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Summary record of the 472nd meeting

Topic:
Other topics

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of their opposition should be given in the report; he would, therefore, suggest, as a solution which would avoid the use of the word "majority", that the words "Despite doubts expressed by certain of its members" should be inserted at the beginning of the sentence in question.

57. The CHAIRMAN, speaking as a member of the Commission, thought that, where important questions of principle were involved, it was right that some indication of the views of the minority should be given in the report. That had in fact been the Commission's practice. It should be remembered that the Commission's decisions were not final, but would have to be considered by the Sixth Committee of the General Assembly; consequently any indication of the real situation in the Commission, especially on important matters, would be of value to the Sixth Committee. He therefore supported Mr. Zourek's proposal and thought the suggestion made by the Rapporteur would provide an adequate solution.

58. Mr. ZOUREK recalled that under article 20 of its Statute the Commission was obliged to report the divergencies and disagreements which exist among its members, as well as the arguments invoked in favour of one or the other view. He would accept the Rapporteur's suggestion as a solution for the particular difficulty to which he had drawn attention.

59. Mr. YOKOTA said that though he was sympathetic in substance to the views expressed by Mr. Zourek and the Chairman, he would not be in favour of using the expression "the majority of the members of the Commission" because, unless that form were used whenever a decision had not been unanimous, the expression "the Commission" might imply a unanimous decision, and consequently there would be a danger of misunderstanding. He was, therefore, in favour of the Rapporteur's suggestion.

It was agreed that the words "Despite doubts expressed by certain of its members" should be inserted at the beginning of the third sentence in paragraph 16.

The meeting rose at 1.5 p.m.

472nd MEETING

Thursday, 26 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Limitation of documentation: General Assembly resolution 1203 (XII)

1. Mr. LIANG, Secretary to the Commission, drew attention to General Assembly resolution 1203 (XII). He suggested that the Commission should take note of the resolution and have its action in so doing placed on record.

It was so agreed.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1) (continued)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.78/Add.1) (continued)

II. TEXT OF THE DRAFT and III. COMMENTARY (continued)

ARTICLE 2

2. Sir Gerald FITZMAURICE, Rapporteur of the Commission, observed that the only change made in article 2 was indicated in the comment on that article, in paragraph 17 of the draft report.

Article 2 was adopted unanimously.

ARTICLE 3

3. Sir Gerald FITZMAURICE, Rapporteur, said that no change of substance had been made in article 3, and that there was no separate comment on it in the draft report.

Article 3 was adopted by 10 votes to none, with 2 abstentions.

ARTICLE 4

4. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the separate commentary on article 4 in paragraph 18 of the draft report.

5. The 1953 text of the article (A/2456, para. 57) had been modified in accordance with the decisions adopted by the Commission earlier in the session. The Drafting Committee had introduced no change of substance into the text as then approved, but had thought it desirable to draw attention to the fact that the text as it stood said nothing about changing an arbitrator appointed by the arbitrators already appointed — in other words, the third or fifth arbitrator, who would be the umpire. The feeling had been that it should not be possible to change such arbitrators even by agreement between the parties, and he therefore proposed that the words "by agreement between the arbitrators already appointed or who are appointed" might be inserted after the words "Arbitrators appointed" in the second sentence of paragraph 3.

6. Mr. SCELLE, Special Rapporteur, said he entirely agreed with the Rapporteur's proposal. The case in question was of frequent occurrence and should be covered in the draft.

7. Mr. MATINE-DAFTARY asked for an explanation of the phrase "the first procedural order" in paragraph 4.

8. Mr. SCELLE, Special Rapporteur, said that no difficulty had been raised in connexion with that phrase since the 1953 text had first been presented. It was necessary to specify the point at which the proceedings were deemed to have begun, and the making of the first procedural order, as for example the order for

the written proceedings to be opened, seemed to provide the most suitable indication.

9. Mr. ZOUREK said that since he had not been present at the discussion on the article he would like to make his position clear. The second sentence of paragraph 3, he thought, went too far, for in exceptional circumstances, as for example when an arbitrator became unable to carry out his functions, it ought to be possible to replace him, no matter in what manner he had been appointed.

