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**Articles Tentatively Adopted as of 11 June 1952 - incorporated in the summary records of the
138th to 140th meetings**

Topic:
Arbitral Procedure

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ments. He accordingly proposed that an additional sentence be added to article 1, reading :

“The undertaking to have recourse to arbitration must be in writing”.

57. Mr. HUDSON said that the Commission should not prejudge its consideration of the Law of Treaties. He saw no need to specify details of how the undertaking was to be entered into. It would be sufficient if it could be proved that it had in fact been entered into.

58. Mr. el-KHOURI said that he had only been able to vote in favour of the wording suggested by Mr. Hudson because he could not imagine two States concluding in practice a verbal agreement to have recourse to arbitration.

Further discussion of article 1 was deferred.

The meeting rose at 1 p.m.

138th MEETING

Monday, 9 June 1952, at 3 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCHELLE, 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).

Welcome to members of the Commission newly present

1-5. The CHAIRMAN extended a welcome to Mr. F. I. Kozhevnikov and Mr. H. Lauterpacht, the newly elected members of the Commission, and also to Mr. J. Zourek, who was attending a session of the Commission for the first time.

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

6. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft

on Arbitration Procedure (annex to document A/CN.4/46) in the second report of the special rapporteur.

ARTICLE 1 (*continued*)

7. Mr. KOZHEVNIKOV said that closer acquaintance with the Second Report on Arbitration Procedure submitted to the Commission by the special rapporteur, which included the Second Preliminary Draft on Arbitration Procedure, had imbued him with the firm conviction that the fundamental theses and premises on which the specific proposals constituting the conclusions of that report were based were totally unacceptable from the standpoint of the generally accepted principles of current international law.

8. Even if the observation — on the substance of which he would express no opinion for the time being — that the elements of a code of arbitration procedure already existing in a number of international conventions were accepted, the Commission's task would merely consist, as was in fact made clear in the report, in harmonizing and developing those elements. In other words, the provisions of the special rapporteur's draft should have proceeded from the basis principles of international law relating to the inherent nature of arbitration as a recognized institution of that law.

9. The draft, however, went further, and in his view conflicted with the very essence of international arbitration, which essence the special rapporteur had himself endorsed to some extent. The special rapporteur pointed out that international arbitration differed from international jurisdiction in the proper sense of that term inasmuch as, *inter alia*, it was left to the discretion of the parties concerned to determine the questions in dispute and to select the arbitrators. He did not propose for the time being to go into the substance of the question of the so-called international judicial authority, but merely wished to draw attention to that definition of international arbitration. He wished also to point out that governments usually used different procedures to conclude the *compromis* and to appoint arbitrators respectively.

10. The report referred to the necessity for providing, in the absence of agreement between the parties, for intervention by an international authority whose decisions would be binding, and which, in the special rapporteur's opinion, might well be the International Court of Justice itself. That contention, which conflicted sharply with the basic principles of international arbitration, seemed to him (Mr. Kozhevnikov) to give rise to a somewhat curious situation.

11. The competence of the International Court of Justice was, as all knew, optional. But the report of the draft on arbitration procedure sought to confer on international arbitration in that respect a character that not even the International Court itself enjoyed. The draft further provided that the arbitral tribunal could be set up even before the conclusion of the *compromis*, which would give it very wide powers. It was clearly impossible to admit such contentions if the Commission wished to

abide by the generally accepted fundamental principles of international law.

12. Hence the texts before the Commission were unacceptable, since they ran counter to the essence of international arbitration—the free consent and independence of the parties in matters relating to the determination of the procedure—and laid down an inequitable principle in providing for possible intervention by the International Court of Justice.

13. The Commission should therefore reject the texts before it. Since it had already decided to deal with the codification of arbitration procedure (although in his view it was not essential to do so at the present juncture, least of all as a matter of first priority), the whole question of international arbitration should be studied afresh in the light of the generally accepted principles of international law relating to it, to which he had already referred.

14. Mr. SCELLE was sorry if he had failed to make it clear in his report that his draft was intended to be binding only on those States which accepted it, in the same way as, under Article 36, paragraph 2, of the Statute of the International Court of Justice, the Court's compulsory jurisdiction was binding only on those States which recognized it. The only aim of his draft was to make sure that States which entered into an undertaking to have recourse to arbitration accepted an effective procedure for carrying out the arbitration.

15. The CHAIRMAN felt that the Commission could not re-open the general debate on Mr. Scelle's report, the main lines of which it had already accepted. It must confine itself to considering his draft article by article, and he recalled that Article 1 had already been tentatively adopted with certain amendments, but that Mr. Yepes¹ and Mr. el-Khoury² had proposed additions to it. He therefore invited comments on the former's proposal, which was to add a sentence reading "The undertaking to have recourse to arbitration shall be made in writing".

