Document:-
A/CN.4/SR.149

Summary record of the 149th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1952 , **vol. I**

United States law of evidence presumption was an assumption until rebutted.

78. As it stood at present, the English text of article 25 seemed to him devoid of meaning.

79. Mr. YEPES considered that article 25 was necessary. He could support either the special rapporteur's text or that proposed by Mr. Lauterpacht.

80. Mr. KOZHEVNIKOV said that in view of the different definitions of presumption and the unlikelihood of reaching agreement on a generally acceptable formula, the article should be deleted.

Mr. Scelle withdrew article 25.

The meeting rose at 5.50 p.m.

149th MEETING

Tuesday, 24 June 1952 at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, 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 3) (*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.

ARTICLES 21 AND 22 (*resumed from the 148th meeting*)

2. The CHAIRMAN recalled that discussion of Articles 21 and 22 had been deferred until such time as an amendment submitted by Mr. Yepes had been distributed.[1] That amendment was now available and read as follows:

> "If the *compromis* cannot be interpreted in a sense permitting fulfilment of the obligation to arbitrate, or if failure to comply with its procedural orders prevents the tribunal from performing its functions, the tribunal shall call upon the parties to modify the *compromis,* to obey the orders of the tribunal or explicitly to discontinue the proceedings. If the parties do not accept any of these proposals, the tribunal shall be free to proceed."

3. Mr. FRANÇOIS said that he would prefer the deletion of articles 21 and 22, since the cases they envisaged would arise so rarely as to make it unnecessary to provide for them. In any event, he did not see how the two articles could be combined. In the case of failure to comply with procedural orders, it might be impossible for the tribunal to proceed with its work regardless.

4. Mr. LAUTERPACHT said that the issue of *non liquet* was already fully covered by articles 19 and 20 already tentatively adopted by the Commission. Mr. Yepes' proposal was also designed to cover cases where the *compromis* rendered fulfilment of the tribunal's functions impossible. But it should be generally accepted that the arbitral tribunal had no powers other than those assigned to it in the *compromis.* Its power derived solely from the will of the parties. He was therefore unable to support Mr. Yepes' proposal.

5. Mr. SCELLE pointed out that his own text was more complicated than that proposed by Mr. Yepes. The point he had in mind was likewise more complicated. In fact, it was so complicated that he had already agreed to withdraw articles 21 and 22. He would, however, be prepared to accept Mr. Yepes' text, although it went rather farther along a slightly different road from his own.

6. Mr. KOZHEVNIKOV said that, before discussing the substance of Mr. Yepes' proposal, the Commission should decide whether it wished to delete or retain the substance of articles 21 and 22.

7. The CHAIRMAN put to the vote the issue whether the subject-matter of articles 21 and 22 of Mr. Scelle's draft should be omitted.

The issue was decided in the affirmative by 7 votes to 1, with 3 abstentions.

[1] See summmary record of the 148th meeting, para. 8.

ARTICLE 26 [2]

8. Mr. HUDSON proposed that article 26 be amended to read as follows:

"The tribunal shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party. The parties have a duty to take the measures indicated."

9. Mr. YEPES proposed that article 26 be replaced by the following text:

"The arbitrator or the arbitral tribunal and, in case of urgency, its President, shall be empowered to indicate, at any point in the procedure and whenever circumstances require, any provisional measures which ought to be taken to preserve the respective rights of either party.

Pending the final award, notice of such measures shall be given without delay to the parties which are bound to comply therewith.

In the event of the parties refusing to comply with the notice given by the tribunal concerning the measures in question, the fact shall be duly recorded."

10. Mr. FRANÇOIS pointed out that the text proposed by Mr. Hudson did not provide that the president of the tribunal should have the power to indicate provisional measures in case of urgency. In his opinion, that power should be given to him, provided that any such measures prescribed by the president were subject to confirmation by the tribunal. He therefore proposed that the following words be inserted after the words "The tribunal", in the text proposed by Mr. Hudson:

"and in case of urgency, its President, subject to confirmation by the tribunal."

11. Mr. SCELLE supported Mr. François' amendment. Otherwise he could accept the text proposed by Mr. Hudson, provided it was understood that the tribunal could indicate such provisional measures on its own initiative, or, as he had said in his draft, *ex officio,* without being requested to do so by the parties.

