Document:-

A/CN.4/L.33/Add.2

Articles Tentatively Adopted on 16, 17 and 18 June 1952 - incorporated in the summary records of the 143rd to 145th meeting

Topic:

Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-

1952, vol. I

unconvinced, since he doubted whether an outside body was capable of judging the interests of two States.

84. Mr. SCELLE asked whether the purpose of arbitration was to defend the interests of the parties or to determine on the basis of the rules of law whether or not a case was well founded. Once a State had given its consent to resort to arbitration that decision should be irrevocable. He confessed that he was unable to understand very clearly Mr. Amado's conception of arbitration, which seemed to him to come perilously close to mediation.

The meeting rose at 1.10 p.m.

143rd MEETING

Monday, 16 June 1952, at 2.45 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. 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 invited members to continue their consideration of the Second Preliminary Draft on Arbitration Procedure submitted by the special rapporteur (Annex to document A/CN.4/46).

2. He recalled that at the end of the preceding meeting the Commission had been considering the new text proposed by the special rapporteur for article 9.[1] The Commission had adopted the first paragraph of that text. He called for comments on the second.

[1] See summary record of the 142nd meeting, para. 67.

ARTICLE 9 (*continued*)

Second paragraph

3. Mr. HUDSON said that the second paragraph seemed to envisage the very improbable contingency of an arbitrator accepting appointment and then finding that he was unable to participate in the work of the tribunal because he had previous cognizance of the case. He wondered whether such a provision, which was appropriate for a standing organ with a fixed membership, such as the International Court of Justice, was really necessary for an *ad hoc* tribunal constituted to deal with a specific case.

4. Furthermore, certain other points needed elucidation. For example, would the member in question take part in the decision whether he must be replaced? He also suggested that the word " hearing " should be replaced by the word " case ".

5. Mr. LAUTERPACHT pointed out that an arbitral tribunal might be appointed in advance to deal with a series of cases. When the appointments were made it would not be known what cases it would have to deal with.

6. Mr. KOZHEVNIKOV said that the latter part of the second paragraph seemed to him obscure. What, for example, was the doubt likely to arise, and what was the procedure to be followed if a tribunal decided that a certain member had to be replaced? He thought that the last phrase, " it may decide to require his replacement ", might be improved by making it read " it may decide on his replacement ".

7. Mr. KERNO (Assistant Secretary-General) suggested that most of the comments so far made were more or less of a drafting character and might well be referred to the Standing Drafting Committee when it was set up. The Commission had only to decide in principle whether or not a provision should be included in the draft, dealing with cases where a member of a tribunal ceased to fulfil the required conditions.

8. Mr. SCELLE agreed with the Assistant Secretary-General.

9. Mr. YEPES proposed that the words " on the unanimous vote of the other members " be inserted after the words " it may decide ", so as to make it perfectly clear how the decision on replacement was to be reached.

10. Mr. FRANÇOIS asked whether it was necessary to stipulate unanimity.

11. Mr. YEPES replied that disqualification of an arbitrator on the grounds that he had previous cognizance of the case was a very serious matter on which a decision could not be reached by a simple majority. His amendment was modelled on paragraph 1 of Article 18 of the Statute of the International Court of Justice.

Mr. Yepes' amendment was adopted by 5 votes to none, with 4 abstentions.

12. The CHAIRMAN put to the vote the substance of article 9, second paragraph, subject to review by the Standing Drafting Committee to be set up.

The substance of the second paragraph was adopted by 7 votes to none, with 3 abstentions.

Third paragraph

13. Mr. HUDSON considered that the provisions of the third paragraph conflicted with those of the first paragraph, which stipulated that once a hearing had begun an arbitrator could not withdraw, save in exceptional cases and with the consent of the tribunal. If the intention of the third paragraph was that if an arbitrator withdrew the other members could continue the proceedings, it should be so stated. As it stood, the text appeared to him to be far too laconic, and it might well be improved if drafted on the lines of a parallel provision in the *compromis* in the Lena Goldfields case. He would also like to suggest the deletion of the word " constituted " from before the word " tribunal ".

14. Mr. SCELLE agreed with Mr. Hudson that the word " constituted " served no useful purpose, and might accordingly be deleted.

15. The intention of the third paragraph was clear — namely, that even if one member of a tribunal were withdrawn or died, the remaining members could proceed with the case if they felt able to do so. For example, even with a tribunal of three, two members might be able to complete a case and make an award.

It was agreed that the word " constituted " should be deleted from the third paragraph.

16. The CHAIRMAN asked whether Mr. Scelle would agree to the substitution of the words " the remaining members " for the words " the latter ".

17. Mr. SCELLE replied in the affirmative.

18. Mr. HUDSON suggested that, in the interests of clarity, and in order to eliminate the impression that some future authorization would be necessary, the words " the remaining members shall be authorized " should be replaced by the words " the remaining memmers at the request of one of the parties shall have power ".

19. Mr. LAUTERPACHT asked whether that amendment implied that the remaining members would be *bound* to continue proceedings, or *might* continue them.

20. Mr. KERNO (Assistant Secretary-General) thought that the second alternative was the correct interpretation.

21. Mr. SCELLE said that he could accept the words " shall have power ", but not the words " at the request of one of the parties ", since he firmly held the view that the tribunal should be master of its own procedure and that it should be able to continue its conduct of a case, even if neither party was in favour of its so doing.

22. Mr. HUDSON asked what would happen if both parties refused to plead their case before the tribunal.

23. Mr. SCELLE said that if that happened before the proceedings started the case would, of course, have to be dropped, but the provisions of the third paragraph came into play once the proceedings had begun, and he was firmly convinced that nothing should be allowed to interfere with them. He was in favour of making international tribunals as similar as possible to tribunals in municipal law. As. Mr. Hudson would have noticed, the question of default was dealt with in article 28.

24. Mr. HUDSON said that, pushed to its logical conclusion, Mr. Scelle's view would deprive the parties of any control over the situation ; he doubted whether States would accept that.

25. Mr. el-KHOURI said that, as he had indicated at the preceding meeting, nothing short of all members of the tribunal as appointed by the parties or by the subsidiary procedure could be considered as a quorum. If one or more members withdrew, the tribunal could not continue the proceedings without the consent of the parties. He could not therefore agree that the tribunal should be master of its own procedure to the extent contemplated by Mr. Scelle, since it was the very essence of arbitration that a dispute should be settled by judges of the parties' own choice.

26. Mr. LAUTERPACHT said that he would vote in favour of the amendment for the insertion in the third paragraph of the words " at the request of one of the parties ".

27. He doubted whether it was necessary for the Commission to devote any time to the consideration of hypothetical situations, such as that in which neither party wished to plead before the tribunal. Article 53 of the Statute of the International Court of Justice, rightly in his opinion, made no provision for such a contingency.

28. Mr. KOZHEVNIKOV considered that Mr. el-Khouri's views merited full consideration, since arbitral proceedings must be based on the consent of the parties. He therefore proposed that the words " by agreement of the parties " be inserted after the words " shall have power ", in Mr. Hudson's amendment.

29. Mr. ZOUREK observed that Mr. Kozhevnikov's amendment was intended to bring out the essential fact that arbitration must proceed on the basis of agreement between the parties.

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

30. Mr. FRANÇOIS proposed the deletion of the words " without the consent of the constituted tribunal ".

Mr. François' amendment was adopted by 7 votes to 2, with 2 abstentions.

