parts.

Paragraph 10, as amended, was approved by 10 votes to 2.

Paragraph 11 (19)

61. Mr. SANDSTRÖM proposed that in the phrase "the obligation to settle a dispute or future disputes by arbitration may be avoided in a number of contingencies" the word "avoided", which again implied an element of censure, should be replaced by the more neutral word "frustrated".

Mr. Sandström's proposal was adopted by 8 votes to 1 with A *abstentions.*

62. Mr. KOZHEVNIKOV was in favour of deleting the whole of paragraph 11 and would vote against it. "Past experience" proved nothing and had no bearing on the Commission's draft.

63. Mr. SCELLE felt that paragraph 11 was of great importance. As he had shown in his reports, by referring to numerous cases of arbitration which had taken place or which had not taken place, past experience did show that the arbitral obligation could be frustrated in a number of contingencies. He did not see why the Commission should not say so. The wording proposed was extremely mild. Moreover the next six or seven paragraphs were dependent on paragraph 11 and if it were deleted they also would have to be deleted.

64. Mr. LAUTERPACHT agreed with the view expressed by Mr. Scelle.

65. Mr. ZOUREK agreed with Mr. Kozhevnikov that the paragraph should and could be deleted. Paragraphs 12 *et seq.* could very well follow on the last sentence of paragraph 10.

Paragraph 11, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 12 (20)

66. Mr. SANDSTRÖM proposed that the sentence reading "It must be noted that the only innovation which the draft has introduced in this connexion is that of machinery" be replaced by the following: "It must be noted that the only innovation which the draft has introduced in this connexion is that machinery has been established where it does not already exist".

67. Mr. LAUTERPACHT accepted Mr. Sandström's proposal.

Paragraph 12, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 13 (21)

68. The CHAIRMAN suggested that, in accordance with the changes made in previous paragraphs, the words "a party may be in the position to frustrate the original undertaking by failing to co-operate in the constitution of the tribunal" should be replaced by the words "a party may refuse to co-operate in the constitution of the tribunal".

69. Mr. LAUTERPACHT accepted the Chairman's suggestion.

Paragraph 13, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 14 (22)

Paragraph 14 was approved by 9 votes to 2, with 1 abstention.

Paragraph 15 (23)

70. Mr. SCELLE suggested the deletion at the end of the first sentence, as unnecessary, of the words "a failure which may be due to the obstructive attitude of one of the parties bent on avoiding its obligation".

71. Mr. LAUTERPACHT accepted that suggestion.

Paragraph 15, as amended, was approved by 9 votes to 2 with 1 abstention.

Paragraph 16 (24)

72. Mr. SANDSTRÖM proposed the addition of the words "and complete" after the word "final" in the phrase "in order to secure the effectiveness of the principal obligation to submit the dispute to a final settlement by arbitration". He also proposed that in the phrase "counterclaims arising out of the subject matter of the dispute" the words "arising out of" should be replaced by "arising directly out of", in order to bring

the wording into line with the text of the article referred to.

73. Mr. LAUTERPACHT accepted Mr. Sandström's proposals.

74. Mr. YEPES suggested that the words "the power of the Tribunal to decree provisional measures with the view to preventing situations in which the legal rights of a party cannot be fully protected or restored by an arbitral award" placed an unnecessary restriction on the tribunal's power as defined in article 17. He proposed that the same wording should be used as in the text of the article, the phrase in question being therefore replaced by the words "the power of the Tribunal to decree provisional measures to be taken for the protection of the respective interests of the parties".

75. Mr. SANDSTRÖM felt that the explanation contained in the text proposed by the General Rapporteur might be of some value for the purposes of interpretation of the article. Although the French text possibly added something, the English text expressed exactly what the Commission had had in mind.

76. Mr. LAUTERPACHT agreed. If the commentary merely reproduced the text of the draft it would be of little value.

Mr. Yepes' proposal was adopted by 4 votes to 1, with 7 abstentions.

77. Mr. ALFARO pointed out that article 23 did not refer to the time limit fixed for the duration of the tribunal but to the time limit fixed for the rendering of the award, and therefore suggested that, in the phrase "the right of the tribunal to extend, at the request of either party, the time limit of its duration", the words "of its duration" should be replaced by the words "for the rendering of the award".

78. Mr. LAUTERPACHT accepted Mr. Alfaro's suggestion, although in cases where there were to be several awards it might be the duration of the tribunal which the parties would fix.

Paragraph 16, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 17 (25)

79. Mr. SANDSTRÖM suggested that in the first sentence the words "the effectiveness of the award" should clearly be replaced by the words "the effectiveness of the undertaking to arbitrate" and that, in the last sentence but one, in accordance with the changes which had been made in previous paragraphs, the words "may provide an occasion for avoiding the legal obligation of a final settlement of a dispute through arbitration" should be replaced by the words "may render ineffective the legal obligation of a final settlement of a dispute through arbitration".

80. Mr. LAUTERPACHT accepted Mr. Sandström's suggestions.

81. Mr. YEPES pointed out that in the last sentence the reference should be to article 31 and not to 30.

82. Mr. LAUTERPACHT agreed.

Paragraph 17, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 18 (26)

Paragraph 18 was approved by 10 votes to 1 with 1 abstention.

Paragraph 19 (27)

Paragraph 19 was approved by 10 votes to 1 with 1 abstention.

Paragraph 20 (29)[5]

83. Mr. YEPES asked what was meant by the sentence reading "In the present final draft the Commission has sought no more than to safeguard the sovereignty of both parties bound by an obligation freely undertaken".