10. Sir Gerald FITZMAURICE, Rapporteur, thought the point raised by Mr. Zourek was covered by article 5, which provided for the filling of vacancies caused by death, incapacity or resignation. Article 4 was not intended to deal with the filling of vacancies.

11. Mr. ZOUREK said he was not entirely satisfied by the Rapporteur's explanation. Article 5 provided for the filling of vacancies, but specified that they should be filled in accordance with the procedure prescribed for the original appointments. That provision presumably implied that if the arbitrator had been appointed by the President of the International Court of Justice, the replacing arbitrator must be similarly appointed. The meaning should be made clear.

12. Mr. FRANÇOIS said it was essential that the arbitrators should have the confidence of the parties. If that confidence did not exist with respect to one of the arbitrators, the other arbitrators should not be prevented from appointing a substitute. That objection would also apply to the addition proposed by the Rapporteur.

13. He would be unable to vote for the second sentence of paragraph 3, or for the addition proposed by the Rapporteur. He would therefore request that article 4 be put to the vote paragraph by paragraph.

14. Sir Gerald FITZMAURICE, Rapporteur, observed that the first sentence of paragraph 3 did not prevent, but merely discouraged, the parties from changing an arbitrator who had been appointed by agreement between them. There were two other procedures for the appointment of arbitrators, and in both cases it was undesirable that, once appointed, the arbitrators should be changed. When, for example, under the terms of the *compromis*, the parties had entrusted their national arbitrators with the task of appointing a third arbitrator, the national arbitrators would certainly be in touch with their respective Governments on the subject and only in exceptional circumstances would they be likely to appoint an arbitrator who was not approved by their Governments. Lastly, in the case of appointments by the President of the International Court of Justice, it was most unlikely that the President of the Court would appoint an arbitrator without consulting the parties previously. It would be very unseemly if, after the parties had been unable to constitute a tribunal themselves, and the President of the Court had had to intervene, an arbitrator appointed by the President was changed and the parties attempted once more to

constitute the tribunal themselves. Despite the objections voiced by Mr. François, he thought that paragraph 3, with the addition he had proposed, should stand.

15. Mr. YOKOTA observed that the Rapporteur's proposal placed arbitrators appointed by the arbitrators already appointed and arbitrators appointed by the President of the International Court of Justice on the same footing. There was, however, another possibility: to give the same treatment to arbitrators appointed by mutual agreement between the parties and to arbitrators appointed by arbitrators already appointed, and to provide that in either case the arbitrators could not be changed save in exceptional circumstances. He thought that while it should be possible for arbitrators already appointed to change the arbitrator they themselves had appointed, it would be damaging to the authority of the President of the International Court of Justice if arbitrators appointed by him were changed after the parties themselves had been unable to constitute the arbitral tribunal. If the majority of the members of the Commission preferred the Rapporteur's proposal to the alternative he (Mr. Yokota) had suggested, he would not vote against that proposal, but would merely abstain.

16. Sir Gerald FITZMAURICE, Rapporteur, said that subject to the agreement of the Special Rapporteur he would be prepared to insert the addition he had proposed in the first sentence of paragraph 3 instead of in the second. The first sentence would then read: "Arbitrators appointed by mutual agreement between the parties, or by agreement between the arbitrators already appointed, may not be changed after the proceedings have begun, save in exceptional circumstances."

17. Mr. SCELLE, Special Rapporteur, signified his assent.

18. The CHAIRMAN said that, in compliance with the request made by Mr. François, he would put article 4 to the vote paragraph by paragraph.

Paragraph 1 was adopted by 10 votes to none, with 2 abstentions.

Paragraph 2 was adopted by 10 votes to none, with 2 abstentions.

Paragraph 3, as amended by the Rapporteur, was adopted by 6 votes to 5, with 1 abstention.

Paragraph 4 was adopted by 11 votes to none, with 1 abstention.

Article 4 as a whole, as amended, was adopted by 7 votes to 2, with 3 abstentions.

ARTICLE 5

19. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 5 in paragraph 19 of the draft report. The text had been thoroughly discussed by the Commission and had not been altered by the Drafting Committee.

Article 5 was adopted by 11 votes to none, with 2 abstentions.

