Document:-
A/CN.4/SR.229

Summary record of the 229th meeting

Topic:
Other topics

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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.

Consideration of the draft report of the Commission covering the work of its fifth session *(continued)*

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45) * *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of the chapter on arbitral procedure in the draft report covering the work of its fifth session (A/CN.4/L.45), beginning with paragraph 21, since the General Rapporteur had not yet submitted a re-draft of paragraph 20.

Paragraph 21 (30) **

Paragraph 21 was unanimously approved.

Paragraph 22 (31)

2. Mr. KOZHEVNIKOV was unable to accept paragraph 22 because it provided that the composition of the Tribunal should be determined in certain cases by the President of the International Court of Justice. In his view, it was inadmissible that a third party should interfere in matters which concerned no one but the two parties to the dispute.

Paragraph 22 was approved by 6 votes to 2, with 2 abstentions.

Paragraph 23 (32)

3. Mr. SANDSTRÖM suggested that the sentence reading "The Tribunal, once constituted, ceases to be a mere organ of the parties" should be replaced by the words "From this moment [i.e. from the time of commencement of the proceedings] the Tribunal becomes a joint organ of the parties", which would be more in accordance with the second sentence of article 5, paragraph 2, which provided that an arbitrator could be replaced during the proceedings by agreement between the parties.

4. Mr. LAUTERPACHT said he would appreciate the Special Rapporteur's comments on Mr. Sandström's suggestion. In some respects it was correct to say that the Tribunal "ceases to be a mere organ of the parties"; for example, the Tribunal was not bound to give the effect of an award to any settlement reached between the parties, and without its consent an arbitrator could not be withdrawn once the proceedings had begun, even if the parties agreed.

5. Mr. SCELLE preferred the wording suggested by Mr. Sandström. The Tribunal did become a joint organ within the legal system established by the parties. The fact that the parties had set it up did not mean that they could not give it powers over themselves. On the other hand, he saw no point in replacing the words "once constituted", provided that it was clearly understood that they meant "once finally constituted"; for, so long as the proceedings had not begun, an arbitrator could be replaced, and the Tribunal could not be said to be "finally constituted".

6. Mr. SANDSTRÖM drew attention to paragraph 3 of article 5, where it was stated that: "The proceedings are deemed to have begun when the President, or sole arbitrator, has made the first order concerning written or oral proceedings". The President could, however, convene the Tribunal to discuss matters of procedure. The words "once constituted" or "once finally constituted" would not necessarily be accurate, therefore, in the sentence under discussion.

7. Mr. SCELLE still preferred those words, since the Commission wished to stress the institutional nature of arbitration.

8. Mr. ZOUREK said that the preceding sentence was also incorrect. It read:

> "While the draft gives full effect to the traditional principle that the parties must have the full opportunity of a free choice of arbitrators, that freedom does not extend to the right to change the composition of the Tribunal subsequent to the commencement of the proceedings".

Yet article 5 made it clear that the composition of the Tribunal could be changed at any time by agreement between the parties. He was, however, unable to accept paragraph 23 as a whole, since he was opposed to the idea of institutional arbitration, believing that it should be purely contractual.

9. Mr. YEPES, too, preferred the words "once constituted" or "once finally constituted", since in certain cases the Tribunal became a joint organ of the parties, even before proceedings began.

10. Mr. SANDSTRÖM pointed out that not only in article 5, but also in article 7, dealing with withdrawal of arbitrators, the reference was to the time the proceedings began.

11. Mr. LAUTERPACHT felt that in the form suggested by Mr. Sandström, the sentence in question would be out of place. The purpose of the sentence which he (Mr. Lauterpacht) had proposed was to explain the preceding sentence, but that might be done equally well by inserting the word "unilaterally" after the words "the right to change".

12. After further discussion, Mr. SANDSTRÖM said that, in order to cut short the discussion, which had already gone on too long on what was, after all, only a minor point, he would withdraw his suggestion and propose instead the deletion of the whole of the third sentence reading: "The Tribunal, once constituted, ceases to be a mere organ of the parties".