84. Mr. LAUTERPACHT said that that sentence did not, of course, mean that the Commission's sole aim had been to safeguard the sovereignty of both parties. He had inserted it in an effort to ensure that Mr. Kozhevnikov and Mr. Zourek would not oppose the draft, even if they could not support it. What he meant, and he thought it was a true statement of the facts, was that the Commission had gone no further than it was necessary to go to safeguard the sovereignty of *both* parties to an arbitral agreement.

85. Mr. KOZHEVNIKOV appreciated Mr. Lauterpacht's efforts to overcome the opposition to the draft of those who upheld the classical principle of the sovereignty of States, but that unfortunately they had merely resulted in casuistry. The whole draft was permeated with a concept which was quite incompatible with the principle of the sovereignty of the parties. It was true that States would be free so long as they had not undertaken to submit a dispute to arbitration, but as soon as they had done so the draft would rob them of any further freedom of action.

---

[5] Paragraph 20 read as follows:

"20. For these reasons the Commission was unable to share the view, which was occasionally put forward in the course of its deliberations, that the procedural safeguards for the effectiveness of the obligation to arbitrate are derogatory to the sovereignty of the parties. The Commission has in no way departed from the principle that no State is obliged to submit a dispute to arbitration unless it has previously agreed to do so either with regard to a particular dispute or to all or certain categories of future disputes. However, once a State has undertaken that obligation, it is fully in accordance not only with legal principle but also with the sovereignty of *both* parties — as distinguished from the unilateral assertion of the sovereignty of one of the parties — that that obligation should be complied with and that it should not be avoided in reliance on procedural loopholes. In the present Final Draft the Commission has sought no more than to safeguard the sovereignty of both parties bound by an obligation freely undertaken. For that reason..." [same as in the "Report"].

86. Faris Bey el-KHOURI felt that the whole of paragraph 20 was irrelevant to the report and should be deleted.

87. Mr. CÓRDOVA felt, on the other hand, that the question of arbitration was so closely linked with that of sovereignty that it was unavoidable for the latter question to be discussed. The text proposed by the General Rapporteur could, however, with advantage be toned down.

88. Mr. SCELLE was strongly in favour of paragraph 20, which explained clearly that one of the main objects of the draft was to prevent one State from taking advantage, for its own ends, of another's willingness to submit a dispute between them to arbitration. Any agreement to arbitrate implied a limitation of sovereignty; but in international law sovereignty could be limited not only by customary law, which was not subject to the will of the States concerned, but also by conventional law, which was wholly subject to their will.

89. Mr. KOZHEVNIKOV pointed out that the Commission was getting involved in matters of substance. That being so, he was obliged to say that, although he agreed with Mr. Scelle up to a point, he could not agree with him altogether. It was true that a State's sovereignty could be limited by its free will. The draft, however, would have the effect of involving sovereign States in arbitral procedure contrary to their will; in that connexion he had already referred to article 2, which implied some sort of censure on the party which denied the existence of a dispute; in fact, it might well be the party which claimed the existence of a dispute that was at fault. The whole draft was permeated with the same unilateral approach, which he believed would make it unacceptable to many States.

90. The CHAIRMAN said that the Commission must avoid becoming entangled in discussions of substance. The only question which it had so far to decide was whether the paragraph should be deleted, as Faris Bey el-Khouri had suggested.

90. Mr. SANDSTRÖM agreed with Mr. Córdova that the paragraph should be retained but that the text proposed by the General Rapporteur was too controversial in tone. It might, for example, be better, in the sentence to which Mr. Yepes had referred, to say simply that the draft was "not in contradiction with the sovereignty of both parties bound by an obligation freely undertaken".

91. Mr. LAUTERPACHT felt that there were two advantages in retaining the paragraph. In the first place it reflected the minority's views, which, owing to the Commission's decision, would otherwise not be reflected at all. In the second place it gave the Commission an opportunity of replying to those views, which would certainly be expressed in other quarters as well; it was for that reason that the paragraph was somewhat controversial in tone. If it was desired, however, he, Mr. Córdova and Mr. Sandström might be asked to submit a revised text.

92. Faris Bey el-KHOURI said that if the General Rapporteur had wished to give the minority's views, he should also have given the arguments they had advanced in favour of them. He maintained his proposal that the paragraph be deleted.

Faris Bey el-Khouri's proposal was rejected by 8 votes to 2, with 1 abstention.

93. Mr. KOZHEVNIKOV said that he had voted in favour of deleting paragraph 20, which, whatever else it was meant to do, manifestly failed to give the arguments which the minority had advanced.

94. Mr. ZOUREK said that he approved the General Rapporteur's idea of giving the views of the minority, but that the manner in which that was done was wholly inadequate. The views of the minority were baldly stated in one sentence, and the remainder of the paragraph was devoted to a series of polemical statements, which, in his view, were quite belied by the whole character of the Draft. The General Rapporteur should have merely stated the different views and left the reader to judge.

95. Mr. SCELLE suggested that the question be left over until the Commission had considered the proposal that the votes on each article should be indicated.

96. Mr. LAUTERPACHT said that he did not see how the two questions were connected, but suggested that further discussion be adjourned until he had had an opportunity of submitting a revised text with the help of Mr. Sandström and Mr. Córdova.

It was so agreed.[6]

The meeting rose at 1 p.m.

[6] See *infra*, 231st meeting, para. 54.

229th MEETING

Saturday, 1 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, 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.