Document:-

A/CN.4/L.33/Add.4

Articles Tentatively Adopted on 20, 23 and 24 June 1952 - incorporated in the summary records of the 147th to 149th meetings

Topic:

Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-

1952, vol. I

a final settlement, binding on the parties. The tribunal was not merely the servant of the parties; it also represented the common interest of the international community.

57. Mr. AMADO felt that Mr. Scelle was attempting to be too perfectionist. He would ask the English-speaking members of the Commission, however, whether the phrase " settlement between the parties " was an accurate translation of " *transaction d'expédient* ".

58. Mr. SCELLE felt that Mr. Amado's question was extremely pertinent. He wondered, in fact, whether Anglo-Saxon law provided for a " *transaction d'expédient* ", meaning an agreement between the parties which was given the force of law by the tribunal's approving it.

59. Mr. LAUTERPACHT said that " settlement between the parties " was a term which had a clear and definite meaning. Whether that meaning was exactly the same as what was meant in French by " *transaction d'expédient* ", he could not say.

60. Mr. KOZHEVNIKOV said that article 18 again raised the general question of the nature of the arbitral award, and that he therefore felt obliged to restate his general views on the subject.

61. Article 18 clearly reflected the general trend of Mr. Scelle's draft, which appeared to be based on the curious assumption that one, at least, of the parties would be acting in bad faith. If that assumption were accepted, it followed that a certain procedure would have to be imposed on the parties, but to do so would be contrary to their sovereign rights and would make the tribunal a supra-national body whose powers might well extend to interference in the domestic affairs of sovereign States. Such a trend ran counter to the basic principles of international law.

62. It was surely a fundamental axiom of arbitration that the tribunal was made for the parties, and not the parties for the tribunal.

63. Article 18 clearly reflected the excessively dogmatic nature of Mr. Scelle's draft as a whole. The bad faith of the parties could not be taken as a basis for drawing up arbitration procedure. He therefore supported Mr. Lauterpacht's proposal that the words " after verifying its good faith and validity " be deleted.

64. Mr. AMADO pointed out that the English words " its good faith " were a mistranslation of the French words " *le caractère certain* ".

65. Mr. FRANÇOIS pointed out that the English text of article 18 contained another error in translation, in that the words " *le cas échéant* " had not been translated; they might be rendered in English by replacing " shall " by " may ". Those words surely made the last clause of article 18 superfluous.

66. Mr. SCELLE feared that there was a basic difference of opinion on the substance of article 18. He had agreed to the deletion of article 15 because he had thought it went without saying. If the idea was that, in the event of the parties concluding a settlement, the tribunal need have nothing further to do, he must resolutely oppose that idea, which was quite contrary to the basic purpose of his draft.

Further discussion of article 18 was deferred.

The meeting rose at 11.45 a.m.

147th MEETING

Friday, 20 June 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33, A/CN.4/L.33/Add.1) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46) contained in the special rapporteur's Second Report.

ARTICLE 18 (*continued*)

2. Mr. ZOUREK supported the first part of the amendment[1] proposed by Mr. Lauterpacht and seconded by Mr. Kozhevnikov at the previous meeting, which envisaged the deletion of the words " after verifying its good faith and validity ". It appeared that that phrase was somewhat in contradiction with the substance of article 17. If a case could be withdrawn from the tribunal by agreement between the parties, why should a different procedure be provided for in the case of the

[1] See summary record of the 146th meeting, para. 53.

parties reaching agreement on the substance of the dispute?

3. However, he could see no convincing reason why the tribunal should be obliged to embody in an agreed award a settlement agreed upon by the parties. It had been suggested that greater authority needed to be given to any settlement concluded between the parties; but the competence itself of an arbitral tribunal depended wholly on the wishes of the parties to the dispute. The procedure proposed by Mr. Lauterpacht was comprehensible for domestic arbitration, where a "*jugement d'expédient*" transformed a private agreement between the parties into an authentic legal instrument with executive force, and also perhaps in the field of international commercial arbitration, provided the two parties agreed to it, since in many countries arbitral awards in that field had executive force by virtue of the 1927 Convention on the Execution of Foreign Arbitral Awards.[2] But in the field of international arbitration, which rested solely on the agreement of the parties, he did not see how a "*jugement d'expédient*" could add anything to a direct agreement between the parties. In such a case the whole aim of the arbitration, which was the settlement of a dispute between the parties, would have been achieved.

4. Mr. HSU said that in his view it was necessary to ensure that the settlement between the parties was a real one, but that he could understand why the words "good faith and validity" appeared objectionable. He suggested that article 18 be amended to read:

> "If the terms of a settlement between the parties prove acceptable to the tribunal. it shall take note of them and, at the request of the parties, shall embody them in an agreed award."

5. Mr. SCELLE had not been convinced by Mr. Zourek's arguments, able as they were. He saw no contradiction between the clause in dispute and article 17. The parties could do one of two things: they could withdraw the case from the tribunal; alternatively, they could ask it to transform the settlement they had concluded into a "*jugement d'expédient*". But the tribunal could not be obliged to bestow the authority of a *res judicata* on a settlement which it had not been given an opportunity of scrutinizing.

6. Mr. KERNO (Assistant Secretary-General) said that the Commission appeared to be faced with two difficulties. One was that, if a settlement was concluded between the parties, it seemed unreasonable that the tribunal should be able to ignore that settlement and render its award notwithstanding; the other was that it seemed illogical for the tribunal to be compelled to give its sanction to a settlement which it did not approve. He felt that both those difficulties would be met if the words "after verifying its good faith and validity" were deleted, and the sentence "At the request of the parties it shall embody the settlement in an agreed award", proposed by Mr. Lauterpacht, added, both parts of the sentence being at the same time made optional by the substitution of the word "may" for the word "shall".

7. Mr. LAUTERPACHT associated himself with the suggestion of the Assistant Secretary-General, which should, in his opinion, give full satisfaction to Mr. Hsu and Mr. Scelle.

8. Mr. HSU withdrew his amendment.

Mr. Lauterpacht's proposal that the words "after verifying its good faith and validity" be deleted was adopted by 8 votes to 2, with 1 abstention.

Mr. Lauterpacht's proposal for the addition of the sentence quoted above was adopted, as amended, by 7 votes to 1, with 3 abstentions.

Article 18 was adopted as a whole, as amended, by 8 votes to 1, with 2 abstentions.[3]

ARTICLE 19[4]

9. Mr. LAUTERPACHT proposed that article 19 be replaced by the following text:

> "In the event of a dispute as to whether the tribunal has jurisdiction, the matter shall be settled by the decision of the tribunal."

10. Mr. AMADO had been particularly struck by the masterly way in which article 19 was drafted in Mr. Scelle's text. The article clearly established the principle that the tribunal possessed power to interpret the *compromis*. That principle was not clearly established in Mr. Lauterpacht's amendment, and for that reason he much preferred Mr. Scelle's original version.

11. Mr. YEPES agreed that Mr. Lauterpacht's draft of article 19 corresponded to only a part of Mr. Scelle's. The question of interpretation of the *compromis* was dealt with by Mr. Lauterpacht in a proposal which he had circulated as an amendment to article 21, and which read:

> "The tribunal shall interpret the procedural provisions of the arbitration treaty or the *compromis*, in a manner most conducive to the expeditious and final settlement of the dispute through a binding award."

12. In his (Mr. Yepes) view, that way of dealing with the question was not so satisfactory as Mr. Scelle's.

13. Mr. LAUTERPACHT said that disputes concerning interpretation of the *compromis* could relate to many

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[2] Text in League of Nations *Treaty Series*, vol. 92, p. 301.

[3] Article 18, as tentatively adopted, read as follows:

"The tribunal may take note of the conclusion of a settlement between the parties. At the request of the parties, it may embody the settlement in an agreed award."

[4] Article 19 read as follows:

"The arbitral tribunal as the judge of its own competence possesses the widest powers to interpret the *compromis*."

questions other than that of the competence of the tribunal, but that disputes relating to the latter issue had, particularly during the past fifty years, been so much more important than any other disputes arising out of interpretation of the *compromis* that it seemed to him that they should be dealt with separately. That had been done in the Statute of the International Court of Justice, on paragraph 6 of Article 36 of which his proposal for article 19 was modelled.

14. He had other objections, of a drafting nature, to Mr. Scelle's text for article 19. In the first place, he did not think that provisions intended for ultimate inclusion in a draft convention should contain parenthetical explanations, as the words "as the judge of its own competence" appeared to be. Secondly, the words "or the arbitration treaty" would have to be added after the words "to interpret the *compromis*", unless the Chairman ruled, once and for all, that whenever the word "*compromis*" was used it was to be understood as referring to an arbitration treaty as well in cases where no special *compromis* was concluded.

15. The CHAIRMAN said that when the arbitration treaty did not specify all the points referred to in article 12 as adopted, "the *compromis*" should be understood to mean the special *compromis* drawn up.

16. Mr. el-KHOURI considered that article 19 should be split into two paragraphs, the first dealing with the question of competence, the second with that of interpretation of the *compromis*. The wording proposed by Mr. Scelle would give the arbitral tribunal powers to interpret the *compromis* even when the parties who had drawn it up agreed on its interpretation. If the parties agreed on the interpretation of the *compromis*, their interpretation should be accepted. He therefore proposed the following text to form the second paragraph of article 19:

> "In case of disagreement between the parties as to the interpretation of the *compromis*, the tribunal's interpretation shall prevail."

17. Mr. KOZHEVNIKOV felt that article 19 dealt with two distinct questions of such importance that they should be discussed separately.

18. The CHAIRMAN agreed, and invited comments on the question of the competence of the tribunal.

19. Mr. HUDSON cited article 73 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, which merely stipulated that "the tribunal is authorized to declare its competence in interpreting the *compromis*..." He thought that the question of the competence of the arbitral tribunal, in the sense of jurisdiction, should be omitted altogether from the text of article 19, which should merely affirm the power of the tribunal to interpret the *compromis*.

