Document:-
A/CN.4/SR.473

Summary record of the 473rd meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1958 , **vol. I**

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

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

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

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

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

The meeting rose at 1.5 p.m.

473rd MEETING

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

Chairman: Mr. Radhabinod PAL.

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

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

III. A. GENERAL OBSERVATIONS *(continued)*

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 11

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

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

Article 12 was adopted unanimously.

ARTICLES 13 TO 17

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

Article 13 was adopted unanimously.

---

[1] Resumed from 472nd meeting.

Article 14 was adopted unanimously.

Article 15 was adopted by 15 votes to 1.

10. Mr. MATINE-DAFTARY said that he had voted against article 15 because, although agreeing that the time fixed in the *compromis* might be extended by agreement between the parties, he could not accept the idea that the tribunal could do so at its own discretion.

Article 16 was adopted by 14 votes to none.

Article 17 was adopted by 14 votes to 1, with 1 abstention.

11. Mr. EDMONDS explained that he had voted against article 17 because he had understood that in the circumstances contemplated by the article a new document could not be introduced unless it could be shown that the evidence to which it related had not been known to the parties at the time of the written pleading.

The commentary on articles 13 to 17 was adopted.

ARTICLE 18

12. Sir Gerald FITZMAURICE, Rapporteur, observed that article 18 was a rearrangement of article 21 of the Special Rapporteur's draft (A/CN.4/113 annex). The only significant change was the introduction of a reference to experts as well as to witnesses.

13. Mr. MATINE-DAFTARY said that he was opposed to the principle enunciated in the article that the tribunal was judge of the admissibility of the evidence produced. Besides, it was not clear by what criteria the tribunal was to be guided.

Article 18 was adopted by 14 votes to 1, with 1 abstention.

ARTICLE 19

14. Sir Gerald FITZMAURICE, Rapporteur, recalled that the Commission had adopted the principle of article 19 subject to redrafting by the Drafting Committee of the part of the text dealing with additional claims and counterclaims. In view of the great difficulty of drawing a precise distinction between the two types of claim, the Drafting Committee had thought it wisest to use the general term " ancillary claims " — which he preferred, on second thoughts, to " incidental claims " — since the proviso that they must be " inseparable from the subject-matter of the dispute and necessary for its final settlement " was an adequate safeguard. He drew attention to the commentary on the article in paragraph 25 of the draft report.

Article 19 was adopted by 15 votes to none, with 1 abstention.

15. Mr. BARTOS said that he had abstained from voting on article 19 because the term " *indivisible* " in the French text had no clear meaning in law. The words " necessary for its final settlement " were also unsatisfactory. It should be stated that the claim must be " necessary for its final settlement on that occasion ". He preferred the article in its original form.

ARTICLE 20

Article 20 was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 21

16. Sir Gerald FITZMAURICE, Rapporteur, pointed out that the last part of article 21 had been added on the proposal of Mr. Zourek. He drew attention to the commentary on the article in paragraph 26 of the draft report.

17. Mr. YOKOTA expressed some misgivings concerning the addition to article 21. Since the proceedings should obviously not be reopened without very strong justification, the conditions under which they could be reopened must be specified in detail. The first part of paragraph 2 was quite satisfactory in that respect and he therefore proposed that the last few words in the article should be amended to read : " that there is a need for clarification on points of a similar nature " — namely, of such a nature as to have a decisive influence on the tribunal's decision.

The proposal was rejected by 3 votes to 2, with 11 abstentions.

Article 21 was adopted by 15 votes to none, with 1 abstention.

The commentary on article 21 was adopted.

ARTICLE 22

18. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the commentary on article 22 in paragraph 27 of the draft report.

19. Mr. ZOUREK said that, in his opinion, the words " Except where the claimant admits the soundness of the defendant's case ", which were an addition to the previous text, went too far. It would be more in keeping with the principles governing civil procedure to say " Except where the claimant renounces his claim ". For example, there might be a dispute concerning a territory to which three States laid claim. In such a case renunciation of a claim would in no way imply admission of the soundness of the defendant's case.

Article 22 was adopted by 14 votes to 1, with 1 abstention.

The commentary on article 22 was adopted.

