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Articles Tentatively Adopted on 26 June 1952 - incorporated in the summary records of the 151st meeting

Topic:

Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-

1952, vol. I

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."

ARTICLE 37 [2]

11. Mr. YEPES proposed that article 37 be amended to read:

"Any dispute which may arise between the parties with regard to the interpretation or execution of the award shall be submitted to the tribunal which made the award. If it proves materially impossible to reconstitute the tribunal, the dispute with regard to interpretation or execution shall be referred to the International Court of Justice."

12. Mr. LAUTERPACHT pointed out that the only difference of substance between the text proposed by Mr. Yepes and that of the special rapporteur was that the former omitted the reference to the Permanent Court of Arbitration. He could not himself understand that reference in Mr. Scelle's draft. There was no such body in existence as the Permanent Court of Arbitration; tribunals had been constituted at various times under the aegis and in pursuance of the Hague Conventions, but that was all.

13. He noted, however, that both Mr. Yepes and Mr. Scelle used the words "If it proves materially impossible to reconstitute the tribunal". If those words were intended to refer to cases where one or more members of the tribunal which had made the award had subsequently died, or were no longer available for any other reason, they raised an important issue, which affected the provisions relating to revision of the award as well as those relating to its interpretation and execution. In his view, it was extremely important that the tribunal which revised or interpreted the award should be the same as that which had rendered it, save in very exceptional cases. All that was necessary, therefore, was to extend the scope of the provisions relating to the replacement and withdrawal of arbitrators to cases of replacement or withdrawal arising after as well as before the award had been made.

14. Mr. el-KHOURI pointed out that article 82 of the 1907 Hague Convention for the Pacific Settlement of International Disputes had contained no provisions corresponding to the second sentence of Mr. Yepes' text or to the second paragraph of article 37 in Mr. Scelle's draft. That was obviously because it had been considered that the tribunal continued to exist until the dispute had finally been disposed of, and because the Hague Convention had contained provisions for the replacement and withdrawal of arbitrators. Article 4 already adopted by the Commission contained provisions dealing with the same matters. Those were all that was required, and he would suggest that article 82 of the Hague Convention be substituted, with the necessary consequential changes, for the whole of article 37 in Mr. Scelle's draft.

15. Mr. SCELLE said that on the main point at issue he was entirely in agreement with Mr. Lauterpacht. What remained was only a matter of drafting. Disputes with regard to the interpretation of an award might arise months, or even years, after the award had been made, and situations might occur in which it would indeed be "materially impossible to reconstitute the tribunal". Provision should be made for such cases, although his basic idea had been that such disputes should be dealt with by the tribunal that rendered the original award.

16. He agreed that the Permanent Court of Arbitration at present existed only on paper. In his view, however, it was extremely regrettable that it had been allowed to fall into desuetude, and that disputes which apparently lent themselves to arbitration were now referred to the International Court of Justice instead.

17. Mr. SANDSTRÖM pointed out that the first paragraph of Mr. Scelle's draft of article 37 appeared to correspond to article 82 of the 1907 Hague Convention, but that the words "in the absence of an agreement to the contrary", which appeared in the latter, had been omitted. He wondered whether that omission was intentional.

18. Mr. SCELLE said that he had omitted those words purposely, because the award was binding on the parties, and he could not agree that the parties should be able, with the object of maintaining the *status quo*, to exploit a dispute, real or otherwise, as to the interpretation of the award. If such a dispute arose, it should be settled, whenever possible, by the tribunal which rendered the award.

19. Mr. KOZHEVNIKOV said that he could accept either Mr. Yepes' proposal or that of Mr. Scelle, subject to two amendments. In the event of Mr. Yepes' proposal being taken as the basis for discussion, he would propose that the words "established by agreement between the parties and" be inserted after the words "be submitted to the tribunal" in the first sentence, and that the words "upon agreement between the parties" be added after the words "to the International Court of Justice" in the second sentence. In the event of Mr. Scelle's proposal being taken as the basis for discussion, he would propose corresponding amendments to it.

20. Mr. LIANG (Secretary to the Commission) asked whether it was the Commission's intention to include in the draft articles a provision concerning what might be called the life of an *ad hoc* arbitral tribunal. He felt that it would be reasonable to provide that an *ad hoc* tribunal should cease to exist when all questions arising out of the dispute which had been referred to it, including questions of interpretation and revision of the award, had been settled. If that was agreed, the question of reconstituting the tribunal for the purpose of the interpretation or revision of the award would not arise,

[2] Article 37 read as follows:

"Any dispute which may arise between the parties with regard to the interpretation and execution of the award shall be submitted to the tribunal which made the award.