12. Mr. HUDSON did not consider that the power to indicate provisional measures should be given to the president of the tribunal, who usually served in an *ad hoc* capacity. Citing Article 41 of the Statute of the International Court of Justice, he pointed out that even the president of that permanent body had not been given the power to indicate provisional measures.

13. Mr. SANDSTRÖM supported Mr. François' amendment, for which, he said, there were very good practical grounds.

14. Mr. el-KHOURI said that if any provisional measures indicated by the president were subject to confirmation by the tribunal, they would become in effect measures indicated by the tribunal. If the tribunal wished to delegate to its president the power to indicate provisional measures in cases of urgency, there was nothing to prevent it from doing so. He felt therefore that the amendment proposed by Mr. François was unnecessary. In general, he preferred the text proposed by Mr. Hudson to the texts submitted by Mr. Yepes and Mr. Scelle.

15. Mr. LAUTERPACHT also preferred the text proposed by Mr. Hudson, provided that Mr. François' amendment thereto was adopted. There was a difference between an arbitral tribunal and the International Court of Justice. The latter was permanently in session and could easily be convened. In the case of the former, either of the parties could easily delay the convening of the tribunal by procrastination or some other means, with the result that the purpose of provisional measures would be defeated.

16. Mr. ZOUREK said that article 26 raised two important questions of principle: first, whether the power to indicate provisional measures of protection should form part of the general powers of the tribunal or should have to be expressly conferred on it by the arbitration treaty or the *compromis*; and secondly, whether the tribunal should be able to indicate such measures *ex officio* or only at the request of one of the parties.

17. With regard to the first question, it must be borne in mind that the power to choose the applicable rules of law had been given to the parties under paragraphs (*f*) and (*g*) of article 12, already tentatively adopted by the Commission. It would be strange, therefore, if the article under consideration conferred on all arbitral tribunals the power to indicate provisional measures where the parties had not agreed in the *compromis* or in the arbitration treaty that it should possess that power.

18. The text proposed was thus in contradiction with the whole concept of arbitration as it resulted from practice, as well as with the requirements of the international community of sovereign and independent States. The parallel with Article 41 of the Statute of the International Court of Justice was not valid, since there was a world of difference, upon which it was unnecessary to elaborate, between that Court and an arbitral tribunal.

19. The arguments he had cited applied *a fortiori* to the proposal that the tribunal should be able to exercise *ex officio* the power to indicate provisional measures. The tribunal's powers depended solely on the will of the parties, and he did not understand how it could, on its own initiative, indicate provisional measures which neither of the parties had asked for.

20. If the Commission decided none the less to adopt such a provision, it should not confer such wide powers on any one person. The practical arguments which had been put forward in favour of conferring such power on the president were in his opinion unconvincing. He did not understand how it could be impossible for the

[2] Article 26 read as follows:

"The arbitrator or the arbitral tribunal and, in case of urgency, its president, may, when circumstances so require, and if necessary *ex officio,* indicate any provisional measures which ought to be taken to preserve the respective rights of each party. Notice of such measures shall be given without delay to the parties which are bound to comply therewith."

tribunal to meet rapidly, if circumstances so required, to consider the question of provisional measures.

21. He therefore wished to submit three amendments to the text proposed by Mr. Yepes. First, that the words: "and in case of urgency its President"; be deleted. Secondly, that after the words: "The arbitrator or the arbitral tribunal" the words "if the arbitration treaty or the *compromis* confer the necessary powers upon them" should be inserted. Thirdly, that after the words "shall be empowered" the words "at the request of either party to the dispute" should be inserted.

22. Mr. KOZHEVNIKOV agreed with Mr. Zourek that there was a fundamental difference between an arbitral tribunal and the International Court of Justice. Article 26 appeared to confuse the functions of the two, and must therefore be considered carefully. The Commission must bear in mind that the essential element of arbitration was the consent of the parties. He supported Mr. Zourek's proposals which would safeguard that principle.

23. Mr. SANDSTRÖM and Mr. LAUTERPACHT felt that there was no contradiction between article 26 and the text of article 12 as adopted.

