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Summary record of the 471st meeting

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471st MEETING

Wednesday, 25 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)

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

1. Sir Gerald FITZMAURICE, Rapporteur of the Commission, introduced the chapter of the draft report relating to arbitral procedure (A/CN.4/L.78/Add.1). Paragraphs 1 to 4 of the draft report contained a sketch of the history of the draft articles, and were followed by an explanation of the basis on which the draft had been written and why he had felt it unnecessary to make a detailed commentary on the articles. In the text of the draft articles the main change was the reintroduction of headings to certain groups of articles; in addition, the order of some articles had been changed. In the light of comments made during the discussion in the General Assembly, the Special Rapporteur had added articles on procedure, and he had placed them under the heading: "Powers of the tribunal and the process of arbitration". The commentary after the text was self-explanatory.

2. Mr. SCELLE, Special Rapporteur, said that the draft articles remained in substance much as they had been, but they had gained in sobriety of expression and clarity of layout. Much of the improvement had been due to the work of Sir Hersch Lauterpacht and of Sir Gerald Fitzmaurice.

I. INTRODUCTION

Paragraphs 1 to 5

No observations.

Paragraph 6

3. Mr. BARTOS said that the reasons given for dispensing with a detailed commentary on the articles had not convinced him. From the scientific point of view it was desirable that the final text should have such a commentary, and from the practical point of view it would be difficult for Governments and for delegations in the General Assembly to consult the successive reports in order to find an adequate commentary on each article. The draft articles would be a possible source of international law, he thought, and deserved better treatment. Because of the short time at the Commission's disposal, he had no practical suggestion to make, but he felt that the commentary on the articles should at least be closely examined and extended so as to bring out clearly the difference between the old and new versions.

4. Mr. SCELLE, Special Rapporteur, said that the previous reports were so voluminous that the Rapporteur of the Commission could not be expected to incorporate them in the draft, especially as members of delegations in the Sixth Committee and the General Assembly ought to have the earlier reports before them when discussing the present draft articles. Unless the General Assembly required a compilation, therefore, Mr. Bartos' criticism was unjustified.

5. Sir Gerald FITZMAURICE, Rapporteur, said that he had considered the question whether there should be a more detailed commentary, but had come to the conclusion that the earlier reports on arbitral procedure had been so full and masterly that they could not be improved upon. Accordingly he had preferred simply to summarize the salient points.

6. Mr. LIANG, Secretary to the Commission, suggested that the Secretariat's detailed *Commentary*,¹ prepared at the Commission's request, should be mentioned in paragraph 6.

7. Mr. SCELLE, Special Rapporteur, supported the Secretary's suggestion. The Secretariat's *Commentary* had been of great assistance, particularly on certain points where doctrine was not fixed and where precedents were required.

8. Sir Gerald FITZMAURICE, Rapporteur, agreed that the Secretariat's *Commentary* should be mentioned in paragraph 6.

9. Mr. HSU suggested that perhaps the Secretariat might revise its *Commentary* in the light of the new draft articles.

10. Mr. LIANG, Secretary to the Commission, said that the articles as now adopted by the Commission did not depart in any radical way from the 1953 text (A/2456,² para. 57) so that the Secretariat's *Commentary* was still of value. The *Commentary* could hardly be revised in time for the thirteenth session of the General Assembly, but thereafter, if there was any request for revision, it might be revised.

11. Mr. GARCIA AMADOR pointed out that some members of the delegations at the forthcoming session of the General Assembly and other persons outside the Assembly would be looking at the draft articles for the first time. For the sake of such persons, and because of the misinterpretations which had occurred and were liable to recur, he felt that it should be made clear in paragraph 6 that the object of the draft articles was to make arbitral procedure efficacious only when States had agreed to resort to arbitration. It must be absolutely clear that the articles did not make arbitration between States compulsory.

¹ *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No.: 1955.V.1).

² *Official Records of the General Assembly, Eighth Session, Supplement No. 9.*

12. Sir Gerald FITZMAURICE, agreeing with Mr. García Amador, suggested that the "General observations" (paragraphs 8 to 13), which were precisely designed to fulfil the purpose the latter had in mind, be placed before the draft articles to serve as an introduction.

