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Summary record of the 140th meeting

Topic:
Arbitral Procedure

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60. Mr. el-KHOURI said that article 5 clearly did not mean that when the arbitrator or members of the tribunal had already been appointed the parties could act in whatever manner they deemed most appropriate, but that they could do so in cases where the arbitrator or tribunal were appointed by mutual agreement. All ambiguity would be removed if the words " to be " were inserted after the words " the arbitral tribunal are ".

61. Mr. LIANG (Secretary to the Commission) said that there were four possibilities to be envisaged under paragraph 5 : a judicial body, a sole arbitrator, an *ad hoc* tribunal, or an already existing arbitral body, such as a general claims commission.

62. Mr. SCELLE believed that a distinction must be made between arbitral awards and judicial settlements. An arbitrator or an arbitral tribunal had slightly more freedom than a court of justice. Some jurists made a distinction between the principles of *praeter legem* and *contra legem,* and considered that an arbitrator or an arbitral tribunal could act *praeter legem,* though not against the law. That was one of the reasons for maintaining the Permanent Court of Arbitration alongside the International Court of Justice. If the former did not have a greater latitude than the latter in deciding cases, there would be no point whatsoever in maintaining two international judicial organs that would otherwise have precisely the same competence. He admitted that the International Court of Justice could not go outside the law unless it was authorized to do so by the parties.

63. Mr. YEPES proposed that the text of article 5 be replaced by the following words :

> " In appointing the arbitrator or members of the arbitral tribunal the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator or to a tribunal constituted as they think fit."

64. Mr. LIANG (Secretary to the Commission) pointed out that the examples quoted by Mr. Scelle all came under the heading of tribunals constituted as the parties thought fit. When the *Cour de cassation* had been asked to act as arbitrator, it had done so as an arbitral tribunal and not as a court. The International Court of Justice, however, had to proceed in accordance with its Statute, and could not go beyond the provisions of that instrument. He was therefore uncertain whether it was within its competence to decide cases otherwise than in accordance with those provisions.

65. The CHAIRMAN observed that it was desirable that article 5 should be drafted in such a way as not to exclude either the Permanent Court of Arbitration or a pre-established tribunal of the kind mentioned by the Secretary.

66. Mr. KERNO (Assistant Secretary-General) suggested that some of the difficulties mentioned in the discussion might be disposed of if the word " appointed " were substituted for the word " constituted " in the final phrase of article 5.

67. Mr. AMADO accepted Mr. Yepes' text, which respected the freedom of choice of the parties in selecting the arbitrator or arbitral tribunal.

The meeting rose at 1 p.m.

140th MEETING

Wednesday, 11 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, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, 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) *(continued)*

ARTICLE 4 *(resumed from the 139th meeting)*

1. The CHAIRMAN invited the Commission to consider the amendments proposed by Mr. Yepes and Mr. Lauterpacht to the text of paragraph 1 of article 23 of the Revised General Act for the Pacific Settlement of International Disputes [1] which had been proposed for the incorporation in article 4 of the second Preliminary Draft on Arbitration Procedure annexed to the second report of the special rapporteur (A/CN. 4/46). Mr. Yepes' amendment consisted in substituting the words " as provided in article 3 above " for the words " from the date on which one of the parties requested the other party to constitute an arbitral tribunal ". Mr. Lauterpacht's amendment sought to insert the words " or the decision of the International Court of Justice taken in conformity with article 2, paragraph 1 above " after the words " to constitute an arbitral tribunal ". It was understood that the text of article 4 would begin with an introductory clause as he (the Chairman) had suggested at the preceding meeting.

[1] See summary record of the 139th meeting, paras. 24—40. For the text of article 23, see *United Nations Treaty Series,* vol. 71, p. 115.

2. Mr. YEPES observed that the sense of his amendment was precisely the same as that of Mr. Lauterpacht's, but it was phrased more simply.

3. Mr. SCELLE said that either of the two amendments would be acceptable to him.

4. Mr. LAUTERPACHT said that in that case he would withdraw his own amendment in favour of that submitted by Mr. Yepes.

Mr. Yepes' amendment was adopted.

5. Mr. KOZHEVNIKOV reminded the Commission that at the preceding meeting he had proposed that the words " by mutual agreement " be inserted after the words " shall have the right " in the original text of article 4.