24. Mr. YEPES said that he would withdraw the first two paragraphs of his proposal in favour of Mr. Hudson's proposal, provided that it was understood that in the latter the tribunal should have the power to indicate provisional measures at any point in the procedure. He suggested, however, that the third paragraph of his proposal, which concerned action to be taken in the event of the parties refusing to carry out the provisional measures indicated by the tribunal, should be added to Mr. Hudson's proposal as an additional sentence.

25. The CHAIRMAN pointed out that Mr. Zourek's second and third amendments applied equally well to Mr. Hudson's proposal. His first amendment directly negated the amendment proposed by Mr. François, to add the words "and in case of urgency, its President subject to confirmation by the tribunal". He would first put that amendment to the vote, it being understood that, if adopted, it would be subject to any drafting changes which the Standing Drafting Committee might later introduce.

Mr. François' proposal was adopted by 6 votes to 5, with 1 abstention.

26. The CHAIRMAN then put to the vote Mr. Zourek's proposal that the words "if the arbitration treaty or the *compromis* confers the necessary powers upon it" be inserted after the word "tribunal".

Mr. Zourek's proposal was rejected by 10 votes to 2.

27. The CHAIRMAN then put to the vote Mr. Zourek's proposal that the words "at the request of either party to the dispute" be inserted after the words "shall have the power to indicate".

Mr. Zourek's proposal was rejected by 8 votes to 2, with 2 abstentions.

28. The CHAIRMAN said that, as Mr. Yepes' proposal now merely added to Mr. Hudson's proposal, he would put the latter, as amended, to the vote first.

Mr. Hudson's proposal was adopted, as amended, by 7 votes to 4, with 1 abstention.

29. Mr. AMADO wished to place on record that he had voted against Mr. François' amendment to Mr. Hudson's proposal, but that he would have voted for Mr. Hudson's proposal itself had that been put to the vote in its original form.

30. Mr. YEPES said that the sentence he proposed be added to Mr. Hudson's text was based on a similar provision in the rules of court of the Permanent Court of International Justice.

31. Mr. el-KHOURI said that he saw no reason for the addition. If the tribunal's decisions were not implemented, it would only be natural that that fact should be recorded.

32. Mr. LAUTERPACHT said that if Mr. Yepes' proposal were adopted the only consequence of refusal by one of the parties to carry out the provisional measures indicated by the tribunal would be that the fact would be recorded. In his view, that party incurred international liability and was responsible for any damages resulting from its refusal. Mr. Yepes' proposal would in practice rob the provisional measures of much of the binding force which they should have, and he would therefore vote against it.

Mr. Yepes' proposal was rejected by 9 votes to 2, with 1 abstention.[3]

ARTICLE 27 [4]

33. Mr. LAUTERPACHT found some difficulty in following the special rapporteur's text for article 27, but assumed that it was mainly concerned with counter-claims. If so, that should be made clear, and the article shortened. He was unable to understand the precise import of the term "additional claims". The distinction between the two seemed to him obscure and controversial.

34. He proposed an alternative text, which read:

"The tribunal shall have jurisdiction in respect of any counter-claim arising directly out of the subject matter of the dispute."

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[3] Article 26, as tentatively adopted, read as follows:

"The tribunal, and in case of urgency, its President subject to confirmation by the tribunal, shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party. The parties have a duty to take the measures indicated."

[4] Article 27 read as follows:

"For the purpose of securing a complete settlement of the dispute, the arbitral tribunal shall rule on objections regarding the admissibility of principal or incidental claims and, in particular, of additional claims and counter-claims. The tribunal may, if it thinks fit, fix time-limits for the submission of such objections."

35. Mr. SCELLE said that there was a difference of substance between his text and that of Mr. Lauterpacht, since he (Mr. Scelle) believed that there was a very clear distinction between additional claims and counter-claims. A typical example of the former might arise when frontier disputes were the object of arbitration. A party might ask that a particular area be considered, though it had not been mentioned in the *compromis,* because a complete settlement of the dispute would otherwise be impossible. On the other hand, in his view a counter-claim had no direct relation to the subject matter of the dispute. Clearly, it was a point on which Anglo-Saxon procedure differed from continental procedure, as a consequence of which he and Mr. Lauterpacht were arguing from different premises.

36. He believed that the tribunal ought to rule both on additional claims and on counter-claims, and was therefore unable to accept Mr. Lauterpacht's wording, which failed to envisage both contingencies.

