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A/CN.4/SR.185

Summary record of the 185th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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46. Mr. LIANG (Secretary to the Commission), reverting to the question of the provisional agenda, recalled that at previous sessions the Commission had at an early stage of its work adopted the provisional agenda in so far as its contents were concerned, but without taking a decision on the order of the items listed therein. It was inexpedient to lay down a hard and fast order for the consideration of the items.

47. Answering Mr. Lauterpacht, he stated that the Commission would be able to consider item 1 on arbitral procedure at the beginning of the session, since the documents were nearly ready. The documents for item 4 would be ready the following week.

48. Mr. LAUTERPACHT said he thought it desirable not only to adopt an agenda, but to decide the order in which the items should be taken. He would propose that the Commission should adopt the following order: nationality, including statelessness (item 5); arbitral procedure (item 1), of which subject the Commission should dispose at that session; régime of the high seas, including the question of the continental shelf (item 2); the law of treaties (item 4), which had been on the agenda for some years; draft code of offences against the peace and security of mankind (item 6); régime of the territorial sea (item 3); the question of taking up the subject of diplomatic intercourse and immunities (item 7); and, lastly, the question of dissenting statements raised by Mr. Zourek.

49. Mr. SCELLE said that, in view of the work already done on arbitral procedure and of the suggestions received from governments, some of which, those from the United States, United Kingdom and Netherlands Governments, for example,[8] were most useful, it should be possible to dispose of that item quickly. He supported the Secretary's proposal that the administrative points mentioned by the latter should be discussed at the next meeting.

50. Mr. AMADO, agreeing with the previous speaker, said that the item on arbitral procedure should certainly be taken early. The subject had already been fully examined, and the Commission should formulate its conclusions as rapidly as possible.

51. After Mr. SANDSTRÖM and Mr. YEPES had signified their agreement with the proposal that the subject of arbitral procedure be taken up with the minimum of delay, Mr. KOZHEVNIKOV observed that the procedural problems the Commission was encountering sprang from the inability of the Secretariat to provide the necessary documents, the lack of which inevitably hindered the Commission's work. Nevertheless, once the documents had been distributed, the order of items on the provisional agenda should not raise any difficulties. As to the immediate programme, he thought that Mr. Zourek's motion should be discussed first, after which the Commission could follow the Secretary's suggestion.

[8] Document A/CN.4/68.

52. The CHAIRMAN said that the next private meeting could be devoted to administrative questions, and that the Commission could consider the question of nationality, including statelessness, on Wednesday, provided Mr. Córdova had arrived. If, however, Mr. Córdova was then still absent, he would suggest that Mr. Zourek's proposal be discussed. The following week should see the documents on arbitral procedure completed, and the Commission would be free to take up that item then.

53. He thought that it would be helpful if the Secretariat, after consultation with him and the special rapporteurs, were to produce a time-table to which the Commission could work.

54. Mr. LAUTERPACHT suggested that, in view of the heavy agenda, it might be advisable to study a few items thoroughly rather than to give only superficial attention to all.

55. The CHAIRMAN observed that, in the last year of the present members' term of office, with the consequent uncertainly about the future, it would be a pity if the Commission were to leave in abeyance subjects upon which it had already worked.

56. He then welcomed Mr. Radhabinod Pal, who had succeeded Sir Benegal Rau as a member of the Commission.

57. Mr. LIANG (Secretary to the Commission) said he had every hope that Mr. Córdova would arrive in Geneva within 48 hours, which would permit a speedy discussion of the subject of nationality, including statelessness.

58. In reply to the Chairman, he said that Mr. Hudson had written expressing his regret at his inability to attend the opening of the session, but stating that, if his recovery was maintained, he hoped to re-join the Commission at the beginning of July.

59. The CHAIRMAN suggested that a telegram be sent to Mr. Hudson expressing the Commission's regret at his absence and its warmest wishes for his speedy restoration to health.

It was so agreed.

The meeting rose at 5.30 p.m.

185th MEETING

Wednesday, 3 June 1953, at 9.45 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radbahinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

Arbitral procedure (item 1 of the provisional agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40)

1. The CHAIRMAN said that, as the text of Mr. Zourek's proposal concerning the inclusion of dissenting opinions in the Commission's reports had not yet been distributed, the Commission would take up item 1 on its agenda. He proposed that it confine itself to considering whether the comments from ten governments (A/CN.4/68 and Add.1) on the draft on arbitral procedure circulated to governments the previous year (A/CN.4/59)[1] called for any modifications to the text of the draft. The most appropriate procedure would be to examine *seriatim* those articles on which governments had made observations. The numerous complex and controversial issues dealt with at the previous session should not be re-opened.

2. Mr. KOZHEVNIKOV asked why the Commission was to take up item 1 before disposing of the administrative matters raised at the private meeting held the previous day.