13. Mr. ZOUREK supported Mr. Sandström's proposal.

Mr. Sandström's proposal was adopted by 6 votes to 2, with 2 abstentions.

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* 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.

14. Mr. LAUTERPACHT suggested that the word "unilaterally" be inserted in the previous sentence after the words "the right to change". As he had said, that would cover the point which he had been trying to make in the sentence which had now been deleted, and would also meet Mr. Zourek's objection that the text, as it stood, was not correct.

Mr. Lauterpacht's suggestion was adopted.

Paragraph 23, as amended, was approved by 6 votes to 2, with 2 abstentions.

Paragraph 24 (33)

Paragraph 24 was approved by 8 votes to 2.

Paragraph 25 (34)

Paragraph 25 was approved by 8 votes to 2.

Paragraph 26 (35)

15. The CHAIRMAN indicated that Mr. Alfaro had proposed an amendment to paragraph 26, but had unfortunately been unable to attend the meeting.

16. Mr. LAUTERPACHT suggested that for that reason, and also because the amendment needed rather careful consideration, discussion of it should be deferred.[1]

It was so agreed.

Paragraph 27 (36)

17. Mr. LIANG (Secretary to the Commission) pointed out that the meaning of the first sentence of paragraph 27 was not quite clear.[2]

18. Mr. LAUTERPACHT agreed, and said that he would re-word the sentence.

On that understanding, paragraph 27 was approved by 9 votes to 2.

Paragraph 28 (37)

19. Mr. SANDSTRÖM pointed out that there was no contradiction between the fourth and fifth sentences. The words "This was so, although" before the words "according to paragraph 2" should therefore be deleted.

20. Mr. LAUTERPACHT agreed.

Paragraph 28, as amended, was approved by 8 votes to 2, with 1 abstention.

Paragraph 29 (38)

21. Mr. SANDSTRÖM recalled that he had been absent during the discussion on the provisions relating to nullity of the award. He wished to place on record, therefore, that he dissociated himself from the decision to make it an absolute rule that the Tribunal's failure to state the reasons for its award should be a ground for nullity. Cases might well occur where the parties agreed in advance that no reasons for the award need be stated, and it would then be inadmissible for one of the parties to cite that to invoke nullity.

22. Mr. LAUTERPACHT felt that cases where the parties agreed that no reasons need be given for the award would be very rare. In any event, a party which had agreed that no reason need be given for the award was hardly likely to challenge its validity on that very ground.

23. Mr. YEPES felt that it was essential that the reasons for the award should be stated, and pointed out that the Commission had said so categorically in article 24, paragraph 2. He asked, however, what was meant by the word "apparent" in the sentence in paragraph 29 reading:

> "After considerable discussion it decided, having regard to the paramount requirement of finality, not to amplify — subject to one apparent exception — the grounds on which the annulment of the award may be sought".

24. Mr. LAUTERPACHT said that by that word he meant that the exception was not really an exception at all, because the Tribunal's failure to state the reasons for the award had been included within the notion of "a serious departure from a fundamental rule of procedure". If the word "apparent" were deleted, the text would imply that the Tribunal's failure to state the reasons for its award did not constitute a serious departure from a fundamental rule of procedure, as he believed Mr. Yepes considered that it did.

25. Mr. SANDSTRÖM asked whether, unless provision to the contrary were made in the comment, the paragraph to which Mr. Yepes had referred did not mean that the award would, in every case, have to state the reasons on which it was based, even if the parties were prepared to agree that it did not.

26. Mr. SPIROPOULOS said that that was the case. There was, however, nothing to prevent the parties concluding a new agreement, whereby, in effect, they undertook to accept the Tribunal's findings as having the force of an award, even if they did not properly constitute an award owing to their failure to state the reasons on which they were based.

Paragraph 29 was approved by 8 votes to 2.

Paragraph 30 (39)

27. Mr. YEPES recalled that it was he who had proposed that the nullity of the *compromis* or, generally, of the undertaking to arbitrate, should be made a reason of nullity of the award. Paragraph 30 gave the arguments which had been advanced against his proposal, but he did not think that any member of the Commis-

[1] See *infra* 230th meeting, para. 1.