37. Mr. YEPES supported the special rapporteur's draft, which was more complete than the text proposed by Mr. Lauterpacht, and contained the additional element of empowering the tribunal to rule on objections regarding the admissibility of principal or incidental claims.

38. Mr. LAUTERPACHT said that Mr. Scelle's text was undoubtedly more complete ; that was precisely why he was reluctant to support it. In so far as an additional claim was of a procedural character connected with the subject matter of the dispute, it would be covered by the articles already adopted by the Commission.

39. In the meantime, Mr. Hudson had suggested to him an alternative wording which, he believed, expressed the idea better than did his own. He would accordingly withdraw his own text in favour of Mr. Hudson's, which read :

> "The tribunal shall have power to entertain any counter-claims arising out of the subject matter of the original dispute."

40. Mr. ZOUREK considered that Mr. Scelle's text went much too far, as it would enable the tribunal to pronounce upon matters not covered by the *compromis.* He would deplore any such extension of the tribunal's competence.

41. Mr. SANDSTRÖM said that Mr. Scelle's text was easily understandable to any jurist familiar with French legal procedure. Perhaps the English translation was not entirely satisfactory, and might have given rise to some of Mr. Lauterpacht's doubts. He believed that the tribunal should be empowered to rule on additional claims if the necessary provisions existed in the original obligation to arbitrate, whether that were a general treaty or a special *compromis.* Otherwise it should not have the power to entertain such claims.

42. Mr. SCELLE pointed out that an additional claim was only admissible if closely linked with the subject matter of the dispute. However, it was, of course, open to an arbitral tribunal, as it was to any domestic tribunal, to reject an additional claim, an example of which was a claim for damages.

43. As he had already had occasion to emphasize, one of the basic principles of his text was that a settlement of the whole subject matter of the dispute should be achieved. If, in order to bring that about the tribunal had to examine and rule upon an additional claim, it should be empowered to do so.

44. Mr. el-KHOURI pointed out that Mr. Scelle did not make it obligatory on the tribunal to rule on an additional claim, but merely gave it jurisdiction to do so if it thought fit. In his view, the text was perfectly satisfactory and he would vote in favour of it.

45. Mr. LAUTERPACHT well understood that the intention of the provision was to enable the tribunal to decide whether an additional claim should be admitted or not. The point was whether the tribunal should be given the power to pronounce on an additional claim concerning which no provision had been made in the *compromis.* Mr. Scelle had referred to damages, and it might be pertinent to point out that the International Court of Justice had in at least two cases been faced with the issue whether the question of reparation for injury was covered by the original obligation to submit to the Court disputes arising from the interpretation of a treaty. The Court had found that it could pronounce on such a claim, which was inherent in the original claim and not an additional one.

46. Mr. SANDSTRÖM emphasized the importance of an arbitral tribunal being empowered to rule on the admissibility of claims. Arbitral procedure would be frustrated if it were unable to do so.

47. Mr. SCELLE fully agreed with Mr. Sandström. He had been surprised by the turn the discussion had taken, as it seemed to him inconceivable that an arbitral tribunal should be denied the power to rule on additional claims and counter-claims. It was an elementary procedural right of tribunals, regardless of their nature.

48. Mr. el-KHOURI added that if the tribunal itself were not empowered to rule on the admissibility of claims, he failed to see what body could do so. And it would be impossible to prevent the parties from bringing additional claims and counter-claims.

49. Mr. SCELLE said that the last sentence of his text seemed to him self-evident, and he would accordingly withdraw it.

50. Mr. AMADO considered that the words "For the purpose of securing a complete settlement of the dispute" were also self-evident, and might equally well be deleted.

51. Mr. SCELLE pointed out that they were valuable in so far as they restricted the competence of the tribunal to the original subject matter of the dispute.

52. Mr. SANDSTRÖM said that the French text of article 27 should be considered the authentic one; accordingly, if the article was adopted, the English

translation would have to be brought into line with the original by the Standing Drafting Committee.

It was so agreed.

53. The CHAIRMAN put to the vote the text proposed by Mr. Hudson, in favour of which Mr. Lauterpacht had withdrawn his own, to replace article 27.

That wording was rejected by 8 votes to 2, with 2 abstentions.

54. The CHAIRMAN put to the vote the special rapporteur's text for article 27, without the last sentence, which had been withdrawn by the author.

