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Summary record of the 231st meeting

Topic:
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the General Assembly whether the Commission adopted some general wording, as proposed by Mr. Sandström and Mr. Spiropoulos, or whether it adopted more detailed wording such as that contained in the last sentence of Mr. Lauterpacht's new proposal ; the results, so far as the draft code was concerned, would be the same ; the General Assembly would discuss it, probably in detail, and would take whatever further action it thought fit.

57. The last sentence of Mr. Lauterpacht's new proposal was an interpretation of sub-paragraph 1 (*c*) of article 23 of the Commission's Statute, and it was an interpretation which was perfectly in accordance with the procedure which the General Assembly had adopted in the past. For example, article 105, paragraph 3, of the Charter provided that the General Assembly " may propose conventions to the Members of the United Nations " with a view to securing the privileges and immunities necessary for the fulfilment of the Organization's purposes ; and the General Assembly had interpreted that provision as meaning that it could itself discuss the draft Convention on Privileges and Immunities and, having discussed and approved it, throw it open for signature by States Members of the United Nations. The last sentence of the text proposed by Mr. Lauterpacht was therefore unlikely to meet an unfavourable reception in the General Assembly. He agreed, however, that it was unnecessarily involved ; moreover, it did not explicitly state that the General Assembly should consider the draft code. He accordingly suggested that it might be replaced by the following :

> " It is hoped that, after considering the draft code, the General Assembly will give it its approval and open it for signature or accession by Members of the United Nations and possibly by other States ".

58. Mr. KOZHEVNIKOV agreed with Mr. Lauterpacht that it would be preferable to defer the vote, since the question was still far from clear. The last sentence of Mr. Lauterpacht's new proposal had been rightly criticized, for it would certainly be inappropriate for the Commission to address itself to the General Assembly in such terms.

59. Mr. LAUTERPACHT said that he was all in favour of deferring the vote if that would ensure universal or nearly universal support for any text. With that end in view, he could accept the wording which Mr. Liang had suggested to replace the last sentence of the text he had proposed ; alternatively, he could agree to the deletion of that sentence, as Mr. Amado had suggested, if that course commended itself to a substantial majority. He could also accept Mr. Amado's proposal that the word " formal " be deleted from the second sentence.

60. Mr. SANDSTRÖM and Mr. SPIROPOULOS withdrew their proposals in favour of Mr. Lauterpacht's new text, as amended by the Secretary.

61. Mr. KOZHEVNIKOV requested that the vote on that text and on the alternative text submitted by Mr. Yepes be deferred until the opening of the next meeting, and that the vote should then be taken without further discussion.

It was so agreed.

The meeting rose at 6.5 p.m.

231st MEETING

Tuesday, 4 August 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

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 46 (55) ** (*continued*)

1. The CHAIRMAN said that at its 230th meeting the Commission had decided to proceed to a vote on para-

* 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.

graph 46 without further discussion.[1] Of the proposals before the Commission, the first was a text submitted by Mr. Yepes, reading as follows :

" 46. In accordance with article 23, paragraph 1 (*b*) and (*c*) of its Statute, the Commission decides to recommend to the General Assembly :

" I. To adopt, by resolution, the report on arbitral procedure and the draft convention annexed thereto ;

" II. To recommend the draft to Member States with a view to the conclusion of a convention to be signed either at the General Assembly or at a special conference called for that purpose. After adoption by the General Assembly or by such special conference, the convention would be open for signature or accession by Member States and, possibly, by other States."

2. The second was a text submitted by the General Rapporteur to replace the text he had originally proposed in his draft report. It ran :

" 46. In the opinion of the Commission the draft Code as adopted calls for action, on the part of the General Assembly, contemplated in paragraph (*c*) of article 23 of the Statute of the Commission, namely, ' to recommend the draft to Members with a view to the conclusion of a convention '. The Commission makes a recommendation to that effect. It is hoped that after considering the draft Code, the General Assembly will give it its approval and open it for signature or accession by Members of the United Nations and, possibly, other States."

3. The third proposal, made by Mr. Amado, was that the last sentence of the General Rapporteur's new text be deleted.

4. Mr. YEPES said that he would withdraw his proposal on condition that the General Rapporteur agreed to include in his text a mention of sub-paragraph 1 (*c*) of article 23 of the Commission's Statute. In his view, sub-paragraphs (*b*), (*c*) and (*d*) of paragraph 1 of that article were not mutually exclusive ; it was therefore open to the Commission to suggest that the General Assembly might adopt all three possibilities.