20. He accordingly proposed the following text:

> "The tribunal possesses the power to interpret the *compromis*."

21. Mr. KERNO (Assistant Secretary-General) felt that Mr. Lauterpacht's objections to the text proposed by Mr. Scelle, which had been drafted in French, arose partly from the difficulty of translating into English what was, in French, an extremely elegant turn of phrase, and one that expressed the meaning precisely.

22. Mr. HSU suggested that Mr. Scelle's text be amended to read:

> "The arbitral tribunal is the judge of its own competence and..."

23. Mr. ZOUREK agreed with Mr. Kozhevnikov that the two questions — namely, the competence of the tribunal and the interpretation of the *compromis* — should be dealt with in separate articles. For the former he proposed the following text:

> "The competence of the arbitral tribunal is determined by the arbitration treaty, or by the *compromis*."

24. The CHAIRMAN said that a fundamental question of principle must first be resolved, namely, whether the two elements in the special rapporteur's text for article 19, that of the competence of the tribunal and that of its power to interpret the *compromis*, should both be retained.

25. He put that question to the vote.

The Commission decided the question of principle in the affirmative by 9 votes to 2.

26. Mr. KOZHEVNIKOV proposed that the text relating to the competence of the tribunal read as follows:

> "The arbitral tribunal constituted by agreement of the parties itself defines its competence".

27. The CHAIRMAN said that he would put to the vote the several proposals before the Commission except that submitted by Mr. Hudson, which sought to provide for only one of the two elements.

Mr. Zourek's proposal was rejected by 6 votes to 3, with 2 abstentions.

Mr. Kozhevnikov's proposal was rejected by 7 votes to 2, with 2 abstentions.

Mr. Lauterpacht's proposal was rejected by 5 votes to 3, with 3 abstentions.

28. Mr. AMADO said that the advantage of Mr. Scelle's text over Mr. Hsu's was that it merely noted a well-known and obvious fact, instead of purporting to establish it as a rule.

29. Mr. LAUTERPACHT expressed the hope that the special rapporteur would support Mr. Hsu's amendment. It was not the purpose of a convention to note facts, but to lay down legal rules.

30. The CHAIRMAN put Mr. Hsu's amendment to the vote.

Four votes were cast in favour of the amendment and 4 against, with 1 abstention. The amendment was accordingly rejected.

31. Mr. SCELLE said that he had abstained from the vote on Mr. Hsu's amendment since, as Mr. Amado had pointed out, it made for a slightly different meaning

from that which he himself had intended. It was because the tribunal was the judge of its own competence that it possessed the widest powers to interpret the *compromis*.

The original wording proposed by Mr. Scelle, down to the words "of its own competence", was adopted by 8 votes to 3.

32. The CHAIRMAN invited comments on the question of interpretation of the *compromis*. He recalled Mr. el-Khouri's proposal in that connexion.

33. Mr. KOZHEVNIKOV felt that the wording proposed by Mr. Scelle, which gave the tribunal the widest powers to interpret the *compromis*, went much too far. The tribunal would be an organ set up by agreement between the parties, and the right to interpret the *compromis* which they themselves had concluded ought to rest with them. He therefore proposed that the reference to the interpretation of the *compromis* be omitted altogether.

Mr. Kozhevnikov's proposal was rejected by 6 votes to 2, with 2 abstentions.

34. Mr. HUDSON proposed that the words "the widest powers" in Mr. Scelle's draft be replaced by the words "the general power".

35. The CHAIRMAN said that he would first put Mr. el-Khouri's proposal [5] to the vote.

Mr. el-Khouri's proposal was rejected by 6 votes to 2, with 2 abstentions.

36. Mr. YEPES said that he had voted against Mr. el-Khouri's proposal, not because he disagreed with the principle underlying it, but because he preferred the simpler wording proposed by Mr. Scelle.

37. Mr. AMADO said that he had voted against Mr. el-Khouri's proposal because he considered that it should be the function of the tribunal constituted by the parties to interpret the *compromis*, and because the wording proposed by Mr. Scelle expressed that principle in the clearest way.

38. The CHAIRMAN then put Hr. Hudson's proposal to the vote.

Four votes were cast in favour of the proposal, and 4 against, with 2 abstentions. The proposal was accordingly rejected.

39. The CHAIRMAN said that as all the amendments proposed had been rejected he would put to the vote as a whole article 19 as proposed by Mr. Scelle.

Article 19, as proposed by Mr. Scelle,[6] was adopted by 7 votes to 4.

40. Mr. el-KHOURI said that he had voted against the wording proposed by Mr. Scelle for article 19 because he could not support a text which would give the tribunal power to place a different interpretation on the *compromis* drawn up by the parties from that upon which they themselves had agreed.

[5] See para. 16 above.

[6] See text in footnote 4 above.

Articles 20, 21 and 22 [7]

41. Mr. LAUTERPACHT proposed that, as articles 20, 21 and 22 all dealt with the interpretation of the *compromis,* they should be taken together.

It was so agreed.

42. Mr. SCELLE said that he was not irrevocably wedded to his own text, in which he took no particular pride of authorship. He had sought to find a formula which would be generally acceptable on the very important issue of *non liquet,* about which legal opinion appeared to be divided. He was partisan to the view that in no circumstances could a tribunal bring in a finding of *non liquet* on grounds of the silence or obscurity of the law. If it did not give judgment it would be failing in its duty. As the Commission was aware, he also believed that a tribunal had the inherent right to judge in equity, on the basis of the general rules of law, and that it might, if necessary, assume to some extent the function of a legislator. Of course, his view might not be shared by all members, and it was for the Commission to pronounce upon what he considered to be one of the most important issues in the whole draft procedure.

43. One possibility must also be taken into consideration, that of a tribunal being unable to give judgment because one of the parties withheld some essential piece of evidence. If that occurred, the tribunal must be empowered to discontinue the proceedings and absolve itself from further responsibility.

44. In view of the adoption by the Commission of the provision which now formed paragraph (*f*) of article 12, and which read: "the law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono*;", he withdrew the words "being in all cases empowered to judge in equity" from the second paragraph of article 20 of his draft.

[7] Articles 20, 21 and 22 read as follows:

Article 20. "If the *compromis* contains no relevant provision, or in the absence of a *compromis* concluded by mutual agreement, the tribunal, in its decision, shall apply the substantive rules set forth in Article 38 of the Statute of the International Court of Justice.

'The tribunal, being in all cases empowered to judge in equity, may not bring in a finding of *non liquet* on the grounds of the silence or obscurity of international law or of the *compromis*.'"

Article 21. "If the tribunal finds itself confronted with express and unequivocal provisions of the *compromis* likely to hinder it in its work, either with regard to the integrality of the dispute or to the conduct of the proceedings, it may overrule them, in particular, if an undertaking prior to, and more comprehensive than, the *compromis* is adduced by one of the parties and that party proves that it was its intention to refer to it."

Article 22. "If the *compromis* cannot be interpreted in this sense, or if failure to comply with procedural orders would prevent the tribunal from performing its functions, the tribunal should, before bringing a finding of *non liquet,* call upon the parties to modify the *compromis,* to obey the orders of the tribunal or explicitly to discontinue the proceedings."

45. The CHAIRMAN drew the attention of the Commission to the alternative texts submitted by Mr. Lauterpacht for articles 20, 21 and 22, which read as follows:

"*Article 20*

"If the treaty of arbitration or the *compromis* contain no relevant provisions in the matter of procedure these shall be framed by the tribunal in accordance with the exigencies of the case, any applicable provisions of the Statute and the Rules of the International Court of Justice, and general principles of law recognized by civilized States in the matter of procedure.

"*Article 21*

"The tribunal shall interpret the procedural provisions of the arbitration treaty or the *compromis* in a manner most conducive to the expeditious and final settlement of the dispute through a binding award.

"*Article 22*

"*The Law to be applied by the Tribunal*

"Subject to any particular rules of law expressly agreed by the parties, the tribunal shall apply the rules of law laid down in Article 38 of the Statute of the International Court of Justice."

46. Mr. HUDSON proposed the following alternative text for article 20, first paragraph:

"Subject to any agreement between the parties on the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice."

47. There was hardly any need for him to point out that Article 38, paragraph 1, of the Statute of the International Court of Justice did not lay down any rules of law, but merely listed the sources of the law to be applied.

48. Mr. AMADO supported Mr. Hudson's proposal. Unfortunately, there were certain elements in Mr. Lauterpacht's text with which he could not agree. His wording for article 20 implied that the rules of the International Court of Justice would be subsidiary to the rules of procedure of the tribunal as laid down in the *compromis*. Nor did he see why the provisions relating to procedure in Chapter III of the Statute of the International Court should be applied to an arbitral tribunal, since rules intended for a judicial organ could hardly be satisfactorily applied in an arbitral tribunal, the structure and purpose of which were more restricted. Furthermore, the Commission had already decided, by adopting paragraph (*c*) of article 12, that the procedure to be followed or the authority conferred on the tribunal to establish its own procedure should be specified in the *compromis*. He therefore failed to understand why there was any need to refer to the rules of the International Court of Justice at all.

49. Mr. SCELLE had no objection to Mr. Hudson's text.

50. Mr. AMADO welcomed Mr. Scelle's readiness to accept Mr. Hudson's text, which would make it unnecessary for the Commission to discuss the problem of *non liquet*.

51. Mr. LAUTERPACHT said Mr. Hudson's wording was substantially the same as that suggested by himself for article 22. He accordingly withdrew his own amendment to that article.

52. He wished to point out, however, that articles 19 to 22 of the special rapporteur's draft and Mr. Hudson's text should be treated separately, since the former dealt with the *compromis* and the latter with the law to be applied by the tribunal, which was a general matter not restricted to the interpretation of the *compromis*.

53. In reply to Mr. Amado, he pointed out that his text for article 22, and not that for article 20, was at present under discussion.