3. The CHAIRMAN explained that discussion of those matters would be resumed after members had had time to reflect on the provisional decisions taken at the private meeting.

4. Mr. KOZHEVNIKOV doubted whether it would be appropriate for the Commission to embark upon item 1, since replies had so far been received from only ten governments.

5. Mr. SCELLE (Special Rapporteur), referring to a point raised by Faris Bey el-Khouri at the private meeting, said that the Commission might have to consider what was a reasonable time-limit for governments to submit their observations. In the present instance, however, he did not think that the fact that only ten governments had replied should preclude the Commission from finally disposing of the draft on arbitral procedure at the present session.

6. The CHAIRMAN said that, admittedly, not many governments had commented on the draft, but that was not unusual. Much the same thing had occurred in the case of the report on the régime of the high seas — even though the time-limit had been extended — and that of the territorial sea. As members' term of office would expire at the end of 1953, it would be impossible to submit to the General Assembly a final report on arbitral procedure if the Commission waited for more replies to come in from governments. He therefore believed it imperative to take up item 1 without delay.

7. Mr. SCELLE agreed with the Chairman.

8. Mr. SANDSTRÖM also agreed with the Chairman, and pointed out that any further replies from governments that might be received during the session could be examined then.

9. Faris Bey el-KHOURI proposed that, when transmitting its report to governments for comment, the Commission should in the future fix a time-limit consistent with the requirements of each particular case.

10. He did not feel that any more replies on arbitral procedure were to be expected; the Commission could therefore formally declare that a "reasonable time" had elapsed, and take up the subject immediately.

11. Mr. LIANG (Secretary to the Commission) said that although the Commission itself had not stipulated any time-limit for the submission of comments by governments, the Secretary-General, in transmitting its report to governments, had asked for replies by 1 March 1953, on the assumption that consideration of arbitral procedure was to be completed at the present session. Replies had in fact been included in document A/CN.4/68 after 1 March 1953.

12. Mr. LAUTERPACHT said that the Commission had implicitly indicated in paragraph 14 of its report on the fourth session, where it was clearly stated that a final draft on arbitral procedure would be drawn up at the fifth session, what it meant by a "reasonable time" for the submission of comments in the case in point.[2]

13. Faris Bey el-KHOURI said that, in the light of the Secretary's explanation, he would not press his proposal that the Commission formally declare that in that case a "reasonable time" had elapsed.

14. Mr. KOZHEVNIKOV said that such replies as had already been received from governments reflected the importance and complexity of the draft on arbitral procedure. He doubted whether there were good grounds for assuming that equally weighty comments would not be submitted later.

15. Mr. ZOUREK observed that, if the Commission were to examine the draft in the light of the comments of ten governments only, the General Assembly might well refer it back for further review.

16. The CHAIRMAN said that, although the number of States which had replied was not great, any which considered the time-limit unduly stringent would pre-

[1] The draft contained in document A/CN.4/59 is identical to that contained in document A/2163. See *Official Records of the General Assembly, Seventh Session, Supplement No. 9*, or *Yearbook of the International Law Commission, 1952*, vol. II.

[2] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), para. 14. Also in *Yearbook of the International Law Commission, 1952*, vol. II.

sumably have so informed the Secretary-General. He did not feel that the possibility mentioned by Mr. Zourek ought to deter the Commission from proceeding with its work. The General Assembly was unlikely to give less weight to the results simply because the comments from ten governments only had been taken into account.

17. Mr. SCELLE said that silence might justifiably be interpreted as agreement. As Politis had argued in his book *La Justice internationale*,[3] where arbitration was concerned governments fell into two categories: the democracies, which were very interested in it; and the autocracies, which were not in the least interested because they were unwilling to submit to procedures of that kind. The replies received demonstrated the truth of that view, and he felt that the very interesting comments, notably those of the Netherlands, United Kingdom and United States Governments, would reinforce the whole structure of the draft, and justified the Commission in embarking forthwith on item 1. There was no need, of course, to re-open the discussion on any article on which no observations had been submitted. It should be remembered that the draft had already been given several readings.

18. Mr. ALFARO considered that the Commission should not allow its work to be held up by the dilatoriness of those governments which had neglected to comment on the draft, either because they had no objections to it, or out of indifference. The draft represented real and effective progess in international law. If any government was not prepared to accept such a system of arbitral procedure, or feared that it went too far along the road to the reign of law and justice, it could state its position in the General Assembly. In the meantime, the Commission, which had already given long and careful consideration to the draft on arbitral procedure, should complete its work on the subject without delay.

