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Summary record of the 143rd meeting

Topic:
<multiple topics>

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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."