16. Mr. SCELLE thought that the texts adopted by the Commission at its present session should be regarded as final, subject only to any editorial changes that might be made by the Standing Drafting Committee which, it seemed to be agreed, was to be set up.

17. As had been pointed out at the very close of the preceding meeting,³ the amendment proposed by Mr. Yepes related to the admissibility of evidence, and might therefore be considered to be out of place in a general introductory article. It might be usefully considered, however, in connexion with the provisions governing the arbitral tribunal's procedure. He would, however, accept the Commission's views as to where the amendment should be placed, but would merely suggest that, in order that there should be no doubt about the fact that it did not necessarily require a treaty, properly speaking, it should be re-worded as follows:

¹ See summary record of the 137th meeting, para. 56.

² *Ibid.*, paras. 41 and 42.

³ *Ibid.*, para. 57.

"The undertaking shall result from a written document."

18. Mr. YEPES accepted that wording.

19. Mr. HSU felt that the question raised by Mr. Yepes should be dealt with under the Law of Treaties, and that his amendment should not therefore be included in the draft convention on arbitral procedure.

20. Mr. LAUTERPACHT agreed. At present he could see no reason why arbitration agreements should necessarily be written instruments. The International Court of Justice had ruled, in a number of instances, that States could be bound otherwise than by written treaties. There might be reasons for that limitation imposed upon the method of bringing about the obligation to submit a dispute to arbitration, but the Commission should at any rate have time to consider Mr. Yepes' proposal further.

21. Mr. SCELLE said that he personally agreed with Mr. Lauterpacht, but that if a majority of the Commission agreed with Mr. Yepes that undertakings to have recourse to arbitration were so important that they should be committed to writing, the draft at present under consideration, and not the text the Commission was drawing up on the Law of Treaties, would be the proper place so to provide. An undertaking to have recourse to arbitration could arise from many instruments or agreements other than "formal treaties", at any rate in the narrow sense in which he interpreted those words.

22. Mr. el-KHOURI recalled that at the third session the Commission had agreed that the words "formal treaties" should be understood in that narrow sense. As he had indicated at the preceding meeting,⁴ he had accepted the amended text of article 1, without the addition proposed by Mr. Yepes, on the assumption that undertakings to have recourse to arbitration were so important that in practice States would never assume them verbally. If the Commission agreed that that was the only reasonable assumption, he thought Mr. Yepes' point would be adequately met.

23. Mr. LAUTERPACHT asked whether, in the event of the Security Council being seized of a dispute between two States and adopting a resolution recommending them to settle the dispute by arbitration, and in the event of the two States agreeing to that recommendation, the Security Council's resolution would constitute a written document under the terms of Mr. Yepes' amended proposal.

24. Mr. YEPES and Mr. SCELLE said that in such a case the Security Council's resolution would be regarded as such written document.

25. Mr. LAUTERPACHT said that in that event he had no further objection to Mr. Yepes' amended proposal.

⁴ *Ibid.*, para. 58.

*Mr. Yepes' proposal, as amended by Mr. Scelle, was adopted by 4 votes to none, with 4 abstentions.*⁵

26. Mr. el-KHOURI said that as the Commission was drafting a convention on arbitration procedure which would be submitted for approval to the General Assembly, it would be desirable to link it up with the relevant provisions of the Charter; for the Charter was far from silent on the subject of arbitration. Article 33 provided that: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution" by various alternative means, including arbitration, and that "The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means". Article 36 provided, *inter alia*, that the Security Council might recommend appropriate procedures or methods of adjustment for the pacific settlement of disputes of the nature referred to in Article 33. The action taken by the Security Council under Articles 33 and 36 clearly constituted decisions of the Security Council, and under Article 25 of the Charter the Members of the United Nations agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter". He therefore proposed that, in order to make the draft convention more complete and to contribute to the maintenance of international peace in accordance with the principles of the Charter, the following paragraph be added to Article 1:

"The resolutions of the Security Council taken under the second paragraph of Article 33 of the Charter, calling upon the parties to arbitrate, or under the first paragraph of Article 36, recommending arbitration for the pacific settlement of any dispute or situation likely to endanger the maintenance of international peace and security, constitute an obligation on the parties to have recourse to that method of adjustment."

27. Mr. FRANÇOIS said that Mr. el-Khourî's proposal was extremely interesting, but that, as a proposal that sought to make arbitration compulsory, it was quite outside the field of arbitration procedure and could not therefore be discussed at the present time.