19. Mr. KOZHEVNIKOV said that he would confine himself to the practical problem facing the Commission and would not touch upon the dubious, arbitrary or irrelevant observations as to the qualifications of states, which certain members of the Commission had permitted themselves. It seemed to him hardly realistic for the Secretary-General to have fixed 1 March 1953 as the time-limit for the submission by governments of comments on the draft. Even the few replies so far received reflected serious misgivings on the part of governments. He therefore moved that the Commission declare it impossible to start examining the comments by governments on arbitral procedure at a time when only ten replies had been received.

20. Mr. YEPES believed that governments had been given plenty of time in which to comment. In the absence of observations, their tacit acceptance of the draft must be assumed. The Commission had already discussed in great detail the drafts submitted by the special rapporteur, and it would be entirely contrary to the aspirations of peoples, and of all who wished to see arbitral procedure scientifically regulated, further to defer consideration of the comments so far received.

21. Mr. HSU agreed that the Commission should proceed forthwith to consider the comments by governments. His experience in the Sixth Committee of the General Assembly led him to the conclusion that ten replies was a reasonable figure. At any rate those replies represented a cross-section of the views of members of the United Nations as a whole, and could therefore be profitably discussed.

22. The CHAIRMAN put Mr. Kozhevnikov's motion to the vote.

Mr. Kozhevnikov's motion was rejected by 10 votes to 2.

23. Mr. LAUTERPACHT proposed that the Commission proceed immediately to examine the draft on arbitral procedure article by article, in the light of the comments submitted by governments.

24. Mr. ZOUREK pointed out that, since certain governments (A/CN.4/68) had touched upon basic questions of principle affecting the concept underlying the draft and its structure, a preliminary general discussion was necessary.

25. Mr. SCELLE said that his examination of the comments had led him to the opposite conclusion. Only one reply out of the ten — that of Belgium — touched upon the general principles underlying the draft. Indeed, the reply of the Belgian Government appeared to him a little odd, inasmuch as it seemed to him to take no account of the existence of the Hague Convention for the Pacific Settlement of International Disputes of 1907 or of the General Act for the Pacific Settlement of International Disputes of 1928, revised in 1949.

26. The Belgian Government appeared to be in favour of making a clean sweep and of reverting to a concept of arbitration which had prevailed over half a century earlier. It was true that the Indian Government had made certain reservations, but in principle it was in agreement with the draft. The United States and United Kingdom Governments had not only accepted the Commission's concept of arbitration, but had also sought to reinforce it in certain respects. The replies had therefore been, on the whole, favourable.

27. Before proceeding to the examination of each individual article, however, one point should be elucidated, namely, what was to be done with the draft. It was, of course, open to the Commission under article 23 of its Statute to recommend to the General Assembly that the draft be cast in the form of a draft convention. If that were to be done, States might legitimately ask whether they would be allowed to enter reservations to such a convention, particularly if they had already entered into an obligation to arbitrate under existing international instruments. He would like to make it clear that, in his view, States were entirely free to adopt such a new convention with reservations. The Commission would be proposing a model convention similar

[3] N. Politis, *La Justice internationale* (Paris, Hachette, 1924).

to that prepared by the League of Nations and adopted as the General Act.

28. Mr. KOZHEVNIKOV observed that, as the Commission had not been deterred by the small number of replies from governments, it should not burke a general discussion on the grounds that only one government had raised objections of principle.

29. Mr. SCELLE, speaking as the Special Rapporteur responsible for the draft, said that he was obliged to repudiate Mr. Kozhevnikov's argument. The basic principles of the draft had already been the subject of exhaustive discussion on three separate occasions.

30. The CHAIRMAN observed that general problems would inevitably be discussed as each article was taken up.

31. Mr. ZOUREK said that Mr. Scelle himself had admitted that some of the replies from governments touched upon general questions which required further eludication, and might give rise to differences of opinion. The Indian Government, for instance, had expressed reservations about article 2, which was of crucial importance inasmuch as it would transform the traditional concept of arbitration. He therefore reiterated his conviction that time should be allowed for a general discussion.

32. Mr. AMADO said that he had already at previous sessions expounded his views on the draft, which bore so clearly the imprint of its author. He paid a tribute to Mr. Scelle for the sincere and candid way in which he admitted how far he had departed from the traditional theory of arbitration. However, since his (Mr. Amado's) personal view that Mr. Scelle's draft struck a mortal blow at arbitral procedure as hitherto understood had not been accepted, he would defer to the will of the majority, and accordingly remain silent during the general discussion.

33. Mr. SCELLE observed that Mr. Amado's general criticism that the draft was too juridical in character, and failed to take into account certain political factors, had been taken up by the Brazilian Government.

34. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the Commission proceed immediately with the consideration of the draft on arbitral procedure, article by article, in the light of the comments presented by governments.

Mr. Lauterpacht's proposal was adopted by 10 votes to 2.

ARTICLE 1

35. Mr. SCELLE said that the only observation on article 1 was a minor one by the Chilean Government, concerning the translation of the word "différends" ("disputes").

