Document:-

A/CN.4/L.33/Add.5

Articles Tentatively Adopted on 25 June 1952 - incorporated in the summary records of the 150th meeting

Topic:

Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-

1952, vol. I

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

It was so agreed.

The meeting rose at 1.05 p.m.

150th MEETING

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

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

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

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

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

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

ARTICLE 31 (*continued*)

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

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

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

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

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

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

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

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

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

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

deegree of freedom must be left to the parties. In the present instance they could not be deprived of their right to regulate the procedure of the tribunal. It was conceivable, after all, that a tribunal might not conduct the case with all the diligence necessary in order to reach a decision.

11. Mr. KOZHEVNIKOV said that, although the question of the extension of time-limits was not of prime importance, it did involve certain issues of principle. Mr. Lauterpacht's text was nearer to his (Mr. Kozhevnikov's) conception of arbitration, namely, that the will of the parties must be respected throughout. He accordingly supported the reservation that the time-limits could only be extended with their consent. He could not agree to the tribunal being given powers as wide as those envisaged by the special rapporteur.

12. Mr. HUDSON considered that the words "or the arbitral tribunal" should be deleted from the special rapporteur's text, since if time-limits were fixed by the tribunal itself it would always be open to it to reconsider its own decision. He also advocated the deletion from Mr. Lauterpacht's text of the words "or the arbitration treaty", which were unnecessary, since they were already covered by the phrase "the *compromis*" in the sense in which it was being used throughout the draft.

13. Mr. LAUTERPACHT said that he could agree to Mr. Hudson's amendment to his own proposal provided that an article were inserted in the draft explaining that the term "the *compromis*" embraced a compromissory clause in a general treaty, a general treaty of arbitration, a special treaty of arbitration or a special *compromis*.

14. Mr. ZOUREK supported Mr. Lauterpacht's text, as he considered that time-limits should not be extended without the consent of both parties.

15. Mr. SCELLE said that, rather than see the adoption of a provision such as that proposed by Mr. Lauterpacht, which was entirely contrary to the spirit of his draft, he would withdraw article 31 altogether.

16. Mr. KOZHEVNIKOV observed that the Commission could not without mature deliberation delete articles dealing with grave issues of principle.

17. Mr. FRANÇOIS re-introduced the special rapporteur's text for article 31, but with the words "or the arbitration treaty" substituted for the words "or the abitral tribunal" and the word "retains" for the word "reserves".

18. Mr. HUDSON proposed an alternative wording for the last sentence in Mr. Lauterpacht's proposal; the entire text as amended by himself would then read:

> "The arbitral award shall be made within the period fixed by the *compromis,* unless the parties consent to an extension of that period."

19. Mr. LAUTERPACHT accepted Mr. Hudson's amendment, the wording of which was more precise than his own.

20. Mr. SCELLE said that Mr. Hudson's wording made the provision even stronger, and would enable the parties to force the tribunal to conclude its work even when it felt itself unable to do so. Such a provision would contradict that of article 29, which stipulated that it was the tribunal itself that must officially declare closed the hearing of a case.

21. Mr. KOZHEVNIKOV asked whether the effect of Mr. Hudson's wording would be that if the parties failed to give their consent to the extension of time-limits, the tribunal could act counter to their wishes.

22. Mr. HUDSON replied in the negative. If the parties withheld their consent to an extension, the tribunal would be bound to give its award within the period fixed.

23. Mr. YEPES said that none of the opponents of Mr. Scelle's text had yet explained what would happen if a tribunal considered that, when the time-limit expired, it had not received all the explanations necessary to enable it to reach a decision.

24. Mr. AMADO suggested that it was a mistake to start from the premise that the tribunal and the parties would necessarily always be at loggerheads.

25. The CHAIRMAN put to the vote Mr. Hudson's amendment concerning the deletion of the words "or the arbitration treaty" from Mr. Lauterpacht's text.

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

26. The CHAIRMAN put to the vote Mr. el-Khouri's amendment concerning the insertion of the words "one of" after the words "consent of" in Mr. Lauterpacht's text.

Mr. el-Khouri's amendment was rejected by 6 votes to 2, with 3 abstentions.

27. The CHAIRMAN put to the vote Mr. Hudson's proposal that the second sentence of Mr. Lauterpacht's text be replaced by the words "unless the parties consent to an extension of that period".