Mr. Scelle's text was adopted, as amended by himself, by 8 votes to 3, with 1 abstention.

ARTICLE 28 [5]

55. Mr. LAUTERPACHT proposed that the last sentence of article 28 be replaced by the following:

"Before rendering the award the tribunal shall satisfy itself that it has jurisdiction and that the claim is well founded in fact and in law."

56. Mr. HUDSON proposed an alternative text for the whole of article 28, to read:

"1. Whenever one of the parties does not appear before the tribunal, or fails to defend its case, the other party may call upon the tribunal to decide in favour of its claim.

"2. In such case, the tribunal may give an award if it is satisfied that it has jurisdiction and that the claim is well founded in fact and in law."

57. Mr. KOZHEVNIKOV said that in his view the whole concept of judgment by default was mistaken, since it would allow for settlement against the will of one of the parties. He accordingly proposed that article 28 be deleted.

58. Mr. el-KHOURI asked Mr. Kozhevnikov what would happen if one party failed to appear before the tribunal or to defend its case. Was it to be allowed to frustrate the work of a tribunal once constituted?

59. Mr. KOZHEVNIKOV maintained that article 28 was unnecessary. He could not admit the possibility of bad faith or of the desire on the part of one of the parties to obstruct proceeding. It ought to be assumed that once the parties had decided to submit a dispute to arbitration they would be interested in securing a settlement.

60. Mr. SANDSTRÖM could not agree that judgment by default was unjust. He was therefore in favour of providing for it, and found Mr. Hudson's text satisfactory.

61. Mr. LAUTERPACHT said that as his own amendment was covered by paragraph 2 of Mr. Hudson's text, he would withdraw it.

62. Mr. SCELLE accepted Mr. Hudson's alternative text for article 28.

Mr. Hudson's text for article 28 was adopted by 10 votes to 2.

63. Mr. KERNO (Assistant Secretary-General) observed that the special rapporteur's draft always spoke of the arbitrator or the tribunal, whereas members proposing amendments sometimes mentioned the tribunal alone. He assumed that the Standard Drafting Committee would use one expression throughout the text, namely, "the tribunal", and that that term would be understood to include the case of a sole arbitrator.

It was so agreed.

ARTICLE 29 [6]

64. Mr. LIANG (Secretary to the Commission) suggested that the second paragraph of article 29 appeared superfluous, since by adopting articles 7 and 8 the Commission had already recognized the immutability of the composition of the tribunal and provided for replacement under specified circumstances.[7] Adoption of the second paragraph of the article under consideration would be inconsistent with those articles.

65. Mr. el-KHOURI agreed with the Secretary that the question of replacement had already been dealt with. He therefore proposed that the second paragraph of article 29 be deleted.

66. Mr. HUDSON pointed out that article 29 seemed to deal only with hearings. In some cases, there might be only written proceedings.

67. He also proposed the deletion of the opening words: "When the arbitrator or the tribunal consider that they have received full explanations, and". Furthermore, the article might begin with the words: "When the parties have completed their presentation of the case," etc.

68. Mr. LAUTERPACHT was in favour of the special rapporteur's text as it stood, since, although the agents, counsel and advocates of the parties might consider that they had completed their presentation of the case, the tribunal might think otherwise, and call for additional information.

69. Mr. FRANÇOIS said that the wording of article 29 was partly borrowed from Article 54 of the Statute of

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[5] Article 28 read as follows:

"Whenever one of the parties does not appear or fails to defend its case, the other party may call upon the arbitrator or the tribunal to decide in favour of its claim. The arbitrator or the tribunal may themselves pass judgment by default, *ex officio*."

[6] Article 29 read as follows:

"When the arbitrator or the tribunal consider that they have received full explanations, and when the agents, counsel and advocates have completed their presentation of the case, the hearing shall be officially declared closed.

"Neither the arbitrator nor any member of the tribunal may be replaced after the closure of the hearing."

[7] See summary record of the 142nd meeting, paras. 59 and 66.

the International Court of Justice. The words "subject to the control of the Court" in that Article had, however, been dropped. He considered that that phrase should be inserted after the word "when" in the article now under consideration, in appropriate form, namely, "subject to the control of the tribunal". He emphasized that the parties should not have the right to protract the hearing *ad infinitum*.