[2] The last part of the first sentence originally read as follows: "... article 16 modifies somewhat the powers of the Tribunal in the matter of counterclaims."

sion had in fact advanced that contained in the last sentence, reading:

"Above all it is impossible to disregard the fact that the award as rendered gives expression to the true legal position with regard to the merits of the dispute."

28. Mr. SANDSTRÖM agreed, and proposed the deletion of that sentence and of the preceding sentence, reading:

"Moreover it was felt that the participation of the party concerned in the arbitral proceeding may fairly be regarded as having cured, to a large extent, any original invalidity of the instrument which served as the basis of the arbitration."

Both arguments were so feeble as to weaken, instead of strengthening, the case which the Commission was seeking to make.

29. Faris Bey el-KHOURI felt that the whole paragraph could be deleted. What was relevant to the draft on Arbitral Procedure was what the Commission had decided to insert in it, not what it had decided to omit from it.

30. The CHAIRMAN recalled that the question dealt with in paragraph 30 had been keenly discussed. He suggested that it would therefore be a mistake to omit all mention of it from the report, which was designed to bear upon the Commission's work as well as upon the texts it submitted.

31. Mr. ZOUREK recalled that he had supported Mr. Yepes' proposal, and that the only argument which had been advanced against it during the discussions was that it was closely connected with a complicated problem which the Commission had not at that time yet discussed. His reply to that argument was that the Commission must submit a complete draft, and it was regrettable that neither that nor any of the other considerations which had been put forward in favour of Mr. Yepes' proposal was mentioned in paragraph 30.

32. Mr. CÓRDOVA agreed with the Chairman that the Commission must indicate that it had not overlooked the question dealt with in paragraph 30. Its decision not to treat the nullity of the *compromis,* or, generally, of the undertaking to arbitrate, as a reason of nullity of the award was an important one, and the arguments stated in favour of it should be as convincing and as strongly worded as possible. For example, the qualifying words: "to a large extent" might be deleted from the penultimate sentence.

33. Mr. YEPES agreed with Mr. Zourek that many arguments had been advanced in favour of his proposal, and that the only one adduced against it had been that it was closely connected with a question which it had then been the intention to deal with later in the session, when the Commission took up the law of treaties. It was for that reason that he had withdrawn his proposal, which had subsequently been reintroduced by Mr. Zourek and rejected by a narrow margin. To be exact, the decision had not been so much to reject it as to omit it from the draft for the time being.

34. Mr. SCELLE felt that the arguments advanced in paragraph 30, taken together, were sufficient reply to those advanced in favour of Mr. Yepes' proposal.

35. Mr. SPIROPOULOS agreed with Faris Bey el-Khouri that paragraph 30 could well be deleted. It would be prudent to omit any reference to the question with which it dealt until the Commission had considered it in connexion with the law of treaties.

36. Mr. LAUTERPACHT said that the Commission's report would have no value unless it were persuasive, and it would not be persuasive if it failed to mention a question with so important a bearing on the draft as that dealt with in paragraph 30. Certainly, there were difficulties inherent in that question, as was clear from the fact that whereas Mr. Sandström wished the penultimate sentence to be deleted, Mr. Córdova considered that it was too weak. He still believed that his text struck a proper balance.

37. Mr. YEPES agreed that some mention of the question should be made, but said that he would vote against the General Rapporteur's text because it did not convey exactly what had been said.

38. Mr. ZOUREK supported Mr. Sandström's proposal that the last two sentences be deleted.

39. The CHAIRMAN put to the vote the proposal that the last sentence be deleted.

The proposal was adopted by 7 votes to none, with 4 abstentions.

40. The CHAIRMAN then put to the vote the proposal that the penultimate sentence be deleted.

The proposal was adopted by 6 votes to 5.

Paragraph 30, as amended, was approved by 5 votes to 2, with 4 abstentions.

41. Mr. CÓRDOVA said that he had voted against the amended text, because it was so weak as to be worthless.

Paragraph 31 (40)

42. At Mr. ZOUREK's suggestion, with which Mr. LAUTERPACHT agreed, *it was agreed to delete the phrase "in this connexion" after the words "Reference may be made".*

Paragraph 31 was approved.