28. Mr. SCELLE agreed. The proposal was neither more nor less than a proposal to amend the United Nations Charter, for he had read a number of commentaries on Articles 33 and 36 of the Charter, and none of them went so far as to attribute obligatory force to the Security Council's recommendations, as did Mr. el-Khourî in his interpretation of those articles.

⁵ Article 1, as tentatively adopted, read as follows:

"1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future. Whatever the instrument or agreement from which it results, the undertaking constitutes a legal obligation, which ought to be carried out in good faith.

"2. The undertaking shall result from a written document."

29. Mr. HSU agreed that the proposal could not be discussed in connexion with the item at present under consideration, though he was by no means sure that it was at variance with the existing text of the Charter.

30. Mr. ZOUREK did not think that it was the intention of the Charter that all decisions of the Security Council should be regarded as legally binding on States Members of the United Nations. Recommendations made under Articles 33 and 36 did not in his opinion fall within the category of binding decisions.

31. Mr. el-KHOURI could not agree that his proposal was in conflict with the text of the Charter, which in his view was perfectly clear. As his proposal had found no support, however, he would withdraw it, provided that it was mentioned in the summary records.

ARTICLE 2, PARAGRAPH 1⁶

32. Mr. SCELLE recalled that article 2 had already been tentatively adopted by the Commission in the form in which it appeared in the second preliminary draft (A/CN.4/46). The procedure proposed therein constituted no innovation. It often happened that the parties disagreed as to whether a dispute fell within the scope of a prior undertaking to have recourse to arbitration, or whether or not that undertaking still applied as a consequence of the *rebus sic stantibus* clause coming into operation. In order that the matter might not rest there, a whole series of international agreements concluded between the United States of America and other countries had provided that such disagreements should be submitted to the commissions of inquiry referred to in the Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes. In his view, it would be more appropriate for such differences to be referred to the highest judicial authority, namely, the International Court of Justice, although he proposed that, in order to avoid delay, the judgment be rendered by the Court's Chamber of Summary Procedure.

33. He would again point out to Mr. Kozhevnikov that the procedure laid down in article 2 would only be binding on those States which accepted the draft procedure under discussion when cast in the form of a convention.

⁶ Article 2 read as follows:

"If the parties disagree as to the existence of a dispute, or whether an existing dispute is within the scope of the obligation to have recourse to arbitration, this question may, in the absence of agreement between the parties upon another procedure for dealing with it, be brought before the Chamber of Summary Procedure of the International Court of Justice by a written application from either party and the judgment rendered by the Chamber of Summary Procedure shall be final and without appeal.

"The judgment given by the Chamber may also indicate the steps to be taken by the parties for the realization of the arbitration and for the protection of the interests of the parties pending a final arbitral award."

34. Mr. FRANÇOIS agreed with the provisions of article 2 in principle, seeing that they would be binding only on States which accepted the convention, but doubted the wisdom of providing that disagreements as to the arbitrability of a dispute should be brought before the International Court's Chamber of Summary Procedure, whose standing in the legal world was by no means so high as the Court's, and to which no case had in practice been referred. Moreover, all legal systems were represented in the Court itself, whereas that was not the case with the Chamber of Summary Procedure. Neither had the Court itself so many cases on its hands that it would be unable to deal with the few extra cases of disagreement as to the arbitrability of a dispute. He therefore proposed that in article 2 the International Court of Justice be specified instead of its Chamber of Summary Procedure. If the parties to a dispute so desired, the question of its arbitrability could of course be referred to the latter organ instead of to the International Court itself even if his suggestion were adopted, by virtue of the words "in the absence of agreement between the parties upon another procedure for dealing with it".

35. Mr. LAUTERPACHT said that he would not, at present, comment on article 2 as a whole, except to point out that it obviously constituted an important new departure, inasmuch as the normal procedure in the past had been for disagreements as to whether a dispute came within the scope of the obligation to have recourse to arbitration to be decided, at least in the first instance, by the arbitrators.

36. If the procedure proposed by Mr. Scelle was to be adopted, he would support the amendment suggested by Mr. François. For example, a decision whether the circumstances in which an undertaking to have recourse to arbitration had been entered into had altered so much as to make the undertaking no longer valid was obviously so important that it could properly only be taken by the International Court of Justice itself.

37. Mr. SCELLE said that Mr. Lauterpacht's substantive objection had already been raised when arbitral procedure had been under discussion at an earlier stage of the Commission's work; but the difficulty was that the issue of whether or not there was an undertaking to have recourse to arbitration could not be referred to a tribunal which did not yet exist. He had therefore proposed that the issue be submitted to a permanent tribunal so as to prevent a party that denied the validity of its undertaking from frustrating the arbitral procedure by refusing to conclude a *compromis* or to designate arbitrators.

