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A/CN.4/SR.147

Summary record of the 147th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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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.