54. Mr. KOZHEVNIKOV said he would be able to accept Mr. Hudson's text if the words "shall apply, by agreement of the parties" were substituted for the words "shall be guided by".

55. The CHAIRMAN suggested that Mr. Kozhevnikov's point was already covered by the words "Subject to any agreement between the parties".

56. Mr. LAUTERPACHT said that Mr. Kozhevnikov's point was also covered by the reference to Article 38, paragraph 1, clause *a*, of the Statute of the International Court, which spoke of international conventions "establishing rules expressly recognized by the contesting States".

57. He added that although he had withdrawn his own amendment in favour of Mr. Hudson's, he did not think it wise to restrict the provision to paragraph 1 of Article 38 of the Statute of the International Court, since it had been recognized in article 12, already adopted by the Commission, that the parties might empower the tribunal to adjudicate *ex aequo et bono*.

58. Mr. YEPES agreed with Mr. Lauterpacht and regretted that the latter should have withdrawn his amendment, which was preferable to Mr. Hudson's. He thought that Mr. Hudson's text might be interpreted as being contradictory to article 12, paragraph (*f*), already adopted by the Commission. He proposed the deletion of the words "paragraph 1" from Mr. Hudson's text, so as to make paragraph 2 of Article 38 of the Statute of the International Court of Justice, which provided for adjudication *ex aequo et bono*, equally applicable.

59. Mr. AMADO pointed out that Mr. Hudson's text related to the "law to be applied". Reference to adjudication *ex aequo et bono* would therefore be inappropriate.

60. Mr. LAUTERPACHT asked whether Mr. Hudson attached importance to the retention of the words "shall be guided by", which seemed to imply an element of discretion, in preference to the expression "shall

apply", which was mandatory and was used in Article 38 of the Statute of the International Court.

61. Mr. SCELLE thought that that was a question of drafting that could be referred to the Standing Drafting Committee.

62. Mr. HUDSON suggested that Mr. Lauterpacht's preoccupation was unnecessary, since the provision expressly referred to Article 38, paragraph 1, which was couched in mandatory terms.

63. He considered Mr. Yepes' amendment to be wholly unnecessary, since the power of the tribunal to adjudicate *ex aequo et bono* was doubly safeguarded in article 12, paragraph (*f*), and in the opening words of his (Mr. Hudson's text) "Subject to any agreement between the parties".

64. The CHAIRMAN put to the vote Mr. Yepes' amendment to Mr. Hudson's text.

Mr. Yepes' amendment was rejected by 5 votes to 4 with 2 abstentions.

65. The CHAIRMAN put to the vote Mr. Hudson's text to replace the first paragraph of article 20 in the special rapporteur's draft.

Mr. Hudson's text was adopted by 8 votes to none, with 2 abstentions.

66. Mr. HUDSON, referring to Mr. Scelle's withdrawal of the words "being in all cases empowered to judge in equity" from article 20, second paragraph, hoped that that had not been done on the grounds that the Commission had adopted article 12, paragraph (*f*), the import of which was by no means the same.

67. Mr. AMADO considered article 20, second paragraph, to be indispensable, in order to lay the ghost of the possibility of a finding of *non liquet*.

68. Mr. LAUTERPACHT observed that it was so generally assumed that that particular ghost had been well and truly laid that no provision of the rudimentary and self-evident kind that was embodied in article 20, second paragraph, had been inserted in the Statute of the International Court of Justice. He accordingly proposed the deletion of that paragraph.

69. Mr. HUDSON said that, if the second paragraph were not deleted, he would propose the deletion from it of the words "or of the *compromis*", since it was clear that it was a finding of *non liquet* on the grounds of the silence or obscurity of the *law*, and not of the *compromis*, that the article was intended to render impossible.

70. Mr. ZOUREK asked what would be the position of a tribunal if it were to find that it could not judge according to the strict rules of law laid down in the *compromis*.

71. Mr. YEPES supported article 20, second paragraph, subject to the deletion of the words "being in all cases empowered to judge in equity", which had already been withdrawn by the special rapporteur.

72. Mr. SCELLE observed that the Commission had already decided to delete article 15, and if Mr. Lauterpacht's proposal for the deletion of article 20, second paragraph, were adopted, the important issue of *non liquet* would be set aside altogether, despite the fact that it was an issue which was under constant discussion in all authoritative works on arbitral procedure. A provision prohibiting a judge from refusing to give judgment existed in all civil codes, and he was convinced that the point could not be passed over in silence in the draft under consideration. Either article 15 must be reinstated, or article 20, second paragraph, must be retained.

73. Mr. LIANG (Secretary to the Commission) considered that the self-evident could not always be assumed. The deletion of article 20, second paragraph, might accordingly give the impression that an arbitral tribunal could bring in a finding of *non liquet*. He added that from his studies of arbitration cases and procedure he had found that the possibility of a finding of *non liquet* was very seldom due to obscurity of international law. It was far more likely to arise from the complete absence of a specific rule on the subject under consideration. Where the law was obscure, it would clearly be the duty of the tribunal to interpret it.

74. He agreed with Mr. Hudson's amendment to article 20, second paragraph, as it was unnecessary to provide for the contingency of a *compromis* being silent or obscure. If it should be silent on the law to be applied, the tribunal would apply international law, being, according to the first paragraph (just adopted) of article 20, guided by paragraph 1 of Article 38 of the Statute of the International Court of Justice. On the other hand, if the *compromis* should be obscure, it would be for the tribunal to interpret it.

75. Mr. SCELLE explained that by the words "or of the *compromis*" he had meant to envisage the situation where the *compromis* provided for the application of certain law, and the tribunal found such law to be silent or obscure on the issue.

76. Mr. LIANG (Secretary to the Commission) said that if that was the case he should think that the meaning of the paragraph would be made clearer by the insertion of the words "the rules agreed upon in" before the words "international law or of".

77. The CHAIRMAN put to the vote the several proposals before the Commission.

Mr. Lauterpacht's proposal that article 20, second paragraph, be deleted was rejected by 6 votes to 4, with 1 abstention.

Mr. Hudson's amendment concerning the deletion of the words "or of the compromis" was rejected by 6 votes to 4.

Mr. Kozhevnikov's amendment was rejected by 8 votes to 2, with 1 abstention.

78. The CHAIRMAN put to the vote the text of article 20, second paragraph, as amended by Mr. Scelle:

"The tribunal may not bring in a finding of *non*

liquet on the grounds of the silence or obscurity of international law or of the *compromis*."

That paragraph was adopted by 8 votes to none, with 3 abstentions.[8]

79. Mr. SCELLE said that, as a result of the foregoing decisions, he felt that articles 21 and 22 would require re-drafting. He would accordingly ask that their consideration be deferred until the next meeting to give him time to do so in consultation with Mr. Lauterpacht, who had submitted alternative texts.

It was so agreed.

The meeting rose at 1.5 p.m.

[8] Article 20, as tentatively adopted, read as follows:

" 1. Subject to any agreement between the parties on the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

" 2. The tribunal may not bring in a finding of *non liquet* on the grounds of the silence or obscurity of international law or of the *compromis*."

148th MEETING

Monday, 23 June 1952, at 3 p.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Date and place of the fifth session (item 7 of the agenda) (*resumed from the 143rd meeting*)

1. Mr. KERNO (Assistant Secretary-General), after recalling that the Commission had decided at its 143rd meeting[1] that the Secretariat should be requested to consult with the Secretary-General with a view to the Commission's fifth session being held in Geneva, beginning about 1 June 1953, said that he had been instructed by the Secretary-General to draw the serious attention of the Commission to the fact that the cost of holding its 1953 session in Geneva would be considerably higher than that of holding it in New York. The additional cost would amount to approximately 8,000 dollars for travel and per diem allowances, and a further 3,000 dollars for engaging the necessary additional interpreters from and into Russian.

2. The CHAIRMAN suggested that the Commission take note of the statement made by the Assistant Secretary-General and defer further consideration of the question until a subsequent meeting.

It was so agreed.

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 3) (*continued*)

3. The CHAIRMAN requested the Commission to resume its discussion of the Second Preliminary Draft on Arbitration Procedure annexed to the special rapporteur's second report on that subject (A/CN.4/46).

ARTICLES 21 AND 22 (*continued*)

4. Mr. SCELLE said that, quite apart from the question whether they constituted unwarranted reflections on the good faith of the parties, he felt that articles 21 and 22 might be deleted, since they were perhaps too detailed and complicated.

5. Mr. YEPES said that it was quite possible that the *compromis* would be drafted in such a way as to defeat the whole arbitration procedure. The cases referred to in articles 21 and 22 of Mr. Scelle's draft should therefore be covered, and he had prepared a text which would be circulated in due course.

6. The CHAIRMAN recalled that Mr. Lauterpacht had also proposed amendments to articles 21 and 22.[2]

7. Mr. LAUTERPACHT withdrew his amendments to articles 21 and 22, but agreed with Mr. Yepes that there might be good reasons for retaining the substance of those articles. The Commission had already adopted an article concerning gaps in the substantive law to be applied by the tribunal. A code on arbitration procedure should also contain provisions concerning possible gaps in the procedural sphere.

8. The CHAIRMAN suggested that further discussion of articles 21 and 22 be deferred until Mr. Yepes' amendment had been circulated.

It was so agreed.

[1] See summary record of the 143rd meeting, paras. 63—66.

[2] See summary record of the 147th meeting, para. 45.

ARTICLE 23 [3]

9. Mr. SCELLE said that it went almost without saying that the principle of the equality of the parties before the rules of procedure should be broadly observed. It seemed reasonable, however, to leave the tribunal free to assess the importance of irregularities of form.

10. Mr. YEPES felt that the wording proposed by Mr. Scelle would be inappropriate in a draft convention, and proposed that article 23 be amended to read:

"Any serious violation of the principle of equality of the parties before the rules of procedure may be invoked by the injured party as a reason for voiding the award. Purely formal irregularities of procedure shall not be considered as serious under this article."