ARTICLE 23

20. Sir Gerald FITZMAURICE, Rapporteur, recalled that the Commission, on the proposal of Mr. El-Erian, had decided to insert in article 23 the words " if it thinks fit ", in order to emphasize that the tribunal should not be bound to include in an award a settlement of which it did not approve.

Article 23 was adopted by 15 votes to 1.

ARTICLE 24

21. Sir Gerald FITZMAURICE, Rapporteur, explained that the words " with the consent of either party " which had appeared in the 1953 text (A/2456, para. 57, article 23) had been deleted ; the new text of article 24 left it to the tribunal to decide whether the period should be extended or not, but that power was qualified by the proviso that the time could only be extended if the tribunal would otherwise be unable to render the award.

Article 24 was adopted by 13 votes to 1, with 2 abstentions.

ARTICLE 25

Article 25 and commentary (A/CN.4/L.78/Add.1, para. 28) were adopted unanimously.

ARTICLE 26

Article 26 was adopted unanimously.

ARTICLE 27

22. Mr. AGO proposed two drafting changes in paragraph 2 of article 27. Since it was not at all in the matter of arbitration to provide for a quorum, particularly in the case of a tribunal of three or five members only — as in such cases the presence of all the arbitrators was normally required — he proposed that the first phrase of the paragraph as far as the word " or " should be amended to read " Except in cases where the *compromis* provides for a quorum ". Secondly, since the procedure to be followed in the event of the appointment of an arbitrator to a vacancy was laid down in article 7, it would be sufficient to replace the last sentence of the paragraph by the words " In the case of such replacement, the provisions of article 7 shall apply."

23. Sir Gerald FITZMAURICE, Rapporteur, accepted both drafting changes. He drew attention to the commentary on articles 26 and 27 in paragraph 29 of the draft report.

Article 27 as amended was adopted by 13 votes to none, with 2 abstentions.

The commentary on articles 26 and 27 was adopted.

ARTICLE 28

24. Sir Gerald FITZMAURICE, Rapporteur, read out the commentary on article 28, in paragraph 30 of the draft report.

25. Replying to an inquiry from Mr. MATINE-DAFTARY, he explained that a member of a tribunal might wish to attach a separate opinion if, while not dissenting from the award, he had supported it for reasons different from those of the majority.

26. On the suggestions of Mr. AGO and Mr. BARTOS, he agreed to add after the words " it shall be drawn up in writing " in paragraph 1, the words " and shall bear the date on which it was rendered ".

Article 28, as amended, was adopted unanimously.

The commentary on article 28 was adopted.

ARTICLE 29

Article 29 was adopted by 15 votes to none, with 1 abstention.

27. Mr. BARTOS explained that he had abstained from voting because he considered that the text should be qualified by the words : " unless the parties have dispensed the tribunal from the need to state its reasons ".

ARTICLE 30

Article 30 was adopted unanimously.

ARTICLE 31

28. Mr. BARTOS observed that in arbitral awards affecting the delimitation of State frontiers, mistakes were often made in geographical nomenclature. He wondered whether the questions to which such mistakes might give rise should be dealt with under article 31 or article 33.

29. Sir Gerald FITZMAURICE, Rapporteur, said the answer would depend on the circumstances of each case. If the mistakes were not such as to affect the substance of the award, article 31 would be applicable ; but otherwise the applicable article would be article 33 or perhaps even article 38, dealing with revision of the award.

Article 31 was adopted unanimously.

ARTICLE 32

30. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 32 in paragraph 31 of the draft report.

Article 32 was adopted unanimously.

ARTICLE 33

31. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 33 in paragraph 32 of the draft report.

32. Faris Bey EL-KHOURI proposed that the phrase " within three months of the rendering of the award " in paragraph 1 of article 33 be amended to read " within three months of the communication of the award to the parties ", since in some cases it might be weeks or even months before the award was communicated to the parties in writing. Even in civil actions under national law, it was the date of the communication of the judgement to the parties which marked the commencement of responsibilities under the term of the judgement.

33. Sir Gerald FITZMAURICE, Rapporteur, said that normally there was no difference between the time of

the rendering of the award and its communication to the parties. He cited the terms of article 28, paragraph 3.

34. Faris Bey EL-KHOURI objected that it might still take some time for the agents of the parties to communicate the award in writing to their Governments.