31. Mr. HUDSON said that if the provisions of the third paragraph were governed by the opening words of the first paragraph, namely : " Once the hearing has begun ", that should be made explicit. It should also be made clear whether the word " withdrawal " was intended to cover the additional contingencies of the

death of a member of a tribunal, or refusal to attend proceedings without withdrawal.

32. Mr. KERNO (Assistant Secretary-General) pointed out that the case of the death of an arbitrator was covered by the provisions of article 8. He therefore suggested that those of article 9 should be confined to withdrawal.

33. Mr. AMADO said that he had abstained from voting on the amendment to the third paragraph because he considered that an arbitral tribunal reduced to two members ceased to be a tribunal. To allow it to pursue the case would be to undermine the whole principle of arbitration.

The third paragraph was adopted as amended.

Fourth paragraph

34. Mr. SCELLE proposed the deletion of the fourth paragraph, which had become redundant in view of the amendments adopted to the preceding paragraph. It was now implicit in that text that if the tribunal could not continue to function after the withdrawal of a member it could request that he be replaced.

Mr. Scelle's proposal was adopted.[2]

ARTICLE 12 [3]

35. The CHAIRMAN suggested that as article 12 enumerated the constituent elements of the *compromis,* those elements should be taken up one by one.

It was so agreed.

36. Mr. SCELLE said that, as he had already had occasion to state, one of the principles underlying his thesis was that the obligation to arbitrate did not always have its source in the *compromis.* That obligation was accordingly binding upon the parties even though what he might describe as the procedural *compromis* did not yet exist. He had accordingly drawn a sharp distinction between the obligation to arbitrate and the compromis itself.

37. He realized that the latter part of the first paragraph of article 12 raised a doctrinal difficulty, and that his view might not command general acceptance in the Commission. He therefore appealed to members for assistance in re-drafting the article if it were found unsatisfactory. The difficulty originated in a divergence of view on the two concepts, that of adjudicating *ex aequo et bono* and that of acting as *amiable compositeur.* Some authorities regarded them as one and the same thing, others — including himself — considered that the former gave the judge more latitude in interpreting the rules of law, and enabled him to act *praeter legem.* He thought that any judicial settlement might on occasion involve departure to some extent from the original intent of the law on which it was based. It could not but be in some respect interpretive. For example, the provisions on liability in the French civil code were now having to be interpreted in quite a different sense from that originally intended, in order to make them applicable to modern developments which had not been envisaged when the code had first been drafted. In most cases, jurisprudence represented an accumulation of judgments, and it was true to say that a judge was almost always something of a legislator. A judgment was therefore not invariably made on the strict interpretation of rules of law, but in accordance with equity.

38. Mr. YEPES said that Mr. Scelle's statement had confirmed him in his view that the clauses relating to the *compromis* should have been considered before those relating to the composition and immutability of the tribunal, since the former were essential to the whole draft. The *compromis* was the keystone of arbitral procedure, and was in the nature of an international treaty which must be negotiated by plenipotentiaries with all the attendant formalities. In his view, the *compromis* was the most important source of the obligation to arbitrate, and, indeed, was the way in which that obligation was given concrete form. It was vital therefore to surround it with all the necessary safeguards.

39. He was unable to understand why the special rapporteur should have divided the provisions of the *compromis* into two parts, the obligatory and the optional. He had accordingly prepared an alternative text for articles 12 and 13, making all the provisions obligatory. He attached particular importance to paragraph (*b*) in his text, according to which the subject of the dispute must be defined precisely and as clearly as clearly as possible ; to paragraph (*e*) concerning the quorum ; and to paragraph (*g*), stipulating how the tribunal was to adjudicate.

40. Mr. LAUTERPACHT said that, as he had not

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

" 1. Once the hearing has begun, an arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the tribunal.

" 2. If, for any reason such as previous cognizance of the case, a member of the tribunal considers that he cannot take part in the proceedings, or if any doubt arises in this connexion within the tribunal, it may decide, on the unanimous vote of the other members, to require his replacement.

" 3. Should the withdrawal take place, the remaining members, upon the request of one of the parties, shall have power to continue the proceedings and render the award."

[3] Article 12 read as follows :

" The parties having recourse to arbitration shall sign a *compromis* in which they shall determine : the subject of the dispute ; the choice of judges and the constitution of the tribunal, if they have not previously done so, or if the tribunal has not already been constituted in accordance with the foregoing provisions ; the rules of procedure they may think fit to agree upon ; such powers as may be conferred on the tribunal concerning the rules of law applicable ; the power to adjudicate *ex aequo et bono,* and, if necessary, the power to act as *amiable compositeur.* Failing express provisions on these points, the arbitral trbiunal may adjudicate *ex aequo et bono* if the positive law is silent or obscure, but may not act as *amiable compositeur,* except with the express consent of the parties.

" The *compromis* shall also decide where the tribunal shall meet and the languages to be used."

had time to study Mr. Yepes' proposal, he would confine himself to commenting on Mr. Scelle's draft and the statement he had just made. He was relieved to hear that Mr. Scelle did not regard himself as irrevocably committed to article 12 of his draft, since he (Mr. Lauterpacht) was in fundamental disagreement with it, first, because it ran counter to the main trend of that draft, which was to remove arbitration from the influence of polities and make it as far as possible a purely legal process ; and secondly, because it also ran counter to the general trend regarding arbitration over the past 150 years, during which time arbitration had tended from political to legal settlement, distinguished from the judicial process provided for in the Statute of the International Court of Justice only in that an *ad hoc* tribunal was substituted for a permanently established forum.

41. Mr. Scelle did not appear to have made up his mind whether decisions *ex aequo et bono* were juridical decisions. He had stated that judges were entitled to adjudicate, and did in fact adjudicate, *ex aequo et bono.* If that were so, it was surely unnecessary to include in the *compromis* a special provision giving the tribunal powers it would already possess under ordinary rules of law. In his opinion, however, it was axiomatic that an arbitral tribunal, whose task it was to settle the dispute on the basis of the law, should not normally be able to adjudicate except on that basis. For the arbitral tribunal, therefore, the question of the law being silent did not arise ; in other words, there was no *non liquet.* It was true that the General Act of 1928 had provided for adjudication *ex aequo et bono* by an arbitral tribunal in cases where there was no rule of law applicable. However, it was fundamental that there was always a rule — or principle — of law enabling the judge to settle a dispute. The General Act was no unimpeachable authority. The unsatisfactory and self-contradictory nature of that instrument was shown by the fact that it stated that disputes which could not be settled on the basis of the law should be referred to conciliation, and then proceeded to provide that cases where conciliation had failed, in other words, cases which *ex hypothesi* could not be settled on the basis of the law, should be dealt with by arbitration, in other words, again on the basis of the law.

42. Mr. Scelle's draft also gave the parties power to consent to the arbitral tribunal acting as *amiable compositeur.* If the parties agreed that the dispute should be settled in that way, on the basis of political considerations, they had better refer it to a conciliation commission ; but a settlement on that basis would be alien to the whole character of international arbitration. It would certainly be inconsistent with the Statute of the International Court of Justice to request it to act in that way.

43. In his view, therefore, it would be sufficient to state, but to state explicitly, that, failing express provisions in the *compromis* on the law applicable, the provisions of Article 38 of the Statute of the International Court of Justice should apply.