ARTICLE 6

20. Sir Gerald FITZMAURICE, Rapporteur, observed that article 6 corresponded to article 8 of the 1953 text (A/2456, para. 57). Earlier in its current session, the Commission had amended paragraph 3 so as to provide that vacancies should be filled in accordance with the procedure prescribed for the original appointments instead of in the manner provided for in article 3, paragraph 2. The Drafting Committee had made no further change.

21. Mr. MATINE-DAFTARY said he agreed with the provisions of the article so far as they related to disqualification by reason of some fact arising subsequently to the constitution of the tribunal. He inquired, however, whether an arbitrator could be disqualified while the tribunal was being constituted, or, in other words, during the process of the appointment of the arbitrators.

22. Sir Gerald FITZMAURICE, Rapporteur, replying, said that the question of the disqualification of arbitrators hardly arose before the tribunal was constituted, since until that point it was open to any of the parties to refuse to accept or agree to a particular arbitrator. Either the parties were going to agree on the choice of arbitrators, in which case they would not accept a person who was disqualified, or they were unable to agree, in which case the appointments would be made by the President of the International Court of Justice. If the President informed the parties in advance of his choice, before the tribunal had been constituted, it would still be open to them to object; but if, after the tribunal had been constituted, one of the parties, not having previously been informed whom the President of the Court had chosen, found that the arbitrator was subject to disqualification, the provisions of article 6 would apply.

Article 6 was adopted by 11 votes to none, with 2 abstentions.

ARTICLE 7

23. Sir Gerald FITZMAURICE, Rapporteur, observed that article 7 was new. He drew attention to the comment in paragraph 20 of the draft report.

24. Mr. EDMONDS said that in view of the fundamental importance of the principle involved in the second sentence, he would like to state his position in the matter.

25. During the discussion which had taken place earlier in the session, the view had been expressed that the parties should have some say in the matter of whether the oral proceedings should be recommenced if a new arbitrator was appointed. In his opinion, that view was correct. It was unfair to place the burden of the decision upon the newly appointed arbitrator, especially since, even though he had a transcript of the oral proceedings, he might not be in a position to say whether the proceedings should be recommenced, for a written transcript did not always represent the

testimony of the witnesses. In the United States law, it was a principle that "he who decides must hear". In his opinion, it was unfortunate that the words "or one of the parties", which it had been proposed should be added after the words "The newly appointed arbitrator", had been dropped (438th meeting, para. 85).

26. The CHAIRMAN, speaking as a member of the Commission, said that the procedure followed in ordinary courts did not strictly apply to arbitral tribunals, which functioned according to the quorum principle, not all the members being necessarily present at all the meetings. The difficulty to which Mr. Edmonds had alluded was, he thought, adequately met by the second sentence, for even though it was not explicitly stated that the oral proceedings could be recommenced at the request of one of the parties, the parties were quite free to make representations in that sense to the newly appointed arbitrator, who would then be in a position to judge whether or not it was desirable to recommence the oral proceedings.

27. Sir Gerald FITZMAURICE, Rapporteur, said that while he fully appreciated the force of Mr. Edmonds' reasoning, he felt there were certain differences between national and international courts of which account must be taken. In the first place, whereas oral evidence figured largely in the proceedings of national courts, it was comparatively infrequent in international courts, the great bulk of the testimony before which was normally presented in writing in the form of affidavits, etc. The second difference was that, while in national courts the action of the parties was strictly controlled by the provisions of the national law and the powers of the court, an effort had to be made, in laying down rules governing the procedure in international arbitral tribunals, to avoid creating a situation in which one of the parties would be able to take advantage of the appointment of a new arbitrator for the purpose of prolonging proceedings which were already sufficiently protracted. It was not generally desirable to recommence oral proceedings unless it was essential to do so.

28. As the Chairman had pointed out, the newly appointed arbitrator would have a transcript of the proceedings.

29. Mr. SCHELLE, Special Rapporteur, said he entirely agreed with the views expressed by the Rapporteur. The new article was very important, and he thought it adequately covered all the questions likely to arise in connexion with the matters with which it dealt.

Article 7 was adopted by 10 votes to 1, with 3 abstentions.

30. Mr. BARTOS said he had abstained from voting on article 7 because he thought the oral proceedings should be recommenced on the appointment of a new arbitrator if the parties so requested and if the tribunal considered that the request was justified. He was of the same opinion on the subject as Mr. Edmonds.