36. Mr. PAL asked whether article 1 would apply to existing undertakings to arbitrate.

37. Mr. SCELLE explained that States accepting the arbitral procedure proposed would be free to apply it to their prior undertakings or not.

38. Mr. PAL said that, if the system was to be retrospective, provision would have to be made to enable States to make reservations concerning any previous undertakings to arbitrate.

39. Mr. ALFARO thought that article 1, paragraph 1, which was optional and not mandatory, was sufficiently clear and required no modification.

40. Mr. SANDSTRÖM said that Mr. Pal was taking up a point raised by the Norwegian Government when it stated that: "... it is not clear from the present draft whether the convention resulting from the draft would replace older bilateral or multilateral treaties on international arbitral procedure... or whether it would be supplementary to such treaties as between States parties to them."

41. Mr. LAUTERPACHT observed that Mr. Pal and Mr. Sandström had raised two separate issues. The former had asked whether an undertaking to arbitrate already entered into should be governed by a convention on arbitral procedure, such as proposed in the present draft, after that convention had been accepted by a State. The latter had asked whether such a convention would replace previous conventions on arbitral procedure existing between the contracting parties. With regard to the first issue, he considered that it would be useful to insert a provision stating that, in acceding to the convention, the contracting parties would be at liberty to stipulate whether or not it applied to previous specific undertakings to arbitrate into which they might have entered. The answer to the second question was to be found in the general principle that a subsequent treaty abrogated any previous treaty inconsistent with it.

42. Mr. SCELLE observed that any procedural rules always had retrospective effect. If, therefore, States were to adopt a new convention on arbitral procedure without reservation as to its application, it would govern all previous undertakings to arbitrate affecting them. If the retrospective principle were admitted, the only problem which could arise would be when a case was already being heard under the procedure laid down in a previous agreement.

43. He did not consider that there was any need for a special provision dealing with retrospective effect.

44. Mr. SANDSTRÖM said that there was an essential difference between ordinary legal procedure under municipal law, which was imposed upon the parties, and arbitral procedure, which was freely accepted by mutual agreement between the States parties to a dispute. Since the latter derived from the will of the parties, it was for them to decide whether a convention on the matter should operate retrospectively or not.

45. Mr. PAL pointed out that the draft was not entirely confined to procedural matters. A scrutiny of the rules showed that they dealt with such substantive issues as

the rights of the parties. He therefore re-affirmed his opinion that some clarification was necessary as to whether the rules were to apply to earlier undertakings to arbitrate.

46. The CHAIRMAN said that it followed from Mr. Lauterpacht's interpretation that the new convention would replace all previous conventions on arbitral procedure, and that States which acceded to it would be free to enter reservations in respect of their antecedent undertakings. Did the Commission agree?

47. Mr. SCELLE assumed that the appropriate place for a reference to that point would be in a final article on reservations.

48. Mr. LAUTERPACHT, speaking as Rapporteur, suggested that since the Commission appeared to be generally agreed on the issue of substance and since it was desirable that an appropriate article should be added as one of the final clauses of the convention, he would in due course submit a text, on which the Commission could take a formal decision.

It was so agreed.

49. Mr. SANDSTRÖM drew attention to the Chilean Government's comment on article 1, paragraph 3. It considered that the last clause reading "whatever the nature of the agreement from which it results" obscured the meaning which the text was intended to convey. In his opinion, too, the phrase was unnecessary, and should be deleted.

50. Mr. ALFARO pointed out that the last clause of paragraph 3 was really consequent upon paragraph 2, but the words "nature of the agreement" related to substance and not to form. Paragraph 2, on the contrary, dealt with form, since it referred to a written instrument.

51. Mr. LAUTERPACHT recalled that that clause had been discussed at great length at the fourth session, and had been adopted by the Commission for the reasons stated in paragraph 2 of the comment thereon, the relevant part of which read:

> "The paragraph does not mean, however, that the undertaking to arbitrate requires the conclusion of a convention or international treaty in the strict sense of those terms. For instance, it would be sufficient for the parties concerned to accept the resolution of the Security Council recommending them to have recourse to arbitration for the settlement of a specific dispute. In such a case the official records of the United Nations would provide the authentic text of the undertaking."

52. Mr. SCELLE concurred with Mr. Lauterpacht. Paragraph 2 had been included in article 1 since it was essential that an undertaking should be supported by a written text such as, for instance, a resolution of the Security Council.

53. The word "agreement" was ambiguous, since it might be interpreted as relating to an oral agreement — hence the necessity of the reference to a written instrument.

54. Mr. ALFARO considered that if the word "nature" were interpreted as meaning "form" (as Mr. Lauterpacht implicitly suggested) the Chilean Government's objection was well founded, and there was a contradiction between paragraphs 2 and 3. He supported Mr. Sandström's proposal that the final clause of paragraph 3 be deleted.