6. Replying to the CHAIRMAN, Mr. LIANG (Secretary to the Commission) said that the adoption of Mr. Yepes' text did not preclude consideration of Mr. Kozhevnikov's amendment, since the latter related to the opening words, namely: " If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the following procedure ", of article 4 in the special rapporteur's text slightly amended, which was to serve as an introduction to the text of article 23 of the Revised General Act.

7. Mr. SCELLE recalled that he had explained at the preceding meeting why he was unable to support Mr. Kozhevnikov's amendment.

Mr. Kozhevnikov's amendment was rejected by 6 votes to 2.

8. Mr. ZOUREK observed that article 4 was based on the judicial theory of arbitration. There were, however, partisans of the contractual theory of arbitration, who believed that the competence of the arbitrator or arbitral tribunal derived from the agreement of the parties. He had opposed article 2 of the special rapporteur's draft procedure because it implied the transformation of arbitral tribunals into courts of justice, and would thus undermine the whole contractual principle of arbitration, which was gaining ground in commercial arbitration.

9. For those reasons it would be difficult for him to accept a provision whereby, in cases where the parties failed to agree, a third authority, chosen solely by one alone of the parties to the dispute, would be asked to make the necessary appointments. Some other method analagous to the system envisaged in article 45 of the 1907 Hague Convention for the Pacific Settlement of International Disputes should, in his view, be found, that was, one which would not conflict with the contractual theory of arbitration.

10. Mr. LAUTERPACHT said that if Mr. Zourek could formulate a concrete proposal to give effect to his contentions he should be given time to do so. The Commission must give due consideration to any suggestion which might help to make arbitration more effective.

11. Mr. SCELLE considered Mr. Zourek's attitude to be out of date. He could not agree that the contractual theory was gaining ground in commercial arbitration. The rules of the International Chamber of Commerce on conciliation arbitration were more stringent than those for international arbitration that he had proposed in his own text.

12. Mr. LAUTERPACHT agreed that the import of Mr. Kozhevnikov's amendment, just rejected, was purely negative and inherently in contradiction with the remainder of article 4. He had felt, however, that Mr. Zourek was prepared to go a little further and had envisaged the possibility of submitting a somewhat more constructive proposal.

13. Mr. KERNO (Assistant Secretary-General) said that the difference of opinion between Mr. Zourek and Mr. Scelle might not be so great as appeared at first sight, since the principle of mutual agreement underlay the whole of the special rapporteur's draft. If the final instrument took the form of an international convention, the provisions would be binding only on the contracting parties, each of which would have agreed in advance to accept certain procedures. Thus, the contractual principle was fundamental to the draft under consideration.

14. The CHAIRMAN put to the vote the three paragraphs of article 23 of the Revised General Act for the Pacific Settlement of International Disputes for incorporation in article 4.

Paragraph 1, as amended by Mr. Yepes, was adopted by 7 votes to 2.

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

Paragraph 3 was adopted by 7 votes to 2.

15. Mr. LAUTERPACHT asked for a ruling whether Mr. Zourek would be given an opportunity of presenting an alternative text for article 4.

16. The CHAIRMAN replied that it was open to any member of the Commission to propose the reconsideration of any article.[2]

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[2] Article 4, as tentatively adopted, read as follows:

" If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the following procedure:

" 1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months as provided in article 3 above, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments.

" 2. If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen.

" 3. If, within a period of three months, the two Powers so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a subject of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointments shall be made by the oldest member of the Court who is not a subject of either party."

ARTICLE 5 (*resumed from the 139th meeting*)

17. Mr. YEPES, introducing his amendment, which sought to substitute the following text for article 5 :

> " In appointing the arbitrator or members of the arbitral tribunal, the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator or to a tribunal constituted as they think fit ",

said that his purpose was to simplify the original wording and to eliminate all the possible difficulties that had been mentioned at the preceding meeting. He believed that his wording " to a single arbitrator or to a tribunal constituted as they think fit " would cover all possible contingencies.

18. Mr. AMADO, Mr. LAUTERPACHT, Mr. SCELLE and Mr. ZOUREK supported Mr. Yepes' amendment.

19. Mr. KERNO (Assistant Secretary-General) said that as the draft adopted by the Commission would be circulated to governments together with comments, Mr. Yepes' broad interpretation of his text would be made clear in the comments.

20. The CHAIRMAN suggested that the words " chosen or " should be inserted before the words " constituted as they think fit " ; otherwise the provision might be interpreted as being restricted to *ad hoc* tribunals and as excluding existing bodies such as the Permanent Court of Arbitration.