5. Mr. LIANG (Secretary to the Commission) still considered that if the Commission suggested that the General Assembly should recommend the draft on arbitral procedure to States Members of the United Nations with a view to the conclusion of a convention, it was unnecessary for it at the same time to suggest that the General Assembly should adopt the report by resolution ; for if the former course were followed, the General Assembly would necessarily arrive at a decision on the draft, and its recommendation to governments could take no other form than that of a resolution.

6. Mr. SANDSTRÖM agreed with the Secretary. It was evident that if the General Assembly decided to recommend the draft to States Members it would first have to take note of it and adopt the Commission's report.

7. Mr. CÓRDOVA agreed.

8. Mr. AMADO said that it seemed to be Mr. Yepes' intention to translate article 23 of the Commission's Statute into the report without making any distinction between the alternatives enumerated in it. He (Mr. Amado) would vote against Mr. Yepes' proposal, as it seemed to him that if the Commission had any views on the procedure which should be followed by the General Assembly it ought to say what they were.

9. Mr. SPIROPOULOS pointed out that Mr. Yepes' intention was entirely met by the last sentence of the General Rapporteur's new text, which referred to the General Assembly's approving the draft on Arbitral Procedure and opening it for signature or accession.

10. Mr. YEPES thereupon withdrew his proposal.

11. Mr. SPIROPOULOS drew attention to the use in the General Rapporteur's new text of the phrase " draft Code ", referring to the draft on Arbitral Procedure. Previously, the Commission had referred to the draft on Arbitral Procedure simply as the " draft ".

12. Mr. LAUTERPACHT thought that it had been agreed to refer uniformly to the draft on Arbitral Procedure as the " draft Code ".

13. Mr. LIANG (Secretary to the Commission) confirmed that the full title was the " draft Code on Arbitral Procedure ".

14. Mr. KOZHEVNIKOV said that the word " code " had been inserted without discussion. He thought also that the operative verb in the first sentence of the General Rapporteur's new text, namely " calls for action ", was too categorical and imperative.

15. Mr. AMADO said that he understood that there had been a vote on the use of the phrase " draft Code ". For his part, he thought the term too ambitious.

16. The CHAIRMAN *ruled* that discussion of the exact title to be given to the draft on Arbitral Procedure be deferred until after the draft had been adopted as a whole.

17. Mr. ALFARO, referring to the last sentence of the General Rapporteur's new text, thought it was inappropriate for the Commission to express any hope about the action to be taken by the General Assembly. He suggested that that sentence might read :

" Should the General Assembly give its approval to the draft Code, it should be opened for signature or accession by Members of the United Nations and, possibly, other States."

18. The CHAIRMAN reminded the Commission of its previous decision not to discuss paragraph 46, but to proceed to vote on the proposals relating thereto.

Mr. Amado's proposal for the deletion of the last

[1] See *supra*, 230th meeting, para. 61.

sentence of the new text submitted by the General Rapporteur for paragraph 46 was adopted by 6 votes to 5 with 2 abstentions.

Paragraph 46, as amended, was approved by 8 votes to 2, with 3 abstentions.

19. Faris Bey el-KHOURI explained that he had voted in favour of Mr. Amado's proposal because he was opposed in principle to the Commission's making any recommendations to the General Assembly ; therefore, the fewer the better. On the other hand, he had abstained from voting on the text as amended because, although he considered that the Commission should make no recommendations, and although he personally disapproved of the text of the draft on Arbitral Procedure and therefore wished in no way to support any recommendation for positive action on it by the General Assembly, yet he had no wish to obstruct the will of the majority of the Commission by adding his vote to the minority, and thus weakening the Commission's recommendation.

20. Mr. SCELLE explained that, although not in favour of the amendment itself, he had voted for the paragraph as amended, because it was better than no paragraph at all.

21. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted in favour of the deletion of the last sentence of the General Rapporteur's text because he considered it beneath the Commission's dignity for it to express any hopes about approval of the Commission's work by the General Assembly.

Paragraph 47 (56)

22. Mr. YEPES could not understand the sentence which ran :

> " Moreover, if and when the work of the Court increases, settlement through arbitration — especially of such disputes which are of limited compass and which require speedy adjudication — will increasingly recommend itself to Governments."

23. He did not see the connexion between the work of the Court and the appreciation which governments might come to have of arbitral procedures. To his mind, it did not follow that more governments would resort to arbitration if the work of the Court increased.