11. Mr. SANDSTRÖM proposed that article 23 be deleted, not because he was opposed to the ideas contained in it, but because the first sentence was axiomatic and the second would more properly be included among the provisions relating to the right of appeal.

12. Mr. el-KHOURI associated himself with Mr. Sandström's proposal.

13. Mr. LAUTERPACHT also supported Mr. Sandström's proposal, for the reasons the latter had given, and also because the question of the admissibility of evidence was dealt with in article 24, which gave the tribunal entire discretion in the matter.

14. Mr. YEPES pointed out that article 23 also provided for a penalty in the event of non-observance of the principle of equality of the parties before the rules of procedure.

15. Mr. SCELLE said that he would only point out that the word used in the French text of the second sentence, namely "*productions*", covered more than evidence. He agreed that the first sentence was axiomatic, but did not agree that it would be inappropriate to include in a convention such statements of generally accepted principles which had, he would remind members of the Commission, been included in earlier instruments laying down arbitration procedure, such as the General Act of Arbitration.

16. Mr. KOZHEVNIKOV emphasized that the whole convention should proceed from the fundamental principles of international law. Accordingly, so important a principle of international law as the equality of the parties should be thoroughly discussed, and mention of it could not be deleted.

17. As to the second sentence of article 23, that could well be deleted in its entirety.

18. Mr. SCELLE pointed out that the main point of article 23 lay in the second sentence. The principle of equality of the parties before the rules of procedure was indeed so generally accepted that he knew of no case where it had been expressly laid down. The purpose of the article was therefore not so much to lay down the equality of the parties, as to give the tribunal a certain freedom of appreciation in that respect.

19. Mr. HUDSON felt that inclusion of a statement to the effect that failure to observe the principle of the equality of the parties before the rules of procedure might void the award would only encourage a party against whom an award was made to challenge the principle. He felt that the second part of the first sentence in Mr. Scelle's draft should be omitted, as should also the second sentence which, as Mr. Sandström had pointed out, was out of place.

20. He proposed, therefore, that article 23 be amended to read as follows:

"The equality of the parties before an arbitral tribunal is an underlying principle of the law of arbitration."

21. The CHAIRMAN said that he would first put to the vote the proposal that article 23 be deleted.

The proposal was rejected by 6 votes to 3, with 3 abstentions.

Mr. Hudson's proposal was adopted by 8 votes to 1, with 3 abstentions.

ARTICLE 24 [4]

22. Mr. LAUTERPACHT felt that it was generally undesirable that the tribunal should be able to overrule the provisions of the *compromis*; in some cases the parties might find it useful to rule out certain kinds of evidence in advance. He therefore felt that the words "regardless of the provisions of the *compromis*" should be deleted.

23. The words "or other methods of proof" should be added at the end of the first paragraph proposed by Mr. Scelle, since the various types of evidence he had listed were not comprehensive.

24. With regard to the second paragraph, he felt that

[3] Article 23 read as follows:

"The equality of the parties before the rules of procedure is the underlying principle of any arbitral jurisdiction; failure to observe this principle may void the award. The tribunal is, however, free to assess the importance of irregularities of form only and is not bound in all cases to rule the preclusion or inadmissibility of the evidence submitted."

[4] Article 24 read as follows:

"Any party adducing a fact likely to be relevant to the decision of the case shall furnish at least the first elements of proof thereof. The tribunal shall be the judge of the admissibility and weight of evidence, regardless of the provisions of the *compromis* and regardless of whether the evidence consists of written papers or documents, depositions, affidavits, inquiries, expert opinions or inquiries *in situ*.

"The parties shall co-operate with one another and with the tribunal in the production of evidence and shall obey the measures ordered for this purpose. Refusal to co-operate shall constitute an unfavourable presumption against the party so refusing.

"The burden of proving the applicable rules of law, including rules of municipal law, does not rest exclusively on the parties; the tribunal may co-operate with them with a view to furnishing such proof."

refusal to co-operate with the other party and with the tribunal in the production of evidence should not necessarily constitute an unfavourable presumption against the party so refusing.

25. He therefore proposed that the second sentence of the first paragraph of article 24 be amended to read as follows:

"The tribunal shall be the judge of the admissibility and weight of evidence regardless of whether it consists of written documents, depositions, affidavits, testimony of witnesses, inquiries by and opinions of experts, visits to the place (*descentes sur les lieux*) or other methods of proof."

and that the second sentence of the second paragraph be amended to read as follows:

"The tribunal shall duly take note of the failure of any party to comply with the obligations of this article."

26. The third paragraph of Mr. Scelle's draft was also unsatisfactory. The first part appeared to lay down the principle that the tribunal should be partly responsible for proving the applicable rules of law; the second part appeared to make that an optional task for the tribunal. He therefore proposed that the third paragraph be deleted. A paragraph should, however, be added, stating:

"The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary."

27. Mr. SANDSTRÖM agreed with the amendments proposed by Mr. Lauterpacht, but also felt that the first sentence of the first paragraph should be deleted, first, because it was unnecessary, and secondly, because the first elements of proof could sometimes be dispensed with.

28. Mr. FRANÇOIS agreed with Mr. Sandström concerning the first sentence of article 24; no proof was required, for example, of well-known facts which might be adduced as evidence.

29. He also agreed in general with Mr. Lauterpacht's amendments, although he thought that the phrase "regardless of... other methods of proof" could be deleted. Nor did he understand what was meant by stating that the parties should "co-operate with one another" in the production of evidence. Finally, he suggested that the wording proposed by the special rapporteur for the second sentence of the second paragraph was unnecessarily cumbersome, and that the wording used in Article 49 of the Statute of the International Court of Justice should be used instead.

30. Mr. HUDSON agreed with the criticisms levelled against the third paragraph of article 24, and suggested that the article as a whole be replaced by the following text:

"1. The tribunal shall be the judge of the admissibility and weight of any evidence presented to it.

"2. The parties shall co-operate with one another and with the tribunal in the production of evidence.

"3. The tribunal shall have power at any stage of the proceedings to call for the production of evidence deemed to be required."

31. Mr. LIANG (Secretary to the Commission) wondered whether it was really necessary to provide that the tribunal shall be the judge of the admissibility and weight of the evidence presented to it. Surely that went without saying. No such provision was to be found in the Statute of the International Court of Justice.

32. Mr. SCELLE said that the whole point of the second sentence of the first paragraph was contained in the words "regardless of the provisions of the *compromis*". If those words were deleted, he agreed that the whole sentence could be deleted. In his view, however, the tribunal should be able to set aside the provisions of the *compromis* if they made it impossible for it to render an award which would constitute a true settlement of the dispute in its integrality.

33. He agreed with Mr. François that the words "with one another and" could be deleted from the second paragraph. What he had had in mind was that the parties and the tribunal should jointly discuss the admissibility of evidence furnished.

34. With regard to the third paragraph, he pointed out that it had been stated in a number of cases that rules of municipal law did not have to be proved; in his view, that was not so, but the tribunal should co-operate with a view to furnishing such proof.

35. Mr. LAUTERPACHT agreed that the enumeration of the various types of evidence should be deleted from the first paragraph. On the other hand, he greatly hoped that the Commission would retain the words "The tribunal shall be the judge of the admissibility and weight of evidence", since the tribunal's right in that respect had been questioned in some cases. The Statute of the International Court of Justice also contained a similar provision, namely, Article 52, which left it to the Court's discretion whether to accept evidence submitted after the time-limit specified for the submission of evidence had expired.

36. He also hoped that the words "with one another and" would be retained. In the United Kingdom and the United States of America, at any rate, the parties were obliged to co-operate with one another in preparing the evidence, and also, in some cases, to produce certain kinds of evidence which was in their possession even if it was damaging to their case.

37. With regard to the third paragraph, it was open to question whether the tribunal should be presumed to be cognizant of rules of municipal law. The International Court of Justice had ruled that it was under no obligation to be cognizant of such rules or to take official notice of them, but that it could do so if it so desired. The questions which the paragraph raised were so controversial that he felt that it should be deleted, and replaced by the paragraph which he himself had proposed.

38. The CHAIRMAN pointed out that Mr. Hudson's proposal entailed the deletion of the first sentence of

the first paragraph from Mr. Scelle's draft. He would, therefore, put that sentence to the vote first.

The first sentence of Mr. Scelle's draft was rejected by 5 votes to 4, with 2 abstentions.

Paragraph 1 of Mr. Hudson's proposal was adopted by 10 votes to none, with 2 abstentions.

39. The CHAIRMAN pointed out that the proposal that the words "with one another and" be deleted, would apply equally to paragraph 2 of Mr. Hudson's proposal.

40. Mr. SCELLE and Mr. el-KHOURI felt that to meet the point made by Mr. Lauterpacht in that respect all that was necessary was to provide that the parties should co-operate with the tribunal.

41. Mr. AMADO pointed out that Article 52 of the Statute of the International Court of Justice provided that, after expiry of the time-limit laid down, the Court could refuse to accept any further evidence that one party might desire to present, unless the other party consented. If more than such consent, was meant by the reference to the parties co-operating with one another he must oppose its inclusion.

42. Mr. SANDSTRÖM felt that the words "with one another and" should be retained, since, in the case of recognition of a known fact, for example, it would be preferable to have recognition by both parties.

43. Mr. FRANÇOIS pointed out that, as worded, the paragraph imposed a quite unqualified obligation on the parties to co-operate with one another in the production of evidence. Such a provision might have some meaning in the particular case referred to by Mr. Sandström, but in general he could see no justification for it.

44. Mr. YEPES felt that the words in question should be retained. As Mr. Lauterpacht had pointed out, one party might be in possession of a piece of evidence which was vital to the other's case.

The proposal to delete the words "with one another and" was rejected by 5 votes to 4, with 3 abstentions.