44. The CHAIRMAN suggested that further consideration of both article 12 and article 13 should be deferred until members of the Commission had had an opportunity of studying the amendment proposed by Mr. Yepes.

It was so agreed.

ARTICLE 14 [4]

45. The CHAIRMAN pointed out that article 14, dealing with the so-called obligatory *compromis,* would not be affected by the decision taken on articles 12 and 13.

46. Mr. HUDSON said that in practice an arbitral tribunal, properly speaking, was never constituted before the *compromis* was drawn up. The draft convention should not include provisions covering a situation that would never arise, and he consequently proposed that the second, third and fourth sentences of article 14 be deleted.

47. Mr. LAUTERPACHT suggested that in the first sentence the words " a suitable person, a Commission or one of its courts of justice " be replaced by the words " a person or body of persons ". He hoped that the second sentence would be retained, in case such person or persons should fail to draft the *compromis,* but he thought that the words " the breakdown of proceedings " should be clarified.

48. Mr. SCELLE said that the whole basis of his draft was again being called into question. As had been correctly stated, that draft was based on a break with existing practice. If the parties were not in agreement on the contents of the *compromis,* it was essential to the purpose of his draft that the tribunal should itself draw up the *compromis* whenever the obligation to have recourse to arbitration resulted, not from the *compromis* but from a prior undertaking. The *compromis* itself, which was the subject of articles 12-14 of his draft, was only of secondary, procedural importance. At present, cases occurred where the contents of the compromis actually prevented the tribunal from rendering an award. It would surely be ridiculous if, in an ordinary court of law, the parties, and not the court, were the masters of procedure. For that reason he had

[4] Article 14 read as follows :

" If the parties cannot agree on the contents of the *compromis* or on one of its stipulations, they may request the good offices of a third Power which shall appoint a suitable person, a commission, or one of its courts of justice to draw up the *compromis.* In the event of disagreement between the parties as to the choice of this third Power or of the breakdown of proceedings, the arbitral tribunal shall itself draw up the *compromis,* if possible in agreement with the agents of the parties, but in any case within a reasonable time-limit which it shall itself determine. Should the tribunal be constituted before the *compromis* has been drawn up, the parties may entrust the preparation of that instrument to the tribunal.

" At the expiry of the time-limit, fixed by the tribunal for the drawing up of the *compromis,* either party may refer the matter to the tribunal by an application."

proposed that the tribunal should be bound by the procedural provisions of the *compromis* only in so far as they proved compatible with the proper exercise of the arbitral function. Only too often the *compromis* was drafted in such a way that only one aspect of the dispute, and not the whole dispute, was referred to the arbitral tribunal, thereby rendering its task impossible. He did not, therefore, understand why Mr. Lauterpacht should maintain that his (Mr. Scelle's) proposals regarding the *compromis* ran counter to the whole purpose of the draft, which was to remove arbitration as far as possible from the influence of politics.

49. In view of what he had already said, it would be obvious that he did not agree with Mr. Yepes' proposal for a would-be exhaustive list of provisions which had necessarily to be included in the *compromis*. In his view, the tendency should be in the other direction; the ideal would be that no *compromis* was necessary in international arbitration, just as it was not required in cases referred to a domestic tribunal. The greater the importance attaching to the *compromis,* the easier it would become for one of the parties to claim that the tribunal had exceeded the powers laid down in it.

50. Mr. LAUTERPACHT said that the information given on pages 83-84 of a publication of the Legal Department of the United Nations entitled " Systematic Survey of Treaties for the Pacific Settlement of International Disputes " [5] made it clear that it was the generally accepted practice, and not merely that of those States which were parties to the General Act, to constitute the tribunal before drawing up the *compromis,* and to provide that, if they were unable to reach agreement on the *compromis,* it should be drawn up by the Tribunal.

51. Mr. YEPES reaffirmed that he was in agreement with Mr. Scelle in principle, and that he agreed that an article on the so-called obligatory *compromis* should be included. The text proposed by Mr. Scelle was, however, excessively complicated, and he proposed that it be replaced by a provision similar to that found in article 53 of the Pact of Bogotá, reading simply:

> " If the parties cannot agree on the contents of the *compromis* or on one of its stipulations, the International Court of Justice shall, at the request of one of the parties, be invited to draw up a *compromis,* which shall be binding on the parties."

52. It was possible that such a task might not be in accordance with the letter of the Court's Statute, but it would be in accordance with its spirit. And, given the qualifications of its members, a *compromis* drawn up by the Court should be acceptable to both parties.

53. Mr. SCELLE found the simplicity of Mr. Yepes' proposal attractive. If he himself had chosen more complicated wording, that was because he had wished to leave the parties as free as possible. He did not think it would be feasible to make the International Court responsible for drawing up the *compromis* whenever the parties failed to do so, but would have no objection to article 14 being replaced by the following text, if a proposal were made to that effect:

> " If the parties cannot agree on the contents of the *compromis* or on one of its stipulations within a period of ——— months, the arbitral tribunal previously constituted shall itself draw up the *compromis* without further delay."

54. Mr. YEPES preferred his own wording.

55. The CHAIRMAN stated that as Mr. Yepes' proposal was the farthest removed from the original text, he would put it to the vote first.

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

56. The CHAIRMAN then put to the vote Mr. Lauterpacht's proposal that the words " a suitable person, a commission or one of its courts of justice " should be replaced by the words " a person or body of persons ".

Mr. Lauterpacht's proposal was adopted by 6 votes to none, with 5 abstentions.

57. The CHAIRMAN said that Mr. Hudson's proposal, that the second, third and fourth sentences of article 14 be deleted, would be put to the vote in three parts.

The proposal that the second sentence be deleted was rejected by 7 votes to 3, with one abstention.

58. Mr. SCELLE suggested, however, that the words " In the event of disagreement between the parties as to the choice of this third Power or of the breakdown of proceedings " might be replaced by the words " In the event of the failure of this procedure ".

It was agreed that that suggestion should be referred to the Standing Drafting Committee which was to be set up.

59. Mr. LAUTERPACHT and Mr. KERNO (Assistant Secretary-General) pointed out that although the second sentence had been retained, the third and fourth sentences added nothing to the sense of the article, and could therefore be deleted, as Mr. Hudson had proposed.

It was so agreed.

Article 14 was adopted, as amended, by 7 votes to 2, with 2 abstentions.

60. Mr. YEPES said that he had voted for article 14 because he felt that the draft convention must contain some provision relating to the obligatory *compromis.*

61. Mr. AMADO said that he would merely ask the Commission to ponder whether the expression " obligatory *compromis* " was not a contradiction in terms.[6]

[5] United Nations publication, Sales No. 1949.V.3.

[6] Article 14, as tentatively adopted, read as follows:

" If the parties cannot agree on the contents of the *compromis* or on one of its stipulations, they may request the good offices of a third Power which shall appoint a person, or body of persons, to draw up the *compromis.* In the event of the failure of this procedure, the arbitral tribunal shall itself draw up the *compromis,* if possible in agreement with the agents of the parties, but in any case within a reasonable time-limit which it shall itself determine."

Appointment of Standing Drafting Committee

62. The CHAIRMAN suggested that a Standing Drafting Committee should be set up, composed of Mr. Hudson, Mr. Lauterpacht and Mr. Yepes, together with the special rapporteur on any subject, *ex officio*, when that subject was being discussed. The general rapporteur would also be free to attend meetings of the Standing Drafting Committee whenever he so wished.