ARTICLE 8

31. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 8 in paragraph 21 of the draft report.

32. The only change of substance made by the Drafting Committee was that in the second sentence of paragraph 1, the words "the essential elements of a *compromis*" had been substituted for the phrase "the essential elements of the case", which had been used in the original text (A/CN.4/113, annex, article 9). The Drafting Committee had felt that the use of the words "of the case" was inappropriate since it was for the tribunal itself to decide what were the essential elements of the case.

33. Mr. BARTOS said he was still of the opinion that decisions as to which questions fell within the competence of the tribunal should be subject to review by the President of the International Court of Justice, if one of the parties applied for review; for in the circumstances contemplated in article 8, as in those contemplated in article 9, the arbitral tribunal could conceivably exceed its powers even if the arbitrators were in good faith.

34. He did not, however, ask for any amendment of article 8.

Article 8 was adopted by 12 votes to none, with 3 abstentions.

35. Mr. MATINE-DAFTARY said he had abstained from voting on article 8 because he did not agree that the arbitral tribunal could ever dispense with a *compromis*. If there was no *compromis*, there could be no arbitration.

ARTICLE 9

36. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the replacement in article 9 of the word "widest", used in the 1953 text (A/2456, para. 57, article 11), by the word "necessary".

37. Mr. YOKOTA said that he had opposed the word "widest" because he felt that it went too far. He now opposed the word "necessary" because he felt that it was too restrictive. He proposed therefore that the word "necessary" be deleted.

38. Mr. EDMONDS supported Mr. Yokota, but for a different reason. The word "necessary" added nothing to the meaning, for he could not see any difference between "powers" and "necessary powers" in the context.

39. Mr. SCALLE, Special Rapporteur, thought that the tribunal should be given the widest possible powers to interpret the *compromis*. The expression "necessary powers" was too restrictive, while the word "powers" used by itself would weaken the text still more. He proposed that the word "widest" be restored to the text.

40. Mr. LIANG, Secretary to the Commission, pointed out that, as in the United States Constitution, the term "necessary powers" could be interpreted as stronger than the simple term "powers", inasmuch as it meant powers of implementation to the fullest extent.

41. Mr. AGO demurred at that interpretation, which seemed to him to be the exact opposite of the true position; the term "the necessary powers" was weaker than "the power". The deletion of the word "necessary" and the change from the plural to the singular was all that was required.

42. Mr. ALFARO approved of the word "necessary", for according to the canons of interpretation with which he was most familiar, "necessary powers" meant all the powers required, and hence the widest powers.

43. Sir Gerald FITZMAURICE, Rapporteur, replying to a question by Mr. YOKOTA, said that he saw no difference between "the power to interpret" and "the necessary powers to interpret".

44. Mr. MATINE-DAFTARY suggested the term "full powers".

The Commission decided, by 7 votes to 4, with 5 abstentions, to delete the word "necessary".

The Committee decided, by 5 votes to 2, with 8 abstentions, not to insert the word "widest".

45. Sir Gerald FITZMAURICE, Rapporteur, said that as a consequential change the word "powers" should be changed to "power".

46. Mr. BARTOS said he had voted against the deletion of the word "necessary" by reason of the position he had adopted with respect to article 8.

Article 9, as amended, was adopted by 15 votes to none, with 1 abstention.

ARTICLE 10

47. Sir Gerald FITZMAURICE, Rapporteur, said that the drafting of the first sentence of article 10 had been left to the Drafting Committee, which had considered the various suggestions of the Commission and chosen the words "shall apply".

48. The Commission had accepted in principle the inclusion of the sentence within brackets, but the Drafting Committee had reached no final decision because it had doubted whether, in view of the opening sentence of the article, the sentence was really necessary. He personally considered it necessary, because the opening sentence concerned only Article 38, paragraph 1, of the Statute of the International Court of Justice, whereas the reference to *ex aequo et bono* occurred in Article 38, paragraph 2.

49. Mr. FRANÇOIS noted that the commentary on article 10 (A/CN.4/L.78/Add.1, para. 23) merely recorded the decision of the Drafting Committee, without explaining why it had reached that decision. The commentary should be expanded to show whether

the change in the text was merely a drafting amendment or whether it was one of substance.