45. Mr. SCELLE, opposing paragraph 2 of Mr. Hudson's proposal, said that, if the Commission were to retain article 26, which provided that the parties were bound to comply with interim measures of protection indicated by the tribunal, it should *a fortiori* retain the words "and shall obey the measures ordered for this purpose" in article 24.

Paragraph 2 of Mr. Hudson's proposal was rejected by 6 votes to 3, with 3 abstentions.

46. Mr. AMADO asked whether Mr. Lauterpacht could agree to delete the word "duly" from his amendment to the second sentence of the second paragraph of Mr. Scelle's draft of article 24.

47. Mr. LAUTERPACHT agreed to do so, but pointed out that Article 49 of the Statute of the International Court of Justice provided that "*Formal* note shall be taken of any refusal" to produce any document or supply any explanations.

48. Mr. el-KHOURI said that he would prefer the second sentence of the second paragraph to be deleted altogether. The question should be left to the discretion of the tribunal, which might well accept the reasons advanced by a party for refusing to produce any particular piece of evidence.

Subject to deletion of the word "duly", and the substitution of the word "paragraph" for the word "article", Mr. Lauterpacht's amendment to the second sentence of the second paragraph of article 24 was adopted by 7 votes to 1, with 4 abstentions.

The second paragraph of article 24 was adopted, as amended and as a whole, by 6 votes to 1, with 5 abstentions.

49. The CHAIRMAN then put to the vote Mr. Lauterpacht's amendment to paragraph 3 of article 24, which amendment was substantially included in paragraph 3 of Mr. Hudson's proposal.

50. Mr. SCELLE expressed his support for Mr. Lauterpacht's amendment.

Mr. Lauterpacht's amendment to the third paragraph of article 24 was adopted by 8 votes to none, with 4 abstentions.

51. Mr. HUDSON stated that his experience at the International Court of Justice had shown him that it was sometimes useful for the tribunal to visit the scene involved in a case before it. Such visits must, however, be made at the request of the parties, since they involved additional expenditure. He therefore proposed the addition of the following paragraph to article 24:

> "The tribunal may visit the scene involved in a case before it, at the request of the parties."

52. Mr. SCELLE and Mr. el-KHOURI felt that the tribunal should be able to visit the scene involved even if the parties did not so request.

53. Mr. KERNO (Assistant Secretary-General) wondered whether it was necessary to include such a provision at all, if visits were to be made subject to the request of both parties.

54. Mr. SANDSTRÖM supported Mr. Hudson's proposal, and felt that the cost of such visits made it necessary to stipulate that they should be carried out only at the request of the parties.

55. Mr. ZOUREK agreed that such visits should be made only at the request of the parties, both for the reason adduced by Mr. Hudson and Mr. Sandström and also because the Commission had already provided in paragraph (*h*) of article 12 that the meeting-place of the tribunal should be specified by the parties in the *compromis*.

56. Mr. KOZHEVNIKOV also supported the wording proposed by Mr. Hudson, which was in accordance with the principles of international law.

57. Mr. LAUTERPACHT, supported by Mr. YEPES, proposed the deletion of the words "at the request of the parties".

58. The CHAIRMAN put Mr. Lauterpacht's proposal to the vote.

Six votes were cast in favour of the proposal and 6 against. The proposal was accordingly rejected.

Mr. Hudson's proposal was adopted by 8 votes to 3.

59. Mr. LAUTERPACHT said that he had voted in favour of Mr. Hudson's proposal because he thought it was better to have such a provision, even with the clause to which he had taken exception, than to have no such provision at all.

60. Mr. HUDSON proposed a further additional paragraph to article 24 to read:

"Subject to any agreement between the parties on the procedure to be followed by the tribunal, the tribunal shall be competent to formulate the rules of procedure to be applied."

61. Mr. SANDSTRÖM suggested that, if Mr. Hudson's proposed additional provision was of a general character, its place was elsewhere in the draft.

62. Mr. HUDSON agreed, but thought that that was a matter which might be left to the Standing Drafting Committee.

63. Mr. SCELLE said that he could support Mr. Hudson's proposal provided it meant that, if there were disagreement between the parties, the tribunal could itself formulate its rules of procedure. If that were the case, the purpose of the proposal would correspond to what he had had in mind in drafting his text for articles 21 and 22.

64. Mr. HUDSON said the purpose of his proposal was to provide for the contingency of the parties either failing to stipulate in the *compromis* the rules of procedure to be applied, or making inadequate provision in that respect.

65. Mr. YEPES suggested that the matter was already covered by paragraph (*c*) of article 12, all provisions of which were obligatory.

66. Mr. SCELLE asked whether the words "Subject to any agreement" in Mr. Hudson's proposal meant in the absence of any agreement.

67. Mr. HUDSON replied in the affirmative.

68. Mr. LAUTERPACHT maintained that the opening words of Mr. Hudson's proposal were slightly ambiguous. The meaning would be clearer if the words "In the absence of agreement between the parties" were substituted.

69. Mr. YEPES proposed that the opening words of Mr. Hudson's proposal be amended to read:

"If contrary to the provisions of article 12 (*c*) above the parties fail to establish the procedure to be followed by the tribunal, the tribunal shall be competent..."

70. Mr. HUDSON considered Mr. Yepes' amendment to be unnecessary, as his point was already met in the wording as it stood. It was important, on the other hand, to enable the tribunal to formulate rules of procedure additional to those laid down in the *compromis*.

71. Furthermore, he would point out that Mr. Yepes had not suggested any mention of article 12 in the provisions relating to the law to be applied.

72. The CHAIRMAN pointed out to Mr. Yepes that it would be one of the duties of the Standing Drafting Committee to ensure that there was no contradiction between any of the articles.

Mr. Hudson's proposal was adopted by 10 votes to none, with 2 abstentions.

Article 24, as amended, was adopted as a whole by 9 votes to none, with 2 abstentions.[5]

Article 25 [6]

73. Mr. LAUTERPACHT proposed alternative wording for article 25 to read:

"Presumptions shall be left to the appreciation of the tribunal."

74. Mr. HUDSON proposed the deletion of article 25. As it stood, he was unable to divine its meaning.

75. Mr. LAUTERPACHT said that, in so far as a presumption was an assertion which did not require proof, it was already covered by article 24, which laid down that the tribunal should be the judge of the admissibility and weight of evidence.

76. Mr. SCELLE observed that presumption and proof were not the same. Presumption was not always a question of evidence. Furthermore, presumption in international law was not parallel to presumption in municipal law, as there were no absolute presumptions in international law. Presumptions must therefore be left to the discretion of the tribunal.

77. Mr. LIANG (Secretary to the Commission) said that the definitions of presumption in French and Anglo-Saxon law respectively were clearly quite different. To the best of his knowledge, according to

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[5] Article 24, as tentatively adopted, read as follows:

"1. The tribunal shall be the judge of the admissibility and weight of any evidence presented to it.

"2. The parties shall co-operate with one another and with the tribunal in the production of evidence and shall obey the measures ordered for this purpose. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

"3. The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary.

"4. The tribunal may visit the scene involved in a case before it at the request of the parties.

"5. Subject to any agreement between the parties on the procedure to be followed by the tribunal, the tribunal shall be competent to formulate the rules of procedure to be applied."

[6] Article 25 read as follows:

"Generally speaking, presumptions shall be left to the learning and discretion of the tribunal."

United States law of evidence presumption was an assumption until rebutted.

78. As it stood at present, the English text of article 25 seemed to him devoid of meaning.

79. Mr. YEPES considered that article 25 was necessary. He could support either the special rapporteur's text or that proposed by Mr. Lauterpacht.

80. Mr. KOZHEVNIKOV said that in view of the different definitions of presumption and the unlikelihood of reaching agreement on a generally acceptable formula, the article should be deleted.

Mr. Scelle withdrew article 25.

The meeting rose at 5.50 p.m.

149th MEETING

Tuesday, 24 June 1952 at 9.45 a.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 3) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46) contained in the special rapporteur's Second Report.

ARTICLES 21 AND 22 (*resumed from the 148th meeting*)

2. The CHAIRMAN recalled that discussion of Articles 21 and 22 had been deferred until such time as an amendment submitted by Mr. Yepes had been distributed.[1] That amendment was now available and read as follows:

> "If the *compromis* cannot be interpreted in a sense permitting fulfilment of the obligation to arbitrate, or if failure to comply with its procedural orders prevents the tribunal from performing its functions, the tribunal shall call upon the parties to modify the *compromis,* to obey the orders of the tribunal or explicitly to discontinue the proceedings. If the parties do not accept any of these proposals, the tribunal shall be free to proceed."

3. Mr. FRANÇOIS said that he would prefer the deletion of articles 21 and 22, since the cases they envisaged would arise so rarely as to make it unnecessary to provide for them. In any event, he did not see how the two articles could be combined. In the case of failure to comply with procedural orders, it might be impossible for the tribunal to proceed with its work regardless.

4. Mr. LAUTERPACHT said that the issue of *non liquet* was already fully covered by articles 19 and 20 already tentatively adopted by the Commission. Mr. Yepes' proposal was also designed to cover cases where the *compromis* rendered fulfilment of the tribunal's functions impossible. But it should be generally accepted that the arbitral tribunal had no powers other than those assigned to it in the *compromis.* Its power derived solely from the will of the parties. He was therefore unable to support Mr. Yepes' proposal.

5. Mr. SCELLE pointed out that his own text was more complicated than that proposed by Mr. Yepes. The point he had in mind was likewise more complicated. In fact, it was so complicated that he had already agreed to withdraw articles 21 and 22. He would, however, be prepared to accept Mr. Yepes' text, although it went rather farther along a slightly different road from his own.

6. Mr. KOZHEVNIKOV said that, before discussing the substance of Mr. Yepes' proposal, the Commission should decide whether it wished to delete or retain the substance of articles 21 and 22.

7. The CHAIRMAN put to the vote the issue whether the subject-matter of articles 21 and 22 of Mr. Scelle's draft should be omitted.

The issue was decided in the affirmative by 7 votes to 1, with 3 abstentions.