55. Mr. LIANG (Secretary to the Commission) said that, when preparing its commentary on the draft on arbitral procedure (A/CN.4/L.40), the Secretariat had also been struck by the fact that the phrase in question was somewhat obscure. In the light of the interpretation given in the comment, it should really be inserted in parargraph 2 of article 1, assuming always that the word "nature" was interpreted as meaning form.

56. He would therefore suggest that article 1 be amended by the deletion of the last clause of paragraph 3, and the insertion of the following words "in whatever form it may be" after the words "written instrument" in paragraph 2.

57. Mr. YEPES also favoured the deletion of the final clause, which added nothing to the article. He would suggest that paragraph 3 be deleted in its entirety and paragraph 2 amended to read:

> "The undertaking shall result from a written instrument. It constitutes a legal obligation which must be carried out in good faith."

58. Mr. SCELLE was opposed to the deletion of the last clause from paragraph 3 which should be amended to read "whatever the form of the instrument may be". That clause should, however, be inserted at the end of paragraph 2. Paragraph 3 would then read:

> "The undertaking constitutes a legal obligation which must be carried out in good faith."

59. A reference to a "written instrument" without further qualification was bound to be interpreted as meaning a treaty or an agreement, although as the comment stated, the document might be an official record of the United Nations. The Commission could not assume that its comments would necessarily be read by persons interpreting the text.

60. It followed that he preferred the word "form" to the word "nature", and the word "document" to the word "agreement" (*accord*).

61. Mr. LIANG (Secretary to the Commission) read out the relevant passage from the Secretariat's Commentary on the Draft on Arbitral Procedure (A/CN.4/L.40, p. 14), as follows:

> "The 'undertaking' or 'agreement' from which the 'legal obligation' to arbitrate results is one that may arise in a variety of circumstances and take various forms. The undertaking may be found in bilateral or multilateral treaties, in general arbitration treaties or in comprimissory clauses (*clauses compromissoires*) providing for the arbitration of disputes arising under particular treaties in which such a clause appears, or in some one of the numerous forms found

listed in Stuyt (*supra*). Paragraph 3 accordingly provided that the obligation to arbitrate is one 'which must be carried out in good faith, whatever the nature of the agreement from which it results'."

62. Mr. ALFARO considered that Mr. Scelle's solution was correct, and would rule out any possibility of misinterpretation. Paragraph 3 would then give the right kind of emphasis to the general rule laid down in paragraph 2.

63. Mr. SANDSTRÖM did not consider that that drafting change invalidated his point.

64. Mr. LAUTERPACHT agreed with Mr. Sandström that the final clause of paragraph 3 added nothing to paragraph 2, but would submit that it clarified the latter, since it referred to situations which might arise outside the framework of international treaties in the strict sense of that term.

65. The clause should therefore be retained.

66. Mr. AMADO also supported Mr. Scelle's proposal.

67. Mr. KOZHEVNIKOV maintained that there was a contradiction between paragraphs 2 and 3. Paragraph 2 referred to a written instrument; the term "nature" in paragraph 3 had a wider connotation.

68. Mr. SCELLE explained that it was precisely in order to remove the contradiction and to clarify the text that he had proposed his amendment.

69. Mr. SANDSTRÖM considered that if the last clause of paragraph 3 were appended to paragraph 2, the word "nature" would be preferable to the word "form". He interpreted the word "nature" as covering a treaty, an agreement, a protocol or an official record.

70. Mr. SCELLE held that the term "nature" inferred a substantive element. That was why he had chosen the word "form".

71. Mr. SANDSTRÖM accepted Mr. Scelle's interpretation and withdrew his proposal that the last clause of paragraph 3 be deleted.

72. Mr. AMADO reminded the Commission of the implications in law of the word "form". An overscrupulous interpreter might well consider that it excluded resolutions of the Security Council.

73. Mr. SCELLE disagreed, holding that such an interpretation would affect a point of substance. In the present instance, the word "form" was used with strict reference to the form of the document.

74. Mr. KOZHEVNIKOV, on a point of order, asked that the constituent paragraphs of each article be put to the vote before the articles were voted on as a whole.

Paragraph 1 of article 1 was adopted unanimously.

Paragraph 2 of article 1, as amended, was adopted by 10 votes to none, with 2 abstentions.

75. Mr. HSU explained that he had abstained from voting on paragraph 2 because he did not consider the formula "written instrument" satisfactory. He regretted that he was unable to suggest a substitute off-hand.

Paragraph 3, as amended, was adopted unanimously.

ARTICLE 2

76. Mr. SCELLE observed that the Indian Government had stated (A/CN.4/68, page 10) that in its present form article 2 was unacceptable. The United States Government suggested the inclusion in the article of a reference to the provisions of paragraph 2 of Article 35 of the Statute of the International Court of Justice (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10). The United Kingdom Government's comments showed approval by implication.