Mr. Hudson's amendment was adopted by 6 votes to 5, with 1 abstention.

28. Mr. SCELLE said that, in the light of the foregoing decisions and in order to eliminate the consequent contradiction between articles 29 and 31, he would propose the addition of a second paragraph to Mr. Lauterpacht's text to read:

> "In case of disagreement between the parties on such an extension of the period, the tribunal shall refrain from rendering its award."

29. Mr. KERNO (Assistant Secretary-General) suggested that Mr. Scelle's wording was, perhaps, too strong, as it would make it obligatory on the tribunal to refrain from rendering its award in such cases. He would suggest that the word "shall" be replaced by the word "may".

30. Mr. SCELLE agreed that it must be left to the

tribunal to decide whether it would or could not make an award, and accepted the Assistant Secretary-General's suggestion.

31. He wished to take the present opportunity of warning the Commission that, as the draft took shape, it was to be observed that the tribunal was approximating more and more closely to a conciliation commission. He could not too strongly emphasize the fact that arbitration constituted a judgment; that the arbitral tribunal was a servant, not of the parties but of the law; and that its functions were to settle disputes on the basis of the law and not in accordance with the interests of the parties.

32. Mr. SANDSTRÖM observed that the need for extension of time-limits would clearly be considered long before they ran out. The tribunal would therefore have time to adjust the pace of the proceedings once it had ascertained that the parties would not agree to prolong them.

33. Mr. LAUTERPACHT suggested that the situation was not so tragic as Mr. Scelle seemed to think. By the time the proceedings terminated, a tribunal would inevitably have a considerable amount of evidence before it. If one party refused without good reason to extend time-limits to enable the tribunal to find more evidence, that contingency would be covered by the provisions of article 24. His proposal did not run counter to the entire system of arbitration as conceived by the special rapporteur, since an extension of time-limits would be possible even if the necessary provisions had not been made in the *compromis*. He hoped in the light of the foregoing considerations that Mr. Scelle would be able to see his way to withdrawing his proposal.

34. Mr. el-KHOURI supported Mr. Scelle's proposal together with the amendment thereto suggested by the Assisant Secretary-General.

35. He regretted that the Commission should have decided to enable one party to a dispute to frustrate the arbitral proceedings.

36. Mr. KOZHEVNIKOV suggested that Mr. Scelle had misunderstood the views held by those who considered that the consent of the parties was fundamental to arbitration. Surely conflict and antagonism between the parties and the tribunal were not inevitable. If the parties agreed to resort to arbitration it would mean that they were willing to submit their case to settlement on the basis of law.

Mr. Scelle's proposal, as amended, was adopted by 6 votes to 4, with 2 abstentions.

Article 31, as amended, was adopted by 9 votes to none, with 3 abstentions.[2]

[2] Article 31, as tentatively adopted, read as follows:

"1. The arbitral award shall be made within the period fixed by the *compromis*, unless the parties consent to an extension of that period.

"2. In case of disagreement between the parties on such an extension of the period, the tribunal may refrain from rendering its award."

ARTICLE 32 [3]

37. Mr. YEPES submitted two texts to replace article 32. They read:

"*Article 32*

"The arbitral award shall be drawn up in writing. It shall be read in open court, the representatives and counsel of the parties being present or duly summoned to appear.

"*Article 32* bis

"The arbitral award shall duly state the grounds on which it is based. In doing so it shall retrace the successive stages of the proceedings and give an objective historical account of the facts that gave rise to the dispute; state the juridical rules or principles of equity on which the award is based; mention the evidence produced by the parties and the statements made on their behalf; and cite any decisions taken on points of fact or law in the form of procedural orders, incidental judgments and, possibly, protective measures."

38. He considered that a separate provision, enumerating the contents of the award, was necessary. That was why he had divided his proposal into two articles.

39. Mr. LAUTERPACHT proposed alternative wording for article 32, to read:

"The arbitral award shall be drawn up in writing and read in open court. It shall include a full statement of reasons."