24. Mr. SPIROPOULOS said that the contents of the paragraph were undeniably true ; but he doubted whether it should be included in the Commission's report, because it expressed general views on arbitration.

25. Paragraph 46 suggested that the General Assembly should recommend the draft on Arbitral Procedure to States Members with a view to their concluding a convention. Paragraph 47 only weakened that recommendation. For example, the mention of the International Court of Justice in the second sentence was of doubtful relevance ; and the reference later in the paragraph to the necessity for " maintaining the character of international arbitration as a procedure based on law " was superfluous, for to his mind arbitration could not very well be based on anything else. The paragraph contained many similar generalities which added neither to the authority of the report nor to the prestige of the Commission ; it should be deleted.

26. Mr. LIANG (Secretary to the Commission) was convinced that paragraph 47 was a necessary part of the report. A possible criticism of the draft on Arbitral Procedure was that it established a system of jurisdiction which might overlap with that of the International Court of Justice, and that there might thus be duplication between that Court and any tribunals established pursuant to the draft. The third sentence of the paragraph, to which Mr. Yepes had referred, was an excellent defence of the draft on Arbitral Procedure against that criticism, for it meant that as the work of the International Court of Justice increased it might not be able to deal expeditiously with every case brought before it. States might then prefer another procedure, of more limited scope, for settling their disputes. Thus arbitral tribunals might relieve possible pressure on the International Court of Justice, and in the circumstances envisaged, States would undoubtedly see the advantages of proceeding to arbitration along the lines suggested in the draft Code. In short, a function of arbitral tribunals was to supplement and relieve the International Court of Justice.

27. It was also important that the report should give some account of the general considerations which members of the Commission had had in mind. The spirit in which the Draft Code had been drawn up should be communicated to the General Assembly, but it would be impossible to do that if the Commission's report ended with brief clauses such as paragraphs 46 and 48, which were concerned with what were essentially procedural matters.

28. He felt, therefore, that though drafting changes might be necessary, the paragraph should be maintained substantially as it was. It would undoubtedly create a powerful impression.

29. Mr. SCELLE agreed with the Secretary, the more inasmuch as the paragraph showed that the basic considerations underlying the draft on Arbitral Procedure were the same as those which underlay the Hague Convention of 1907 for the Pacific Settlement of International Disputes, which had first established a procedure for judicial arbitration.

30. Mr. ALFARO also supported the inclusion of the paragraph in the report ; it ably expounded certain pertinent considerations. In particular, he welcomed the strong affirmation in the first sentence. Referring to the third sentence, already mentioned by other members, he said that the procedure of the International Court of Justice tended to be slow and expensive, and it might prove possible to settle cases more easily and speedily by means of the arbitral procedures provided in the draft. The paragraph thus fully vindicated the Commission's concern for the conclusion of a convention, and should be maintained.

31. Mr. KOZHEVNIKOV was inclined to agree with those members who doubted the appropriateness of the paragraph. Its thesis was that the draft on Arbitral Procedure would increase the authority of international law, and maintain the character of international arbitration; in fact, it would have precisely the opposite effect, since the draft Code was contrary to the established principles of international law.

32. Mr. LAUTERPACHT said that, as General Rapporteur, he had been faced with the alternatives of making the report as convincing as possible, or merely neutral; of providing the background to the draft that would show it in its widest perspective or of writing an uninformative and pedestrian report; and of saying that the draft was important, and why, or of saying nothing at all about it. In each case, he had taken the first-named course. He agreed with Mr. Spiropoulos that in the strict sense the paragraph was not indispensable, but none the less he thought it was useful. If he was right, there should be no objection to the statements made in the paragraph, even though some of them might appear obvious.

33. Mr. SANDSTRÖM considered that the general considerations set out in paragraph 47 had a place in the report, though he thought that they ought to appear at the beginning rather than the end. As it was, the force of the Commission's recommendations to the General Assembly, which were really the conclusions reached by the Commission, was weakened.

34. Mr. ZOUREK had several objections to paragraph 47. In the first place, it conveyed a general impression with which he was not in sympathy. In the second place, it could not fail to provoke controversy. For example, it might well be true that clarification of the law on arbitral procedure would increase the authority of international law in general; but many might consider that the draft Code prepared by the Commission would not have that effect. Again, many would disagree with the statement that international arbitration was a procedure based on law; the judicial arbitration which the draft attempted to establish had certainly not been the normal practice in the past. Further, the statement that international arbitration must be made " independent . . . of any influence of the governments bound by the obligation voluntarily undertaken " gave the completely false impression that arbitral awards had in the past been influenced by the governments concerned. There was also the reference to arbitration as being " created in the first instance by the will of the parties "; but in his view arbitration depended exclusively, and not only in the first instance, on that will.