77. The Commission could not accept the Indian objection, since its decision had been firm on a point where the draft did make an innovation. The United States proposal was acceptable, since it would make the text more precise.

78. Mr. ALFARO and Mr. SANDSTRÖM supported the United States proposal.

79. Mr. KOZHEVNIKOV wished to state his general conclusions not only on article 2, but on the whole draft on arbitral procedure. In a number of respects, the draft was based on generally accepted rules of arbitral procedure; it reflected the character of arbitration as commonly understood, recording the essential features that distinguished it from judicial procedure and affirming a number of indisputable judicial principles and judicial practices. From that point of view, no exception could be taken to the draft since, generally speaking, it followed the usual conception of a code for arbitral procedure. Articles 1, 4 and several others afforded examples of that, and he had voted in favour of article 1.

80. As a whole, however, the draft was unacceptable, since it violated the principle of voluntary arbitration and took no account of the sovereignty of States parties to an undertaking to arbitrate. In other words it deviated markedly from traditional arbitral procedure.

81. Articles 2, 28, 29, 31 and several others clearly illustrated that point. They provided for interference by the International Court of Justice or by its President in the initiation of arbitral procedure as well as in the rendering of an award. Articles 6 and 16, for instance, provided for the right of the tribunal to decide the extent of its own competence and to give a broad interpretation to arbitrate, thus unduly extending the rights of the tribunal and transforming it into a kind of supranational court.

82. The fact that the word "tribunal" was used in the draft was significant. In the English and French texts the word "arbitral" was often omitted, the word "tribunal" being used alone.

83. It was impossible to expect that States which might later be asked to accept the draft would agree to provisions which radically changed the very nature of arbitration.

84. A study of the comments submitted by governments led to the same conclusion. A number of those governments had been impelled to raise serious objections both on general matters of principle and in respect of specific articles. The Belgian Government (A/CN.4/68, No. 1 or A/2456, Annex I, No. 2) had made abundantly clear its doubts whether the majority of States would accept the draft, based as it was on a so-called concept of "judicial arbitration"; it considered the Commission's proposal unacceptable since it conflicted with the traditional concept of arbitration, by which the parties to the dispute had themselves the right to decide the susceptibility of the dispute to settlement by arbitration, to select the arbitrators and to fix the limits of the *compromis*. The Belgian Government consequently drew the conclusion that the draft should be amended. A similar, and in general unfavourable, view of the principles on which the draft was based was taken by the Indian Government (A/CN.4/68, No. 4 or A/2456, Annex I, No. 5).

85. Individual articles too had provoked fundamental objections from governments. Thus, the Indian Government pointed out that it was unable to accept articles 2, 16, 28, 30, 31 and 32. The United States Government considered that article 16, relating to the competence of the tribunal, went too far. The comments of the Netherlands Government (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) showed that it feared that acceptance of the draft would hinder the practical application of arbitral procedure.

86. In the light of what he had said, he believed that the Commission should proceed with the greatest caution, and seriously consider the possibility of reviewing the draft.

87. Mr. SCELLE said that the Commission could not abandon an article which provided the foundation for the whole structure of the draft. It was clear from the United Kingdom Government's comment (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9) that it accepted article 9 by implication. As to article 2, he was prepared to follow the United States proposal and include a reference to paragraph 2 of article 35 of the Statute of the International Court of Justice.

88. Mr. ZOUREK recalled that he had expressed his views on article 2 at the fourth session,[4] and merely wished to reiterate, in the light of the comments submitted by governments, the main premise of his argument.

89. He, too, was opposed to article 2, on the grounds that international arbitration rested on the will of the parties to a dispute, and that an arbitral tribunal could in no sense be a court; it merely provided the basis for an agreement expressed in an undertaking or a *compromis*. He was convinced that the draft rules sought to change the very nature of arbitral procedure, and that they would make States reluctant to proceed to arbitration. Indeed, article 2 was the article the farthest removed from the traditional conception, and its provisions were not procedural, but tended to impose substantive obligations. In general, when two States concluded an arbitral undertaking they reserved the right to judge of the arbitrability of a dispute and of the appropriateness of setting up a tribunal, should a dispute occur. Article 2 deprived States of that prerogative, and awarded it to an international organ, and hence, he feared, would prove to be the main obstacle to the acceptance of the draft. Indeed, to follow the argument of article 2 to its logical conclusion, it would seem that if States were prepared to accept so new and so different a procedure there was no reason why they should not take disputes straight to the International Court of Justice.