50. Mr. AGO doubted whether the word "apply" was suitable in the context of article 10. The tribunal would apply customary international law, but it would not "apply" a provision specially framed for another court. He suggested that the words "conform to" should be substituted for "apply".

51. Sir Gerald FITZMAURICE said he had no objection to such an amendment, but thought that the effect was substantially the same whichever wording was used. He believed that the tribunal could be said to "apply" Article 38, paragraph 1, if it applied the various sources of law specified therein.

52. Mr. ALFARO agreed that the sentence within brackets should be left in the article and the brackets removed.

53. The term "apply" raised primarily a question of language, but undoubtedly its use immediately after the word "applied" was undesirable. He suggested that the words "proceed in conformity with" be used.

54. Mr. LIANG, Secretary to the Commission, pointed out that, technically, it would be incorrect to say "apply Article 38, paragraph 1, of the Statute", since it was intended only that the tribunal should apply what was often termed "the sources of law" enumerated in that paragraph. The preambular part of that paragraph, naturally, was not susceptible of being applied. He thought that one solution might be the insertion of the words "the rules contained in" after the word "apply".

55. Mr. ZOUREK supported the Secretary's suggestion, but added that he would prefer the insertion to read: "the rules and principles of law in".

56. Sir Gerald FITZMAURICE, Rapporteur, pointed out that in Article 38, paragraph 1, of the Court's Statute only sub-paragraph (c) referred to rules and principles of law as such; the other sub-paragraphs referred to sources of law. He proposed that the article read: "... the tribunal shall act in conformity with the provisions of Article 38, paragraph 1, sub-paragraphs (a) to (b)."

57. After further discussion, Faris Bey EL-KHOURI proposed that article 10 should reproduce textually, without any reference to Article 38 of the Statute of the International Court, those provisions of Article 38, paragraph 1, which mentioned the rules intended to be applied by the arbitral tribunal in the absence of agreement between the parties.

58. Mr. ZOUREK supported the proposal.

59. Sir Gerald FITZMAURICE, Rapporteur, said that Faris Bey El-Khouri's proposal offered an acceptable solution. After the words "shall apply" the actual text of Article 38, paragraph 1, sub-paragraphs (a) to (b), would be inserted in article 10. The sentence in brackets would become a separate paragraph.

Faris Bey El-Khouri's proposal was adopted by 15 votes to none, with 1 abstention.

Article 10, as amended, was adopted.

III. A. GENERAL OBSERVATIONS (*continued*)¹

60. Sir Gerald FITZMAURICE, Rapporteur, after recalling the requests made by Mr. Bartos and Mr. García Amador at the previous meeting and the Commission's decision in that connexion (471st meeting, paras. 32-38), submitted the following draft footnote:

"The present draft is of course intended to apply to arbitrations between States. The Commission considered how far the draft might also be applicable to other types of arbitration, such as arbitrations between international organizations, or between States and international organizations, or between States and foreign private corporations or organizations, or other juridical entities. The Commission decided not to proceed with these aspects of the matter. Nevertheless, now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, certain of its provisions might, with the necessary adaptations, also be capable of utilization for the purposes of other types of arbitration."

61. The first three sentences of the note were purely historical. The last sentence could be omitted, if the Commission saw fit, but he would prefer to retain it. Since the parties to a dispute were entirely free to decide whether to make use of the model draft at all, and, if so, of what articles and with what adaptations, the comment in the footnote could hardly do any harm.

62. Mr. AGO regretted that the passage concerning arbitration between international organizations or between States and international organizations was couched in such modest terms. It was his impression that the Commission, when discussing the model draft, had been generally agreed that, with very little adaptation, affecting in particular three of its articles, the model draft could apply to disputes between States and international organizations and to disputes between international organizations themselves. Such disputes tended to become increasingly frequent and the system of arbitration advocated in the draft might perhaps come to be more easily accepted in such cases than in disputes purely between States. He would, therefore, prefer disputes involving international organizations to be referred to in more definite terms.