40. Mr. HUDSON suggested that for the time being the Commission should confine itself to the opening words of the special rapporteur's text, namely, the words: "The arbitral award shall be drawn up in writing and read in open court." He found that formula acceptable, but wondered whether it covered the possibility of the parties not wishing to make an award public. He referred in that connexion to the *Chevreau case* between France and the United Kingdom, when the parties, for considerations of public policy, had not wished the award to be made public.[4]

He had had grave doubts at that time as to the propriety of that proceeding, and had approached the President of the Permanent Court of Arbitration to secure the permission of the parties to allow qualified persons to consult the text of the award at the Peace

[3] Article 32 read as follows:

"The arbitral award shall be drawn up in writing and read in open court, the grounds being carefully stated. The operative part should retrace the successive stages of the proceedings, state the juridical rules or principles of equity on which it is based, and any decisions taken on points of fact or law in the form of procedural orders, incidental judgments and protective measures."

See summary record of the 154th meeting, paras. 64—65.

[4] See English text of the award in *American Journal of International Law*, vol. 27 (1933), pp. 153—182. Award of 9 June 1931.

Palace at The Hague. It would be remembered, of course, that the award had been published twelve months later.

41. He supported Mr. Yepes' view that the form and content of the award should be dealt with in separate provisions, and agreed with the additional provision, contained in Mr. Yepes' text for article 32, concerning the presence of representatives and counsel for the parties when the award was being read.

42. Mr. SANDSTRÖM pointed out that the special rapporteur's text had omitted mention of the signature of the award, a matter which was covered by article 79 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. He believed that that gap should be made good.

43. The CHAIRMAN put to the vote Mr. Yepes' text for article 32.

That text was adopted by 10 votes to none.

44. Mr. LAUTERPACHT, referring to the content of the award, suggested that the Commission might confine itself to deciding whether the provision should be general and brief, as suggested in his own text, or whether it should enumerate the different constituent elements, as was done in the special rapporteur's draft and the text proposed by Mr. Yepes for article 32 *bis*. Should the Commission decide in favour of the latter method it would not be necessary to discuss the article in detail, since it was unlikely to give rise to differences of opinion on substance, and its drafting might be well left to the Standing Drafting Committee.

45. Mr. FRANÇOIS expressed a preference for Mr. Lauterpacht's text, namely:

"It shall include a full statement of reasons".

46. It should be left to the tribunal itself to decide whether there was any need to include the elements enumerated in Mr. Yepes' text.

47. Mr. LAUTERPACHT observed that a statement of reasons would normally comprise an objective historical account of the facts which gave rise to a dispute, since it would otherwise hardly be intelligible.

48. Mr. AMADO agreed with Mr. Lauterpacht. Any award must give a clear and full statement of reasons, and it would normally do so. He made a plea for a sober and concise provision such as that proposed by Mr. Lauterpacht, which was very similar to article 79 of the Hague Convention of 1907.

49. Mr. SCELLE had no objection to Mr. Lauterpacht's formula.

50. Mr. HUDSON supported Mr. Lauterpacht's text.

51. The CHAIRMAN put to the vote the issue whether the provision on the content of the award should be brief, and more or less in the form suggested by Mr. Lauterpacht, or whether the constituent elements should be enumerated in detail, as in Mr. Yepes' text.

It was agreed by 9 votes to 1, with 1 abstention, that the provision should be modelled on Mr. Lauterpacht's proposal.

52. Mr. YEPES said that, notwithstanding the decision of the Commission, he would request that the attention of the Standing Drafting Committee be drawn to his text.

53. Mr. HUDSON agreed with Mr. Sandström that some provision should be inserted relating to signature, but was not in favour of following the 1907 Hague Convention on that point, as he considered that the award should normally be signed by all members of the tribunal. Even a dissenting member should add his signature, since that act would not imply approval of the award itself. Of course, where an umpire had been called in his sole signature would be enough.

54. He accordingly suggested that the provision might be worded as follows:

"The award shall be signed by all the members of the tribunal or by the umpire."

55. Mr. SCELLE remained to be convinced whether a dissenting member of the tribunal could sign the award.

56. Mr. HUDSON suggested that the difficulty would be overcome if it were laid down that the award must stipulate the number of votes by which it had been adopted.

57. Mr. SANDSTRÖM accepted the wording proposed by Mr. Hudson.

58. Mr. LAUTERPACHT said that he too could accept Mr. Hudson's wording; but a stipulation that every member of the tribunal should sign the award might give rise to difficulties. It would be remembered that there had been cases in the past of arbitrators refusing to attend the proceedings at which the award had been made.