38. It had been the practice of the United States Government to meet such contingencies by providing for the establishment of a commission of inquiry to decide the issue of arbitrability, and a clause to that effect had been inserted in over one hundred treaties. He had decided, however, that such a method might lead to delay. He had accordingly proposed that if there was disagreement between the parties as to the existence of a dispute the question should be referred to the

Chamber of Summary Procedure of the International Court of Justice.

39. Mr. François had argued that little confidence was felt in that Chamber, and that as the International Court was not overburdened with work it might itself deal with any such cases as might arise. It must be recognized, however, that if that procedure was followed much more work would fall to the International Court, since many States which had hitherto been unable to bring a case to arbitration would thereby be enabled to do so. But as he had no particularly strong views on the point he would be prepared to abide by the opinion of the majority.

40. Mr. YEPES supported Mr. François' amendment.

41. The CHAIRMAN put to the vote Mr. François' proposal that the words "the Chamber of Summary Procedure of" be deleted from the first paragraph of article 2.

Mr. François' proposal was adopted by 6 votes to 1.

42. Mr. KOZHEVNIKOV said the vote had been taken so rapidly that he had had no time to move the deletion of article 2 as a whole, which article, as he had already stated, appeared to him contrary to the whole principle of arbitration.

43. The CHAIRMAN observed that Mr. Kozhevnikov could vote against article 2 when it was put to the vote as a whole.

44. Mr. SCELLE said that Mr. Lauterpacht had indicated to him in private conversation that it was not entirely clear from the first paragraph of article 2 that recourse would only be had to the Court if no arbitral tribunal had been set up. He would have no objection if that point were met by the insertion of the words "prior to the establishment of an arbitral tribunal" after the word "If" at the beginning of the paragraph.

Mr. Scelles' amendment was adopted by 6 votes to none, with 2 abstentions.

ARTICLE 2, PARAGRAPH 2

45. Mr. FRANÇOIS considered that the words "pending a final arbitral award" went too far, since once a tribunal had been constituted it must be empowered to modify any interim measures indicated by the International Court of Justice.

46. He accordingly proposed that those words be replaced by the words "pending the constitution of the arbitral tribunal".

47. Mr. SCELLE agreed with Mr. François' views, but explained that he had prepared the text of the second paragraph in conformity with the decision taken by the Commission at its second session. Furthermore, Mr. Hudson had then argued that the provisional measures must remain in force so long as it was necessary to prevent one party from altering the material

situation, and he himself wondered whether a tribunal was competent to modify a decision of the Court.⁷

48. Mr. LAUTERPACHT seconded Mr. François' amendment.

Mr. François' amendment was adopted by 6 votes to none, with 2 abstentions.

49. Mr. LIANG (Secretary to the Commission) asked whether he was right in thinking that the phrase "pending a final arbitral award" referred both to the phrase "the realization of the arbitration" and to the phrase "for the protection of the interests of the parties". The English text did not appear clear on that point.

50. Mr. SCELLE replied that the Secretary's supposition was correct.

51. Mr. LIANG (Secretary to the Commission) asked for an explanation of the precise meaning of the words "*la réalisation de l'arbitrage*". He presumed that they referred merely to the carrying-out of the process of arbitration.

52. Mr. LAUTERPACHT was also uncertain whether the phrase referred only to bringing about arbitration proceedings, and whether it did not include giving effect to the final arbitral award.

53. Mr. SCELLE said that the words in question were intended to refer to arbitral proceedings up to the moment when the final award was made. In order to make that clear, he would be ready to substitute for that phrase the words "the completion of the arbitration proceedings".

54. Mr. LAUTERPACHT realized that article 41 of the Statute of the International Court of Justice was the source of the word "indicate", but it was well known that that term had given rise to controversy, since it had been interpreted as meaning that provisional measures laid down by the Court were not obligatory.

55. Mr. Hudson, in the second edition of his book "The Permanent Court of International Justice",⁸ had changed his previous opinion on the subject and expressed the view that there was a legal obligation on parties to comply with the measures indicated by that Court.

56. In view of the element of uncertainty to which the word "indicate" had given rise, perhaps the special rapporteur might consider an alternative for it.

57. Mr. KERNO (Assistant Secretary-General) said that Mr. Scelle had used the word *prévoir* in the French text of article 2, and not the word *indiquer* as used in the French text of the Statute of the International Court. He presumed that that change had been made deliberately.

58. Mr. SCELLE confirmed that he had used the word *prévoir* in the sense that the measures decided upon by the Court were obligatory, but he would be prepared to make his meaning clearer by substituting the word "*prescrire*", which should be rendered by the word "prescribe" in the English text.