[1] See summmary record of the 148th meeting, para. 8.

ARTICLE 26 [2]

8. Mr. HUDSON proposed that article 26 be amended to read as follows:

"The tribunal shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party. The parties have a duty to take the measures indicated."

9. Mr. YEPES proposed that article 26 be replaced by the following text:

"The arbitrator or the arbitral tribunal and, in case of urgency, its President, shall be empowered to indicate, at any point in the procedure and whenever circumstances require, any provisional measures which ought to be taken to preserve the respective rights of either party.

Pending the final award, notice of such measures shall be given without delay to the parties which are bound to comply therewith.

In the event of the parties refusing to comply with the notice given by the tribunal concerning the measures in question, the fact shall be duly recorded."

10. Mr. FRANÇOIS pointed out that the text proposed by Mr. Hudson did not provide that the president of the tribunal should have the power to indicate provisional measures in case of urgency. In his opinion, that power should be given to him, provided that any such measures prescribed by the president were subject to confirmation by the tribunal. He therefore proposed that the following words be inserted after the words "The tribunal", in the text proposed by Mr. Hudson:

"and in case of urgency, its President, subject to confirmation by the tribunal."

11. Mr. SCELLE supported Mr. François' amendment. Otherwise he could accept the text proposed by Mr. Hudson, provided it was understood that the tribunal could indicate such provisional measures on its own initiative, or, as he had said in his draft, *ex officio,* without being requested to do so by the parties.

12. Mr. HUDSON did not consider that the power to indicate provisional measures should be given to the president of the tribunal, who usually served in an *ad hoc* capacity. Citing Article 41 of the Statute of the International Court of Justice, he pointed out that even the president of that permanent body had not been given the power to indicate provisional measures.

13. Mr. SANDSTRÖM supported Mr. François' amendment, for which, he said, there were very good practical grounds.

14. Mr. el-KHOURI said that if any provisional measures indicated by the president were subject to confirmation by the tribunal, they would become in effect measures indicated by the tribunal. If the tribunal wished to delegate to its president the power to indicate provisional measures in cases of urgency, there was nothing to prevent it from doing so. He felt therefore that the amendment proposed by Mr. François was unnecessary. In general, he preferred the text proposed by Mr. Hudson to the texts submitted by Mr. Yepes and Mr. Scelle.

15. Mr. LAUTERPACHT also preferred the text proposed by Mr. Hudson, provided that Mr. François' amendment thereto was adopted. There was a difference between an arbitral tribunal and the International Court of Justice. The latter was permanently in session and could easily be convened. In the case of the former, either of the parties could easily delay the convening of the tribunal by procrastination or some other means, with the result that the purpose of provisional measures would be defeated.

16. Mr. ZOUREK said that article 26 raised two important questions of principle: first, whether the power to indicate provisional measures of protection should form part of the general powers of the tribunal or should have to be expressly conferred on it by the arbitration treaty or the *compromis*; and secondly, whether the tribunal should be able to indicate such measures *ex officio* or only at the request of one of the parties.

17. With regard to the first question, it must be borne in mind that the power to choose the applicable rules of law had been given to the parties under paragraphs (*f*) and (*g*) of article 12, already tentatively adopted by the Commission. It would be strange, therefore, if the article under consideration conferred on all arbitral tribunals the power to indicate provisional measures where the parties had not agreed in the *compromis* or in the arbitration treaty that it should possess that power.

18. The text proposed was thus in contradiction with the whole concept of arbitration as it resulted from practice, as well as with the requirements of the international community of sovereign and independent States. The parallel with Article 41 of the Statute of the International Court of Justice was not valid, since there was a world of difference, upon which it was unnecessary to elaborate, between that Court and an arbitral tribunal.

19. The arguments he had cited applied *a fortiori* to the proposal that the tribunal should be able to exercise *ex officio* the power to indicate provisional measures. The tribunal's powers depended solely on the will of the parties, and he did not understand how it could, on its own initiative, indicate provisional measures which neither of the parties had asked for.

20. If the Commission decided none the less to adopt such a provision, it should not confer such wide powers on any one person. The practical arguments which had been put forward in favour of conferring such power on the president were in his opinion unconvincing. He did not understand how it could be impossible for the

[2] Article 26 read as follows:

"The arbitrator or the arbitral tribunal and, in case of urgency, its president, may, when circumstances so require, and if necessary *ex officio,* indicate any provisional measures which ought to be taken to preserve the respective rights of each party. Notice of such measures shall be given without delay to the parties which are bound to comply therewith."

tribunal to meet rapidly, if circumstances so required, to consider the question of provisional measures.

21. He therefore wished to submit three amendments to the text proposed by Mr. Yepes. First, that the words: "and in case of urgency its President"; be deleted. Secondly, that after the words: "The arbitrator or the arbitral tribunal" the words "if the arbitration treaty or the *compromis* confer the necessary powers upon them" should be inserted. Thirdly, that after the words "shall be empowered" the words "at the request of either party to the dispute" should be inserted.

22. Mr. KOZHEVNIKOV agreed with Mr. Zourek that there was a fundamental difference between an arbitral tribunal and the International Court of Justice. Article 26 appeared to confuse the functions of the two, and must therefore be considered carefully. The Commission must bear in mind that the essential element of arbitration was the consent of the parties. He supported Mr. Zourek's proposals which would safeguard that principle.

23. Mr. SANDSTRÖM and Mr. LAUTERPACHT felt that there was no contradiction between article 26 and the text of article 12 as adopted.

24. Mr. YEPES said that he would withdraw the first two paragraphs of his proposal in favour of Mr. Hudson's proposal, provided that it was understood that in the latter the tribunal should have the power to indicate provisional measures at any point in the procedure. He suggested, however, that the third paragraph of his proposal, which concerned action to be taken in the event of the parties refusing to carry out the provisional measures indicated by the tribunal, should be added to Mr. Hudson's proposal as an additional sentence.

25. The CHAIRMAN pointed out that Mr. Zourek's second and third amendments applied equally well to Mr. Hudson's proposal. His first amendment directly negated the amendment proposed by Mr. François, to add the words "and in case of urgency, its President subject to confirmation by the tribunal". He would first put that amendment to the vote, it being understood that, if adopted, it would be subject to any drafting changes which the Standing Drafting Committee might later introduce.

Mr. François' proposal was adopted by 6 votes to 5, with 1 abstention.

26. The CHAIRMAN then put to the vote Mr. Zourek's proposal that the words "if the arbitration treaty or the *compromis* confers the necessary powers upon it" be inserted after the word "tribunal".

Mr. Zourek's proposal was rejected by 10 votes to 2.

27. The CHAIRMAN then put to the vote Mr. Zourek's proposal that the words "at the request of either party to the dispute" be inserted after the words "shall have the power to indicate".

Mr. Zourek's proposal was rejected by 8 votes to 2, with 2 abstentions.

28. The CHAIRMAN said that, as Mr. Yepes' proposal now merely added to Mr. Hudson's proposal, he would put the latter, as amended, to the vote first.

Mr. Hudson's proposal was adopted, as amended, by 7 votes to 4, with 1 abstention.

29. Mr. AMADO wished to place on record that he had voted against Mr. François' amendment to Mr. Hudson's proposal, but that he would have voted for Mr. Hudson's proposal itself had that been put to the vote in its original form.

30. Mr. YEPES said that the sentence he proposed be added to Mr. Hudson's text was based on a similar provision in the rules of court of the Permanent Court of International Justice.

31. Mr. el-KHOURI said that he saw no reason for the addition. If the tribunal's decisions were not implemented, it would only be natural that that fact should be recorded.

32. Mr. LAUTERPACHT said that if Mr. Yepes' proposal were adopted the only consequence of refusal by one of the parties to carry out the provisional measures indicated by the tribunal would be that the fact would be recorded. In his view, that party incurred international liability and was responsible for any damages resulting from its refusal. Mr. Yepes' proposal would in practice rob the provisional measures of much of the binding force which they should have, and he would therefore vote against it.

Mr. Yepes' proposal was rejected by 9 votes to 2, with 1 abstention.[3]

ARTICLE 27 [4]

33. Mr. LAUTERPACHT found some difficulty in following the special rapporteur's text for article 27, but assumed that it was mainly concerned with counter-claims. If so, that should be made clear, and the article shortened. He was unable to understand the precise import of the term "additional claims". The distinction between the two seemed to him obscure and controversial.

34. He proposed an alternative text, which read:

"The tribunal shall have jurisdiction in respect of any counter-claim arising directly out of the subject matter of the dispute."

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[3] Article 26, as tentatively adopted, read as follows:

"The tribunal, and in case of urgency, its President subject to confirmation by the tribunal, shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party. The parties have a duty to take the measures indicated."

[4] Article 27 read as follows:

"For the purpose of securing a complete settlement of the dispute, the arbitral tribunal shall rule on objections regarding the admissibility of principal or incidental claims and, in particular, of additional claims and counter-claims. The tribunal may, if it thinks fit, fix time-limits for the submission of such objections."

35. Mr. SCELLE said that there was a difference of substance between his text and that of Mr. Lauterpacht, since he (Mr. Scelle) believed that there was a very clear distinction between additional claims and counter-claims. A typical example of the former might arise when frontier disputes were the object of arbitration. A party might ask that a particular area be considered, though it had not been mentioned in the *compromis,* because a complete settlement of the dispute would otherwise be impossible. On the other hand, in his view a counter-claim had no direct relation to the subject matter of the dispute. Clearly, it was a point on which Anglo-Saxon procedure differed from continental procedure, as a consequence of which he and Mr. Lauterpacht were arguing from different premises.

36. He believed that the tribunal ought to rule both on additional claims and on counter-claims, and was therefore unable to accept Mr. Lauterpacht's wording, which failed to envisage both contingencies.

37. Mr. YEPES supported the special rapporteur's draft, which was more complete than the text proposed by Mr. Lauterpacht, and contained the additional element of empowering the tribunal to rule on objections regarding the admissibility of principal or incidental claims.