21. Mr. YEPES accepted the Chairman's suggestion.

22. Mr. SCELLE said that Mr. Yepes' text would have been acceptable to him, but he agreed that it was considerably improved by the Chairman's amendment.

23. He understood the reasons for Mr. Lauterpacht's doubts, expressed at the preceding meeting, whether the International Court of Justice could act as an arbitrator, but believed that the parties were free to request it to do so and to render judgment *ex aequo et bono*. At all events, if the Court did not regard itself as competent to deal with such cases it could refuse to do so. The wide scope of Mr. Yepes' text, as amended by the Chairman, provided for every possible eventuality.

24. Mr. el-KHOURI did not believe that there was any need to substitute an alternative text for the original draft of article 5. Any possible ambiguity in the wording of the latter could be removed by inserting the words " to be " between the words " tribunal are " and the words " appointed by mutual agreement ".

25. Mr. AMADO considered the Chairman's amendment to be unnecessary. Mr. Yepes' text was perfectly satisfactory as it stood.

26. Mr. SCELLE pointed out that there was no reason why the parties should not select an existing body to act as an arbitral tribunal. That possibility was not provided for in Mr. Yepes' original text, which spoke of a tribunal *constituted* as the parties thought fit.

27. Mr. LAUTERPACHT said that Mr. Yepes' text was acceptable to him either with or without the Chairman's amendment, but he wished to make it very clear that he personally did not visualize the International Court of Justice being asked to act in the capacity of an arbitral tribunal.

28. Mr. HSU said that if the majority of the Commission felt Mr. Yepes' text to be adequate, he would not oppose it ; but he wondered whether it brought out as clearly as did the special rapporteur's text for article 5 the fundamental principle of the freedom of the parties to choose the arbitrator or arbitral tribunal. He saw no objection to emphasizing that principle more forcibly.

29. The CHAIRMAN suggested that the consideration mentioned by Mr. Hsu should be referred to the Standing Drafting Committee to be set up.

It was so agreed.

30. The CHAIRMAN put to the vote Mr. Yepes' text for article 5, amended by the insertion of the words " chosen or " before the words " constituted as they think fit ".

Mr. Yepes' text, as amended, was adopted by 8 votes to none, with 2 abstentions.

ARTICLE 6 [3]

31. Mr. FRANÇOIS said that article 6 should make clear whether nationals of the parties to a dispute could be chosen to sit on the arbitral tribunal. He was personally in favour of that being possible, and could then agree that the tribunal should consist of five judges. If that were not to be the case, however, the tribunal should be reduced to three. He would accordingly suggest that a fourth recommendation be added to article 6 specifying that the tribunal should include one arbitrator from each State party to the dispute.

32. Mr. el-KHOURI considered that article 6 was redundant, since it was unnecessary to make stipulations concerning the choice of arbitrators if the composition of the tribunal had to be decided by mutual agreement between the parties.

33. Mr. SCELLE said, in reply to Mr. François, that it was most unlikely, desirable though it would be, that parties would refrain from selecting arbitrators from among their own nationals. As Judge Loder, the First President of the Permanent Court of International

[3] Article 6 read as follows :

" Nevertheless, generally speaking, and having due regard to the circumstances of the case, it is recommended in the light of experience : (*a*) that the persons chosen as arbitrators should possess the qualifications set forth in Article 2 of the Statute of the ICJ ; (*b*) that the sole arbitrator or the majority of the arbitrators should be chosen from among the nationals of States having no special interest in the case ; and (*c*) that the tribunal should have an odd number of judges, preferably five, and that it should be presided over by one of the neutral judges."

Justice, had declared in another connexion, the presence of judges who were nationals of a party to a dispute was a concession to human frailty. Great progress would indeed have been made if parties could be persuaded not to insist on the appointment of their own nationals. He would therefore deplore the addition of a provision such as that suggested by Mr. François. It might, for example, prevent States from requesting the International Law Commission itself to act as arbitrator.

34. Mr. LAUTERPACHT said that the remarks of Mr. Scelle and Mr. el-Khouri encouraged him to express his doubts concerning article 6, which was clearly not intended to impose legal obligations, but merely constituted a series of recommendations. He doubted whether it was advisable to include optional recommendations, which might or might not be accepted, in international instruments intended to impose binding obligations. He was aware that precedents for doing so existed, for example, Article 6 of the Statute of the International Court of Justice, but, as was well known, that article had remained a dead letter. He feared that the insertion of such recommendations in instruments having the character of a treaty would do nothing to enhance the authority of international law or the integrity of international conventions.