The Chairman's suggestion was adopted.

Date and place of the fifth session (item 7 of the agenda)

63. Mr. LIANG (Secretary to the Commission) pointed out that it was necessary for the Commission to take a preliminary decision at once with regard to the date and place of the next session, so that consultation with the Secretary-General might be undertaken in time, if necessary.

64. Mr. HUDSON proposed that the Commission should hold its next session in Geneva, beginning about 1 June 1953, and that the Secretary be requested to consult with the Secretary-General in accordance with article 12 of the Commission's Statute.

65. Mr. YEPES, Mr. SCELLE, Mr. ZOUREK, Mr. KOZHEVNIKOV, Mr. LAUTERPACHT and Mr. FRANÇOIS supported Mr. Hudson's proposal.

66. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission's Statute laid down (article 12) that the Commission should sit at the headquarters of the United Nations, but that it had the right to hold meetings at other places after consultation with the Secretary-General. In other words, it had obviously been the intention that the Commission should normally meet in New York. Members knew the administrative and financial implications of meeting elsewhere.

After some further discussion, Mr. Hudson's proposal was unanimously adopted.

The meeting rose at 6 p.m.

144th MEETING

Tuesday, 17 June 1952, at 9.45 a.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. 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*)

ARTICLES 12 (*resumed from the 143rd meeting*) AND 13 [1]

1. The CHAIRMAN invited the Commission to consider a text proposed by Mr. Yepes to replace articles 12 and 13 in the special rapporteur's Second Preliminary Draft on Arbitration Procedure. Paragraphs (*b*), (*c*), (*d*), (*g*) and (*j*) in Mr. Yepes' text amplified or amended the provisions proposed by Mr. Scelle. Paragraphs (*e*), (*f*), (*h*) and (*i*) were new.

Introductory clause of text proposed by Mr. Yepes:

"The parties having recourse to arbitration shall sign a *compromis* in which they shall determine:"

The introductory clause to Mr. Yepes' text was accepted.

Paragraph (a) of text proposed by Mr. Yepes:

"(*a*) Their common desire to submit the dispute between them to arbitration;"

2. Mr. YEPES said that it was a *sine qua non* of arbitral procedure for the parties to embody in the *compromis* an affirmation of their common desire to submit the dispute between them to arbitration. Paragraph (*a*) should therefore not give rise to objection.

3. Mr. el-KHOURI said that such a provision was necessary when there was no previous general undertaking to resort to arbitration. It would not be redundant even if such an agreement existed. He would accordingly support paragraph (*a*).

4. Mr. SCELLE said that such a provision might sometimes be unnecessary, but it would never be harmful. He would therefore be able to accept it. He wished, however, to propose that paragraph (*a*) be amended by the substitution of the words "the whole subject-matter" for the words "the dispute between them", in conformity with Article 13 of the Covenant

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[1] Article 13 reads as follows:

"The *compromis* may contain any other conventional provisions that the parties deem it necessary to introduce, such as the order and time-limits for the communication of documents and procedural acts, the time-limit for delivery of judgment, the manner in which evidence is to be taken, the allocation of costs and fees, the appointment of agents, advocates and counsel.

"The arbitrator or the tribunal shall be bound by the procedural provisions only in so far as they prove compatible with the proper exercise of his or its function. The arbitrator or the tribunal shall be sole judge of such compatibility."

of the League of Nations. He attached great importance to that amendment.

5. Mr. YEPES accepted Mr. Scelle's amendment.

6. Mr. ZOUREK asked whether the provisions proposed by Mr. Yepes would be applicable if there was no prior obligation to resort to arbitration, in which case, in his (Mr. Zourek's view), the parties would be free to determine what elements in a dispute should be submitted for arbitration.

7. Mr. SCELLE said that if there was a prior obligation to resort to arbitration, freedom of the parties to reduce the scope of that obligation in any way must be opposed. Even when such obligation did not exist, he considered that the whole case should be submitted to arbitration, so that it might be settled in its entirety.

8. Mr. LAUTERPACHT was in favour of the provision in paragraph (*a*) being maintained, but only on condition that it was embodied in the preamble to article 12. That article was concerned with the special *compromis* to be concluded for a definite case arising from an earlier obligation to resort to arbitration. In view of the general and solemn nature of that commitment it would be both unnecessary and dangerous to repeat it, unless in the form of a clause in the preamble. Otherwise the implication might be that, in order to be valid in a definite case, the undertaking to resort to arbitration would have to be repeated in the special *compromis*. Furthermore, article 12 must be framed in such a way as to make its provisions applicable to an obligatory *compromis* imposed by an outside body on the parties.

9. Mr. el-KHOURI, speaking to a point of order, asked whether the Commission was in process of deciding in principle the kind of provisions to be inserted in article 12 for detailed formulation by the Standing Drafting Committee, or whether it was considering Mr. Yepes text as an alternative to articles 12 and 13 in the special rapporteur's draft.

10. Mr. KERNO (Assistant Secretary-General) pointed out that according to rule 90 of the rules of procedure of the General Assembly a motion was only considered as an amendment if it merely added to, deleted from or revised part of a proposal. If it envisaged the replacement of a proposal in its entirety, it was considered as a new proposal, to be discussed in order of submission unless decided otherwise.

11. Turning to the substance of paragraph (*a*), he expressed his agreement with Mr. Lauterpacht that it should be embodied in the preamble.

12. The purpose of Mr. Yepes' proposal was to make all the provisions relating to the conclusion of a *compromis* obligatory, and to enumerate them exhaustively. He submitted, however, that that could not be done, and that the enumeration should accordingly be prefaced by some form of words, such as those used in article 13 of the special rapporteur's draft, so as to make clear that it was not complete.

13. Mr. YEPES had hoped that his text would not give rise to a lengthy procedural debate. His intention had been simply to facilitate discussion and simplify the problem. His proposal did merely add to some parts of Mr. Scelle's draft and delete or revise others. Under rule 90 of the rules of procedure of the General Assembly, therefore, it was an amendment.

14. Mr. LIANG (Secretary to the Commission) said that it was imperative that the Commission should decide whether the substance of paragraph (*a*) should form part of the preamble or was a matter for confirmation by the parties or for negotiation when the special *compromis* was being drawn up.

15. Mr. LAUTERPACHT said that his views would be met if the introductory clause were re-drafted to read:

> " The parties shall sign a *compromis* which, after affirming their obligation to submit their dispute to arbitration, shall specify :"

16. The CHAIRMAN *ruled* that, in view of the submission of Mr. Lauterpacht's amendment, discussion on the introductory clause to Mr. Yepes text was re-opened.

17. Mr. YEPES accepted Mr. Lauterpacht's amendment.

18. Mr. SCELLE said that the intent of the provision in paragraph (*a*) would not be entirely the same in all cases. If an earlier obligation to resort to arbitration existed, paragraph (*a*) would merely be a re-affirmation of an existing undertaking. That might perhaps be brought out in Mr. Lauterpacht's amendment.

19. Mr. LAUTERPACHT said that the form in which his amendment had been cast reflected the preoccupation of the Commission with the case of a special *compromis* following a general undertaking to arbitrate. There would still have to be considered the case in which no special *compromis* was necessary, for the reason that its substance was embodied in the arbitration treaty itself.

20. Mr. AMADO said that Mr. Scelle's system of arbitration pre-supposed that the parties would no longer remain masters of the procedure. Partisans of that theory must define how the *compromis* was to be drawn up and what prrocedure was to be followed.