70. Mr. SCELLE accepted Mr. François' amendment. It was essential that the tribunal be empowered to terminate the hearing even against the will of the parties.

71. Mr. AMADO preferred the text of Article 54, paragraph 1, of the Statute of the International Court of Justice to the opening phrase of Mr. Scelle's draft, which seemed a little obscure.

72. Mr. KERNO (Assistant Secretary-General) pointed out that the opening words of article 29 would become unnecessary if Mr. François' amendment were adopted, since the latter would enable the court to decide whether it had been in possession of all the necessary facts.

73. Mr. KOZHEVNIKOV opposed Mr. François' amendment, which would place a quite unacceptable restriction on the freedom of the parties — a trend which he deplored.

74. He also expressed dissatisfaction with the Commission's practice of transplanting provisions of the Statute of the International Court of Justice, an organ of a quite special character. He doubted whether such provisions were in every case appropriate to an arbitral tribunal.

Mr. Hudson's proposal that the words "When the arbitrator or tribunal consider that they have received full explanations, and" be deleted from article 29 was adopted by 7 votes to 1, with 4 abstentions.

Mr. François' proposal that the words "subject to the control of the tribunal" be inserted after the word "when" was adopted by 9 votes to 2, with 1 abstention.

Article 29, first paragraph, as amended, was adopted by 9 votes to 2, with 1 abstention.

Mr. el-KHOURI's proposal that the second paragraph of Article 29 be deleted was adopted by 7 votes to 3, with 1 abstention.[8]

ARTICLE 30 [9]

75. Mr. LIANG (Secretary to the Commission) suggested that the words "in whole or" might be deleted from article 30 since, for the most part, the deliberations of the tribunal would have to take place after the closure of the hearing.

76. Mr. LAUTERPACHT proposed the deletion from article 30 of the words "which must be attended by all the members of the tribunal", since members might have good reasons, such as illness, for being unable to attend. Furthermore, such a provision might be abused by members who wished to obstruct the work of the tribunal by absenting themselves, although it was obvious that all members of the tribunal should normally take part in its deliberations.

77. Mr. HUDSON supported Mr. Lauterpacht's amendment. The words in question were inconsistent with certain articles already adopted by the Commission.

78. Mr. SCELLE accepted Mr. Lauterpacht's amendment.

79. Mr. el-KHOURI proposed the deletion of the second sentence of article 30.

80. Mr. HUDSON supported Mr. el-Khouri's amendment.

81. Mr. SCELLE pointed out that the tribunal should be empowered to start its deliberations before the closure of the hearing, if necessary.

82. Mr. SANDSTRÖM observed that that was an inherent right of any tribunal; it was therefore unnecessary to state it.

83. Mr. SCELLE agreed.

84. Mr. HUDSON considered that article 78 of the 1907 Hague Convention for the Pacific Settlement of International Disputes was more satisfactorily worded. He proposed that article 30 should read somewhat as follows:

> "The deliberations of the tribunal, in which all the members of the tribunal shall participate, shall take place in private and shall remain secret".

85. The CHAIRMAN suggested that the final wording of article 30 be left to the Standing Drafting Committee in the light of the observations made by Mr. Hudson.

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

Mr. el-Khouri's amendment was adopted by 9 votes to 1, with 2 abstentions.

Article 30, as amended and subject to review by the Standing Drafting Committee, was adopted by 12 votes to none.[10]

ARTICLE 31 [11]

86. Mr. SCELLE declared that he would withdraw

[8] Article 29, as tentatively adopted, read as follows:

"When, subject to the control of the tribunal, the agents, counsel and advocates have completed their presentation of the case, the hearing shall be officially declared closed."

[9] Article 30 read as follows:

"The deliberations, which must be attended by all the members of the tribunal, shall remain secret. They may take place, in whole or in part, before the closure of the hearing."

[10] Article 30, as tentatively adopted, read as follows:

"The deliberations, which ought to be attended by all the members of the tribunal, shall remain secret."

[11] Article 31 read as follows:

"The arbitral award shall be made within the period fixed by the *compromis* or the arbitral tribunal but the tribunal reserves the right to extend this period within reasonable limits if it deems such action essential to the elucidation of the case."

article 31, which had become unnecessary in view of the adoption of article 12, paragraph (*g*).[12]

87. Mr. LAUTERPACHT proposed an alternative text for article 31, to read:

"The arbitral award shall be made within the period fixed by the *compromis* or the arbitration treaty. The tribunal may, with the consent of the parties, extend the time-limit thus fixed".