35. He had no objection in principle to the recommendations contained in article 6 of the special rapporteur's draft, but believed that such matters might be left to the good will of the parties concerned. If, however, Mr. Scelle insisted on the retention of that article, it might be better to cast it in a slightly different form. For example, the words " it is recommended " might be replaced by the words " it is desirable ", and the phrase " in the light of experience " might be omitted altogether, since it was inappropriate to include in an international convention reasons for its provisions. All were obviously the result of experience.

36. Mr. FRANÇOIS said that unless article 6 was made more explicit, he too would be in favour of its being deleted in its entirety.

37. Mr. SCELLE pointed out that article 22 of the Revised General Act was much more imperative, and went a great deal further than his own text, which he had been careful to phrase more liberally.

38. Mr. LIANG (Secretary to the Commission) said that the introductory sentence to article 6 was perhaps somewhat unorthodox, but pointed out that it had not yet been decided whether the Commission's text was to take the form of a draft convention.

39. If, however, it was found desirable to retain article 6, its recommendations could be included in the commentary which would accompany the draft articles adopted by the Commission.

40. As to the substance, the article might perhaps be redrafted to conform with the provisions of Article 9 of the Statute of the International Court of Justice, namely, that the main forms of civilization and the principal legal systems of the world should be represented in the Court.

41. Mr. LAUTERPACHT said that he was anxious that he should not be misunderstood. He fully supported the intention of article 6, and warmly endorsed Mr. Scelle's desire to contribute towards the development of international law by encouraging parties to a dispute to select as arbitrators persons from other States, but was uncertain whether that purpose would in fact be served by article 6 as at present conceived. For instance, recommendations (*a*) and (*b*) were optional in the special rapporteur's draft, whereas the parallel provisions in the Statute of the International Court of Justice and in the Revised General Act respectively were legally binding. He would ask, with all respect, whether article 6 really represented an advance. Accordingly, he would only be prepared to vote for it if it were cast in the form of a definite legal obligation in conformity with the afore-mentioned instruments.

42. Mr. SCELLE thanked Mr. Lauterpacht for his very pertinent observations, which he was quite prepared to act upon.

43. He could not agree with the Secretary, however, that Article 9 of the Statute of the International Court of Justice should be taken as a model for the recasting of article 6, since Article 9 referred to the representation of the main forms of civilization and of the principal legal systems of the world, considerations which had nothing whatever to do with the constitution of arbitral tribunals. Article 2 of the Statute of the International Court would be a far more suitable model and, if it were the Commission's wish, he would be prepared to redraft article 6 in similar form.

44. Mr. HSU agreed that the provisions of article 6 should be made obligatory. Mr. Lauterpacht's argument that, where possible, optional recommendations should not be included in international instruments was perfectly sound.

45. Mr. AMADO was categorically opposed to article 6. He did not propose to elaborate his views on the development of international law, but would confine himself to saying that such recommendations as were embodied in that article would not contribute to it. Nor did he see the utility of raising such, to his mind, superfluous recommendations to the status of legal obligations. He was strongly opposed to affirmations of high-flown principles which bore very little relation to reality, a fault which was very much in evidence in the Revised General Act, the adoption of which by the General Assembly had been deferred for one year as a result of his intervention. He deplored the idealistic academic approach from which that instrument suffered.

46. Arbitration was quite distinct from judicial settlement, and the two must be kept separate ; that was the only way in which progress could be made.

47. Mr. YEPES was in favour of recasting article 6 of the special rapporteur's draft, which he considered

should be maintained in the form proposed by Mr. Lauterpacht. He was particularly in favour of that being done because of the paramount importance he attached to recommendation (*a*), which would ensure that arbitration was lifted out of the political plane and protected from political influences. He welcomed the fact that the special rapporteur had not fallen into the error of the American Treaty on Pacific Settlement of 1948 (Pact of Bogotá) which, in article XLI, empowered the parties to select as a single arbiter a Head of State, a trend that he deplored, since it placed arbitral procedure at the mercy of political considerations.