38. Mr. LAUTERPACHT said that Mr. Scelle's text was undoubtedly more complete ; that was precisely why he was reluctant to support it. In so far as an additional claim was of a procedural character connected with the subject matter of the dispute, it would be covered by the articles already adopted by the Commission.

39. In the meantime, Mr. Hudson had suggested to him an alternative wording which, he believed, expressed the idea better than did his own. He would accordingly withdraw his own text in favour of Mr. Hudson's, which read :

> "The tribunal shall have power to entertain any counter-claims arising out of the subject matter of the original dispute."

40. Mr. ZOUREK considered that Mr. Scelle's text went much too far, as it would enable the tribunal to pronounce upon matters not covered by the *compromis.* He would deplore any such extension of the tribunal's competence.

41. Mr. SANDSTRÖM said that Mr. Scelle's text was easily understandable to any jurist familiar with French legal procedure. Perhaps the English translation was not entirely satisfactory, and might have given rise to some of Mr. Lauterpacht's doubts. He believed that the tribunal should be empowered to rule on additional claims if the necessary provisions existed in the original obligation to arbitrate, whether that were a general treaty or a special *compromis.* Otherwise it should not have the power to entertain such claims.

42. Mr. SCELLE pointed out that an additional claim was only admissible if closely linked with the subject matter of the dispute. However, it was, of course, open to an arbitral tribunal, as it was to any domestic tribunal, to reject an additional claim, an example of which was a claim for damages.

43. As he had already had occasion to emphasize, one of the basic principles of his text was that a settlement of the whole subject matter of the dispute should be achieved. If, in order to bring that about the tribunal had to examine and rule upon an additional claim, it should be empowered to do so.

44. Mr. el-KHOURI pointed out that Mr. Scelle did not make it obligatory on the tribunal to rule on an additional claim, but merely gave it jurisdiction to do so if it thought fit. In his view, the text was perfectly satisfactory and he would vote in favour of it.

45. Mr. LAUTERPACHT well understood that the intention of the provision was to enable the tribunal to decide whether an additional claim should be admitted or not. The point was whether the tribunal should be given the power to pronounce on an additional claim concerning which no provision had been made in the *compromis.* Mr. Scelle had referred to damages, and it might be pertinent to point out that the International Court of Justice had in at least two cases been faced with the issue whether the question of reparation for injury was covered by the original obligation to submit to the Court disputes arising from the interpretation of a treaty. The Court had found that it could pronounce on such a claim, which was inherent in the original claim and not an additional one.

46. Mr. SANDSTRÖM emphasized the importance of an arbitral tribunal being empowered to rule on the admissibility of claims. Arbitral procedure would be frustrated if it were unable to do so.

47. Mr. SCELLE fully agreed with Mr. Sandström. He had been surprised by the turn the discussion had taken, as it seemed to him inconceivable that an arbitral tribunal should be denied the power to rule on additional claims and counter-claims. It was an elementary procedural right of tribunals, regardless of their nature.

48. Mr. el-KHOURI added that if the tribunal itself were not empowered to rule on the admissibility of claims, he failed to see what body could do so. And it would be impossible to prevent the parties from bringing additional claims and counter-claims.

49. Mr. SCELLE said that the last sentence of his text seemed to him self-evident, and he would accordingly withdraw it.

50. Mr. AMADO considered that the words "For the purpose of securing a complete settlement of the dispute" were also self-evident, and might equally well be deleted.

51. Mr. SCELLE pointed out that they were valuable in so far as they restricted the competence of the tribunal to the original subject matter of the dispute.

52. Mr. SANDSTRÖM said that the French text of article 27 should be considered the authentic one; accordingly, if the article was adopted, the English

translation would have to be brought into line with the original by the Standing Drafting Committee.

It was so agreed.

53. The CHAIRMAN put to the vote the text proposed by Mr. Hudson, in favour of which Mr. Lauterpacht had withdrawn his own, to replace article 27.

That wording was rejected by 8 votes to 2, with 2 abstentions.

54. The CHAIRMAN put to the vote the special rapporteur's text for article 27, without the last sentence, which had been withdrawn by the author.

Mr. Scelle's text was adopted, as amended by himself, by 8 votes to 3, with 1 abstention.

ARTICLE 28 [5]

55. Mr. LAUTERPACHT proposed that the last sentence of article 28 be replaced by the following:

"Before rendering the award the tribunal shall satisfy itself that it has jurisdiction and that the claim is well founded in fact and in law."

56. Mr. HUDSON proposed an alternative text for the whole of article 28, to read:

"1. Whenever one of the parties does not appear before the tribunal, or fails to defend its case, the other party may call upon the tribunal to decide in favour of its claim.

"2. In such case, the tribunal may give an award if it is satisfied that it has jurisdiction and that the claim is well founded in fact and in law."

57. Mr. KOZHEVNIKOV said that in his view the whole concept of judgment by default was mistaken, since it would allow for settlement against the will of one of the parties. He accordingly proposed that article 28 be deleted.

58. Mr. el-KHOURI asked Mr. Kozhevnikov what would happen if one party failed to appear before the tribunal or to defend its case. Was it to be allowed to frustrate the work of a tribunal once constituted?

59. Mr. KOZHEVNIKOV maintained that article 28 was unnecessary. He could not admit the possibility of bad faith or of the desire on the part of one of the parties to obstruct proceeding. It ought to be assumed that once the parties had decided to submit a dispute to arbitration they would be interested in securing a settlement.

60. Mr. SANDSTRÖM could not agree that judgment by default was unjust. He was therefore in favour of providing for it, and found Mr. Hudson's text satisfactory.

61. Mr. LAUTERPACHT said that as his own amendment was covered by paragraph 2 of Mr. Hudson's text, he would withdraw it.

62. Mr. SCELLE accepted Mr. Hudson's alternative text for article 28.

Mr. Hudson's text for article 28 was adopted by 10 votes to 2.

63. Mr. KERNO (Assistant Secretary-General) observed that the special rapporteur's draft always spoke of the arbitrator or the tribunal, whereas members proposing amendments sometimes mentioned the tribunal alone. He assumed that the Standard Drafting Committee would use one expression throughout the text, namely, "the tribunal", and that that term would be understood to include the case of a sole arbitrator.

It was so agreed.

ARTICLE 29 [6]

64. Mr. LIANG (Secretary to the Commission) suggested that the second paragraph of article 29 appeared superfluous, since by adopting articles 7 and 8 the Commission had already recognized the immutability of the composition of the tribunal and provided for replacement under specified circumstances.[7] Adoption of the second paragraph of the article under consideration would be inconsistent with those articles.

65. Mr. el-KHOURI agreed with the Secretary that the question of replacement had already been dealt with. He therefore proposed that the second paragraph of article 29 be deleted.

66. Mr. HUDSON pointed out that article 29 seemed to deal only with hearings. In some cases, there might be only written proceedings.

67. He also proposed the deletion of the opening words: "When the arbitrator or the tribunal consider that they have received full explanations, and". Furthermore, the article might begin with the words: "When the parties have completed their presentation of the case," etc.

68. Mr. LAUTERPACHT was in favour of the special rapporteur's text as it stood, since, although the agents, counsel and advocates of the parties might consider that they had completed their presentation of the case, the tribunal might think otherwise, and call for additional information.

69. Mr. FRANÇOIS said that the wording of article 29 was partly borrowed from Article 54 of the Statute of

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[5] Article 28 read as follows:

"Whenever one of the parties does not appear or fails to defend its case, the other party may call upon the arbitrator or the tribunal to decide in favour of its claim. The arbitrator or the tribunal may themselves pass judgment by default, *ex officio*."

[6] Article 29 read as follows:

"When the arbitrator or the tribunal consider that they have received full explanations, and when the agents, counsel and advocates have completed their presentation of the case, the hearing shall be officially declared closed.

"Neither the arbitrator nor any member of the tribunal may be replaced after the closure of the hearing."

[7] See summary record of the 142nd meeting, paras. 59 and 66.

the International Court of Justice. The words "subject to the control of the Court" in that Article had, however, been dropped. He considered that that phrase should be inserted after the word "when" in the article now under consideration, in appropriate form, namely, "subject to the control of the tribunal". He emphasized that the parties should not have the right to protract the hearing *ad infinitum*.

70. Mr. SCELLE accepted Mr. François' amendment. It was essential that the tribunal be empowered to terminate the hearing even against the will of the parties.

71. Mr. AMADO preferred the text of Article 54, paragraph 1, of the Statute of the International Court of Justice to the opening phrase of Mr. Scelle's draft, which seemed a little obscure.

72. Mr. KERNO (Assistant Secretary-General) pointed out that the opening words of article 29 would become unnecessary if Mr. François' amendment were adopted, since the latter would enable the court to decide whether it had been in possession of all the necessary facts.

73. Mr. KOZHEVNIKOV opposed Mr. François' amendment, which would place a quite unacceptable restriction on the freedom of the parties — a trend which he deplored.

74. He also expressed dissatisfaction with the Commission's practice of transplanting provisions of the Statute of the International Court of Justice, an organ of a quite special character. He doubted whether such provisions were in every case appropriate to an arbitral tribunal.

Mr. Hudson's proposal that the words "When the arbitrator or tribunal consider that they have received full explanations, and" be deleted from article 29 was adopted by 7 votes to 1, with 4 abstentions.

Mr. François' proposal that the words "subject to the control of the tribunal" be inserted after the word "when" was adopted by 9 votes to 2, with 1 abstention.

Article 29, first paragraph, as amended, was adopted by 9 votes to 2, with 1 abstention.

Mr. el-KHOURI's proposal that the second paragraph of Article 29 be deleted was adopted by 7 votes to 3, with 1 abstention.[8]

ARTICLE 30 [9]

75. Mr. LIANG (Secretary to the Commission) suggested that the words "in whole or" might be deleted from article 30 since, for the most part, the deliberations of the tribunal would have to take place after the closure of the hearing.