90. For those reasons he proposed that article 2 be deleted.

91. Mr. KOZHEVNIKOV supported Mr. Zourek's point about article 2. As to the whole project, he considered that it was not in accordance with the tasks assigned to the Commission, inasmuch as the latter had merely been entrusted with the codification of international law and its progressive development, which did not authorize it to make radical changes in existing standards. He held, therefore, that it was essential to redraft several articles, in particular those he had mentioned previously, because as they stood they were contrary to existing international law. The Commission should decide to make such changes in the present draft on arbitral procedure as would make it conform to the juridical concept of arbitration.

92. Mr. SANDSTRÖM did not share the views expressed by Mr. Kozhevnikov and Mr. Zourek. Had the Commission been simply entrusted with the task of codifying existing practice, there would have been no need for it to undertake a thorough study of arbitral procedure. But the Commission had also to endeavour to contribute to the development of international law, and article 2 expressed such progress. He was therefore in favour of retaining it.

93. Mr. ALFARO said that article 2 raised the issue whether in future arbitral procedure would be a reality, or just a polite fiction. The whole system would be pointless if governments retained the right to determine the arbitrability of a dispute. He, too, was in favour of retaining the article.

94. Mr. YEPES, supporting Mr. Scelle and Mr. Alfaro, conceded Mr. Zourek's point that arbitral procedure rested on the will of States. But the factor of free will came into play only at the initial stage. Once two States had agreed to arbitrate, they were no longer free to withdraw from their undertakings. It was really too easy for States to invoke the argument of the non-arbitrability of a dispute. The Commission had done well to accept article 2 at the fourth session. It should be maintained and the United States proposal added on to it.

95. Mr. HSU considered that article 2 filled an important gap in arbitral procedure.

[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 138th meeting, para. 61.

96. Faris Bey el-KHOURI said that, according to Moslem law, arbitration depended on the free will of States or persons. Article 2, however, placed responsibility on the International Court of Justice, and was consequently unacceptable. For it followed from that article that the Court would be able to oblige a State to accept a certain interpretation. He was therefore unable to agree to its retention.

97. Mr. LAUTERPACHT said that the very purpose of the article — and, indeed, of the whole draft — was to give effect to the will of the parties and to ensure that, once the parties had agreed to arbitrate, neither would be able to frustrate the process. That was the central aspect of the draft now before the Commission. If. Mr. Kozhevnikov's view were accepted, the undertaking would be no better than a scrap of paper. That was exactly what the Commission wished to prevent.

98. He would vote in favour of article 2.

99. Mr. Scelle said that, carrying Mr. Lauterpacht's argument a stage further, it was clear that in adopting article 2 the Commission had given practical expression to the principle laid down in article 1, namely, that the undertaking constituted a legal obligation that had to be carried out in good faith. That was where the free will of States was circumscribed. Otherwise it would be too easy for States to claim exceptions. In that connexion, he would draw attention to the United Kingdom Government's general comments. That government strongly supported the conception that judicial arbitration was based on the necessity of provision being made for safeguarding the efficacy of the obligation to submit the case to arbitration in all cases in which it might happen that, after the conclusion of the arbitration agreement, the attitude of the parties threatened to render nugatory the original undertaking.

100. Mr. AMADO said that he would either maintain his original vote on the article, or abstain on the basis of the Netherlands Government's position concerning the need to include a clause providing for an opportunity to accept the convention with reservations. He was unable to accept Mr. Lauterpacht's view. There was no getting away from the fact that article 2 brought the International Court of Justice into play. But arbitration was not a judicial procedure. The comments of the Netherlands Government were insipred by very sound sense. If arbitral procedure were to die out, that would also be a stage in the development of international law, and why then should the Commission endeavour to arrest a natural development? He remained unconvinced by Mr. Scelle's arguments and, believing that arbitration should in no way be linked with the procedures of the International Court, he would abstain from voting on the article.

101. Mr. SCELLE drew Mr. Amado's attention to the fact that the logical outcome of his view of the sovereignty of States (as previously expressed) would be entirely to vitiate the provisions of paragraph 2 of Article 36 of the Statute of the Court. But that paragraph existed, and its provisions constituted an essential element of positive law today. The Commission was proposing a step forward in respect of arbitral procedure. States which did not approve it would be free to enter an appropriate reservation.

102. Mr. AMADO replied that the applicability of paragraph 2 of Article 36 related to the Statute of the International Court of Justice.

103. Mr. ZOUREK said that no one contended that States which had entered into a firm undertaking could try to withdraw from it. But there were cases when States had concluded an undertaking only in principle. It was precisely there that the crucial difficulty of article 2 lay.

104. Mr. PAL considered that article 2 was very bold in its conception, and that to maintain it in its present form might lead to the fears of the Netherlands Government being justified.

105. Mr. KOZHEVNIKOV noted that the majority of members considered that article 2 represented progress. He maintained, however, that it was really a step backwards. Progress must be judged in terms of practical results, and he was convinced that if article 2 were adopted it would make States extremely reluctant to embark on arbitral procedure, with the result that the development of arbitration would be smothered. He earnestly counselled caution, since it would be highly regrettable if the Commission did the cause of international law a disservice.