48. The CHAIRMAN said he would first put to the vote the amendment farthest removed from the original text, namely, the proposal by Mr. el-Khouri that article 6 should be deleted in its entirety.

The proposal that article 6 be deleted in its entirety was carried by 6 votes to 4.

49. Mr. SCELLE expressed his regret at the rejection of article 6, which meant that the Commission had reversed its earlier decision on that issue. The result of the vote might perhaps have been different had all members of the Commission been present. If the Commission persisted in reversing its own decisions, it would be very difficult for rapporteurs to divine its intentions.

50. Mr. HSU pointed out that the Commission had only voted against retention of the text of article 6 as set forth in document A/CN.4/46. There was nothing in that decision to prevent it from adopting a text of an obligatory nature if it so wished.

51. Mr. KERNO (Assistant Secretary-General) said that in his view the important point in article 6 was that contained in recommendation (*a*). If a new proposal were made, therefore, he suggested that it be limited to the substance of that recommendation ; such a proposal might replace article 6, or, alternatively, form part of the commentary on the Commission's draft.

52. Mr. ZOUREK noted that the Commission had already decided, in article 5, that when the tribunal was set up by agreement between the parties they would be free to choose or constitute it as they thought fit. It would appear to be contrary to that provision to make it binding on them to conform with the criteria proposed in article 6. The Commission should therefore respect the decision it had just taken, and pass on to consideration of article 7.

53. Mr. el-KHOURI, agreeing, pointed out that the two parties might disagree on whether a person nominated as arbitrator did in fact possess the qualifications set forth in Article 2 of the Statute of the International Court of Justice. What body was to resolve that disagreement ? And what body was to enforce such a provision if it were made obligatory ? In the case of the judges of the International Court of Justice, it was envisaged that the General Assembly should play that role, but in the case of arbitral tribunals there would be no higher authority suitable for the purpose.

54. Mr. SCELLE could not agree with Mr. el-Khouri's reasoning. Nine-tenths of the rules of international law relied for their implementation only on the good faith of the parties, and were unsupported either by any separate higher authority of by the threat of sanctions.

55. The CHAIRMAN accepted the procedural point made by Mr. Hsu, and said that if any proposal were submitted incorporating part or the whole of the provisions of article 6 in obligatory form, he would accept it for submission to the Commission.

56. Mr. YEPES said that he would submit such a proposal in due course.

ARTICLE 7 [4]

57. Mr. KOZHEVNIKOV proposed the deletion of the words " or by the subsidiary procedures indicated above ".

58. Mr. YEPES proposed that in that event the words " by agreement between the parties " should be deleted also.

59. Mr. FRANÇOIS pointed out that article 7 should be read in conjunction with article 9, which provided that " An arbitrator may not withdraw or be withdrawn by the government which has appointed him. . . ." He could agree that the arbitrators who really were chosen by common agreement, that was to say, those chosen from among nationals of States which had no special interest in the case, should not be allowed to withdraw or to be replaced once the proceedings had started. The " national arbitrators " would, however, be in a different position. They would be appointed by their respective governments, and not by common agreement between the parties, although he had noted that in his report, Mr. Scelle had referred to all the arbitrators as being appointed by common agreement. " National arbitrators " were, however, as he had just said, in a different position from the other arbitrators, and he saw no reason why it should not be possible for them to withdraw or to be replaced.

60. Mr. SCELLE said that when the *compromis* was being concluded, one party could object to the " national arbitrator " chosen by the other, so that it was perfectly permissible to say, as he had, that all the arbitrators were chosen by common agreement, although admittedly in the case of some of them, such agreement might be tacit. It was of the very essence of his proposals that the tribunal should be an *independent* and truly

[4] Article 7 read as follows :

" Once the arbitral tribunal has been set up by agreement between the parties or by the subsidiary procedure indicated above, it shall not be open to any of the contending Governments to alter its composition.

" If a vacancy occurs, for reasons beyond the control of those Governments, the arbitrator shall be replaced by the method laid down for appointments."

international body, jointly constituted and immutable in all its parts. The unfortunate outcome of failure to respect that principle in the past could be clearly seen, for example, in the case of the Hungarian Optants.[5] He realized that Mr. François had behind him the weight of tradition and of confirmed habits of thought, but in his (Mr. Scelle's) view, it was essential to break with tradition in the present issue.