"If it proves materially impossible to reconstitute the tribunal, the dispute with regard to interpretation or execution shall be referred, at the choice of the parties, either to the ICJ or to the PCA. In the event of disagreement between the parties, the ICJ shall have compulsory jurisdiction."

because the tribunal would then be still in existence, and the provisions already adopted by the Commission relating to the withdrawal and replacement of arbitrators would apply.

21. On the other hand, it was possible, as Mr. Scelle had pointed out, that disputes concerning interpretation and revision might arise years after the award had been made, when members of the tribunal would no longer be available. In such cases, one solution would be to regard such disputes as new disputes and to consider the functions of the original tribunal as having ceased with the rendering of its award.

22. Mr. SCELLE could not agree with the last point made by the Secretary. In his view, all questions arising out of the interpretation, execution and revision of an award should be settled, if at all possible, by the tribunal which had made the award. One solution of the difficulty to which attention had been drawn by some members would be to provide for a time-limit, as had been done in Article 61, paragraph 5, of the Statute of the International Court of Justice, within which applications must be made for that purpose. Six months might be a suitable limit. After the time-limit prescribed had expired, such application would have to be made to the International Court of Justice or to the Permanent Court of Arbitration.

23. Mr. HUDSON had grave doubts whether article 37 should deal with the execution of awards. Some awards, such as that in the *Trail Smelter Case*, entailed execution over a very long period.[3] Moreover, disputes with regard to execution could arise years after the award had been made. In *The Pious Fund of the Californian Case*, for example, a dispute had arisen with regard to the interpretation of a treaty concluded in 1848. The dispute had been submitted to arbitration by an umpire, and an award had been made in 1875 and slightly revised the following year. A dispute concerning execution of that award had arisen only in 1898, and had been submitted to a tribunal and an award rendered in 1902.[4]

24. If mention of execution was retained in article 37, some such words as those used in article 82 of the 1907 Hague Convention, namely, "in the absence of an agreement to the contrary", should be added, in order to give the parties some measure of control over the proceedings. It would also be necessary to provide for a time-limit, as suggested by Mr. Scelle.

25. Mr. ZOUREK said that the Secretary had raised a very important question, namely, that of the life of the tribunal. In his (Mr. Zourek's) view, an *ad hoc* arbitral tribunal ceased to exist as soon as the time-limit laid down in the arbitral undertaking or the *compromis* for the rendering of its award had expired, since it owed its very existence to the arbitral undertaking or the *compromis*. So long as the tribunal remained in existence, the parties should be free to refer to it questions of the interpretation of its award, if they so chose; if they did not so choose, or if the tribunal had ceased to exist, such questions should be dealt with as separate disputes, in accordance with the international instruments in force between the parties for the international settlement of disputes; if there were no such instruments in force between the parties, the dispute would have to be settled in any other manner agreed by them.

26. Mr. SANDSTRÖM did not consider it logical to assert that the tribunal ceased to exist on the expiry of the time-limit set for the rendering of its award.

27. After some drafting discussion, Mr. HUDSON suggested that the first paragraph of article 37 in Mr. Scelle's draft be replaced by the following text, adapted from Article 60 of the Statute of the International Court of Justice:

> "Unless the parties agree upon another solution, any dispute which may arise between the parties as to the meaning and scope of the award may, at the request of any party, be submitted to the tribunal which rendered the award".

28. Mr. SCELLE and Mr. YEPES accepted Mr. Hudson's suggestion.

Mr. Hudson's suggestion was adopted by 9 votes to none, with 2 abstentions.

29. Mr. HUDSON felt that the words "unless the parties agree to another solution" in the first paragraph as just adopted made the second paragraph of Mr. Scelle's draft unnecessary.

30. Mr. LAUTERPACHT said that if the second paragraph were deleted, and if a situation arose where it became impossible to reconstitute the tribunal and the parties did not agree on another solution, deadlock would result. For that reason, the second paragraph ought to be retained.

31. Mr. YEPES and Mr. SCELLE agreed with the point of view expressed by Mr. Lauterpacht.

32. Mr. HUDSON suggested that if the second paragraph were to be retained it should be worded as follows, although he did not favour its substance;

> "If for any reason it is impossible to submit the dispute to the tribunal which rendered the award, and if the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of any party."

33. Mr. SCELLE and Mr. YEPES accepted the text suggested by Mr. Hudson, and Mr. YEPES withdrew his own amendment.

The text suggested by Mr. Hudson was adopted by 8 votes to none, with 4 abstentions.