63. On the other hand, the question of the applicability of the model draft to disputes between States and foreign private corporations or other juridical entities had been considered by the Commission, if he rightly recalled, as an entirely distinct matter. Whereas disputes between States and international organizations or between international organizations were disputes between subjects of international law in which the law

¹ Resumed from 471st meeting.

applicable was international law, in the case of disputes between States and foreign private corporations the substantive applicable law was essentially internal law. The latter type of dispute was consequently outside the scope of the model draft.

64. In a word, his objection to the text of the footnote was that it said too little on the first question and too much on the second.

65. Mr. BARTOS said that his objections to the text were almost the same as those of Mr. Ago. The Commission had refrained from further consideration of the applicability of the model draft to disputes between States and international organizations or between international organizations because some of the articles might involve recourse to the International Court of Justice, whose competence was confined to disputes between States. The Commission had not, however, been opposed to the idea in principle, and had recognized that the law applicable in such disputes would be public international law.

66. But only Mr. García Amador had regarded the model draft as capable of being applied to disputes between States and foreign private corporations. All the other members of the Commission had considered that the law applicable in such cases was not public international law, unless the State of nationality of the private corporation transformed the dispute into a dispute between States by espousing its national's cause. What he chiefly objected to in the draft footnote was that it placed two different types of disputes on the same footing. He could, however, accept a text dealing with disputes between States and foreign corporations in a separate paragraph, in which it would be pointed out that the Commission had not gone further into the subject. He would be obliged to vote against the text as it stood.

67. Mr. GARCIA AMADOR said he could not understand how anyone who had studied the more recent instruments making provision for arbitration between States and foreign private corporations or other juridical entities could continue to maintain that the procedure involved in such arbitrations was governed by internal law. However, he still recognized, as he had recognized when the question had first been discussed, that it was inexpedient for the Commission to consider so very complex a problem. All that the footnote was meant to do was to mention that the Commission had discussed how the model draft might be applied to such types of arbitration. It merely pointed out that fact and added that some provisions of the draft might, with appropriate adaptations, be applied to arbitrations of that kind. Since several of the provisions of the model draft were reproduced almost word for word in the instruments he had mentioned at the Commission's 433rd meeting (paragraph 60), he could see no objection to the statement, which contained no recommendation and in no way committed the Commission to consider the matter further. In his opinion the footnote could be adopted without any reservation.

68. Mr. TUNKIN recalled that at its previous meeting the Commission had been in favour of dealing with the subject in a footnote but had left the actual text to be drafted by the Rapporteur in the light of the discussion. The point raised by Mr. Ago and Mr. Bartos was a very important one, since the text appeared by implication to place arbitrations between States and international organizations or between international organizations and arbitrations between States and private entities on exactly the same footing. He supported Mr. Bartos' suggestion for the redrafting of the text. He also thought that even in the case of the first type of arbitration, it was too strong to say "The Commission considered". It would be more appropriate to say "The Commission briefly discussed".

69. Mr. SCELLE, Special Rapporteur, observed that the Commission was reopening a debate on matters of substance which had already been discussed at length. He found the text of the footnote quite satisfactory. The model draft was concerned solely with arbitration between States. The Commission could, if it wished, mention that it had considered other related but subsidiary questions out of curiosity, but there was no real need to inform the General Assembly of that fact.

70. Mr. LIANG, Secretary to the Commission, thought that no mention should be made in the text of arbitrations involving foreign private corporations or other juridical entities. Arbitration between States and foreign private corporations was an entirely different subject from the first point dealt with in the footnote and the applicability of the model draft to such types of arbitration was extremely doubtful.

71. On the other hand, there was no denying that the Commission had discussed, though briefly, the applicability of the model draft to arbitrations between States and international organizations or between international organizations. And it must be said that, in view of the large number of agreements between international organizations and their host States, there was ample scope for such a type or arbitration.

72. He suggested retaining the first sentence of the text, changing the word "considered" in the second sentence to "discussed briefly" and deleting both the end of the sentence, from the words "or between States and foreign private corporations", and the following sentence. He did not think there could be any objection to the substance of the last sentence.

73. The CHAIRMAN, speaking as a member of the Commission, wondered whether the Commission was in a position to make the statements appearing in the last sentence of the text, since it had not considered the articles of the model draft in that light.