35. For those reasons he urged that the paragraph be deleted.

36. Mr. SPIROPOULOS agreed with Mr. Sandström that the paragraph contained many good ideas which should find a place in the report. Nevertheless, some of them were already treated at length elsewhere; for example, the idea that it was desirable to maintain the autonomous nature of arbitration had been fully developed in section IV of chapter II. He agreed also that general considerations of the kind set forth in the paragraph should not follow what was in substance the Commission's final conclusion on arbitral procedure, namely, the recommendation that it addressed to the General Assembly on the way in which the latter should deal with the results of its work.

37. Mr. LIANG (Secretary to the Commission) recalled that in the Commission's report on its fourth session the chapter on arbitral procedure had opened with a paragraph similar to paragraph 47, setting forth general considerations. That, however, was not the sole logical and convincing form for a lengthy report; it often happened that a long symphony ended with a long coda. It would be difficult to transfer paragraph 47 to the beginning of the report, though it might be transferred to the beginning of section V. If that were done, paragraph 48 might also be placed elsewhere, so that the report would finish with the definite recommendation contained in paragraph 46.

38. Mr. SCELLE sympathized with the General Rapporteur; as Special Rapporteur he had also had to endure protracted discussions on matters that were in themselves of little importance.

39. In general, paragraph 47 expressed the right ideas in the right ways. There was, for example, a growing tendency to base arbitration on legal principles, and though the sentences concerning the International Court of Justice might need re-drafting, they were correct in substance.

40. But above all the report was an expression of the personality of the General Rapporteur. The Commission should give him what liberty he required in respect of taste and style.

41. Mr. LAUTERPACHT hoped that Mr. Sandström would be able to accept the Secretary's suggestion that paragraph 47 should precede the paragraph in which the Committee's recommendations were set forth, which would then become the last paragraph of the chapter on arbitral procedure. In that way, the Commission would be able to meet Mr. Sandström's major point without putting its conclusions at the beginning of the report.

42. Mr. SANDSTRÖM and Mr. SPIROPOULOS supported the Secretary's suggestion.

43. Mr. AMADO, referring to Mr. Lauterpacht's distinction between pedestrian and more imaginative reports, said that, although he usually favoured the former, he would in the present instance accept the General Rapporteur's text.

Paragraph 47 was approved by 10 votes to 2, with 1 abstention.

44. The CHAIRMAN then asked members for their views on the order of the final paragraphs.

45. Mr. LAUTERPACHT thought that paragraph 47 should come between paragraphs 45 and 46.

46. Mr. LIANG (Secretary to the Commission) pointed out that paragraphs 44 and 45 were an exegesis of the Commission's Statute and the alternative recommendations which the Committee might make; paragraph 46 presented the recommendation itself. The three paragraphs formed a unity which would be disrupted if paragraph 47, which was much more general, were placed between them. For his part, he thought that paragraph 47 ought to precede the other three paragraphs, so as to bring out the considerations that made desirable the course of action suggested in paragraphs 44 to 46.

47. Mr. CÓRDOVA suggested that paragraphs 46 and 47 should stand, but that paragraph 48 should be deleted, for it gave the impression that the Commission considered that it had not finished its work and that it should draft the final clauses itself after the General Assembly had approved the draft.

48. Paragraph 47 stated, accurately and succinctly, why the Commission thought that the draft on Arbitral Procedure should be given the standing of a convention. If that paragraph came at the end of the relevant chapter of the report it would create a deep impression on the reader, and provide an excellent bridge passage leading to the text of the draft itself.

49. Mr. HSU thought that the discussion related mainly to a matter of style which could be safely left to the General Rapporteur.

50. Mr. SANDSTRÖM agreed that the General Rapporteur should be free to arrange the paragraphs in whatever order he thought fit, in the light of the present exchange of views. For himself, he thought that paragraph 47 might even be made a separate section and placed between sections IV and V.

51. Mr. ALFARO thought that paragraph 47 should form the final paragraph of the chapter on arbitral procedure. In the first place, as the Secretary had rightly pointed out, the unity of paragraphs 44, 45 and 46 would be destroyed by the interpolation of paragraph 47. In the second place, the logical sequence in section V would be to state the Commission's recommendation and then to justify it; paragraph 47 should therefore be kept and paragraph 48 deleted.