It was so decided.

13. Mr. ZOUREK proposed that the words "*de style*" in the penultimate sentence of the French text of paragraph 6 should be deleted.

It was so agreed.

14. The CHAIRMAN pointed out that in view of the decision just taken, section III. A, "General observations" (paragraphs 8 to 13), would be considered before section II (paragraph 7) containing the text of the draft.

III. A. GENERAL OBSERVATIONS

Paragraph 8

15. Sir Gerald FITZMAURICE suggested that, in view of the decision just taken by the Commission (para. 12 above), paragraph 8 should be redrafted.

It was so agreed.

Paragraph 9

16. Mr. GARCÍA AMADOR suggested that the fourth sentence in paragraph 9 should be so redrafted that it could not be misconstrued as implying that resolutions adopted by the General Assembly, or model drafts adopted in General Assembly resolutions, had no binding force.

17. Mr. ZOUREK saw no difficulty in the sentence referred to. It was already recognized that resolutions of the General Assembly, with the exception of those relating to internal administrative matters of the United Nations, had no binding force in law.

18. The CHAIRMAN, speaking as a member of the Commission, observed, with reference to the second sentence in paragraph 9, that in his view the adoption of a convention by the General Assembly did not involve an obligation on Member States to decide whether to sign and ratify it or not. It seemed unnecessary to raise such a debatable point in the paragraph and he suggested that the second half of the sentence should be replaced by the words "... convention for adoption by the General Assembly and for possible signature and ratification by States." The fourth sentence, referred to by Mr. García Amador, could be deleted as superfluous. It might be hardly proper to make so self-evident a statement as the fact that adoption of the report by resolution would not make the draft binding on States.

19. Mr. HSU supported the Chairman's suggestion that the fourth sentence of paragraph 9 should be deleted. The question whether a resolution of the General Assembly was binding or not depended more on the form in which it was drafted than on the fact that it was

a resolution. In any case, he would welcome the deletion of the reference to article 23, paragraph 1 (b) of the Statute of the Commission, since recommendations under that clause ("To take note of or adopt the report by resolution") had come to be associated with drafts which embodied only customary law and which did not need to be couched in the form of a convention. It was obviously inadvisable to convey such an impression in the case of the model draft on arbitral procedure.

20. Mr. SCELLE, Special Rapporteur, proposed that at an appropriate point in paragraph 9 a statement should be added to the effect that the draft had nothing in common with a general draft on compulsory arbitration.

21. Sir Gerald FITZMAURICE, Rapporteur, agreed with the suggestions of Mr. García Amador and with that of the Chairman relating to the second sentence in the paragraph, but was reluctant to delete the fourth sentence or to adopt Mr. Hsu's suggestion. In view of the history of the draft, it was most desirable that the Commission should make a definite recommendation as to its fate. In its report on its fifth session (A/2456, para. 55) the Commission had made a specific reference to article 23, paragraph 1 (c) of its Statute, and he thought that a corresponding reference should be made to paragraph 1 (b) in its present report, in order to make it quite clear that the Commission was recommending a different course of action. He was in favour of retaining the sentence, subject to redrafting to meet Mr. García Amador's point. In his opinion, for the reasons stated by that speaker, it was advisable to stress that neither the adoption of the Commission's report nor the adoption of the draft articles in the form of a resolution would be in any way binding on States Members of the United Nations.

22. Faris Bey EL-KHOURI pointed out that paragraph 4 of the preamble to the model rules on arbitral procedure should make it perfectly clear that the procedures suggested in the rules would be compulsory only if the States concerned had agreed to have recourse thereto.

23. Mr. LIANG, Secretary to the Commission, agreed with Mr. García Amador and also with the Rapporteur on the desirability of retaining the reference to the Commission's Statute in order to explain the course of action advocated. He suggested redrafting the second part of the fourth sentence as from the words "now recommends" and merging it with the fifth sentence in the following manner:

"the Assembly adopts the present report by resolution, the draft articles would become binding only in the following circumstances..."

It was so decided.

Paragraph 10

24. Mr. ZOUREK proposed that the word "*accord*" should replace the word "*consentement*" in the third

and fourth sentences of the French text of paragraph 10.