74. Mr. FRANÇOIS said that he could accept the text of the footnote, with some drafting changes, and could not agree with either Mr. Ago or Mr. Bartos. Disputes between States and large commercial concerns were becoming increasingly important, far more important than disputes between international organizations. Moreover, it could not be claimed that

the former type of dispute was governed merely by internal private law. Public law was also partly applicable and the Permanent Court of Arbitration had, in fact, declared its willingness to co-operate in the settlement of disputes between States and foreign private corporations. Such disputes were a new chapter in law which was largely governed by exactly the same principles as those enunciated in the draft. There would of course be some differences, but that fact was already recognized in the text under consideration.

75. Sir Gerald FITZMAURICE, Rapporteur, pointed out that he had originally regarded the two questions as too detailed to warrant including a reference to them in a very general commentary and he had only drafted the text under consideration in response to the requests of Mr. Bartos and Mr. García Amador. In doing so he had tried to keep to generalities without saying anything that was definitely incorrect. The word "considered" in the second sentence could be attenuated if necessary, but it was a matter of fact that both questions had been raised and discussed.

76. With regard to the last sentence, he said that, whatever might be the law applicable in such cases, many provisions of the model draft were undoubtedly quite normally included in arbitration agreements between States and foreign private corporations. Furthermore he could not entirely agree with those who claimed that the disputes in question were governed solely by internal law. For one thing, in such cases it was difficult to say which internal law applied. The position was more as Mr. François had described. If an arbitration agreement with a foreign private corporation was not carried out by the Government of the State which was party to it, the Government of the State of nationality of the corporation might well espouse the corporation's cause and bring a claim under the rules governing State responsibility. Thus it was impossible to say that international law and the principles of international law were wholly foreign to such disputes.

77. Mr. ZOUREK considered that all reference to arbitration between States and private entities should be omitted from the footnote. Firstly, the Commission, though it had touched on it, had not really discussed such arbitration. Secondly, the text as it stood conveyed the very false impression that the question remained on the programme of the Commission.

78. In disputes between States and foreign private corporations the law applied was not public international law but internal law and private international law. It was the Protocol on Arbitration Clauses of 1923² and the Convention on the Execution of Foreign Arbitral Awards of 1927,³ as recently revised at the conference of plenipotentiaries held in New York, which

applied in the case of such disputes. That basic difference should be borne in mind. As the Secretary had pointed out, arbitrations between States and foreign corporations were entirely different from arbitrations between States and international organizations or between international organizations.

79. Finally, apart from some purely formal provisions, he considered that only very few of the articles in the model draft could be applied to disputes between States and foreign corporations.

80. Mr. YOKOTA, speaking on a point of order, said that, to his best recollection, the Commission had decided to include as a footnote a statement that the two questions had been raised and discussed to some extent but that the Commission had decided not to proceed any further with them. That much, he thought, had been agreed and was no longer open to discussion.

81. The last sentence in the text, however, was a new element and, since it had given rise to a reopening of the discussion on matters of substance, he proposed that the text be confined to the first three sentences.

82. Mr. ZOUREK recalled that he had proposed at the previous meeting (471st meeting, para. 36) that a decision be taken only when the Commission had a text before it. There had thus been no final decision.

83. Sir Gerald FITZMAURICE, Rapporteur, observed that the two instruments cited by Mr. Zourek (para. 78 above) were primarily applicable not to arbitrations between Governments and foreign private entities but to arbitrations between private entities in different countries. Disputes between Governments and foreign private corporations were always governed by the arbitration agreements previously concluded between them. Though it was difficult to say exactly what law applied in such cases, they were certainly not governed exclusively by internal law. Indeed there was sometimes an extremely close analogy between arbitration between States and arbitration between States and foreign private corporations.

84. Mr. AGO observed that certain provisions of the model draft could undoubtedly be applied to any form of arbitration, even to arbitration between two private juridical entities. But those provisions were purely formal ones, such as article 9 or article 38, and were not necessarily concerned with international arbitrations but with every form of arbitration in general. On the other hand, with some slight exceptions, every provision in the model draft was capable of being applied to arbitration between States and international organizations, which was an international arbitration. He could not therefore agree to putting both types of arbitration on the same footing. He proposed the deletion of the reference to arbitrations between States and foreign private corporations. On the contrary, for arbitrations with international organizations, the words "certain of its provisions" in the last sentence should be reduced simply to "its provisions".