52. Mr. AMADO likened the report to a symphony, most of the movements of which rightly ended with a big bang. He would therefore be glad to see paragraph 47 bring the first movement to its close.

53. Mr. YEPES agreed that the General Rapporteur should be free to fix the order of paragraphs, though he thought that, as the synthesis of the entire report, paragraph 47 should come last.

It was agreed that it should be left to the General Rapporteur to fix the order of the final paragraphs of the chapter on arbitral procedure in the draft report.

Paragraph 48

It was unanimously agreed that paragraph 48 should be deleted.[2]

Paragraph 20 (29) (resumed from the 228th meeting)[3]

54. The CHAIRMAN said that, after consulting the other members concerned, the General Rapporteur suggested the following text for paragraph 20:

> "For these reasons, the Commission was unable to share the view, which was occasionally put forward in the course of its deliberations, that the procedural safeguards for the effectiveness of the obligation to arbitrate are derogatory to the sovereignty of the parties. The Commission has in no way departed from the principle that no State is obliged to submit a dispute to arbitration unless it has previously agreed to do so, either with regard to a particular dispute or to all or certain categories of future disputes. However, once a State has undertaken that obligation, it is not inconsistent with principles of law or with the sovereignty of *both* parties — as distinguished from the unilateral assertion of the sovereignty of one of the parties — that that obligation should be complied with and that it should not be frustrated on account of any defects in rules of procedure. For that reason the Commission was unable to share the view that the final draft departs from the traditional notion of arbitration in a manner inconsistent with the sovereignty of States inasmuch as it obliges the parties to abide by procedures adopted for the purpose of giving effect to the obligation to arbitrate. For that obligation is undertaken in the free and full exercise of sovereignty. While the free will of the parties is essential as a condition of the creation of the common obligation to arbitrate, the will of one party cannot, in the view of the Commission, be regarded as a condition of the continued validity and effectiveness of the obligation freely undertaken."

55. Mr. ZOUREK said that the re-draft was no improvement on the original text of paragraph 20, all his objections to which still held.

56. He had previously objected to the draft on Arbitral Procedure because of its incompatibility with the principle of the sovereignty of States. However, his objections were in the re-draft presented in such a way that he appeared only to favour the possibility that one party might, by unilateral action, frustrate an arbitration to the possible detriment of the other. In truth, his view was that the draft included provisions

[2] Paragraph 48 read as follows:

"48. While it is the opinion of the Commission that the conclusion of an international convention with the approval of and on the initiative of the General Assembly is the course which is most appropriate and while the Commission so formally recommends in accordance with articles 16, 22 and 23 of its Statute, it considers it unnecessary, so long as the General Assembly has not acted on that recommendation, to formulate the Final Clauses of the Convention."

[3] See *supra*, 228th meeting, paras. 82-96.

according to which in certain cases the tribunal would be able to set aside the will of both parties to the dispute.

57. The paragraph did not give a complete or correct summary of his position, which was: first, that the draft covered matters outside the scope of arbitral procedure as normally conceived; and secondly, that it included provisions contrary to existing international law. The paragraph made no mention of those arguments, but presented his position inaccurately in order to lend weight to the opposite case. Indeed, the minority view was summarized in the form of a polemic against it. He wondered whether it was in order for the report to be thus drafted when the minority had been refused the right to attach their dissenting opinion.

58. As the General Rapporteur's re-draft was utterly inadequate, he would make his own proposal for paragraph 20. It read:

> "Certain members of the Commission were of the opinion that the draft prepared by the Commission went far beyond the scope of arbitral procedure and contained substantive provisions contrary to the notion of arbitration as conceived in existing international law. They argued in particular that the draft tended to impose on Contracting States an obligation to arbitrate even where the Parties had been unable to agree on the *compromis* and where, in consequence, no definite undertaking to arbitrate had been entered into; that the draft purported in many instances to be effective where there was an absence of will by the Parties, and that by unduly extending the powers of arbitral tribunals it tended to transform those bodies into a kind of supra-national court of justice. They also pointed out that the draft, by making provisions in several places for the intervention of the International Court of Justice in arbitral procedure, was making every arbitration case subject to the supervision and jurisdiction of that Court. They stressed that the general tendency of the draft, as well as all its provisions implying the relinquishment by States of certain rights in favour of arbitral tribunals, were incompatible with the fundamental principle of State sovereignty on which international law rested."