35. Sir Gerald FITZMAURICE, Rapporteur, pointed out that in any case the date of communication to the parties could not be taken as the point from which the three-month period referred to in article 33, paragraph 1, should run, because that point must be a fixed date, and the parties might receive written communication of the award on different dates.

36. The CHAIRMAN recalled that Mr. Zourek's proposal earlier in the session for extending the time limit in question to three months had been unanimously accepted. It was generally agreed that the parties must be represented before the tribunal and that the award would be communicated to their representatives at the same time as it was rendered.

Faris Bey El-Khouri's proposal (para. 32 above) was repected by 8 votes to 4, with 4 abstentions.

37. Sir Gerald FITZMAURICE, Rapporteur, observed that Faris Bey El-Khouri's proposal had drawn his attention to the need to amend, in paragraph 2, the words " if within a time limit of three months " to read : " if within the above-mentioned time limit ".

Article 33 was adopted by 12 votes to 1, with 3 abstentions.

ARTICLE 34

38. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 34 in paragraph 33 of the draft report.

Article 34 was adopted unanimously.

ARTICLE 35

39. Sir Gerald FITZMAURICE, Rapporteur, observed that the only new element in article 35 was sub-paragraph (*d*), and drew attention to the comment on the article in paragraph 34 of the draft report. In view of what had been said in the introduction to the 1953 text (A/2456, para. 39), the reintroduction of that sub-paragraph needed some explanation. It was difficult to deny that if the original undertaking to arbitrate was invalid the award must also be invalid. Yet it was a case that should very seldom arise, and which ought to be especially rare in the case of arbitration agreements. However, allowance should be made for the theoretical possibility.

40. The word " essential " should be inserted before " validity " in the last sentence of the comment.

41. Mr. MATINE-DAFTARY said he would be unable to vote for the article unless the words " or a serious departure from a fundamental rule of procedure " in sub-paragraph (*c*) were deleted. The Drafting Committee should either have deleted those words or made their meaning clear.

42. The CHAIRMAN recalled that sub-paragraph (*c*) had originated in a proposal by Mr. Liang which had been amended by Mr. El-Erian and accepted by the Commission in its present form by 12 votes to none, with 2 abstentions (450th meeting, para. 42).

43. Mr. VERDROSS proposed that sub-paragraph (*d*) should be placed first in the list of grounds on which the validity of an award might be challenged. That would be the most logical arrangement, since the undertaking to arbitrate, or the *compromis,* was the basis of the whole procedure.

44. Mr. SCELLE, Special Rapporteur, said that though Mr. Verdross' proposal was apparently logical he doubted its value, since it was inconceivable that the invalidity of the undertaking to arbitrate or of the *compromis* should not be discovered until after the conclusion of proceedings which might have lasted for months. He did not ask for the deletion of sub-paragraph (*d*), but he would not be in favour of placing it at the head of the list.

45. Sir Gerald FITZMAURICE, Rapporteur, agreed with the Special Rapporteur. Though Mr. Verdross' proposal seemed logical, the rearranged order would suggest that the invalidity of the undertaking to arbitrate or of the *compromis* was a frequent ground for challenging the validity of an award, whereas in fact the opposite was true. He had had considerable misgivings as to the advisability of including sub-paragraph (*d*) when Mr. Zourek had made the original proposal, especially in view of the reasons for not doing so given in the introduction to the 1953 text (A/2456, para. 39). Sub-paragraph (*d*) would obviously give any State acting in bad faith an excuse for alleging that an award rendered against it was invalid because the undertaking to arbitrate or the *compromis* had itself been invalid. While it could not be denied in principle that if the agreement to arbitrate was invalid the award must therefore be nullified, he thought the provision should not be given a conspicuous place in the draft.

46. Mr. AGO said he shared the Rapporteur's misgivings as to the wisdom of including sub-paragraph (*d*). Moreover, while he admitted that the invalidity of the undertaking to arbitrate would exclude the possibility of the tribunal's issuing a valid award, he would point out that, as a consequence of article 9, the validity of the *compromis* must necessarily have been examined by the arbitral tribunal itself before the award was given. He therefore suggested that, if sub-paragraph (*d*) was retained, at least the words " or the compromis " should be deleted.