85. Mr. GARCÍA AMADOR remarked that after the protracted debate at that meeting it could hardly be

² Protocol on Arbitration Clauses, signed at Geneva on 24 September 1923. See League of Nations, *Treaty Series*, vol. XXVII, 1924, No. 678.

³ Convention on the Execution of Foreign Arbitral Awards, signed at Geneva on 26 September 1927. See League of Nations, *Treaty Series*, vol. XCII, 1929-1930, No. 2096.

said that the Commission had not discussed the question of arbitration between States and foreign private corporations or other juridical entities. He felt it essential, especially in view of Mr. Zourek's remarks, to mention that the subject had been discussed.

86. Mr. MATINE-DAFTARY agreed with Mr. Zourek and Mr. Ago and urged that a decision be taken on the text.

87. The CHAIRMAN pointed out that the first three sentences of the text merely stated matters of fact. It could not be denied that the Commission had discussed, however briefly, both arbitrations involving international organizations and arbitrations between States and foreign companies, and had not proceeded further with the subject.

88. He put to the vote the question whether a footnote dealing with the subject should appear in the report.

The Commission decided by 10 votes to 2, with 1 abstention, that such a footnote should appear in the report.

The meeting rose at 1.5 p.m.

473rd MEETING

Friday, 27 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1) (continued)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.78/Add.1) (continued)

III. A. GENERAL OBSERVATIONS (continued)

1. Sir Gerald FITZMAURICE, Rapporteur of the Commission, read out a revised version of the footnote discussed at the previous meeting (472nd meeting, para. 60), which he had drafted in conjunction with Mr. Ago. Except for the deletion of the words "of course" from the first sentence, the first three sentences remained unchanged. The remainder would read:

"Nevertheless, now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, its provisions would, with the necessary adaptations, also be capable of utilization for the purpose of arbitration between States and international organizations or between international organizations.

"Arbitrations between States and foreign private corporations or other juridical entities are, of course, governed by different legal considerations. However, some of the articles of the draft, if adapted, might also be capable of use for this purpose."

2. Mr. GARCÍA AMADOR suggested that, since the Commission had not discussed what legal considerations applied to arbitrations between States and foreign corporations, the words "are, of course, governed", in the first sentence of the second paragraph, were rather too categorical.

3. After discussion, Sir Gerald FITZMAURICE, Rapporteur, agreed to change the sentence in question to: "Different legal considerations arise in arbitrations between States and foreign private corporations or other juridical entities."

4. Mr. TUNKIN remarked that the new text did not take account of the discussion at the previous meeting. Furthermore, the term "legal considerations" was misleading. The point was that a different law applied. He could not vote for the text as it stood.

5. The CHAIRMAN put the new text of the footnote, as just amended by the Rapporteur, to the vote.

The text was adopted by 9 votes to 3, with 1 abstention.

6. Mr. ZOUREK said that he had voted against the text because there was not the slightest doubt that arbitrations between States and foreign corporations were governed by entirely different principles from those applicable to arbitrations between States and international organizations or between international organizations.

7. Replying to the Rapporteur's remarks at the previous meeting (472nd meeting, para. 83) concerning the Protocol of 1923 and the Convention of 1927, he said that the texts of those two instruments made it perfectly clear that the arbitration of disputes arising out of contracts between States and foreign corporations was governed by private international law and not by public international law. The Rapporteur's opinion on that matter was clearly wrong.

II. TEXT OF THE DRAFT and III. COMMENTARY (continued)¹

ARTICLE 11

8. Sir Gerald FITZMAURICE, Rapporteur, said that the only change from the previous text of the corresponding article (A/CN.4/113, annex, article 12) was the substitution of the words "the law to be applied" for the words "international law or of the *compromis*".

Article 11 was adopted by 13 votes to none, with 2 abstentions.

Article 12 was adopted unanimously.

ARTICLES 13 TO 17

9. Sir Gerald FITZMAURICE, Rapporteur, pointed out that articles 13 to 17 were new but largely procedural. He read out the proposed commentary on them in paragraph 24 of the draft report.

Article 13 was adopted unanimously.

¹ Resumed from 472nd meeting.