59. The CHAIRMAN said there seemed to be general agreement that the second paragraph be amended to read as follows :

"The judgment given by the Court may also prescribe the measures to be taken by the parties for the completion of the arbitration proceedings and for the protection of the interests of the parties, pending the constitution of the arbitral tribunal."

60. He suggested that that text be adopted, subject to review by the Standing Drafting Committee to be set up.

It was so agreed.

Article 2 as amended, was adopted by 6 votes to 2.⁹

61. Mr. ZOUREK said that article 2 embodied a procedure entirely different form that laid down in the 1907 Hague Convention for the Pacific Settlement of International Disputes, which provided for an obligatory *compromis*. He would like to know what the relation between the two systems would be.

62. The CHAIRMAN observed that the purpose of article 2 had been fully discussed by the Commission in the course of the latter's examination of the special rapporteur's first report (A/CN.4/18), after which the present text had been prepared by Mr. Scelle. He did not consider that the whole question could now be re-opened.

63. Mr. YEPES, raising the question of method, suggested that it would be more logical for the Commission to take up article 12 before articles 3 to 11, since in most cases the *compromis* provided for the constitution of the tribunal.

64. Mr. SCELLE regretted that Mr. Yepes should have made that suggestion, from which it appeared that one of the main principles upon which the Second Preliminary Draft on Arbitration Procedure was based, namely, that arbitration should take place even if there was no *compromis* agreed upon by the parties, had not been fully understood. As he had already had occasion

⁹ Article 2, as tentatively adopted, read as follows :

"1. If, prior to the establishment of an arbitral tribunal, the parties disagree as to the existence of a dispute, or whether an existing dispute is within the scope of the obligation to have recourse to arbitration, this question may, in the absence of agreement between the parties upon another procedure for dealing with it, be brought before the International Court of Justice by a written application from either party and the judgment rendered by the Court shall be final and without appeal.

"2. The judgment given by the Court may also prescribe the measures to be taken by the parties for the completion of the arbitration proceedings and for the protection of the interests of the parties, pending the constitution of the arbitral tribunal."

⁷ See summary record of the 70th meeting, para. 49. *Yearbook of the International Law Commission, 1950*, p. 245.

⁸ *The Permanent Court of International Justice 1920—1942* (New York, The McMillan Company, 1943).

to emphasize, it was a fundamental error to suppose that the undertaking to have recourse to arbitration always had its origin in the *compromis*. Article 3 of his draft made the immediate constitution of a tribunal obligatory. Without such a provision no progress whatsoever could be made, since a recalcitrant party might refuse to designate arbitrators. If the constitution of a tribunal were imposed upon such a party it would be for that tribunal to prepare the *compromis* in the face of the opposition of one of the parties. His proposal in no way implied a violation of sovereignty, since it was intended to form part of a convention to which any State would be free to adhere or not as it chose. However, once a State had entered into such an obligation it would have to carry it out in good faith.

65. What he was proposing was no innovation, and was consonant with article 23 of the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly on 28 April 1949.¹⁰ According to that article, if agreement could not be reached on the constitution of the arbitral tribunal within a period of three months the necessary appointments were to be made by the President of the International Court of Justice. He himself had, at the 137th meeting of the Commission, referred to the arbitration procedure of the International Chamber of Commerce¹¹ precisely because that procedure laid down that even if agreement were not reached on a *compromis* arbitration must still take place.

66. He could not stress too strongly the importance of preventing States from frustrating arbitral proceedings and evading their legal obligations by invoking procedural arguments.

67. Mr. YEPES entirely agreed with Mr. Scelle's views. His proposal merely related to the Commission's method of work.

68. The CHAIRMAN suggested that the question of the order of the articles should be left to the Standing Drafting Committee which it was proposed to set up. In the meantime, it might be preferable to follow the order in the special rapporteur's text.

It was so agreed.

The meeting rose at 6.5 p.m.

¹⁰ *United Nations Treaty Series*, vol. 71, p. 115.

¹¹ See summary record of the 137th meeting, para. 10.

139th MEETING

Tuesday, 10 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, 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) (*continued*)

1. The CHAIRMAN, after welcoming Mr. Gilberto Amado, Second Vice-Chairman of the Commission, who had been unable to attend the earlier meetings of the session, invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitration Procedure contained in the special rapporteur's second report (annex to document A/CN.4/46).

ARTICLE 3¹

2. Mr. SCELLE recalled that in his proposed preliminary draft text he had not specified a period within which the tribunal had necessarily to be constituted, but had merely provided for "a reasonable time"² (A/CN.4/18, p. 93). However, as certain members of the Commission had felt that that expression was too vague, he had now specified a period of six months.