61. The whole question was connected with the law of treaties. He considered that each individual treaty brought into being an international system which constituted a legal entity and did not require any further sanction or support other than what was inherent in itself. He therefore attached great importance to the principle that the so-called " national arbitrators ", once appointed, became members of an independent " international " tribunal, and could not be replaced or withdrawn until the task of that tribunal had been completed.

62. Mr. LAUTERPACHT said that, generally speaking, he was in full agreement with Mr. Scelle, although he thought the latter was unnecessarily complicating his case by maintaining that all arbitrators were in effect appointed by common agreement. He understood Mr. Scelle's reasoning, but such a logical refinement hardly corresponded with prevailing practice. The fact that one party could object to the national arbitrator chosen by the other was not equivalent to the tribunal's being chosen by common agreement.

63. He thought that it was essential to the very nature of arbitration, and in accordance with present practice, that a contending government should not be able to withdraw the arbitrator it had appointed, either because it did not favour the particular line he was pursuing or for some other reason, once the proceedings had begun. Otherwise, to mention only a few practical disadvantages, national arbitrators would have to remain in constant contact with the governments which had appointed them, and would enjoy no security of tenure of their offices.

64. Mr. el-KHOURI said that from his experience both of international arbitration and of arbitration within a State, he could say that one of the most frequent causes of its breaking down was that one party dismissed the arbitrator it had appointed, or caused him to withdraw, if the case appeared to be going against it. He therefore considered it essential to stipulate that, once the tribunal had been constituted, none of the arbitrators could withdraw or be withdrawn until the case had been completed. He therefore supported article 7 in its present form.

65. Mr. KOZHEVNIKOV proposed that the words " it shall not be open to any of the contending governments to alter its composition " be amended to read " it is recommended that none of the contending governments alter its composition ", so as to avoid conflict with the principle of national sovereignty as a fundamental principle of international law.

66. Mr. ZOUREK felt that the text proposed by the special rapporteur was too categorical, for in practice it was possible for the parties to a dispute before the International Court of Justice to change the judges appointed by them under Article 31, paragraphs 2 and 3, of the Court's Statute. He did not believe that that right could be denied absolutely in arbitration procedure.

67. The case of the Hungarian Optants had been mentioned, but detailed analysis of that case showed that there had been an excess of jurisdiction on the part of the Mixed Arbitral Tribunal. That Tribunal had in fact pronounced that, in virtue of article 250 of the Treaty of Trianon, it was competent in respect of agrarian reform laws, which in no wise constituted an act of seizure or liquidation falling within the Tribunal's jurisdiction as had been asserted by the Hungarian Optants. Subsequently, it had been generally recognized that there had been an excess of jurisdiction. Now, if the tribunal set up by the parties to the dispute to decide what was the law — to settle the dispute — began by violating a standard which was the sole source of its jurisdiction, or, in other words, by exceeding the limits of its jurisdiction as set forth in the *compromis* or, as in the case at present under discussion, in another legal text, the withdrawal of the arbitrator became a legitimate defensive measure by which the State victim of a manifest excess of jurisdiction attempted to repel the injustice with which it was threatened. It must not be forgotten that, by its very definition, arbitration was based on the will of the parties. Hence, the possibility of an excess of jurisdiction occurring should be provided for in the rules of arbitration procedure. Even if the Commission were to adopt the rigid text under consideration, a government which found itself confronted by a manifest excess of jurisdiction would not hesitate to have recourse to the defensive measures he had mentioned.

68. Mr. FRANÇOIS pointed out that in some cases a tribunal was set up to deal not with one particular case, but with any cases which might arise out of what might be a comprehensive treaty. Under the special rapporteur's proposal, it would be impossible to change an arbitrator, even though his competence might extend to only one of the fields covered by that treaty.

69. Mr. SCELLE agreed that the text proposed by him referred only to tribunals set up to arbitrate in one particular case, and that some amendment might be necessary to meet the point raised by Mr. François.

70. Mr. LAUTERPACHT suggested that, in order to cover that point and the contingency, arising out of Mr. Zourek's statement, that if both parties for any reason agreed that the composition of the tribunal should be altered it would be in accordance with the principles of arbitration to permit them to alter it, the text proposed by Mr. Scelle might be amended to read as follows :

[5] See Francis Deák, *The Hungarian-Rumanian Land Dispute* (New York, Columbia University Press, 1928).

" Except by common agreement it shall not be open to the parties to alter the composition of the tribunal subsequent to the commencement of the proceedings in any particular case."