Paragraph 32 (41)

Paragraph 32 was approved by 9 votes to none, with 2 abstentions.

Paragraph 33 (42)

It was agreed that the word "undertake" in the third sentence should be replaced by the word "arbitrate".

Paragraph 33 was approved by 8 votes to 3, with 1 abstention.

Paragraph 34 (43)

Paragraph 34 was approved unanimously.

Paragraph 35 (44)

43. Mr. ZOUREK was unable to accept the distinction between an arbitral award and the principles of international law.

Paragraph 35 was adopted by 8 votes to 2, with 1 abstention.

Paragraph 36 (45)

44. At the suggestion of Mr. YEPES, supported by Mr. LAUTERPACHT, *it was agreed* that the corresponding wording of the United Nations Charter "the principal judicial organ" should be used instead of the phrase "the highest judicial organ of the United Nations", qualifying the International Court of Justice.

Paragraph 36 was approved by 9 votes to 2.

Paragraph 37 (46)

45. Mr. LIANG (Secretary to the Commission) found paragraph 37 a little difficult to understand at first reading.[3] He did not, for example, like the phrase "regularizing the situation" at the end of the first sentence, because there was nothing, to his mind, irregular in a State not being a Party to the Statute of the International Court of Justice. He therefore suggested that the first sentence might be amended to read somewhat as follows:

> "The Commission examined the question whether in those cases in which one or both parties are not parties to the Statute of the International Court of Justice, it is necessary to provide for some special procedure whereby the parties might gain access to the Court".

46. Mr. LAUTERPACHT agreed that the paragraph needed re-drafting.

47. Mr. ZOUREK said that there seemed to be no need to make special provision for States not Parties to the Statute of the International Court of Justice. Article 35 of that Statute laid down the conditions under which such States could have access to the Court.

48. The CHAIRMAN suggested that the Commission might take up the paragraph again when the Special Rapporteur had re-drafted it.

It was so agreed.[4]

Paragraph 38 (47)

49. Mr. SANDSTRÖM asked whether there was any accepted English expression equivalent to the French "*descente sur les lieux*".

50. Mr. LAUTERPACHT said that he knew of none better than "visits to the area", used in the draft report. He wondered whether the Statute of the International Court of Justice contained any equivalent phrase.

Subject to a decision by the Drafting Committee on that point,

Paragraph 38 was approved by 9 votes to none, with 2 abstentions.

Paragraph 39 (48)

51. Mr. SANDSTRÖM, referring to the fourth sentence, proposed that the words "the beginning of" should be inserted after the words "subsequent to" in the English text to make it conform with the French.

It was so agreed.

Paragraph 39 was adopted by 7 votes to 2.

Paragraph 40 (49)

Paragraph 40 was approved by 7 votes to 1, with 1 abstention.

Paragraph 41 (50)

52. Mr. ZOUREK pointed out that in paragraph 39 it was stated that, apart from certain fundamental considerations, the procedure formulated in the draft on Arbitral Procedure came into operation "only to the extent to which the parties have not adopted different provisions not inconsistent with the basic considerations as stated". Yet in paragraph 41 it was stated that some articles of the draft on Arbitral Procedure remained operative even after the two parties to the arbitration had agreed to waive them. There seemed to him to be an obvious contradiction.

53. Mr. LAUTERPACHT said that that issue had been raised frequently during the earlier discussions. The rule that, once arbitration had begun, the tribunal would have to disregard an agreement contrary to the fundamental purpose of the arbitration was of great importance. If he were to reply fully to Mr. Zourek, however, it would involve re-opening the discussion.

Paragraph 41 was approved by 7 votes to 2.

Paragraph 42 (51)

Paragraph 42 was approved by 6 votes to 2.

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[3] Original paragraph 37 read as follows:

"37. The Commission examined the question whether in those cases in which one or both parties are not parties to the Statute of the International Court of Justice it is necessary to provide for some procedure regularizing the situation. The Commission considered that the articles adopted by it on arbitral procedure were sufficient for the purpose — subject to the power of the Court to regulate, in accordance with Article 35 of its Statute, the question of costs."