3. Mr. LIANG (Secretary to the Commission) said that the words "within six months after recognition by the parties . . . of the arbitrable nature of the dispute" raised the question whether some special act or procedure of recognition was envisaged, for if not it might sometimes be difficult to determine exactly from what date the period would start to run. If some special act or procedure of recognition was in fact envisaged, should it not be provided for expressly in the text?

4. Mr. SCELLE said that the period of six months would start to run from the time when the parties agreed

¹ Article 3 read as follows:

"If the dispute is of the kind referred to in the undertaking to resort to arbitration, the parties shall, within six months after recognition by the parties or by the International Court of Justice of the arbitrable nature of the dispute, constitute an arbitral tribunal or appoint a sole arbitrator by mutual agreement. This may be done either by means of a clause to that effect in the arbitral *compromis*, if the parties agree to accept the various stipulations thereof, or in a special conventional instrument relating solely to the constitution of the tribunal. The tribunal shall, in any case, be constituted within the period of six months specified above."

² A/CN.4/18, p. 93 (mimeographed English text). See *Yearbook of the International Law Commission, 1950*, vol. II, p. 148, for printed French text.

to resort to arbitration or from the time when the International Court of Justice enjoined them to do so. The text was clear.

5. Mr. el-KHOURI thought that a delay of six months was too long. Article 23 of the Revised General Act for the Pacific Settlement of International Disputes provided for a period of three months only.³ The article under consideration would present any party which wished to avoid arbitration altogether, or to avoid it for as long as possible, with an unfair advantage if the period allowed for the constitution of the tribunal was as long as six months. In his view, the question should be left to the parties; if one party felt that the other was unduly delaying constitution of the tribunal, it should be able to invoke the procedure provided for in article 4 without waiting six months. The parties should begin taking steps to constitute the tribunal immediately the arbitrability of the dispute had been established.

6. Mr. SCELLE agreed with Mr. el-KHOURI that there were disadvantages in fixing a time-limit of six months. He himself could see no objection to the term "within a reasonable time", it being understood that it would be for the International Court of Justice to determine whether such reasonable time had expired.

7. Mr. AMADO and Mr. YEPES felt that the phrase "within a reasonable time" was too vague, and that a time-limit must be specified, the latter adding, however, that six months was too long.

8. Mr. LIANG (Secretary to the Commission) suggested that if it were agreed to retain mention of a specific time-limit, the difficulty to which he had referred might be alleviated if the phrase were amended to read "within . . . months after the arbitrable nature of the dispute has been agreed upon by the parties or recognized by the International Court of Justice".

9. He wondered, however, whether article 3 could not be simplified if it were linked only with article 2, which dealt with cases where there was disagreement between the parties as to the arbitrable nature of a dispute, and not with article 1 as well. For if there was no disagreement there would presumably be no difficulties concerning the constitution, as distinct from the composition, of the tribunal.

10. Mr. FRANÇOIS agreed that a definite time-limit should be prescribed. Otherwise there would be a danger that the more diligent party might invoke the provisions of article 4 and thus seize the International Court of Justice of the matter before the parties had made every effort to agree on the constitution of a tribunal.

11. He pointed out, moreover, that the last sentence of the present text merely repeated what went before, and that the phrase "if the parties agree to accept the various stipulations thereof", after the words "the arbitral *compromis*", also appeared superfluous.

12. Mr. SCELLE agreed to the deletion of that phrase and of the last sentence of article 3.

13. Mr. LAUTERPACHT thought that the first phrase, reading "If the dispute is of the kind referred to in the undertaking to resort to arbitration", was also unnecessary. He agreed that the time-limit for the constitution of the tribunal should be specified, but saw no reason to depart from that laid down in article 23 of the Revised General Act for the Pacific Settlement of International Disputes, namely, three months. He was chiefly concerned, however, about the suggestion that it should be necessary for the parties expressly to recognize that the dispute came within the scope of the obligation to have recourse to arbitration. In that respect, he agreed with the point made by the Secretary. He also had doubts regarding the expression "arbitrable nature of the dispute". The crux of the matter was whether the dispute came within the scope of the obligation to have recourse to arbitration, an expression used in article 2, already adopted by the Commission.

14. In the light of those observations and the two proposals made by Mr. François, he accordingly submitted an alternative text to replace the whole of article 3.

15. The CHAIRMAN suggested that, before taking up Mr. Lauterpacht's proposal as a whole, the Commission should first settle the question of the time-limit for the constitution of the tribunal.

16. Mr. SCELLE said that it was most desirable that undue delay in the constitution of the tribunal should be avoided. The present text, taken in conjunction with article 4, would permit a delay of nine months, which, in his opinion, would be much too long for the great majority of cases. But if the time-limit were to be specified, it would obviously have to cover those few cases where comparatively lengthy delay was reasonable. For that reason he would prefer the phrase "within a reasonable time"; after all, one of the outstanding advantages of arbitration was its flexibility. It was, however, for the Commission to decide whether it wished to specify the period.