59. Mr. HUDSON replied that signature by all members of the tribunal should not be a *sine qua non*, but should be the regular procedure. He was therefore prepared to amend his wording to read: "The award ought to be signed etc."

60. Mr. AMADO considered that the provision should be modelled on article 79 of the 1907 Hague Convention. He therefore proposed the following wording:

"The arbitral award shall contain the names of the arbitrators and shall be signed by the president and by the registrar or the secretary."

61. Mr. FRANÇOIS said that he could support Mr. Amado's text provided it was amplified by stating that the award should indicate the number of votes by which it had been adopted.

62. Mr. el-KHOURI said that the provision in the Hague Convention was in accordance with the procedure followed in all courts of justice. He therefore supported Mr. Amado's proposal.

63. Mr. HUDSON had no particular preference for his own wording.

Mr. Amado's proposal was adopted by 6 votes to none, with 4 abstentions, subject to any drafting changes that might be made by the Standing Drafting Committee.[5]

ARTICLE 33 [6]

64. Mr. HUDSON proposed that article 33 be amended to read:

"The arbitral award shall provide for the allocation between the parties of the expenses of the tribunal."

65. Mr. LAUTERPACHT agreed that the references to measures of reparation or award of damages should be deleted as unnecessary, since reparation or damages were usually the most important part of the claims of the party which considered itself injured. He noted, however. that Mr. Hudson's amendment failed to mention the costs of the litigation, which might be considerable. Article 64 of the Statute of the International Court of Justice read: "Unless otherwise decided by the Court each party shall bear its own costs", and thus provided that the Court could award costs.

66. Mr. SANDSTRÖM pointed out that article 85 of the 1907 Hague Convention did not give the tribunal that power.

67. Mr. YEPES wondered whether Mr. Lauterpacht's point was not covered by the text of paragraph (*j*) of article 12, already adopted by the Commission.

68. Mr. SCELLE felt that that paragraph dealt with a slightly different question. To solve the difficulty, however, he proposed that article 33 be deleted.

69. Mr. ZOUREK pointed out that the purpose of article 12 as a whole was merely to enumerate what questions should be specified in the *compromis.* The actual award of costs was an entirely separate process, and must be provided for separately.

Mr. Scelle's proposal that article 33 be deleted was rejected by 7 votes to 2, with 1 abstention.

70. Mr. LAUTERPACHT said that it was true that the Hague Convention provided that the parties should bear their own costs. However, such a provision was obviously unsatisfactory. The reason why it had been included in the Hague Convention was doubtless that it had at that time been regarded as a great achievement if two States could be persuaded to have recourse to arbitration, and that the authors of the Convention had not wished to include any provision which might increase the reluctance of governments to have recourse to that, at that time, rather novel process. It was only just, however, that the tribunal should be allowed to award costs in certain cases; cases had occurred, and still occurred, for example, where litigation was quite unnecessary, where one party had resolutely opposed from the very outset an obviously just claim by the other party. For that reason he proposed that the following words be added at the end of Mr. Hudson's proposal:

"and of the costs of the litigation"

Mr. Lauterpacht's proposal was adopted by 9 votes to none, with 2 abstentions.

71. Mr. HUDSON suggested that it would be preferable in that case to retain the wording used in Article 64 of the Statute of the International Court of Justice, "Unless otherwise decided by the Court, each party shall bear its own costs".

72. Mr. SANDSTRÖM suggested that that question might be referred to the Standing Drafting Committee.

On that understanding, Mr. Hudson's proposal was adopted as amended.

ARTICLE 34 [7]

73. Mr. HUDSON proposed that article 34 be amended to read:

"Subject to any contrary provision in the *compromis,* any member of the tribunal may attach his separate opinion to the award."

74. Mr. YEPES said that although, in theory, he did not favour separate or dissenting opinions, which weakened the authority of an arbitral award, he realized that the practice of including them was so firmly established that it would not be possible to eliminate them.

75. He proposed, however, that the following sentence be added to article 34, either in its original form or in that proposed by Mr. Hudson:

"Separate or dissenting opinions shall be limited to a brief statement of the considerations advanced by their authors."