[4] See *infra*, 231st meeting, para 74.

Paragraph 43 (52)

Paragraph 43 was approved by 8 votes to 2.

SECTION V. ACTION RECOMMENDED WITH REGARD TO THE FINAL DRAFT

54. Mr. KOZHEVNIKOV thought that it would be premature for the Commission to discuss what action it should recommend with regard to the final draft. It was first necessary formally to adopt the text of the final draft. He therefore formally moved that consideration of Section V be deferred.

55. Mr. LAUTERPACHT had been under the impression that the text of the final draft, as annexed to the relevant Chapter of the Commission's draft report on its fifth session, had been adopted.

56. The CHAIRMAN's recollection was that the articles had been approved individually, but that there had been no vote on the final draft as a whole.

57. Mr. SCELLE suggested that the Commission should therefore vote forthwith on the final draft as a whole.

58. The CHAIRMAN thought that, as both Mr. Alfaro and Mr. Amado were absent, it might be preferable to postpone the vote until the next meeting.

59. Mr. SPIROPOULOS agreed with the Chairman, but thought that there was no reason to defer consideration of section V. If the Commission adopted the final draft, the discussion on section V would still have to be held; if it did not adopt the final draft, then the whole of the discussion of the chapter on arbitral procedure in the Commission's draft report would have been useless.

It was agreed by 8 votes to 2, with 1 abstention, to proceed with the discussion on Section V.

Paragraph 44 (53)

Paragraph 44 was approved by 9 votes to 1, with 1 abstention.

Paragraph 45 (54)

Paragraph 45 was approved by 9 votes to 2.

Paragraph 46 (55)[5]

60. Mr. KOZHEVNIKOV pointed out that the Commission was asked to make a recommendation, and requested the General Rapporteur to explain the scope and implications of the paragraph.

61. Mr. LAUTERPACHT said that the Commission was bound to make some recommendation to the General Assembly. The sense of the paragraph was that it recommended that the General Assembly should decide between two possible courses of action.

62. Mr. KOZHEVNIKOV, referring to article 23 of the Commission's Statute, said that he thought a more appropriate recommendation would be, in the terms of paragraph 1 (*a*) of that article, that the General Assembly should " take no action, the report having already been published ; ". His reason for so thinking was that several members of the Commission considered that the final draft on Arbitral Procedure included innovations which went beyond the scope of the Commission's terms of reference. Many governments, he was sure, would object to those innovations, and it was therefore premature to recommend either that a convention be concluded or that a conference be convened.

63. Mr. LIANG (Secretary to the Commission) also referring to article 23 of the Commission's Statute, said that the procedures laid down in paragraphs 1 (*c*) and 1 (*d*) thereof were intended to operate under different circumstances. If the subject matter of a convention was expected to concern States that were not Members of the United Nations, it was appropriate that a conference be convoked to conclude the convention ; otherwise, it was more convenient, following the procedure laid down in paragraph 1 (*c*), to recommend the draft to States Members with a view to the conclusion of the convention.

64. By stating no opinion in paragraph 46 of its draft report as to which of those two courses might be appropriate in the case of the draft on Arbitral Procedure, the Commission gave the impression that it had no views on the matter. He thought, however, that the Commission ought either to make a single positive recommendation, or at least to give some guidance to the General Assembly.

65. Mr. HSU agreed that the convocation of a Conference, as provided for in paragraph 1 (*d*) of article 23 of the Commission's Statute, was particularly appropriate when issues with grave political implications had to be considered. In his view, the procedure laid down in paragraph 1 (*c*) would be more appropriate for the draft on Arbitral Procedure.

66. Mr. LAUTERPACHT considered that the choice between the procedure laid down in paragraph 1 (*c*) and that laid down in paragraph 1 (*d*) depended on the urgency of the matter under consideration. If the matter was urgent, a conference would be preferable. The question of urgency, however, was normally a political issue, and therefore one for the General Assembly rather than the Commission. He agreed that it would be desirable to state clearly in the report why the Commission thought that the General Assembly rather than the Commission should take the decision.