The Commission decided by 6 votes to 4 that the time-limit for the constitution of the tribunal should be specified.

After further discussion, the Commission decided by 6 votes to 1, with 3 abstentions, that the time-limit for the constitution of the tribunal should be three months.

17. Mr. ZOUREK, after recalling that Mr. Lauterpacht had suggested the deletion of the first phrase from article 3, said that, in his opinion, even if that phrase was not perhaps absolutely necessary, it was extremely useful, inasmuch as it made it clear that the arbitral procedure laid down only covered cases where there was a prior undertaking to have recourse to arbitration.

18. Mr. YEPES agreed that the phrase enhanced the intelligibility of the text.

19. Mr. LAUTERPACHT thought that it did rather the opposite, in that it seemed to add a conditional element where in fact there was none.

³ *United Nations Treaty Series*, vol. 71, p. 115.

20. Mr. AMADO agreed with the view expressed by Mr. Lauterpacht.

21. Mr. KOZHEVNIKOV proposed the deletion of the words "or by the International Court of Justice" from article 3.

22. The CHAIRMAN thought that that proposal might be discussed in connexion with Mr. Lauterpacht's amendment.

23. Mr. ZOUREK requested that further discussion of article 3 be deferred until Mr. Lauterpacht's proposal had been translated and distributed in English and French.

It was so agreed.

ARTICLE 4⁴

24. Mr. YEPES asked whether the last sentence of article 4, which seemed to him to contain a self-evident affirmation, was necessary.

25. Mr. SCELLE said that he was in favour of emphasizing the binding nature of arbitral awards.

26. Mr. KERNO (Assistant Secretary-General) said that, although he had sympathy with Mr. Scelle's pre-occupation, he wondered whether it was necessary to emphasize everywhere the obligatory character of arbitral procedure.

27. Mr. el-KHOURI considered that the second sentence of article 4 should be deleted. Once a matter had been referred to an arbitral tribunal, there would be no need for a further delay of three months.

28. Mr. SCELLE said that he would prefer that that sentence be retained, since it gave a certain latitude to the parties. He had gained the impression that, when discussing his first report, the Commission had favoured such a provision. The trend now appeared to be towards greater stringency.

29. Mr. LIANG (Secretary to the Commission) suggested that it would be preferable to incorporate in the article the whole of article 23 of the Revised General Act for the Pacific Settlement of International Disputes, rather than to make a mere reference to it.

30. Mr. HSU agreed with the Secretary.

31. The CHAIRMAN pointed out that, if the Secretary's suggestion was adopted, the article would

begin with the words "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".

32. Mr. KOZHEVNIKOV proposed the substitution of the word "they" for the words "each of them", and the insertion of the words "by mutual agreement" after the word "right", in article 4.

33. Mr. SCELLE said that Mr. Kozhevnikov's amendment was quite unacceptable to him, as it ran counter to the whole spirit of article 4, which was designed to provide a method of obliging a recalcitrant party to accept arbitration.

34. Mr. YEPES said that in the light of the foregoing discussion he would formally move the deletion of the last sentence of article 4.

35. Mr. SCELLE said that if article 23 of the Revised General Act were embodied *in toto* in the draft it would replace article 4, and he would have no objection to it.

36. Mr. LAUTERPACHT said that he too was in favour of the substitution of the text of article 23 of the Revised General Act for article 4. But if that was done, the former would have to be slightly amended so as to refer to the second of the two contingencies envisaged in article 4. His point would be met if the words "or of the decision of the International Court of Justice taken in conformity with article 2 (1) above," were inserted after the words "an arbitral tribunal" in paragraph 1 of article 23 of the Revised General Act.

37. Mr. ZOUREK said that there were methods of proceeding, when a difference arose between the parties, other than that laid down in article 23 of the Revised General Act. He had in mind, for example, that contained in article 45 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. What would be the position of signatory States to such instruments vis-à-vis the proposed convention? Which of the systems would be binding?

38. Mr. SCELLE said that Mr. Zourek had raised a very pertinent point, but one which he (Mr. Scelle) believed was covered by the second sentence of article 3 in his own draft. He had rejected the procedure laid down in the 1907 Hague Convention as being more complicated and lengthy than that prescribed by the Revised General Act.

39. Mr. YEPES proposed that the text of paragraph 1 of article 23 of the Revised General Act be amended, with a view to its inclusion in the draft convention, to read as follows:

"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."