106. The CHAIRMAN said that after the full discussion which had been held, he would put article 2 to the vote.

Paragraph 1 was adopted by 7 votes to 4, with 1 abstention.

Paragraph 2 was adopted by 7 votes to 4, with 1 abstention.

107. Mr. SANDSTRÖM proposed that the United States amendment (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10) to article 2 form paragraph 2, the existing paragraph 2 being re-numbered 3.

108. Mr. SCELLE agreed.

109. Mr. YEPES considered that reference should be made not only to paragraph 2 of Article 35 of the Statute but to paragraph 3 also, because both paragraphs related to States which were neither Members of the United Nations nor parties to the Statute of the International Court.

110. Mr. SCELLE, replying to Mr. KOZHEVNIKOV, said that he would propose that the amendment be worded as follows: "Paragraphs 2 and 3 of Article 35 of the Statute of the International Court of Justice shall be applicable to the case in point."

111. Mr. LIANG (Secretary to the Commission) thought that paragraphs 2 and 3 of Article 35 of the Statute were applicable not only to article 2 of the draft, but to other articles also and wondered whether the

appropriate place for the reference should not be in the final clauses.

112. It might therefore be best if the proposed addition were examined after the Commission had concluded its study of the main articles of the draft.

113. Mr. SANDSTRÖM and Mr. SCELLE agreed.

It was so decided.

The meeting rose at 1.05 p.m.

186th MEETING

Thursday, 4 June 1953, at 9.45 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

Arbitral procedure (item 1 of the provisional agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

ARTICLE 3

1. Mr. SCELLE (Special Rapporteur) noted that the United States Government considered the procedure contemplated in article 3 for the selection of arbitrators to be unnecessarily complex (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10). The three-month periods referred to in paragraphs 1, 3 and 4 were cumulative, and a period of nine months might indeed elapse before the tribunal was constituted. However, the United States proprosal that paragraphs 2 and 3 be deleted was somewhat radical, since it would bring the provisions of paragraph 4 into operation within three months if States were unable to agree on the constitution of the tribunal. None of the general instruments on arbitration examined by the Commission while preparing the draft had envisaged so short a time-limit. He would, however, be prepared to delete paragraph 2 and to modify paragraph 4 by extending the period therein mentioned to four months.

2. Mr. SANDSTRÖM considered that a radical change in the procedure was needed. In his opinion, paragraph 3 was superfluous.

3. Mr. LAUTERPACHT expressed the hope that the Special Rapporteur might yet see his way to accept the United States proposal since it would greatly simplify article 3 and eliminate the danger of the parties being unable to agree on the selection of the third State under the provisions of paragraph 3.

4. Mr. SCELLE said that, in the light of the observations made by Mr. Sandström and Mr. Lauterpacht, he would be prepared to accept the United States proposal that paragraphs 2 and 3 be eliminated, provided that his own amendment to paragraph 4 (the substitution of the word "four" for the word "three" after the words "preceding paragraph within") were accepted. Paragraph 4 would also require the consequential amendment of the deletion of the words "or if the governments of the two States designated fail to reach an agreement within three months".

5. Mr. SANDSTRÖM, Mr. ALFARO and Mr. YEPES all expressed agreement with the amendments to article 3 proposed by the Special Rapporteur.

6. Mr. KOZHEVNIKOV could not agree with the principle underlying article 3 for reasons he had already given during the discussion on article 2 at the previous meeting. Furthermore, article 3 provided for direct intervention by the International Court of Justice without stipulating the agreement of the parties. He would therefore vote against it.

7. Mr. ZOUREK said that article 3 was incompatible with the traditional notion of arbitration, inasmuch as it might result in the tribunal being constituted by a third party. The argument that a parallel provision existed in the Revised General Act for the Pacific Settlement of International Disputes of 1949 carried very little weight, since that convention had been ratified by very few States. Nor was the system laid down in the Hague Convention of 1907 a happy solution. With those considerations in mind he had at the previous session proposed[1] an alternative system for the constitution of the tribunal in the event of the parties failing to reach agreement. As his proposal had been rejected, he would be obliged to vote against article 3.

8. The CHAIRMAN put to the vote the Special Rapporteur's proposal that paragraphs 2 and 3 of article 3 be deleted, and the consequential amendments to paragraph 4 of that article.

The amendments were adopted by 7 votes to 1, with 4 abstentions.

9. Mr. SCELLE, drawing attention to the comment of the Netherlands Government on article 3 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6), said that its substance had already been discussed at the previous meeting in connexion with retrospective effect. He would

[1] See *Yearbook of the International Law Commission, 1952*, vol. I, 173rd meeting, para. 28.