21. He supported Mr. Lauterpacht's amendment.

22. Mr. SCELLE pointed out that there was no such thing as " the Scelle system ". In preparing his draft he had borrowed from a whole series of international instruments which had been in existence for years. He was merely trying to introduce some kind of order into the procedure to be followed.

23. He would wish to repeat at the present stage that a *compromis* might result from a prior general obligation to resort to arbitration, which might not even specify in any great detail the kind of dispute to which it would apply, or from a decision to submit an actual, specific dispute to arbitration. An example of the former was to be found in the recent treaty

concluded with the Government of the Federal Republic of Germany to replace the Occupation Statute.[2] That treaty contained a clause by which disputes arising from its interpretation or implementation were to be submitted to arbitration. At present no one could foresee what the nature of those disputes would be. The obligation was therefore assumed purely *in abstracto*. Should a dispute arise, the special *compromis* to be drawn up would determine the subject of the dispute and would contain a re-affirmation by the parties of their previous obligation to submit such a dispute to arbitration.

24. On the other hand, it was self-evident that where no previous obligation existed, it could not be re-affirmed, since in that event the obligation would derive from the *compromis* itself.

25. He recognized that one difficulty would arise later in the discussion, namely, whether parties should or should not be free to reduce the scope of an obligation previously entered into, and to submit only certain elements in a dispute to arbitration. As the Commission already knew, he strongly advocated that the parties should be bound to submit the whole subject-matter of the dispute to arbitration once they had entered into a general obligation to do so.

26. Mr. AMADO recalled that Mr. Scelle had stated at the previous meeting that his draft entailed a clean break with traditional procedure. Yet he now asserted that it contained nothing new.

27. Mr. SCELLE declined to retract either of his statements. The theories on which his draft were based had all been formulated by recognized authorities on international law and incorporated in treaties for many years past. In practice, however, the parties had often found ways of evading the implementation of the provisions in which those theories had found expression. To make it impossible for them to do so henceforward, a break with traditional practice had to be made.

28. Mr. KERNO (Assistant Secretary-General) suggested that, in order to meet all points made, Mr. Lauterpacht's amendment might be expanded to read:

> " The parties having recourse to arbitration shall sign a *compromis* in which, after having re-affirmed their previous undertaking or affirmed their common desire to submit the whole subject-matter of the dispute between them to arbitration, they shall specify, *inter alia* :"

29. Mr. HUDSON felt that the suggested wording was unnecessarily cumbersome, and proposed that the preamble should read as follows:

> " The parties having recourse to arbitration, either in pursuance of the previous agreement or otherwise, shall sign a *compromis* in which they shall specify, *inter alia* :"

30. Mr. LAUTERPACHT asked whether the special rapporteur regarded it as necessary for the parties to sign a separate *compromis* in every case, for example, even in cases where they concluded an arbitration treaty in which they undertook to submit all disputes of a particular kind to arbitration and to set up an arbitral tribunal for the settlement of such disputes, and specified the various matters referred to in Mr. Yepes' draft.

31. Mr. SCELLE pointed out that no treaty of the type referred to by Mr. Lauterpacht could define the subject-matter of disputes which had not yet arisen ; it could only define what category of disputes were to be submitted to arbitration.

32. The CHAIRMAN pointed out that in a number of cases — for example, that of the boundary dispute between Colombia and Costa Rica and that of the boundary dispute between Panama and Costa Rica which had arisen out of it — no separate *compromis* had been drawn up other than what had been included in the arbitration treaty.[3] He did not, however, understand Mr. Lauterpacht's difficulty with regard to such cases, since the wording proposed did not state that the parties should sign a separate *compromis,* but merely that they should sign a *compromis*. That *compromis* might take the form of part of the arbitration treaty, or it might be a separate instrument.

33. Replying to a question by Mr. LAUTERPACHT, Mr. SCELLE said that he preferred the wording suggested by the Assistant Secretary-General to that proposed by Mr. Hudson, because the words " or otherwise " in the latter were too vague. In view of the objections which had been raised to the phrase " the whole subject-matter ", he would, however, agree to those words being deleted from the wording suggested by the Assistant Secretary-General, since the point he was anxious to establish was covered in a subsequent article.

Subject to those words being deleted, the wording suggested by the Assistant Secretary-General was adopted by 8 votes to 2 with 1 abstention.

34. Mr. AMADO said that, although he had voted for the wording just adopted, since it had been Mr. Scelle's preference, he would have preferred that proposed by Mr. Hudson.

35. Mr. LAUTERPACHT said that he reserved the right to propose in the Standing Drafting Committee the insertion of the words " unless already contained in the treaty of arbitration ".

36. Mr. HUDSON said that by adopting the wording suggested by the Assistant Secretary-General the Commission had seriously weakened article 1. If the parties were required to reaffirm an undertaking, that would necessarily cast doubts on the obligatory nature of the undertaking in the first place.

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[2] *Convention on relation between the three Western Powers and the Federal Republic of Germany,* 26 May 1952. Cmd. 8571, p. 4.

[3] See A. M. Stuyt, *Survey of International Arbitration* (The Hague, Martinus Nijhoff, 1939), pp. 125 and 311.

37. The CHAIRMAN said that it might be possible for the Standing Drafting Committee to resolve satisfactorily the points raised by Mr. Lauterpacht and Mr. Hudson.

Paragraph (b) of text proposed by Mr. Yepes:

" The subject of the dispute, defined precisely and as clearly as possible,".

Paragraph (b) was adopted by 5 votes to 1, with 4 abstentions.

Paragraph (c) of text proposed by Mr. Yepes:

" The choice of judges and the constitution of the Tribunal, if they have not previously done so, or if the Tribunal has not already been constituted in accordance with the foregoing provisions ;".

38. Mr. YEPES pointed out that paragraph (c) of his proposals repeated Mr. Scelle's draft word for word.

39. Mr. ZOUREK suggested that the word " judges " be replaced by the word " arbitrators ", as used elsewhere in the text.

Mr. Zourek's suggestion was adopted by 8 votes to none, with 1 abstention.

40. Mr. ZOUREK also proposed that the words " in accordance with the foregoing provisions " be deleted.

41. Mr. KOZHEVNIKOV supported that proposal, and himself proposed that the words " by them " be inserted after the words " or if the tribunal has not already been constituted ".

42. Mr. SCELLE could not agree to those proposals, which would preclude constitution of the tribunal by the International Court of Justice or a third Power.

43. Mr. KERNO (Assistant Secretary-General) asked whether that objection did not apply only to Mr. Kozhevnikov's proposal.

44. Mr. SCELLE said that Mr. Zourek's proposal introduced at any rate an element of doubt on that point. For that reason, he could not support it.

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

Mr. Zourek's proposal that the words " in accordance with the foregoing provisions " be deleted was adopted by 7 votes to none, with 2 abstentions.

45. Mr. HUDSON proposed that the words " if they have not previously done so, or " be deleted, since that contingency was covered by the words " if the tribunal has not already been constituted."

Mr. Hudson's proposal was adopted by 5 votes to none, with 2 abstentions.

46. Mr. HUDSON also proposed the deletion of the words " and the constitution of the tribunal ".

Mr. Hudson's proposal was adopted by 6 votes to 1 with 2 abstentions.

47. Replying to a question by Mr. el-KHOURI, the CHAIRMAN stated that the phrase " the tribunal " was to be understood *passim* as including the case of a single arbitrator.