40. The CHAIRMAN ruled that further discussion on

⁴ Article 4 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 procedure prescribed in article 23 of the General Act on arbitration. The period of three months prescribed in paragraph 3 of the said article shall be added to the period of six months prescribed in article 3 above. The tribunal, when thus constituted, shall hear the case and its judgment shall be binding."

article 4 be deferred pending the circulation of Mr. Yepes' amendment in writing in both English and French.

ARTICLE 3 (resumed from above)

41. The CHAIRMAN invited the Commission to resume its consideration of Mr. Lauterpacht's amendment to article 3, which was now available in both working languages. The text, which would replace the existing one in its entirety, read as follows :

"The Parties shall within three months of the request made for the constitution of the tribunal or the decision of the International Court of Justice in conformity with Article 2, paragraph 1, set up an arbitral tribunal or appoint a sole arbitrator by mutual agreement. This may be done either in the *compromis* agreed by the parties or in a special instrument."

42. Mr. SCELLE pointed out that the French text, unlike the English version, called for revision, since the words "*soit par le compromis adopté par elles*" suggested that a *compromis* already existed.

43. Mr. LAUTERPACHT asked whether the sense would be made clearer if the words "to be" were inserted after the words "in the *compromis*" in the last sentence.

44. Mr. SCELLE agreed that if that amendment were translated by the word "*éventuel*" or the words "*à intervenir*", his objection would be met.

45. Mr. LAUTERPACHT said that the text might be made even clearer if reference were made to "*a compromis*" instead of "*the compromis*".

46. Mr. AMADO said that such a substitution was totally unacceptable, since what was in question was an arbitral *compromis* and no other. The indefinite article would be quite inappropriate.

47. Mr. SCELLE said that he would agree to the French text reading: "*Elles pourront le faire soit dans le compromis à intervenir soit dans un instrument conventionnel spécial.*"

48. Mr. AMADO could not support that text.

49. Mr. SCELLE proposed, in order to meet Mr. Amado's views, that the text should read: "*Elles pourront le faire soit dans le compromis soit dans un instrument conventionnel spécial.*"

50. Mr. LAUTERPACHT supported Mr. Scelle's final version, which would be rendered in English "This may be done either in the *compromis* or in a special instrument."

Mr. Scelle's final version was accepted.

Mr. Lauterpacht's amendment, as amended by Mr. Scelle's proposal, was adopted by 7 votes to none, with 2 abstentions.

ARTICLE 5⁶

51. Mr. FRANÇOIS did not consider that article 5 had been drafted very felicitously.

52. Mr. AMADO asked whether the words "the parties may act in whatever manner they deem most appropriate" had any real meaning.

53. Mr. SCELLE replied that the phrase constituted recognition of the fact that the parties were free to designate the arbitrators, which was the core of arbitral procedure. His concern had been to be as liberal as possible in that respect, in order not to depart too far from tradition.

54. Article 5 was in the nature of a recommendation as to how the parties were to proceed. It bore strong resemblance to a number of provisions in the 1907 Hague Convention for the Pacific Settlement of International Disputes: provisions which were optional, and in no way obligatory. Of course, the whole article could be dropped as being a self-evident statement. The same argument might, however, have been adduced against numerous articles of The Hague Convention.

55. Mr. LAUTERPACHT asked what organ or organs the special rapporteur had in mind in referring to "an existing judicial body". Was it national or international? If the latter, presumably it could only be the International Court of Justice.

56. Mr. SCELLE said that he had both types in mind. For example, the French *Cour de cassation* and the Senate of Hamburg had both acted as arbitrators.

57. Mr. LAUTERPACHT said that, in the light of Mr. Scelle's explanation, he must declare that the phrase raised a wider issue than had at first occurred to him. He did not know of any case in which the International Court of Justice had been called upon to act as arbitrator. If Mr. Scelle had that possibility in mind, it would be difficult for him to accept the proposal.

58. Mr. SCELLE recalled that it was contended that the Permanent Court of International Justice in effect consented to act as arbitrator when it decided a case *ex aequo et bono*, if the parties agreed thereto.

59. Mr. LAUTERPACHT said that it would be useful if the Commission could obtain more information on whether the Permanent Court of International Justice had acted as an arbitrator or had merely been asked to do so. As he saw it, the International Court of Justice could only act in accordance with its Statute, namely, as a court applying the rules of law or deciding a case *ex aequo et bono*, in which eventuality it would not be acting as an arbitrator. Both judicial settlement and arbitration were based on the application of rules of law.

⁶ Article 5 read as follows :

"When the arbitrator or members of the arbitral tribunal are appointed by mutual agreement, the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator, to an existing judicial body or to a tribunal constituted as they think fit."

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.

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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 Disputes¹ 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 analogous 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

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 6³

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-Khoury 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 or 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 7⁴

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.