59. The CHAIRMAN regretted that Mr. Zourek had not found it possible to present his text earlier, as it was essential that it be circulated as a document before it could be discussed. He suggested therefore that further discussion of paragraph 20 be deferred until the next day.

60. Mr. KOZHEVNIKOV said that, as he had already made clear his views on the question of principle on a number of previous occasions, he would only add that he fully shared the views just expressed by Mr. Zourek. The General Rapporteur's re-draft of paragraph 20 could not be regarded as tallying with the facts, and he would be obliged to vote against it. It implicitly criticized those who at present formed the minority in the Commission — those who defended the principle of the sovereignty of States — by asserting that the principle which they sought to defend was one of unilateral sovereignty. He must repeat that he, at least, was actuated by the desire to uphold the interests of both parties to the arbitration, and it was in fact the draft itself which was based on an entirely unilateral conception; in it, the whole arbitral procedure was regarded from the point of view of only one of the States concerned.

61. The CHAIRMAN suggested that the substantive discussion be closed, and that the voting, together with any necessary discussion of points of drafting, be deferred until the next meeting, by which time Mr. Zourek's proposal would have been circulated in writing.

The Chairman's suggestion was adopted.[4]

Title of the draft

62. The CHAIRMAN invited suggestions for the title to be given to the draft, and pointed out that the term "draft Code", which was used in the draft report, appeared nowhere in the draft itself.

63. Mr. YEPES proposed that the draft be called "Draft Statute on Arbitral Procedure". The word "Statute" was at once broader and narrower than the word "Code", which seemed to imply that the Commission had been engaged purely in a task of codification.

64. Mr. SANDSTRÖM felt that the term "Statute" could only apply to a permanent organization.

65. Replying to a question by Mr. SCELLE, Mr. LIANG (Secretary to the Commission) said that when the Commission had adopted its programme of work, no specific title had been allotted to the draft which the Commission had decided to prepare on arbitral procedure. The first time the term "draft Code" appeared was in the United Kingdom Government's comments on the text approved at the fourth session.

66. Mr. SCELLE said that in that case he would propose that the draft be called "Draft Convention on Arbitral Procedure".

67. Mr. LAUTERPACHT supported Mr. Scelle's proposal.

68. Mr. YEPES also supported Mr. Scelle's proposal, and withdrew his own in favour of it.

69. Mr. KOZHEVNIKOV pointed out that the draft was not a complete draft convention, since it still lacked essential articles. The title should reflect as closely as possible the exact nature of the draft, and he therefore proposed that it read: "Draft Articles on Arbitral Procedure".

70. Mr. LAUTERPACHT suggested that the Commission's report should explain why the draft contained no final clauses, and why it had none the less been

[4] See *infra*, 232nd meeting, para. 1.

called a draft convention. Suitable wording might be found in paragraph 48 of the chapter on arbitral procedure in his draft report.

71. Mr. ALFARO said that he would prefer the term "draft Code", which expressed exactly what the draft was. The Commission had not been asked to draft a convention, and it had not done so; it had drafted a set of rules which, it believed, might serve as the basis for a convention. If the majority of the Commission preferred the term "draft Convention", however, he would accept it.

72. The CHAIRMAN said that he would put the various proposals to the vote, in the order in which they had been submitted. He therefore put to the vote the proposal by Mr. Scelle and Mr. Lauterpacht that the draft be called the "Draft Convention on Arbitral Procedure".

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

73. The CHAIRMAN said that that disposed automatically of the other proposals.

Paragraph 37 (46) (resumed from the 229th meeting)

74. Mr. LAUTERPACHT recalled that the text which he had originally proposed for paragraph 37 had been subjected to some criticism, and that he had agreed to submit a redraft.[5] On considering the matter, he had come to the conclusion that the text was correct so far as it went, but incomplete. It had therefore at first been his intention to propose that the following three sentences be added:

> "It is true that the second paragraph of article 35 of the Statute provides that the conditions under which the Court shall be open to other States (i.e. States not parties to the Statute) shall be laid down by the Security Council. However, this is so, in the words of that paragraph, only 'subject to the special provisions contained in treaties in force'. The relevant articles of the Code of Arbitral Procedure must be regarded as constituting the 'special provisions contained in treaties in force'."