[5] Original paragraph 46 read as follows :

" 46. In the opinion of the Commission the Final Draft as adopted calls for action contemplated in either (c) or (d) of article 23, that is to say, that the General Assembly should either recommend the Draft to Member States with a view to the conclusion of a convention or that it should convoke a conference invited to conclude a convention on arbitral procedure. This is the formal recommendation which the Commission now makes under articles 16 (j) and 23 of its Statute."

67. Referring to Mr. Kozhevnikov's suggestion that the Commission should recommend that the General Assembly take no action on the final draft on Arbitral Procedure, he agreed that a similar recommendation had been made in other cases, but as was made clear in paragraph 47, it was the Commission's view that the conclusion of a convention on arbitral procedure would be highly desirable. Due consideration of the final draft on Arbitral Procedure — which could be given by the General Assembly alone — was therefore an important and urgent matter concerning both the pacific settlement of international disputes and the maintenance of good faith between the nations.

68. Mr. CÓRDOVA said that the actual decision between the procedure laid down in paragraph 1 (*c*) and that laid down in paragraph 1 (*d*) of article 23 of the Commission's Statute was one for the General Assembly, but in his view the Commission should recommend the latter course, which would at least force a full discussion of the matter. If the former course were followed, it was possible that there might be no results at all.

69. Mr. SPIROPOULOS reminded the Commission that the final draft on Arbitral Procedure would be the first text to be sent by the Commission to the General Assembly with a recommendation for action. The General Assembly might wish to take the matter up itself, and perhaps refer it to the Sixth Committee for consideration. He therefore favoured the course suggested by the General Rapporteur, namely, to leave the General Assembly with a choice of alternatives.

70. Mr. HSU felt that the Commission ought to make a practical and appropriate recommendation. If, for political reasons, the adoption of a convention on arbitral procedure was a matter of urgency, then the convocation of a conference would be the appropriate course, and the Commission should recommend it. If, on the other hand, the importance of concluding a convention rested on other considerations, there was no need for the General Assembly to do more than recommend the final draft to States Members with a view to their concluding a convention. He personally thought that the latter course, which had been followed in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, was the more normal. It would mean the General Assembly's adopting an appropriate report and opening a convention immediately for signature.

71. Mr. CÓRDOVA asked exactly what would be entailed by the General Assembly's recommending a draft to States Members with a view to their concluding a convention — the procedure laid down in paragraph 1 (*c*) of article 23 of the Statute. Did it mean simply that the draft would be sent to States Members for their consideration, or did it establish a definite procedure for opening a convention for signature? It would be pointless to recommend it if it meant only the former.

72. Mr. KOZHEVNIKOV said that in his view there was no need for the Commission to submit a specific recommendation to the General Assembly. It would be better to be more modest, and simply to state that the Commission had completed a certain task, and was handing in the results for consideration by the General Assembly.

73. Mr. YEPES said that it would appear exceedingly strange if the Commission made no recommendations about the future of a piece of work that it had needed several years to complete. He emphasized, however, that the final draft on Arbitral Procedure was in fact a draft, rather than the final text of a convention. That being so, he thought that the General Assembly should be left free to choose whichever procedure for dealing with it it thought most appropriate.

74. Mr. SPIROPOULOS pointed out that article 23 of the Commission's Statute referred to the codification of international law. He considered that its wording meant that the Commission, when sending a final draft to the General Assembly, was under an obligation to state which of the four courses listed in paragraph 1 of that article the General Assembly ought, in its view, to follow. But article 23 had not been applied before, and he therefore thought that the Commission should leave it to the General Assembly to choose between the procedure laid down in paragraph 1 (*c*) and that laid down in paragraph 1 (*d*), while at the same time stressing its view that the conclusion of a convention would be highly desirable.

75. He also pointed out that final drafts of proposals relating to the development of international law were covered by article 16 of the Commission's Statute; it was clearly obligatory on the Commission to submit its recommendations with such drafts to the General Assembly.