It was so agreed.

Paragraph 11

25. Mr. LIANG, Secretary to the Commission, thought that it might be advisable to explain what was meant by the phrase "if not in form" in the first sentence of paragraph 11. In his opinion, an agreement to arbitrate involved, even in form, an international obligation.

26. Sir Gerald FITZMAURICE, Rapporteur, said that the phrase in question was intended to refer to a treaty obligation. It had been argued that an undertaking to arbitrate was not equivalent in form to an obligation under an ordinary treaty. The phrase was not essential, however, and could be deleted, in keeping with the principle that observations which were not absolutely essential were best omitted if they might give rise to any misunderstanding.

27. Mr. SCELLE, Special Rapporteur, thought that the sentence was quite clear and very well rendered in French. He was in favour of retaining the phrase, since an undertaking to have recourse to arbitration might take a number of forms.

28. Mr. LIANG, Secretary to the Commission, remarked that Mr. Scelle's point was covered elsewhere, namely, in the draft articles themselves.

It was decided that the words "if not in form" should be deleted.

29. Mr. ZOUREK proposed that the words "*un engagement de recourir à l'arbitrage*" should replace the words "*une convention d'arbitrage*" in the first sentence of the French text.

It was so agreed.

30. Mr. YOKOTA proposed that the words "in law" should be inserted after the word "bound" in the second sentence of paragraph 11, to make it clear that a legal obligation was involved.

It was so agreed.

Paragraph 12

No observations.

Paragraph 13

31. Mr. GARCÍA AMADOR proposed that the word "sovereign" should be omitted before the word "States" in the first and fourth sentences of paragraph 13.

It was so agreed.

32. Mr. BARTOS urged that some reference be made to the fact that the Commission had discussed the question whether the draft should apply, *mutatis mutandis*, to disputes between States and international organizations and to disputes between international organizations and, though not opposed to the idea, had concluded that in view of frequent references in the

draft to the International Court of Justice, whose Statute precluded it from adjudicating in disputes involving international organizations, it would be difficult to apply the draft to such disputes.

33. Mr. GARCÍA AMADOR suggested that reference should also be made to the fact that the Commission had discussed the advisability of extending the scope of the draft to cover disputes between States and individuals or bodies corporate concerning agreements or contracts containing an arbitration clause.

34. Mr. SCELLE, Special Rapporteur, suggested that it might be more appropriate to mention the points just raised in a footnote rather than in a paragraph of the text. The preamble referred to disputes between States, and consequently a reference to disputes between entities other than States, or between States and such other entities, was not strictly relevant.

35. Sir Gerald FITZMAURICE, Rapporteur, supported Mr. Scelle's suggestion. The footnote might say that the Commission had not felt it necessary to add provisions covering disputes involving bodies other than States.

36. Mr. ZOUREK said that, so far at least as disputes between international organizations were concerned, the substance of the matter had not been discussed. He suggested that a decision on the form which the reference should take in the report should be deferred until the text of a footnote had been prepared for the Commission's consideration.

37. Mr. HSU thought that perhaps there was no need to discuss the matters referred to, since the draft articles were to take the form, not of a convention, but of model rules. The position was that if a State was willing to enter into an arbitration agreement with an international organization or a body corporate, it would be quite free to do so.

38. The CHAIRMAN suggested that the Rapporteur be asked to prepare a footnote for the Commission's consideration.

It was so agreed.

II. TEXT OF THE DRAFT and III. COMMENTARY

TITLE AND PREAMBLE

39. The CHAIRMAN, speaking as a member of the Commission, suggested that in the title it might be more appropriate to use, instead of "model rules", the more neutral term "set of rules".

40. Mr. EDMONDS said that the phrase "model rules" was frequently used in the United States to describe drafts of that kind.

41. Mr. YOKOTA said he was in favour of keeping the phrase "model rules", since it was less likely to lead to misunderstanding than the expression "set of rules".

42. Mr. SCELLE was also in favour of retaining the word "model". A group of experts on international

law, like the Commission, was well qualified to produce a model of that kind.