The meeting rose at 11.40 a.m.

145th MEETING

Wednesday, 18 June 1952, at 9.45 a.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. 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*)

1-3. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46) contained in the special rapporteur's Second Report.

ARTICLES 12 AND 13 (*continued*)

Amendments submitted by Mr. Yepes (continued)

Paragraph (d)

4. The CHAIRMAN recalled that the Commission had been discussing Mr. Yepes' amendment to articles 12 and 13 paragraph by paragraph, and invited comments on paragraph (*d*), reading:

" The procedure to be followed or the authority conferred on the tribunal to establish its own procedure."

5. That paragraph corresponded to the words " the rules of procedure they may think fit to agree upon " in Mr. Scelle's draft.

6. Mr. YEPES explained that he had thought it preferable to indicate clearly that the parties could confer authority on the tribunal to establish its own procedure, if they so wished.

Paragraph (d) of Mr. Yepes' amendment was adopted by 9 votes to none, with 1 abstention.

Paragraphs (e) and (f)

7. The CHAIRMAN invited comments on paragraph (*e*) of Mr. Yepes' amendment, reading :

" Where the tribunal has several members, the number of judges constituting the quorum required for the tribunal to deliberate and take a valid decision ;"

8. There was nothing corresponding to that paragraph in Mr. Scelle's draft.

9. Mr. YEPES recalled that Mr. el-Khouri had drawn attention, in connexion with article 9, to the question of what was to happen if one member of a tribunal of three was absent.[1] In his view, a question which could have such important consequences ought to be determined in the *compromis* itself. As had been pointed out, the whole process of arbitration frequently foundered on what might appear to be minor points of procedure.

10. Mr. LAUTERPACHT asked what was the connexion between paragraph (*e*) of Mr. Yepes' amendment and paragraph (*f*), which read :

" Whether the tribunal may hold a valid session in the absence of one or more of its members or in the absence of one of the parties ;"

11. Mr. YEPES said that, as paragraph (*f*) covered the question he had wished to settle under paragraph (*e*), the latter could be deleted.

12. Mr. SCELLE agreed that it might be difficult, in certain cases, such as when it was composed of only three arbitrators, to decide whether the tribunal should continue to sit in the absence of one of them. However, since the tribunal was being entrusted with responsibility for adjudicating on the substance of the dispute, confidence could surely be placed in it to decide the procedural questions referred to in paragraph (*e*) and (*f*) of Mr. Yepes' amendment.

13. Moreover, the Commission had already decided, in article 9, that in the event of the withdrawal of one arbitrator the remaining members of the tribunal should, at the request of one of the parties, be empowered to continue the proceedings and render the award. It would be contradictory to that provision to give the parties power to impose a different procedure in the *compromis*.

14. He therefore felt that both paragraph (*e*) and paragraph (*f*) should be deleted.

15. Mr. KOZHEVNIKOV said that, whatever might be their relation to articles already adopted by the Commission, paragraphs (*e*) and (*f*) of Mr. Yepes' amendment were perfectly in accordance with the basic principles of international law.

16. Mr. ZOUREK recalled that it had been made clear that the draft articles were intended to apply to cases where the obligation to have recourse to arbitration referred to a particular dispute (*arbitrage occasionnel*), as well as to cases where it resulted from a general agreement. In cases of the first kind, he could not imagine its being left to the tribunal to determine the important questions referred to in paragraphs (*e*) and (*f*) of Mr. Yepes' amendment. Those questions should be determined in the *compromis*.

17. Mr. LAUTERPACHT saw no connexion, and hence no possibility of conflict, between article 9 already adopted and paragraph (*e*) of Mr. Yepes' amendment, which dealt with the simple question of the quorum for the conduct of proceedings. A rule governing that question was a necessity for every formally constituted body. The only point at issue was whether such a rule should be included in the *compromis* or left to the tribunal itself to lay down.

18. After further discussion, Mr. HUDSON suggested that in any case paragraph (*e*) and (*f*) needed rearranging, since the question of a quorum for the ordinary day-to-day conduct of proceedings was quite distinct from that of the number of votes required for the rendering of an award by the tribunal. He therefore proposed that paragraphs (*e*) and (*f*) of Mr. Yepes' amendment be themselves amended to read as follows :

" (*e*) If the tribunal has several members, the number of members constituting a quorum for the conduct of the proceedings ;

" (*f*) The number of members constituting the majority required for a judgment of the tribunal ;"

19. Mr. LAUTERPACHT said that he could vote in favour of paragraph (*e*) as proposed by Mr. Hudson, but that he personally understood the words " conduct of the proceedings " to cover all stages of the proceedings, including the making of the award.

20. Mr. SCELLE agreed with Mr. Lauterpacht that the words " conduct of the proceedings " covered the making of the award. He would point out to the Commission, however, that if it adopted either of the paragraphs proposed by Mr. Hudson it would make it possible for one party to the dispute to bring about a breakdown of the arbitration procedure, notwithstanding all the elaborate precautions which had been taken in the previous articles to preclude that possibility. In other words, it would be giving legal sanction to the second advisory opinion — which he regarded as indefensible — of the International Court of Justice in the case of the interpretation of the peace treaties with Bulgaria, Hungary and Romania.[2]

21. Mr. LAUTERPACHT said that Mr. Scelle had drawn attention to an important and valid objection to the proposed clauses. On the other hand, the question of the quorum should, in his (Mr. Lauterpacht's) view, be settled in the *compromis*.

[1] See summary record of the 142nd meeting, para. 79.

[2] Interpretation of Peace Treaties (second phase), Advisory Opinion, *I.C.J. Reports 1950*, p. 221.

22. Mr. FRANÇOIS proposed that the words " without prejudice to the provisions of article 9, paragraph 3," be inserted at the beginning both of paragraph (*e*) and of paragraph (*f*) as proposed by Mr. Hudson.

Mr. François' proposal was adopted by 6 votes to 5.

Paragraph (e) of Mr. Yepes' amendment, in the form proposed by Mr. Hudson, was adopted, as amended, by 7 votes to 3, with 1 abstention.

Paragraph (f) of Mr. Yepes' amendment, in the form proposed by Mr. Hudson, was adopted, as amended, by 6 votes to 2, with 1 abstention.

Paragraph (g)

23. The CHAIRMAN invited comments on paragraph (*g*) of Mr. Yepes' amendment, which read :

" The law and principles by which the decisions of the tribunal must be guided : whether it is strictly bound by existing law or whether, on the contrary, it may adjudicate *ex aequo et bono* or as an *amiable compositeur* ;".

24. Mr. Hudson had submitted to the Chair an alternative proposal to the effect that paragraph (*g*) should simply read :

" The principles of law to be applied by the tribunal ;".

25. Mr. SCELLE withdrew the wording he had used in his original draft in favour of that proposed by Mr. Yepes.

26. Mr. LAUTERPACHT recalled that at the 143rd meeting he had explained in some detail his objections to the text proposed by Mr. Scelle.[3] Much the same objections applied to the wording proposed by Mr. Yepes. His main objection was to providing that the parties could ask the tribunal to act as an *amiable compositeur,* which was a purely political way of settling a dispute. On the other hand, it seemed reasonable to permit them to ask the tribunal to adjudicate *ex aequo et bono :* that would be in accordance with prevailing practice ; moreover, there seemed no reason why the tribunal should in that respect be placed in a position different from that of the International Court of Justice. The parties should, however, also be permitted, if they so wished, to request the tribunal to make recommendations, in addition to the binding award based on law, for settlement of the dispute. Recommendations by the arbitral tribunal had greatly contributed, for example, to the satisfactory and statesmanlike settlement of the Behring Sea Fisheries dispute and to that of the North Atlantic Fisheries Case between Great Britain and the United States.[4]

27. He therefore proposed that paragraph (*g*) be amended to read :

" The law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono* and to make recommendations ;".