76. Mr. LAUTERPACHT disagreed emphatically with Mr. Yepes' proposal, the intention of which was to restrict the arbitrators' right to present separate or dissenting opinions. It must be assumed that in submitting such opinions arbitrators would take care not to detract from the authority of the tribunal; apart from that, their right should be subject to no limitation. It was essential to the healthy development of international

[5] Article 32, as tentatively adopted, read as follows:

"1. The arbitral award shall be drawn up in writing. It shall be read in open court, the representatives and counsel of the parties being present or duly summoned to appear.

"2. The arbitral award shall include a full statement of reasons.

"3. The arbitral award shall contain the names of the arbitrators and shall be signed by the president and by the registrar or the secretary."

[6] Article 33 read as follows:

"Any measures of reparation or award of damages shall be carefully specified, as shall the allocation of costs and expenses."

[7] Article 34 read as follows:

"The arbitrators are authorized to attach their separate or dissenting opinions to the award, unless they are explicitly debarred from doing so by the *compromis.*"

law that any separate or dissenting opinions should be made known in as much detail as possible.

77. He could agree to the wording proposed by Mr. Scelle or to that proposed by Mr. Hudson, although he did not understand why Mr. Hudson spoke only of "separate opinions".

78. Mr. HUDSON pointed out that Article 57 of the Statute of the International Court of Justice also referred only to separate opinions. Separate opinions included dissenting opinions.

79. Mr. AMADO could find no fault with the admirably clear text proposed by Mr. Scelle. He could see no reason for the amendment submitted to it, unless its translation into English had given rise to difficulties.

80. Mr. KOZHEVNIKOV said that he was not convinced by Mr. Yepes' argument, and would vote against his proposal, which would have the effect of restricting the undoubted right of members of the tribunal to submit separate or dissenting opinions. In Soviet Union law, those two terms related to two distinct matters, and if Mr. Hudson's proposal was to be voted on, he would propose the insertion in it, after the words "may attach his separate", of the words "or dissenting".

81. He would be prepared to vote for the wording proposed by Mr. Scelle as it stood.

After further discussion, *Mr. Yepes' proposal was put to the vote and was rejected by 7 votes to 1, with 2 abstentions.*

Mr. Kozhevnikov's proposal, that the words "or dissenting" be inserted after the words "may attach his separate" in Mr. Hudson's amendment, was adopted by 7 votes to 2, with 1 abstention.

Mr. Hudson's proposal was adopted, as amended, by 8 votes to none with 1 abstention, subject to any further amendments that might be made by the Standing Drafting Committee.

82. Mr. el-KHOURI hoped that the Standing Drafting Committee would take into account the possibility that members of the tribunal who dissented from an award might use their right to attach to it their separate or dissenting opinions in such a way as to delay the issue of the award beyond the time-limit, thus invalidating it.

83. Mr. SANDSTRÖM pointed out that the draft prepared by Mr. Scelle did not specify what majority was required to enable the tribunal to make its award. He therefore proposed that the following sentence, taken from article 78 of the 1907 Hague Convention on the Pacific Settlement of International Disputes, be inserted in the draft text before the Commission, either as a second paragraph to article 34 or in any other place where the Standing Drafting Committee thought fit:

"All questions are decided by a majority of the members of the tribunal."

Mr. Sandström's proposal was adopted by 8 votes to none, with 2 abstentions.

ARTICLE 35 [8]

84. Mr. HUDSON proposed that article 35 in its entirety be replaced by the following text:

"The award is obligatory for the parties, and it must be carried out in good faith."

85. Mr. SCELLE pointed out that Mr. Hudson's proposal ignored the question of what was usually known as the "*effet utile*" of an award. If an award was carried out with respect only to its actual content, and not with respect to its logical implications as well, it could become meaningless. A recent judgment by the International Court of Justice, for example, had stated that the action taken by one of the parties was illegal. That party had pointed out that the Court had not said that it should revoke that action, and had declined to do so. What he wished to ensure was that, if the tribunal failed to dot the I's and cross the T's, its clear intention should nevertheless be carried out.