47. Mr. ZOUREK said that cases were conceivable in which the *compromis* was subsequently found to be a nullity because concluded under duress. Though he agreed with the Rapporteur that cases in which the validity of the award could be challenged on the grounds mentioned in sub-paragraph (*d*) were very rare, he

thought that the provision should nevertheless be retained, especially if a similar provision was to be included in the draft on the law of treaties. Cases in which the validity of treaties could be challenged on the same grounds were also rare.

48. Mr. BARTOS said he was of the same opinion as Mr. Ago so far as the words "or the *compromis*" were concerned. If they were retained, some reference would have to be made to the powers of the tribunal under articles 8 and 9, but in his opinion it would be better if the phrase were deleted.

49. Faris Bey EL-KHOURI pointed out that a *compromis* could be a nullity if it had been signed by a person who was not qualified to represent the State in question.

50. Mr. SCELLE, Special Rapporteur, said that in his opinion sub-paragraph (*d*) was an encouragement to act in bad faith, for any party which was dissatisfied with an award would be able to say that the undertaking to arbitrate had been given under pressure, or that the *compromis* was invalid. He proposed that the Commission should reconsider its earlier decision and that sub-paragraph (*d*) should be deleted.

51. The CHAIRMAN observed that under the rules of procedure, a two-thirds majority would be required for the adoption of Mr. Scelle's proposal for reconsideration. He put the proposal to the vote.

The result of the vote was 9 in favour and 5 against, with 2 abstentions.

The proposal was not adopted, having failed to obtain the required two-thirds majority.

Article 35 was adopted by 7 votes to 3, with 4 abstentions.

ARTICLE 36

52. Sir Gerald FITZMAURICE, Rapporteur, said that the rest of the sentence made it clear that the claim of nullity referred to in paragraph 1 of article 36 did not mean a claim before the tribunal; in other words, the period of limitation was three months from the allegation of nullity by either party. In the French, however, the term "*demande en nullité*" could be taken to imply that the tribunal was seized of the claim. A more suitable word might be "*contestation*".

53. Paragraph 3 had been left substantially unchanged from the 1953 text. The language used was mandatory, although in article 33 and in paragraph 7 of article 38 the language dealing with the same point was much more qualified. There seemed to be good reason for using similarly permissive language in article 36, because it would be undesirable that the tribunal should automatically have to stay execution when, for example, the reasons for the claim of nullity were manifestly weak. He proposed therefore that paragraph 3 should be amended to read:

"The Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for annulment."

54. Mr. YOKOTA said that the same question of a stay of execution as that in paragraph 3 had arisen in respect of articles 33 and 38, and the Commission had unaccountably passed over article 36. He supported the proposed change.

55. Sir Gerald FITZMAURICE, Rapporteur, replying to Mr. AGO, said that the period of six months referred to in paragraph 2 obviously began with the claim of nullity. He had no objection to Mr. Ago's suggested use of the words "*la validité doit être contestée*" instead of "*la demande en nullité doit être formée*" in the French version. The English text did not require amendment.

Article 36, as amended, was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 37

Article 37 was adopted by 12 votes to none, with 2 abstentions.

ARTICLE 38

56. Mr. SCELLE, Special Rapporteur, regretted that he had not been present at the 447th meeting, when article 38 (then article 39 of the model draft) had been adopted after the Commission had decided that paragraph 1 should begin with the clause "Unless the parties have in the *compromis* expressly excluded an application for the revision of the award" (447th meeting, para. 21). If some fact were discovered after the award "of such a nature as to constitute a decisive factor", then, as far as the tribunal was concerned, no real award could be said to have been rendered, for the tribunal's award would have been rendered without knowledge of essential facts. In other words, the tribunal would not have had all the evidence before it. He pointed out that under article 21 the tribunal had the power to reopen the proceedings after their closure on the ground of material new evidence. If by the retention of the words at the beginning of article 38, paragraph 1, a revision was excluded, the tribunal would be prevented from rendering a real award, and the award would be manifestly contrary to the law. He proposed therefore that the discussion on paragraph 1 be reopened and that the introductory phrase of that paragraph be deleted.

By 11 votes to none, with 4 abstentions, it was decided to reopen the discussion.

57. The CHAIRMAN put to the vote the proposal that the introductory phrase of paragraph 1 be deleted, which would result in the article reading: "An application for the revision of the award may be made by either party..."