76. Mr. LAUTERPACHT proposed the deletion from article 30 of the words "which must be attended by all the members of the tribunal", since members might have good reasons, such as illness, for being unable to attend. Furthermore, such a provision might be abused by members who wished to obstruct the work of the tribunal by absenting themselves, although it was obvious that all members of the tribunal should normally take part in its deliberations.

77. Mr. HUDSON supported Mr. Lauterpacht's amendment. The words in question were inconsistent with certain articles already adopted by the Commission.

78. Mr. SCELLE accepted Mr. Lauterpacht's amendment.

79. Mr. el-KHOURI proposed the deletion of the second sentence of article 30.

80. Mr. HUDSON supported Mr. el-Khouri's amendment.

81. Mr. SCELLE pointed out that the tribunal should be empowered to start its deliberations before the closure of the hearing, if necessary.

82. Mr. SANDSTRÖM observed that that was an inherent right of any tribunal; it was therefore unnecessary to state it.

83. Mr. SCELLE agreed.

84. Mr. HUDSON considered that article 78 of the 1907 Hague Convention for the Pacific Settlement of International Disputes was more satisfactorily worded. He proposed that article 30 should read somewhat as follows:

> "The deliberations of the tribunal, in which all the members of the tribunal shall participate, shall take place in private and shall remain secret".

85. The CHAIRMAN suggested that the final wording of article 30 be left to the Standing Drafting Committee in the light of the observations made by Mr. Hudson.

Mr. Lauterpacht's amendment was rejected by 6 votes to 4, with 1 abstention.

Mr. el-Khouri's amendment was adopted by 9 votes to 1, with 2 abstentions.

Article 30, as amended and subject to review by the Standing Drafting Committee, was adopted by 12 votes to none.[10]

ARTICLE 31 [11]

86. Mr. SCELLE declared that he would withdraw

[8] Article 29, as tentatively adopted, read as follows:

"When, subject to the control of the tribunal, the agents, counsel and advocates have completed their presentation of the case, the hearing shall be officially declared closed."

[9] Article 30 read as follows:

"The deliberations, which must be attended by all the members of the tribunal, shall remain secret. They may take place, in whole or in part, before the closure of the hearing."

[10] Article 30, as tentatively adopted, read as follows:

"The deliberations, which ought to be attended by all the members of the tribunal, shall remain secret."

[11] Article 31 read as follows:

"The arbitral award shall be made within the period fixed by the *compromis* or the arbitral tribunal but the tribunal reserves the right to extend this period within reasonable limits if it deems such action essential to the elucidation of the case."

article 31, which had become unnecessary in view of the adoption of article 12, paragraph (*g*).[12]

87. Mr. LAUTERPACHT proposed an alternative text for article 31, to read:

"The arbitral award shall be made within the period fixed by the *compromis* or the arbitration treaty. The tribunal may, with the consent of the parties, extend the time-limit thus fixed".

88. He wondered whether the provisions of article 12, paragraph (*g*), would enable the tribunal to disregard a time-limit, laid down in the *compromis,* for making the award, or whether that should be expressly stated elsewhere.

89. Mr. SCELLE replied that in his view there was no need for such provision, since it was always open to the tribunal to exceed a time-limit if it felt itself unable to give an award within the period specified.

90. Mr. SANDSTRÖM said that he would hesitate to agree with Mr. Scelle that article 12, paragraph (*g*), implied that a tribunal could exceed a time-limit laid down in a *compromis.*

91. Mr. ZOUREK said that he had failed to find in the text so far adopted any provision enabling the tribunal to disregard a time-limit fixed by the parties.

92. Mr. SCELLE agreed that the Commission had left a gap by deleting article 21.[13]

93. He could not, however, accept Mr. Lauterpacht's amendment, according to which the tribunal would have to obtain the consent of the parties in order to extend the time-limit fixed by the *compromis,* since he was convinced that a tribunal could not be obliged to adhere strictly to time-limits if it found itself unable to do so.

Nothing should be allowed to impede the tribunal from making a final settlement.

94. Mr. LAUTERPACHT said that the point at issue was whether an extension could be effected without the consent of the parties. If Mr. Scelle's view prevailed, the first sentence of his (Mr. Lauterpacht's) amendment would become meaningless.

95. Mr. YEPES disagreed with Mr. Lauterpacht. The first sentence of the latter's amendment laid down a general rule and the second an exception to it. For his part, he could accept the special rapporteur's text for article 31.

96. Mr. SCELLE maintained that article 31 was unnecessary since, by the adoption of article 29, the tribunal was empowered to continue the hearing until such time as it felt itself to be in possession of all the information required for reaching a decision. The hearing could not be terminated without an act of closure by the tribunal itself.

97. Mr. SANDSTRÖM pointed out that closure of a hearing was not the same thing as a time-limit for making an award. It was impossible to deduce from the provisions of article 29 that a tribunal was free to disregard a time-limit, stipulated in the *compromis,* for rendering the award.

98. Mr. SCELLE re-affirmed that a tribunal could not make an award until it was fully informed of the facts of the case.

99. Mr. HUDSON proposed that the concluding words of article 31, "essential to the elucidation of the case" be replaced by the word "necessary".

100. Mr. LAUTERPACHT said that as the words "with the consent of the parties" did not appear to have secured the general support of the Commission, he would withdraw his amendment. He pointed out, however, that if the tribunal were given power to extend its period of existence beyond that laid down in the *compromis,* that would be the sole exception so far made to the general rule that the tribunal should not be allowed to depart from the provisions of the *compromis.*

101. He then expressed his objection to the word "reserves" in Mr. Scelle's text, and suggested that it might be replaced by the word "retains".

102. Mr. KOZHEVNIKOV could not agree that the tribunal should have the right to extend time-limits laid down in a general treaty of arbitration or in a special *compromis.* He therefore proposed that article 31 be deleted.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 3.

103. Mr. HUDSON found it difficult to support a provision that would empower the tribunal to extend, without the consent of the parties, time-limits laid down in a *compromis.*

104. Mr. el-KHOURI suggested that the tribunal should be empowered to extend time-limits at the request of one of the parties.

105. Mr. SCELLE believed that neither one party nor both parties could judge whether a tribunal was ready to render the award. If the tribunal were to be held to the time-limits laid down by the parties, in the *compromis,* the latter would be in a position to prevent the tribunal from rendering an award. Such a procedure was unacceptable to him, since it would make the award contingent on the will of the parties. He recognized that in the matter of the observance of time-limits the tribunal should, if possible, take into account the will of the parties, but that was a moral and not a legal obligation.

106. Mr. LAUTERPACHT proposed that the vote on article 31 be deferred to give members more time for reflection. He would point out that treaties of arbitration did not always lay down time-limits, and the Commission might have to reconsider article 12, paragraph (*g*), to establish whether it was wise in imposing

[12] See summary record of the 146th meeting, para. 40.

[13] See above, para 7.

an obligation on the parties to stipulate time-limits in the *compromis*.

It was so agreed.

The meeting rose at 1.05 p.m.

150th MEETING

Wednesday, 25 June 1952, at 9.45 a.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 4) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (annex to document (A/CN.4/46) contained in the special rapporteur's second report.

ARTICLE 31 (*continued*)

2. Mr. LAUTERPACHT said that, following the discussion at the preceding meeting, he had given further consideration to article 31 and had come to the conclusion that he must maintain the alternative wording he had himself proposed.[1]

3. His researches had enabled him to establish not only that the stipulation of time-limits within which the award must be made was an almost constant feature of arbitration agreements, but that tribunals observed those limits strictly. In certain cases, of course, the parties had provided by agreement for an extension, as, for example, in the case of the French-Mexican Claims Commission. On that occasion the tribunal had attached so much importance to continuing its proceedings within the time-limits fixed by the parties that it had done so despite the absence of one of its members.

4. He was also convinced that the Commission must adhere to the principle that the *compromis* was the source of the authority of the tribunal and that the latter should not have the power to extend its own existence without the consent of the parties. He appreciated that consent might not be forthcoming and that the tribunal might in consequence be hurried into making its award. Such a contingency was, however, unlikely to occur, and if one party withheld its consent to an extension of time-limits without good reason, the tribunal would take that fact into account as a factor in assessing the evidence submitted.

5. Mr. SCELLE observed that Mr. Lauterpacht had based his argument upon precedent, and not on the essential principle, namely, that the tribunal must make an award. Though he admitted that Mr. Lauterpacht's provision would be adequate in a number of cases, he could not support it, because its effect would be to render the tribunal dependent on the will of the parties. It was quite inadmissible that one party — and it was likely to be the one which expected the award to go against it — should be free to refuse extensions of the time-limits and thereby prevent the tribunal from making an award in a manner consonant with its high responsibilities.

6. Mr. el-KHOURI thanked Mr. Scelle for having focused attention on the fact that it would be the losing party which was likely to withhold its consent to an extension of the time-limits, a view which substantiated the argument he himself had put forward at the preceding meeting, namely, that extension should be made possible at the request of one of the parties. He accordingly proposed the insertion in Mr. Lauterpacht's text of the words "one of", after the words "consent of".

7. Mr. YEPES supported Mr. el-KHOURI's amendment.

8. Mr. HSU preferred the special rapporteur's text to that proposed by Mr. Lauterpacht, since the former was more in harmony with the spirit of the draft as a whole.

9. Mr. YEPES said that it would be most dangerous to stipulate that the consent of the parties must be obtained before the time-limits could be extended. Such a provision would run counter to the whole spirit of arbitration by making the award contingent upon the will of one of the parties. Was an arbitral tribunal composed of persons of the highest moral standing to be prevented from prolonging its proceedings if it felt itself in need of more time?

10. Mr. SANDSTRÖM said that he would vote in favour of Mr. Lauterpacht's text because a certain

[1] See summary record of the 149th meeting, paras. 87—88.