86. Mr. LAUTERPACHT associated himself with Mr. Hudson's proposal, although he felt that the text proposed should replace article 36 as well as article 35. In so far as the States parties to the dispute were concerned, article 36 merely repeated article 35; the further proposal that the award should be binding on the nationals of States parties to the dispute introduced a controversial element upon which he thought the Commission would have difficulty in agreeing. Finally, the provision that the award should be binding only on the parties to the dispute and in respect of the case which had been decided, which was based on Article 59 of the Statute of the International Court of Justice, where it had been included with the intention of somewhat weakening the impact of Article 38, was unnecessary in the draft convention, which contained no counterpart to Article 38 of the Court's Statute.

87. With regard to the question of "*effet utile*", his understanding of the statement that "the award... must be carried out *in good faith*" was precisely that the parties were bound to carry out everything which was logically implied in it as well as what was stated explicitly.

88. Mr. SCELLE said that he could accept Mr. Hudson's proposal if the majority of the Commission supported it. He would only point out that in his view Mr. Lauterpacht was too optimistic; the parties to a dispute could not be expected to be judges of good faith and justice; all that they could be expected to know was what was to their interest.

89. Mr. KOZHEVNIKOV felt obliged to protest against the statement that the parties could be judges

[8] Article 35 read as follows:

"The award is strictly binding and shall be carried out in good faith with respect not only to its actual content but also to its logical implications.

"The tribunal has no power to issue regulations regarding either the execution of the award or the adjustment of future relations between the parties in the matter which has been the subject of the dispute, unless expressly invested with such power by agreement between the parties."

only of their own interests, not of good faith and justice. He requested, however, that the vote on Mr. Hudson's proposal be deferred until it had been distributed in writing.

It was so agreed.

Data and place of the fifth session (item 7 of the agenda) (*resumed from the 148th meeting*)

90. The CHAIRMAN recalled that the Commission had already provisionally decided that its fifth session should be held in Geneva, beginning about 1 June 1953, and that the Assistant Secretary-General in charge of the Legal Department had subsequently transmitted to it certain comments by the Secretary-General on the additional financial implications of such a decision. The time had now come when the Commission should take its final decision on the matter.

After a brief discussion, *the Commission decided by 9 votes to none, with 3 abstentions, to confirm its previous provisional decision, taken in the interests of the efficient conduct of its work, to hold its fifth session in Geneva, beginning about 1 June 1953. The voting was as follows:*

In favour: Mr. Alfaro, Mr. Amado, Mr. François, Mr. Hsu, Mr. Hudson, Mr. Lauterpacht, Mr. Sandström, Mr. Scelle, Mr. Yepes.

Against: None.

Abstaining: Mr. el-Khouri, Mr. Kozhevnikov, Mr. Zourek.

The meeting rose at 1.10 p.m.

151st MEETING

Thursday, 26 June 1952, at 9.45 a.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

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

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

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

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

ARTICLES 35 (*continued*) AND 36 [1]

2. The CHAIRMAN recalled that, at the previous meeting, Mr. Hudson had proposed that articles 35 and 36 be replaced by the following article:

"The award is obligatory for the parties, and it must be carried out in good faith."

3. Mr. KOZHEVNIKOV said that although the French text was clear, the Russian translation with which he had been provided was not. It would be preferable to insert the words "by them" in the Russian text, after the words "carried out".

4. The CHAIRMAN pointed out that only English and French were working languages. The Russian translation should therefore not be regarded as authentic.

5. Mr. SCELLE asked whether Mr. Hudson would agree to the insertion of the word "immediately" after the words "carried out".

6. Mr. YEPES felt that that addition was absolutely necessary. He formally moved the insertion of the word "immediately".

7. Mr. SANDSTRÖM and Mr. LAUTERPACHT pointed out that an award did not always have to be carried out immediately. The words "in good faith" covered the point which Mr. Scelle had in mind.

8. Mr. KOZHEVNIKOV agreed, and pointed out that the word "immediately" was itself open to varying interpretations. Its inclusion would not make for clarity in the way desired by Mr. Scelle.

9. Mr. SCELLE said that he would not press his suggestion.

10. Mr. YEPES withdrew his proposal.

The text proposed by Mr. Hudson to replace articles 35 and 36 was adopted by 10 votes to none, with 1 abstention.

[1] Article 36 read as follows:

"The arbitral award, which shall be binding forthwith on the States parties to the dispute and on the nationals and organs of those States, is binding only on the parties to the dispute and in respect of the case which has been decided."