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[3] Dispute between Canada and the United States of America. Award of 16 April 1938. See text in *American Journal of International Law*, vol. 33 (1939), pp. 182—212.

[4] Dispute between Mexico and the United States of America. Award of 14 October 1902. See text in *American Journal of International Law*, vol. 2 (1908), pp. 898—902.

Article 37 as a whole and as amended was adopted by 9 votes to none, with 3 abstentions.[5]

ARTICLES 38 AND 41 [6]

34. Mr. LAUTERPACHT proposed alternative wording for article 38, to read as follows:

"An application for the revision of the award may be made only on the ground of the discovery of some new fact of such a nature as to be of a decisive character, provided that, when the award was rendered, that fact was unknown to the tribunal and to the party claiming revision and that such ignorance was not due to the negligence of the party claiming revision.

"The application for revision must be made at the latest within six months of the discovery of the new fact."

35. He had incorporated in his text article 41 from the special rapporteur's draft, where that article conflicted with article 38, which stated that the application for an award might be made at any time.

36. Mr. HUDSON supported Mr. Lauterpacht's text, which departed from that drafted by the special rapporteur by stipulating that the application for revision must be made within six months of the discovery of the new fact, and by omitting the words "notwithstanding any clauses to the contrary in the *compromis*".

37. He himself had drafted an alternative text for article 38, modelled on article 61, paragraph 1, of the Statute of the International Court of Justice. His text read as follows:

"An application for revision of an award may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the award was rendered, unknown to the tribunal and also to the party claiming revision, provided that such ignorance was not due to that party's negligence."

38. Mr. SCELLE asked whether Mr. Lauterpacht and Mr. Hudson considered that the parties had a right to stipulate in the *compromis* that there should be no revision. If that were the intention of the two alternative texts proposed he would be unable to accept either of them, since it seemed to him contrary to the interests of the international community to allow the parties to prohibit revision of an award which was manifestly mistaken.

39. Mr. HUDSON replied in the negative.

40. Mr. LAUTERPACHT was not absolutely certain that Mr. Hudson's wording did not mean that the parties were masters of the procedure, and that accordingly they were not deprived of the right of providing against revision in the *compromis*. Such a contingency could be envisaged, but was unlikely to occur.

41. Mr. SANDSTRÖM considered that the Commission might have to insert in the draft procedure the provision contained in article 83, first paragraph, of the 1907 Hague Convention for the Pacific Settlement of International Disputes, whereby, if the parties did not reserve their right to demand revision in the *compromis*, revision would be excluded. In the interests of public order, disputes must be finally settled and litigation should not be allowed to continue indefinitely. He would accordingly propose that article 38 be amended in that sense.

42. The CHAIRMAN observed that, according to article 12, paragraph (*g*), already adopted by the Commission,[7] the *compromis* was to contain special provisions in the matter of procedure for revision.

43. Mr. KERNO (Assistant Secretary-General) observed that if it was agreed that the parties did not have the right to exclude the possibility of revision, then some provision would have to be made to enable the tribunal to re-open a case *ex officio*.

44. Mr. SCELLE expressed surprise at the thesis developed by Mr. Sandström, which seemed to him retrograde, and with which he was in profound disagreement. According to an axiom in Anglo-Saxon law, "nothing was settled until it was settled right"; an arbitral award which was contrary to public order should not be allowed to stand, even though it be in accord with the will of the parties. For him, it was absolutely axiomatic that the possibility of revision should be allowed in any judicial process, whatever its nature.

45. Mr. HUDSON did not think that the issue whether the parties had a right to exclude revision arose in any of the texts before the Commission.

46. Mr. LAUTERPACHT said that, even though that might be true, it was nevertheless an issue which the Commission ought to face, and he was inclined to support Mr. Scelle's views. A new fact, for instance,

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[5] Article 37, as tentatively adopted, read as follows:

"1. Unless the parties agree upon another solution, any dispute which may arise between the parties as to the meaning and scope of the award may, at the request of any party, be submitted to the tribunal which rendered the award.

"2. If for any reason it is impossible to submit the dispute to the tribunal which rendered the award, particularly if the tribunal cannot be reconstituted in accordance with Article 4, and if the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of any party."

See paras. 81—85 below.

[6] Article 38 read as follows:

"An application for revision of an award may be made at any time, notwithstanding any clauses to the contrary in the *compromis*, if it is based upon the discovery of some new fact of such a nature as to be a decisive factor, which fact was, when the award was given, unknown to the arbitrator and also to the party claiming revision."