76. Mr. ZOUREK said that members had argued in favour of the adoption of paragraph 46 of the draft report because it was a matter of urgency that a convention on arbitral procedure should be adopted. That argument seemed unsound; for arbitration had existed for a long time without any convention, and the pacific solution of international disputes was already regulated by many other international instruments. The General Assembly, therefore, should be left to decide what action it wished to take on the final draft on Arbitral Procedure. The Commission should not do more than invite the Assembly's attention to sub-paragraphs 1 (*a*) and 1 (*b*) of Article 23 of its Statute, according to which the General Assembly might either take no action or take note of or adopt a report by resolution.

77. Mr. SCELLE was not clear about the exact purport of the four courses enumerated in paragraph 1 of article 23 of the Commission's Statute. Was the adoption of a report by resolution, the course laid down in paragraph 1 (*b*), stronger than the recommendation of a draft to States Members, the course laid down in paragraph 1 (*c*)? And was the latter course in turn stronger than that suggested in paragraph 1 (*d*), namely, the mere convocation of a conference without any recommendation or adoption of a draft? If the General

Assembly's recommendation of a draft to Members with a view to the conclusion of a convention meant that the draft must be adopted and opened for signature, then it seemed to him that the Commission ought to recommend that course to the General Assembly.

78. Mr. KOZHEVNIKOV considered that the Commission should not overestimate the importance of the work it had done. In his opinion, article 23 of the Commission's Statute was not mandatory. But in view of the difference of opinion on the matter, he thought that the Commission should first decide whether to make a recommendation or not.

79. Mr. SPIROPOULOS thought that Mr. Kozhevnikov's suggestion was very reasonable, although he disagreed with his interpretation of article 23 ; surely the enumeration of four possible courses in paragraph 1 of the article meant that a choice had to be made between them.

80. He thought that if it were merely a question of the codification of international law, nothing more would normally be desired of the General Assembly than the adoption of a report by resolution. But there were innovations in the final draft on Arbitral Procedure ; it was therefore essential that the adoption of the draft by the General Assembly should be followed by its signature by governments.

81. He supported the text of paragraph 46 of the draft report because, although it was very desirable that a convention on arbitral procedure be concluded, it was not a question of extreme urgency, on the same plane, as, for example, the conclusion of an armistice.

82. Mr. CÓRDOVA said that the Commission should first decide on what interpretation it wished to place on article 23 of its Statute.

83. Mr. YEPES said that article 22 of the Statute made it obligatory on the Commission to prepare a final draft, an explanatory report and recommendations to be submitted through the Secretary-General to the General Assembly. Mr. Spiropoulos was therefore right in saying that recommendations were obligatory.

84. Mr. KOZHEVNIKOV said that he failed to find any proof that it was mandatory on the Commission to make recommendations to the General Assembly. The meaning of article 23 was clearly that if the Commission were to make any recommendation to the General Assembly, it should choose between the four courses enumerated.

It was decided by 8 votes to 2 that the Commission should attach to its report to the General Assembly a recommendation concerning the action the latter should take on the final draft on Arbitral Procedure.

The meeting rose at 1 p.m.

230th MEETING

Monday, 3 August 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. 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.

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER II : ARBITRAL PROCEDURE (A/CN.4/L.45) * (*continued*)

Paragraph 26 (35) **
(resumed from the 229th meeting) [1]

1. The CHAIRMAN invited the Commission to take up paragraph 26, to which Mr. Alfaro had proposed an addition reading :

> " It may be observed that the only elements of a *compromis* classified as obligatory by article 9 are those enumerated in paragraphs (*a*), (*b*) and (*c*) thereof, and that among the particulars classified as optional in paragraphs (1) to (10), some are indispensable to carry on an arbitration. The reason the Commission had for not classifying such particulars as obligatory is that provision is made therefor in other articles of the draft. Thus, for instance, if the Parties should omit in the *compromis* one or more of the particulars referred to in paragraphs (1) to (7), the Tribunal would apply articles 12, 13, 23 and 25 of the draft and the arbitration could be carried out without any difficulty."

2. Mr. ALFARO recalled that article 9 of the draft on Arbitral Procedure listed a number of particulars to be specified in the *compromis*, only three of which were listed as mandatory for the parties. In order to avoid unnecessary confusion, the Commission should explain

* 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.

[1] See *supra*, 229th meeting, paras. 15-16.