28. Mr. HUDSON said that he would have no objection to mentioning the power to adjudicate *ex aequo et bono,* if that was thought necessary, although it seemed to him that it was covered by the wording he himself had proposed. He agreed with Mr. Lauterpacht that it should not be possible for the parties to request the tribunal to act as an *amiable compositeur,* but felt that the question of recommendations should preferably be dealt with in paragraph (*i*).

29. Mr. LAUTERPACHT agreed that the question of recommendations should be dealt with in paragraph (*i*), and therefore withdrew the last four words of the text he had proposed.

30. Mr. KOZHEVNIKOV pointed out that pargraph (*i*) dealt with the form of the judgment ; the question of recommendations would be better dealt with in paragraph (*g*). Unlike Mr. Lauterpacht, he considered that the parties should be able to request the tribunal to act as an *amiable compositeur.*

31. The CHAIRMAN pointed out that Mr. Lauterpacht had already agreed to delete any reference to recommendations from his proposed text.

32. Mr. HUDSON said that he could accept Mr. Lauterpacht's proposal provided the words " the principles of law " were substituted for the words " the law ". In the " Alabama " Claims case, for example, the principles of law to be applied by the tribunal had been specified in the *compromis.*[5]

33. Mr. SCELLE pointed out that article 20 of his draft provided that if the *compromis* contained no relevant provision, the tribunal, in its decision, should apply the substantive rules set forth in Article 38 of the Statute of the International Court of Justice. On further consideration, and in the light of private discussion with other members of the Commission, especially Mr. Lauterpacht, he now felt that those rules should be applied in every case. It was not the rôle of the tribunal or of the parties to make the law. The " Alabama " Claims case had been quite exceptional and in his opinion did not constitute a precedent.

34. Mr. LAUTERPACHT said that the question under consideration was fundamental. He would therefore deplore its being disposed of hastily. He did not understand how Mr. Hudson could argue from the *compromis* in the " Alabama " Claims case that the expression " the principles of law " should be used in preference to " the law ". The provisions in the *compromis* to which Mr. Hudson had referred were usually known as the Three Rules of Washington ; they were not principles, but rules of law.

35. Mr. YEPES said that, in referring to " principles " in the text which he had himself proposed, he too had had in mind the Three Rules of Washington. He was convinced that it was necessary to state in the

[3] See summary record of the 143rd meeting, paras. 40 to 44.

[4] Award of 17 December 1897; award of 7 September 1910.

[5] " Alabama " claims between Great Britain and the United States; award of 8 May 1871.

compromis the principles of law by which the tribunal was to be guided. The aim of arbitration was the settlement of disputes on the basis of respect for law. But the question arose, which law ? In his view, the law which was to be applied could be law not yet existing. For that reason it was essential that the *compromis* should state the principles of law which were to apply.

36. Mr. SCELLE said that the practice followed in the " Alabama " Claims case had been absolutely extra-juridical. For, had the dispute been between two other States, the Three Rules of Washington would have been quite different. He could not agree that international law should vary with the nationality of the parties ; in his view, it must be supra-national in character. If it were to be resticted merely to what the parties to each dispute could accept, the Commission's work would have no meaning.

37. The CHAIRMAN said that he would put Mr. Hudson's proposal to the vote first.

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

Mr. Lauterpacht's proposal, as amended by himself, was adopted by 9 votes to 1, with 1 abstention.

Paragraph (h)

38. The CHAIRMAN invited the Commission to consider paragraph (*h*) of Mr. Yepes' amendment, which read :

" whether the tribunal may impose such provisional or conservatory measures as are required by the circumstances ".

39. Mr. HUDSON proposed an alternative text, to read :

" whether the tribunal may indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the parties ".

40. The Commission would note that he had borrowed the operative part of that wording from Article 41, paragraph 1, of the Statute of the International Court of Justice, but had substituted the words : " the parties " for the words " either party ".

41. Mr. SCELLE explained that he had not inserted such a provision at that point in his draft, but had related it to the procedure of the tribunal, as he considered it to be self-evident that it was the inherent right of a tribunal to indicate provisional measures. That was something that was entirely independent of the will of the parties, and therefore had no place whatsoever in the *compromis*.

42. Mr. LAUTERPACHT agreed with Mr. Scelle and proposed that paragraph (*h*) be deleted. The imposition of interim measures was solely within the competence of the tribunal, and was dealt with in article 26 of the special rapporteur's draft. By using the word " prescribe ", and not the word " indicate ", in Article 2, paragraph 2, already adopted, the Commission had already endorsed Mr. Hudson's view expressed in the second edition of his book " The Permanent Court of International Justice " that, when the Permanent Court indicated interim measures, those measures imposed a legal obligation on the parties.

43. Mr. YEPES suggested that Mr. Scelle's argument was equally applicable to article 26 in the draft arbitration procedure, the only difference being that he (Mr. Yepes) wished the provision to be included in the article on the *compromis*, since if that were not done the parties might contest the right of the tribunal to impose such measures.

44. Mr. AMADO pointed out that if the tribunal's power to indicate interim measures was as self-evident as Mr. Scelle thought, Article 41 of the Statute of the Court must be redundant.

45. Mr. SCELLE said that it was sometimes necessary to state the obvious, but that must be done in the right place. To make the power of the tribunal to indicate interim measures dependent on the parties would be tantamount to allowing them to withdraw the case during the proceedings, which was, of course, unthinkable.

46. Mr. AMADO could not subscribe to Mr. Scelle's general tendency to regard the parties as suspect, and the arbitrators as paragons of virtue and honesty.

47. Mr. SCELLE said that it was a natural tendency for parties to a dispute to be more concerned with protecting their interests than with maintaining the law.

48. Mr. AMADO pointed out that arbitration had a very honourable history.

49. Mr. SCELLE said that he would only be prepared to meet Mr. Yepes' view if a provision was inserted in article 12 stating that the parties must always recognize in the *compromis* the right of an arbitral tribunal to impose interim measures.

50. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that paragraph (*h*) be deleted.

Mr. Lauterpacht's proposal was adopted by 6 votes to 5.

51. Mr. el-KHOURI explained that he had voted for the deletion of paragraph (*h*) because he favoured the subject-matter being dealt with in article 26 of the special rapporteur's draft.

Paragraph (i)

52. The CHAIRMAN invited the Commission to consider paragraph (*i*) of Mr. Yepes text, which read :

" the form and time-limits in which the judgment must be delivered, provisions regarding the enforcement of the judgment and possible appeals against it ".

53. Mr. HUDSON proposed an alternative text for paragraph (*i*), to read :

" the form of the judgment to be given by the tribunal and any recommendations which it may present to the parties ".

54. Mr. LAUTERPACHT did not clearly understand what Mr. Hudson meant by " the form of the judgment " or what Mr. Yepes meant by " the enforcement of the judgment ".