Article 41 read as follows:

"The application for revision must be made at the latest within six months of the discovery of the new fact."

[7] See summary record of the 146th meeting, para. 40.

might be the discovery after an award had been made that it had been procured by fraud, collusion or false testimony. Could it be maintained that in such cases the parties should be in a position to prevent the tribunal from re-opening the matter?

47. Mr. SANDSTRÖM replied that fraud or false testimony discovered subsequent to the award did not, in his view, constitute the discovery of a new fact, but was a case of irregular procedure, which was dealt with elsewhere in Mr. Scelle's draft articles.

48. Mr. LAUTERPACHT said that in order to meet Mr. Scelle's point he would amend his own text by adding the words "by either party" after the words "revision of the award may be made". The word "only" might also be dropped from his text.

The first paragraph of Mr. Lauterpacht's amendment, as amended, was adopted by 8 votes to none, with 3 abstentions.

49. Mr. HUDSON said that both Mr. Lauterpacht's text and his own should be prefaced by the words "Subject to any relevant provisions in the *compromis*".

50. Mr. SCELLE pointed out that the addition suggested by Mr. Hudson could not be put to the vote, since it conflicted with the text already adopted.

51. Mr. LAUTERPACHT agreed that Mr. Hudson's proposal ran counter to the spirit of the text just adopted and to the sense of the special rapporteur's draft as a whole. He added that there was no contradiction between his text and that of article 12, paragraph (*g*), according to which the parties had full latitude to lay down provisions in the *compromis* relating to the procedure of revision. Their right to exclude it did not of course arise.

52. The CHAIRMAN *ruled out of order* Mr. Hudson's amendment to Mr. Lauterpacht's text which had already been adopted.

53. He then put to the vote the whole of Mr. Lauterpacht's text.

Mr. Lauterpacht's text, as amended, to replace articles 38 and 41 in the special rapporteur's draft was adopted as a whole by 7 votes to 1, with 4 abstentions.[8]

54. Mr. AMADO, explaining his vote, said that he had abstained because he shared Mr. Sandström's views.

55. Mr. LAUTERPACHT raised the question whether the Commission should not make some provision similar to that contained in Article 61, paragraph 5, of the Statute of the International Court of Justice, imposing a time-limit of ten years on applications for revision.

56. Mr. SCELLE was not in favour of such a provision, although he had no objection of principle to the issue.

57. Mr. LIANG (Secretary to the Commission) expressed his doubts on the wisdom of transposing to the draft before the Commission the provision of Article 61, paragraph 5, of the Statute, since that provision was appropriate only to a permanent judicial organ.

58. Mr. HUDSON considered that if such a provision were inserted, the period should be reduced to three or five years.

59. Mr. el-KHOURI thought that such a provision would be unwise. If it was impossible to re-convene the original tribunal for the purpose of entertaining an application for revision, the matter could be referred to the International Court of Justice.

60. Mr. SANDSTRÖM proposed the adoption of a provision couched in the same terms as Article 61, paragraph 5, of the Statute of the International Court, namely:

"No application for revision may be made after the lapse of ten years from the date of the award."

61. Mr. LAUTERPACHT supported Mr. Sandström's proposal.

62. Mr. SCELLE considered that if article 39 of his own draft were adopted that would suffice to meet the purpose of the text proposed by Mr. Sandström, since it would make the tribunal responsible for deciding whether revision should take place.

63. Mr. ZOUREK pointed out that an arbitral tribunal was quite different in nature and composition from the International Court of Justice. He did not believe that provisions applicable to the latter were always appropriate to the former. He therefore opposed Mr. Sandström's proposal.

64. Mr. AMADO also opposed Mr. Sandström's proposal.

Mr. Sandström's proposal was rejected by 6 votes to 5, with 1 abstention.

ARTICLE 39[9]

65. Mr. HUDSON proposed that article 39 be replaced by the following text:

"The proceedings for revision shall be opened by an interlocutory award by the tribunal expressly recording the existence of the new fact, and declaring the application admissible on this ground."

[8] Article 38, as tentatively adopted, read as follows:

"1. An application for the revision of the award may be made by either party on the ground of the discovery of some new fact of such a nature as to be of a decisive character, provided that, when the award was rendered, that fact was unknown to the tribunal and to the party claiming revision and that such ignorance was not due to the negligence of the party claiming revision.

"2. The application for revision must be made at the latest within six months of the discovery of the new fact."