43. Mr. ALFARO said he also preferred to retain the word "model", partly because it was the term most suited to the aim of the draft, and partly because the expression "set of rules" would be difficult to translate into Spanish in such a way as to convey the purpose of the draft.

44. Mr. ZOUREK recalled that the expression "standard rules" (*règles types*) had also been suggested and might perhaps be adopted if there was strong objection to the use of the word "model".

45. The CHAIRMAN, speaking as a member of the Commission, said that since a majority of the members seemed to be in favour of retaining the word "model", he would withdraw his amendment.

The title and preamble were adopted unanimously.

46. Mr. BARTOS, explaining his vote, said he was aware that although the preamble stated that the rules should not be compulsory unless the States concerned had agreed to have recourse thereto, they would in fact become compulsory in the course of time, for that was the fate of all sets of rules or models which were generally accepted. He opposed the idea that the rules should be compulsory at the present time, but despite his awareness that they would become compulsory, he had not voted against the preamble, for he realized that by sponsoring those rules the Commission was making a contribution to the future international law on arbitration.

COMMENTS ON THE PREAMBLE (A/CN.4/L.78/Add.1, paras. 14 and 15)

47. Mr. LIANG, Secretary to the Commission, suggested the deletion of the words "under the present scheme" in the second sentence of paragraph 14, since the articles of the 1953 draft would have had no binding effect, either. The purpose of the paragraph was to draw attention to the fact that the articles had no binding effect, and consequently the phrase "under the present scheme" was misleading.

It was decided to delete the words "under the present scheme".

48. Mr. ZOUREK pointed out that in the French text of paragraph 14 the words "have no binding effect" were rendered by "*n'ont pas force exécutoire*", which he thought did not mean the same thing.

49. Sir Gerald FITZMAURICE, Rapporteur, suggested substituting "*n'ont pas d'effet obligatoire*".

50. Mr. ZOUREK signified his approval of the suggestion.

The French text of paragraph 14 was amended accordingly.

51. Mr. GARCÍA AMADOR suggested that, to avoid misunderstanding, the word "international" should be

inserted between the words "general" and "law" in the last sentence of paragraph 15.

It was so agreed.

ARTICLE 1

Article 1 was adopted by 12 votes to 1, with 1 abstention.

COMMENTS ON ARTICLE 1 (A/CN.4/L.78/Add.1, para. 16)

52. Mr. ZOUREK suggested that, in the commentary on article 1, the words "The majority of the members of" should be inserted at the beginning of the third sentence so as to avoid giving the impression that the Commission had been unanimously of the opinion that the criticisms were not well founded.

53. Mr. FRANÇOIS said he felt some difficulty in accepting Mr. Zourek's proposal. It was true that if the text was left unchanged, the impression might be conveyed that the Commission had been unanimously of the opinion that the criticisms were not well founded; but on the other hand, if the phrase "the majority of the members of the Commission" were used, there might be some justification for claiming that it should be used on every occasion on which a decision had not been unanimous.

54. His practice as Rapporteur had been to use the phrase "the Commission" when reporting majority decisions, except in cases where important principles were involved, when he had used the phrase "the majority of the members of the Commission". On the whole, he thought it was better to say only "the Commission", but perhaps a general statement could be included in the report to indicate that the use of that phrase did not necessarily imply that the Commission had been unanimous on the point in question.

55. Mr. ALFARO observed that decisions were taken by majority vote in most deliberative bodies. In recording decisions of the International Court of Justice, for example, it was stated that "The Court decided . . .", even if there were dissenting opinions, and the same practice was universally followed in recording the decisions of courts with a plurality of judges. So far as the decisions of the Commission were concerned, dissenting opinions were normally mentioned in the records, and though reservations to votes were sometimes referred to in footnotes in the Commission's reports, it seemed natural to use the expression "The Commission decided . . ." for the purpose of recording majority decisions.

56. Sir Gerald FITZMAURICE, Rapporteur, agreed with Mr. François and Mr. Alfaro. The phrase "the Commission" had been used for a long time in reporting majority decisions, and he did not think there was any danger of its being interpreted as implying that the decision in question was necessarily unanimous. It was, however, reasonable that members who had opposed a decision should request that some indication

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