71. The CHAIRMAN stated that as Mr. Kozhevnikov's proposal to turn the first sentence of article 7 into a recommendation was the most far-reaching, he would put it to the vote first.

Mr. Kozhevnikov's proposal to replace the words " it shall not be open to any of the contending governments to alter " by the words " it is recommended that none of the contending governments alter " was rejected by 6 votes to 2, with 1 abstention.

72. The CHAIRMAN then put to the vote Mr. Kozhevnikov's proposal that the words " or by the subsidiary procedures indicated above " be deleted.

That proposal was adopted by 5 votes to 3.

73. Mr. AMADO, explaining his vote, said that the words " or by the subsidiary procedures indicated above " were not sufficiently clear. There seemed good reason why that phrase and the one preceding it should both be deleted.

74. Mr. SCELLE pointed out that, now that Mr. Kozhevnikov's proposal had been adopted, article 7 would contradict the preceding articles unless Mr. Yepes' proposal that the words " by agreement between the parties " be deleted was also adopted.

75. Mr. el-KHOURI said that his vote in favour of Mr. Kozhevnikov's proposal to delete the words " or by the subsidiary procedures indicated above " was conditional on Mr. Yepes' proposal being adopted.

Mr. Yepes' proposal that the words " by agreement between the parties " be deleted was adopted by 8 votes to none, with 2 abstentions.

76. Mr. FRANÇOIS expressed support for the text proposed by Mr. Lauterpacht.

77. Mr. SCELLE pointed out that under Mr. Lauterpacht's proposal the parties, if in agreement, would be free to change not only the arbitrators appointed by them, but also those appointed by a third party, for example, by the International Court of Justice. In his view, they should not be able to do that.

78. Mr. LAUTERPACHT did not agree with Mr. Scelle. The only ground on which a third party could intervene in the constitution of the tribunal was that the parties had been unable to agree on its constitution. If they could subsequently reach agreement on its composition being changed, he did not see that it would be derogatory to the International Court of Justice or any other third party to permit them to do so.

79. Mr. SCELLE felt that Mr. Lauterpacht's arguments were debatable, in that they envisaged the objectivity and good faith of the parties. But both parties might regard it as more likely to be to their interest if a dispute was not judged on purely legal grounds. For that reason, they might well agree on an arbitrator whom each thought would be more amenable to political influence than would the impartial and highly authoritative arbitrator appointed by a third party. If the arbitral tribunal were to stand above the parties as an independent authority, it must not be open to the parties to change its neutral members, even by mutual agreement.

80. He did not attach the same importance to the principle that the parties should not be able to replace their " national arbitrators ", and understood the difficulties indicated by Mr. François in that respect. He would, however, regret any departure from the principle of the immutability of the tribunal as a whole.

81. Mr. AMADO stated that, as was made clear in article 37 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, what distinguished arbitration from conciliation and other means of peaceful settlement was that it was based on respect for the law. Therein lay its historical significance. In resorting to arbitration, governments agreed to submit their differences to the rule of law. It was therefore not correct to proceed from the standpoint that governments which resorted to arbitration would indulge in all kinds of trickery and bad faith.

82. Mr. SCELLE said that he was not attacking governments, but merely wished to point out that if they suspected that the strict application of the law might not be favourable to them, they would, by their very functions, be bound to attempt to interfere with it, resting as they did on the support of political parties whose policy was dictated by national interests. It was therefore impossible for governments to be really objective in a dispute to which they were a party. As had been pointed out, the whole aim of his report was to remove arbitration from the sphere of politics. Mr. Lauterpacht's proposal would work in exactly the opposite direction.

83. Mr. YEPES was regretfully compelled to disagree with Mr. Scelle on the point under discussion. As Mr. Lauterpacht had pointed out, agreement between the parties was one of the basic principles underlying arbitration procedure.

84. Mr. el-KHOURI said that in his view any effort to alter the composition of the tribunal set up by a third party would be very little different from an attempt to circumvent the arbitral award: in both cases the assistance of a third party would have been requested; if its decision was set aside, the procedure would have to be begun anew.

85. He pointed out, however, that article 9 provided that an arbitrator might not withdraw or be withdrawn by the government which had appointed him, *save in exceptional cases*. He suggested, therefore, that further consideration of Mr. Lauterpacht's proposal be deferred until article 9 was taken up.

It was so agreed.

The meeting rose at 1 p.m.