The proposal was adopted by 12 votes to none, with 3 abstentions.

58. Sir Gerald FITZMAURICE, Rapporteur, in reply to Mr. MATINE-DAFTARY, said that paragraph 7 could not prevent the tribunal or the Court from staying the execution, even though the question of the admissibility of the application for revision had not yet been decided. He did not feel that there was any ground for not giving the widest latitude in that respect to the tribunal or the Court.

59. Mr. MATINE-DAFTARY said that the law should be absolutely clear. Until the tribunal or the Court had dealt with the admissibility of an application for revision it could not grant a stay of execution. If the paragraph was not amended to make that position clear, he would vote against it. He asked for a separate vote on paragraph 7.

60. The CHAIRMAN pointed out that in domestic law a court had the power to order an interim stay of proceedings even before it took up the question of the admissibility of an application; otherwise there was a possibility of irreparable damage being done to the applicant. He could not see anything faulty in the wording of paragraph 7.

Paragraphs 1 to 6, as amended, were adopted by 13 votes to none, with 2 abstentions.

Paragraph 7 was adopted by 12 votes to 1, with 2 abstentions.

Article 38 as a whole, as amended, was adopted by 12 votes to 1, with 2 abstentions.

61. Sir Gerald FITZMAURICE, Rapporteur, said that the commentary on article 38, in paragraph 35 of the draft report, would be deleted in view of the Commission's decision to delete the introductory words of paragraph 1.

Chapter II as a whole (A/CN.4/L.78/Add.1), as amended, was adopted by 11 votes to none, with 3 abstentions.

62. Mr. TUNKIN, explaining his abstention, said that arbitration was a specific means of settling international disputes, and the main principles of arbitral procedure were well known. The Commission had adopted a set of model rules which in substance denied those main principles, as was clear from the treatment of the rights of the parties regarding the constitution of a tribunal and also the rights which the parties might exercise in the course of the proceedings. In addition, they introduced, as it were by the back door, the compulsory jurisdiction of the International Court of Justice, with the consequence that the arbitral tribunal would be a jurisdiction subordinate to the International Court. The innovations might thus have the effect of undermining arbitration as a means of settling international disputes. Preferably, the Commission should have simply endeavoured to improve the rules currently in use and make them more acceptable to States.

63. He had abstained from voting, but he had not voted against the draft, as it was to be presented not as a draft convention but only as a set of rules from which States might choose such elements as could be of value to them.

64. Mr. ZOUREK said that the set of model rules was an improvement on the original draft convention of 1953. The new form in which the draft was presented also seemed preferable. Nevertheless, the Commission had not remedied all the defects which he had criticized at previous sessions and which had been adversely commented upon by many Governments. In particular, he thought that in certain respects the model rules tended to place undue restrictions on the will of the parties: thus in article 4 they forbade the replacement of a member of the tribunal, by a rule which was more rigorous than that applied in the International Court of Justice. Again, articles 33, 35 and 38 permitted the parties, after an award had been rendered, to apply to the International Court for interpretation, annulment or review of the arbitral award. He felt that those provisions, by giving advance authority for recourse to another body, would tend to encourage such recourse and destroy the definitive character of the award. Because of those faults, he had abstained from voting.

65. Mr. GARCÍA AMADOR said that he had voted in favour of the model rules because nothing, either in the new draft or in the 1953 draft, was in any way contrary to existing international law in the matter of arbitration. The model rules conformed to a modern trend which was particularly marked in America, where it had resulted in the Pact of Bogotá.[2] Traditional arbitration, even in those cases where States had bound themselves to submit their disputes to arbitration, was a system which suffered from basic defects, and the model rules would undoubtedly help bring about adequate solutions once States had assumed an obligation to arbitrate. He felt therefore that they provided an indispensable aid to arbitration of all kinds.

66. It was important, however, to realize that the model rules would not be of value in all kinds of disputes between States, and were by no means a magic formula for the solution of every difficulty. In that respect some of the remarks made in the General Assembly had been well founded. On the other hand, especially where the nature of the dispute was favourable, the model rules would be of great assistance in making the arbitral undertakings effective.

The meeting rose at 12.50 p.m.

---

[2] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series*, vol. 30, 1949, No. 449.