[9] Article 39 read as follows:

"The proceedings for revision shall be opened by a judgment of the tribunal recording the existence of the new fact and ruling upon admissibility. The tribunal shall then rule upon the merits of the case."

66. Mr. LAUTERPACHT supported Mr. Hudson's proposal, but asked whether the word "expressly" might not be deleted, as it appeared to him redundant.

67. Mr. LIANG (Secretary to the Commission) suggested that there was no need to follow the wording of Article 61 of the Statute of the International Court of Justice too closely. He had misgiving about the words "The proceedings for revision shall be opened...", as any hearing upon the admissibility of an application for revision in itself constituted part of the proceedings.

68. Mr. HUDSON observed that the point raised by the Secretary might be met by amending the opening words of his text to read: "The decision on revision shall be preceded by", etc.

69. Mr. KERNO (Assistant Secretary-General) suggested that it was important to make clear that the tribunal had first to pronounce on whether it was in the presence of a new fact. After which it could examine the merits of the case and decide whether to revise its award.

70. Mr. SCELLE agreed that the procedure of revision entailed two stages: first, the decision on admissibility, and secondly, examination of the substance of the new fact.

71. Mr. LAUTERPACHT suggested that, as there was no disagreement on the substance of article 39, suggestions regarding its drafting should be left to the Standing Drafting Committee.

It was so agreed.

Mr. Hudson's text for article 39 was adopted, subject to review by the Standing Drafting Committee, by 9 votes to none, with 1 abstention.

ARTICLE 40 [10]

72. Mr. HUDSON proposed an alternative text for article 40, to read:

> "The application for revision shall be made to the tribunal which rendered the award. If for any reason it is not possible to address the application to that tribunal, the application may, unless the parties agree upon another solution, be made to the International Court of Justice."

73. Mr. SCELLE accepted Mr. Hudson's proposal.

74. Mr. KOZHEVNIKOV said that Mr. Hudson's proposal largely accorded with his own views. He would, however, propose an amendment to the second part, namely, the insertion of the words "by consent of the parties" after the words "be made".

75. Mr. LAUTERPACHT, referring to Mr. Hudson's proposal, asked what were the reasons for which it would not be possible to address an application for revision to the original tribunal. If one of the members of the tribunal had died after the award had been rendered, would the situation then be one envisaged by Mr. Hudson's text? He thought it a fundamental principle that revision should be made by the original tribunal. That was a characteristic feature which distinguished revision from other remedies. Some means should therefore be found to prevent a party from discarding the tribunal which had rendered the award.

76. Mr. SCELLE said that he had intentionally referred in articles 37 and 40 to the reconstitution of the tribunal, since that would mean that if one of the members had died in the meantime, the provisions relating to replacement would apply.

77. Mr. HUDSON said that his text would cover reconstitution of the tribunal.

78. Mr. LAUTERPACHT suggested that that was open to question. The possibility of reconstitution did not seem to him to be implicit either in Mr. Hudson's text or in the second paragraph of article 37 as already adopted by the Commission. Indeed, he had had the intention of submitting an amendment to the latter concerning the insertion of the words "if necessary the tribunal shall be reconstituted in accordance with the provisions of article 4".

79. Mr. AMADO agreed with Mr. Lauterpacht.

80. Mr. SANDSTRÖM had understood the words "the tribunal which rendered the award", in the second paragraph of article 37, to mean a tribunal consisting of at least a majority of the original arbitrators.

81. Mr. SCELLE said that it was becoming evident that the second paragraph of article 37 was not quite clear. He therefore proposed that a reference to the reconstitution of the tribunal be inserted in it, and in Mr. Hudson's draft of article 40, by adding, at the appropriate place, the following words, "particularly if the tribunal cannot be reconstituted in accordance with article 4".

82. Mr. HUDSON accepted Mr. Scelle's proposal.

83. Mr. LAUTERPACHT suggested that it should be laid down that the tribunal should be reconstituted in accordance with the provisions of article 4.

84. Mr. SCELLE agreed.

85. The CHAIRMAN put to the vote Mr. Hudson's text for article 40, as amended by Mr. Scelle. He declared that, if adopted, the addition proposed by Mr. Scelle would apply equally to the second paragraph of article 37, already tentatively adopted.

Mr. Hudson's wording, as amended, was adopted by 9 votes to none, with 3 abstentions.

The meeting rose at 1.15 p.m.

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[10] Article 40 read as follows:

"The application for revision shall be made to the tribunal which gave the original award. If it is impossible to reconstitute that tribunal, the application shall be made to the ICJ or the PCA, as provided in the above article on interpretation."