75. When he had shown that text to the Secretary, however, the latter had said that the words "treaties in force" referred to something quite different; that was possibly the case, although at first sight they would certainly appear to cover the Convention on Arbitral Procedure as soon as it entered into force. As the matter was apparently controversial, however, he wished to submit the following alternative text for paragraph 37:

> "The Commission considered the situation arising from the fact that in some cases one or both parties may not be parties to the Statute of the International Court of Justice. With regard to cases in which the task of the Court does not amount to adjudication upon the merits of the dispute — as in the case of article 3 (2), (3) and (4), article 7 (2), article 8 (2) and (3) — the Commission believes that no difficulty arises. With regard to cases where the decision of the Court may amount to an adjudication upon the merits of the dispute — as in the case of article 28 (2), article 29 (4), article 31 (1) and article 32 — action of the Security Council would be required in conformity with article 35 (2) of the Statute of the Court. However, it is possible that such action may not be required if literal interpretation is given to the phrase of the article which lays down that such action is necessary only 'subject to the special provisions contained in treaties in force'."

76. Mr. LIANG (Secretary to the Commission) submitted that the problem of access to the International Court of Justice for States which were not parties to the Court's Statute fell solely within the province of the Court itself, and that it was both unnecessary and inappropriate for the Commission to deal with it.

77. The words "subject to the special provisions contained in treaties in force" had been taken over from the Statute of the Permanent Court of International Justice, where they formed Article 35, and related to the provisions regarding compulsory access to the Court contained in the peace treaties which had been concluded after the first World War and had come into force prior to the entry into force of the Statute of the Court. They had been inserted in the Statute of the International Court of Justice because it had been thought that by the time that Statute came into force peace treaties with the Axis Powers containing similar provisions might have been concluded. Such had not been the case, and the phrase in question was therefore a dead letter.

78. It was also debatable whether the task which the draft laid on the International Court of Justice did not "amount to adjudication upon the merits of the dispute" in all the cases mentioned by Mr. Lauterpacht in the alternative text which he had now submitted; article 8 (2), for example, referred to disqualification of a sole arbitrator, and provided that the question of disqualification should be decided by the Court on the application of either party. It therefore implied a dispute between the parties, and was therefore in a rather different category from the provisions of article 3 (2) and (3), under which the task of appointing arbitrators was entrusted not to the whole Court, but to its President.

79. Mr. LAUTERPACHT said that the question under discussion was not intrinsically of great importance, since it was unlikely that many States which were not Members of the United Nations would adhere to the Convention on Arbitral Procedure. He would have no objection to its being left to the Court to decide in each case whether it could properly be seized of a specific dispute without further action by the Security Council, but since he understood that the conditions under which States which were not parties to the Statute of the International Court of Justice could have access to it

[5] See *supra*, 229th meeting, para. 48.

had already been further defined in a resolution adopted by the Security Council on 15 October 1946, he suggested that it would be sufficient to amend the text which he had originally proposed for article 37 to read as follows:

"The Commission examined the question whether in those cases in which reference is made to the jurisdiction of the International Court of Justice and 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 particular procedure. The Commission considered that such cases are covered by the provisions of Article 35 (2) of the Statute of the International Court of Justice, and by the resolution adopted by the Security Council on 15 October 1946 in pursuance of those provisions."

80. Mr. KOZHEVNIKOV said that the amendment of paragraph 37 had not removed the objections which he had expressed at an earlier meeting, and that he would therefore vote against it.

The text suggested by Mr. Lauterpacht was approved, as amended, by 9 votes to 2, with 1 abstention.

81. The CHAIRMAN invited the Commission to comment on the suggestion which Faris Bey el-Khouri had made at the 228th meeting, namely, that the Commission's report should give the figures of the voting on each article.[6]

82. Mr. YEPES felt, with all respect to Faris Bey el-Khouri, that that suggestion was unnecessary. Anyone who was interested in finding out what the vote had been on a particular article could do so by referring to the summary records.

83. Faris Bey el-KHOURI said that, since his suggestion did not appear to be generally acceptable, he would withdraw it.

Further discussion on the draft chapter on arbitral procedure in the Commission's report on its fifth session was adjourned until the next meeting.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*resumed from the 225th meeting*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*resumed from the 225th meeting*)

Article on the interpretation and implementation of the Conventions [Article 10] (resumed from the 224th meeting)

84. The CHAIRMAN invited the Commission to resume its discussion of the proposal to add to the draft Conventions on the Elimination and the Reduction of Future Statelessness respectively an article dealing with the establishment of special international machinery for settling disputes arising out of the conventions. That discussion had been interrupted[7] to enable the Drafting Committee to submit a revised text, and the Drafting Committee now proposed the following:

"1. An agency shall be established within the framework of the United Nations to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

"2. A tribunal, to be set up by the Parties, shall be competent to decide upon complaints presented by the Agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the Convention.