55. He attached importance to the *compromis* stipulating time-limits within which the judgment was to be delivered, and also to the inclusion of provisions in article 12 relating to appeal and revision. The latter two questions had been troubling international legal opinion for the last twenty years, ever since the case of the Hungarian Optants.

56. Mr. YEPES explained that he had included the clause on the enforcement of the judgment to ensure that the tribunal indicated how the award was to be carried out.

57. Mr. SCELLE observed that the last two chapters of his draft procedure dealt with revision and remedies. He queried whether such provisions should rightly find their place in an article on the *compromis,* since they were not matter for the parties to decide. As to the question of enforcement, he would point out to Mr. Yepes that an international arbitral award was never executory in nature.

58. Paragraph (*i*) seemed to confer upon the parties rights which properly belonged to the tribunal. He could not therefore support it.

59. Mr. LAUTERPACHT said that it was not entirely clear whether the special rapporteur was in favour of retaining certain elements from paragraph (*i*).

60. It was the problems of appeal and revision which, in the light of experience, gave the entire question of arbitral procedure its topical and urgent character, and the Commission must take the greatest care when considering paragraph (*i*) to avoid any decision which might obstruct development in that respect.

61. Mr. SCELLE agreed with Mr. Lauterpacht about the importance of appeal and revision, but re-affirmed his conviction that provisions relating to either could not be made contingent on the will of the parties. He accordingly proposed the deletion of the whole of paragraph (*i*).

62. Mr. Hudson's amendment was interesting, but would find its true place farther on in the draft, as it had no relation whatsoever to the *compromis.*

63. Mr. LAUTERPACHT then proposed an alternative text for paragraph (*i*) to read :

" the time limits within which the award must be rendered, the form of the award and any power given to the tribunal to make recommendations and, subject to articles 38 to 41, any special provisions in the matter of appeal and revision ".

64. Mr. LIANG (Secretary to the Commission) also found difficulty in comprehending what exactly was meant by " the form of the judgment ".

65. Mr. YEPES referred the Secretary to paragraph 16, section (8) of the memorandum on arbitral procedure prepared by the Secretariat (A/CN.4/35).[6]

66. Mr. LIANG (Secretary to the Commission) pointed out that, as a draft convention would not contain the explanations given in the paragraph mentioned by Mr. Yepes, something more precise was needed.

67. Mr. HUDSON observed that in two recent cases submitted to arbitration, one judgment had been couched in the form of a conclusion and the other had been accompanied by carefully reasoned arguments. That was the sort of thing he had in mind when he spoke of the form of a judgment.

68. As to time-limits, they had in the past been more often disregarded than observed and had given rise to great difficulties.

69. Mr. SCELLE, referring to the second paragraph of article 13 in his draft, which stipulated that the arbitrator or the tribunal should be bound by the procedural provisions of the *compromis* only in so far as they proved compatible with the proper exercise of his or its function, pointed to the danger of including in the *compromis* provisions with which the tribunal might find it impossible to comply. It would be appropriate for certain conditions concerning the form of the judgment to be imposed on the tribunal in a general instrument such as that contemplated by the Commission, but it would be quite inappropriate for the parties to prescribe that imposition.

70. Referring to Mr. Lauterpacht's amendment, he asked whether there was any need to empower a tribunal to make recommendations. A tribunal was always free to do so.

71. Mr. LAUTERPACHT pointed out that it was not the normal function of an arbitral tribunal to make recommendations.

72. Mr. SCELLE observed that if a tribunal could not make an award it would be bound to put forward recommendations.

73. The CHAIRMAN put to the vote Mr. Scelle's proposal that paragraph (*i*) be deleted in its entirety.

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

74. Mr. KOZHEVNIKOV said that as Mr. Lauterpacht's text was of some complexity, he would like to have an opportunity of studying it carefully before pronouncing upon it. He accordingly requested that the text be translated into Russian for him and that in the meantime the vote thereon be deferred.

75. The CHAIRMAN acceded to Mr. Kozhevnikov's request.

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[6] It read as follows : " 16. A *compromis* should include certain items : ... (8) The form in which the award should be presented, the method by which it is determined, and the extent of its obligation (e.g. as to revision, if any) should be stated, and provision, if any, as to its execution ; ".

Paragraph (j)

76. The CHAIRMAN invited the Commission to consider paragraph (*j*) of Mr. Yepes' amendment, which read :

" finally, the place where the tribunal shall meet, the date of its installation and the language to be used ".

77. Mr. HUDSON proposed two alternative clauses to replace paragraph (*j*), to read :

" (*j*) the place where the tribunal shall meet and the date of its first meeting.

" (*k*) the languages to be employed in the proceedings before the tribunal."

Mr. Hudson's texts were adopted unanimously.

78. Mr. ZOUREK asked whether article 12 should not include a provision relating to costs.

79. Mr. SCELLE said that he would have no objection, since it was clearly a matter for the decision of the parties.

80. Mr. HUDSON considered that a provision on the functions of the umpire might also be included in the article relating to the *compromis*. The question was how far an umpire could participate in the proceedings, and how far he could go in establishing whether there was a difference of view between two national arbitrators.

81. The CHAIRMAN invited the preceding speakers to consult together and prepare texts on those two points for possible inclusion in article 12.

The meeting rose at 1.5 p.m.

146th MEETING

Thursday, 19 June 1952, at 9.45 a.m.

CONTENTS

Chairman : Mr. Ricardo J. ALFARO.

Present :

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

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

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

ARTICLE 12 (*continued*)

Mr. Zourek's proposal for an additional paragraph

1. The CHAIRMAN announced that, in accordance with his suggestion at the preceding meeting,[1] Mr. Zourek had submitted a proposal for an additional paragraph to article 12, to read :

" the way in which costs and expenses shall be divided ".

2. Mr. SCELLE supported Mr. Zourek's proposal.

Mr. Zourek's proposal was adopted unanimously.

Amendment to paragraph (i) of Mr. Yepes' text for article 12 (resumed from the previous meeting)

3. The CHAIRMAN invited the Commission to resume its consideration of Mr. Lauterpacht's amendment to paragraph (*i*) of Mr. Yepes' text, a decision on which had been deferred at the request of Mr. Kozhevnikov to enable a Russian translation to be prepared.[2]

4. Mr. KOZHEVNIKOV said that the words " subject to articles 38 to 41 " seemed to suggest that those articles had already been adopted, whereas in fact they had not yet been discussed. He would therefore propose that they be deleted pending the decision on the articles in question.

5. Mr. HSU said that the adoption of Mr. Lauterpacht's text as it stood would not give rise to any difficulty, since there was nothing to prevent the Commission from making a consequential amendment to it should articles 38 to 41 not be adopted.

6. Mr. SCELLE said that, as he had already explained, he was not greatly in favour of Mr. Lauterpacht's amendment, since it would require the parties to take decisions on matters which were not within their discretion. For example, a tribunal should not be compelled to observe the time-limits laid down in the *compromis*, as there might be very good reasons for its being unable to do so. He would accordingly suggest that the word " must " be replaced by the words " ought to ", after the word " award ".

7. Again, appeal and revision did not depend solely on the will of the two parties, and it would be impossible to argue that it was open to them to prohibit both of the two processes in the *compromis*. The possibility of revision was inherent in any judicial settlement.

[1] See summary record of 145th meeting, para. 78.

[2] *Ibid*, paras. 52—75. For Mr. Lauterpacht's text, see para. 63.