88. He wondered whether the provisions of article 12, paragraph (*g*), would enable the tribunal to disregard a time-limit, laid down in the *compromis,* for making the award, or whether that should be expressly stated elsewhere.

89. Mr. SCELLE replied that in his view there was no need for such provision, since it was always open to the tribunal to exceed a time-limit if it felt itself unable to give an award within the period specified.

90. Mr. SANDSTRÖM said that he would hesitate to agree with Mr. Scelle that article 12, paragraph (*g*), implied that a tribunal could exceed a time-limit laid down in a *compromis.*

91. Mr. ZOUREK said that he had failed to find in the text so far adopted any provision enabling the tribunal to disregard a time-limit fixed by the parties.

92. Mr. SCELLE agreed that the Commission had left a gap by deleting article 21.[13]

93. He could not, however, accept Mr. Lauterpacht's amendment, according to which the tribunal would have to obtain the consent of the parties in order to extend the time-limit fixed by the *compromis,* since he was convinced that a tribunal could not be obliged to adhere strictly to time-limits if it found itself unable to do so.

Nothing should be allowed to impede the tribunal from making a final settlement.

94. Mr. LAUTERPACHT said that the point at issue was whether an extension could be effected without the consent of the parties. If Mr. Scelle's view prevailed, the first sentence of his (Mr. Lauterpacht's) amendment would become meaningless.

95. Mr. YEPES disagreed with Mr. Lauterpacht. The first sentence of the latter's amendment laid down a general rule and the second an exception to it. For his part, he could accept the special rapporteur's text for article 31.

96. Mr. SCELLE maintained that article 31 was unnecessary since, by the adoption of article 29, the tribunal was empowered to continue the hearing until such time as it felt itself to be in possession of all the information required for reaching a decision. The hearing could not be terminated without an act of closure by the tribunal itself.

97. Mr. SANDSTRÖM pointed out that closure of a hearing was not the same thing as a time-limit for making an award. It was impossible to deduce from the provisions of article 29 that a tribunal was free to disregard a time-limit, stipulated in the *compromis,* for rendering the award.

98. Mr. SCELLE re-affirmed that a tribunal could not make an award until it was fully informed of the facts of the case.

99. Mr. HUDSON proposed that the concluding words of article 31, "essential to the elucidation of the case" be replaced by the word "necessary".

100. Mr. LAUTERPACHT said that as the words "with the consent of the parties" did not appear to have secured the general support of the Commission, he would withdraw his amendment. He pointed out, however, that if the tribunal were given power to extend its period of existence beyond that laid down in the *compromis,* that would be the sole exception so far made to the general rule that the tribunal should not be allowed to depart from the provisions of the *compromis.*

101. He then expressed his objection to the word "reserves" in Mr. Scelle's text, and suggested that it might be replaced by the word "retains".

102. Mr. KOZHEVNIKOV could not agree that the tribunal should have the right to extend time-limits laid down in a general treaty of arbitration or in a special *compromis.* He therefore proposed that article 31 be deleted.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 3.

103. Mr. HUDSON found it difficult to support a provision that would empower the tribunal to extend, without the consent of the parties, time-limits laid down in a *compromis.*

104. Mr. el-KHOURI suggested that the tribunal should be empowered to extend time-limits at the request of one of the parties.

105. Mr. SCELLE believed that neither one party nor both parties could judge whether a tribunal was ready to render the award. If the tribunal were to be held to the time-limits laid down by the parties, in the *compromis,* the latter would be in a position to prevent the tribunal from rendering an award. Such a procedure was unacceptable to him, since it would make the award contingent on the will of the parties. He recognized that in the matter of the observance of time-limits the tribunal should, if possible, take into account the will of the parties, but that was a moral and not a legal obligation.

106. Mr. LAUTERPACHT proposed that the vote on article 31 be deferred to give members more time for reflection. He would point out that treaties of arbitration did not always lay down time-limits, and the Commission might have to reconsider article 12, paragraph (*g*), to establish whether it was wise in imposing

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

[13] See above, para 7.

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.