"3. The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

"4. If, within two years of the entry into force of the convention, the tribunal referred to in paragraph 2 has not been set up by the Parties, that tribunal shall be set up by the General Assembly."

85. Mr. YEPES suggested that the words "within the framework of the United Nations" be inserted after the words "by the Parties" in paragraph 2.

86. Mr. LAUTERPACHT felt that, whereas it was quite appropriate that the agency referred to in paragraph 1, which would be of an administrative nature, should be established within the framework of the United Nations, it was by no means so certain that the tribunal referred to in paragraph 2, which would be an arbitral tribunal, should also be within the framework of the United Nations.

87. Mr. YEPES pointed out that paragraph 4 clearly stated that in certain circumstances that tribunal should be set up by the General Assembly. It therefore seemed perfectly appropriate to say that it should be set up "within the framework of the United Nations".

88. Mr. SPIROPOULOS felt that those words meant so little that it was immaterial whether they were used or not. It was not clear, however, whether the words "a tribunal, to be set up by the Parties", implied that it should be set up by the original signatories, or something else.

89. Mr. LAUTERPACHT said that he supposed that those words meant that, as soon as either Convention entered into force, the Parties to it *at that time* would be under an obligation to set up a tribunal. That was a question of detail, however, which would be regulated in the final clauses.

90. Mr. SANDSTRÖM and Mr. HSU suggested that the difficulty could be overcome if paragraph 2 were amended to read "A tribunal shall be established by

[6] See *supra*, 228th meeting, para. 42.

[7] See *supra*, 224th meeting, para. 52.

the General Assembly to decide upon..." In that case paragraph 4 could be deleted.

91. Mr. LAUTERPACHT said that, although that would deprive any States not members of the United Nations which signed the convention of any part in setting up the tribunal, he would have no objections. The General Assembly, however, might not be the appropriate body, and he would therefore prefer the phrase "A tribunal shall be established by the United Nations."

92. Mr. SCELLE felt that the Commission had no right to impose such an obligation on the General Assembly.

93. Mr. LAUTERPACHT pointed out that the Commission was imposing no such obligation. If the General Assembly approved the draft Convention and opened it for signature, that would mean that it accepted the obligations which the text placed upon it.

94. Mr. ZOUREK said that he had already stated his views on the question at previous meetings, and had no wish to reiterate them. He would only say that he thought it very doubtful whether the General Assembly was entitled to set up an organ for any purpose other than those explicitly attributed to it by the Charter.

95. Mr. SPIROPOULOS recalled that similar doubts had been raised concerning the General Assembly's right to establish an International Criminal Court. If it was agreed that those doubts were not valid in the present case, it might be most appropriate to say "A tribunal *should* be established by the General Assembly".

96. Faris Bey el-KHOURI said that he could not support the proposal that the United Nations or the General Assembly should set up a new organ within the framework of the United Nations to settle disputes arising out of one particular international treaty, especially since it was not yet known by how many States that treaty would be ratified—if, indeed, it was ratified by any. The acceptance of the Conventions would certainly not be aided by the inclusion of such a provision. The Commission should leave the whole question open, since it could be raised in the General Assembly by any government which so desired.

Further discussion of the additional article proposed by the Drafting Committee was adjourned.

The meeting rose at 1.5 p.m.

232nd MEETING

Wednesday, 5 August 1953, at 9.30 a.m.

CONTENTS

* The number within brackets corresponds to the article number in the Commission's report.

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 (*resumed from the 231st meeting*)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45)* (*resumed from the 231st meeting and concluded*)

*Paragraph 20 (29)*** and new text proposed by Mr. Zourek (paragraph 28) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the General Rapporteur's redraft of paragraph 20 in the chapter on arbitral procedure in its draft report on the work of the fifth session, and of the proposal which Mr. Zourek had submitted at the previous meeting.[1] He assumed that Mr. Zourek's text was intended to replace not the whole of paragraph 20, but only that part of the first sentence in which the views of the minority were expressed. Although it would be impracticable to state in the report the minority's views on every question in the draft convention on arbitral procedure, it was, in his view, proper and desirable that its views should be stated on a question of such fundamental importance as that dealt with in paragraph 20. The wording which

* 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*, 231st meeting, para. 58.