Document:-
A/CN.4/SR.177

Summary record of the 177th meeting

Topic:
Arbitral Procedure

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

it was not clearly explained in the comment. In his view the special provisions referred to in article 9 (*h*) could not be *contra legem* as it was laid down in articles 29 to 32, but could be *praeter legem*.

60. Mr. SCELLE said that in his view it would be impossible for the parties to extend the time-limit of six months laid down in article 29, paragraph 2.

61. Mr. CÓRDOVA said that on one point there was no doubt: the parties could not state in the *compromis* that there should be no possibility of revision and the other legal remedies provided for in articles 29 to 32. To that extent those articles should be regarded as obligatory, but if the parties were to be allowed no freedom in settling the detail of the procedure for revision and the other legal remedies, article 9 (*h*) had no meaning.

62. Mr. LIANG (Secretary to the Commission) asked whether Mr. Scelle could accept the following text:

> "As regards the special provisions concerning the procedure for revision of the award and other legal remedies, account must be taken of articles 29 to 32, which state the general principles and procedures of revision and other legal remedies. The parties may agree in the *compromis* on any special procedures for revision and other legal remedies, in so far as these procedures are not in conflict with articles 29 to 32".

63. Mr. LAUTERPACHT said that he had been about to propose the following wording:

> "As regards the special provisions concerning the procedure for revision and annulment, the parties are bound by the general provisions of articles 29 to 32. Their freedom of action, provided for in article 9 (*h*), refers only to the procedure of revision and annulment."

64. Mr. LIANG (Secretary to the Commission) withdrew his text in favour of that proposed by Mr. Lauterpacht.

65. Mr. SCELLE said that he could accept the text proposed by Mr. Lauterpacht.

Mr. Lauterpacht's proposal was adopted.

Comment on article 10 [14]

66. Mr. HUDSON pointed out that article 47 of the Pact of Bogotá bore no relation to the subject-matter of article 10.

67. Mr. SCELLE agreed that the reference should be to article 43.

68. Mr. YEPES suggested that, for the sake of clarity, the words "of 1948" be inserted after the words "Pact of Bogotá".

It was so agreed.

69. Mr. LIANG (Secretary to the Commission) suggested that, as reference was made to a specific article in the Pact of Bogotá, the same should be done in the case of the 1907 Convention on the Pacific Settlement of Disputes.

It was so agreed.

The meeting rose at 1.5 p.m.

177th MEETING

Friday, 1 August 1952, at 9.45 a.m.

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* The number within brackets indicates the article number in the Special Rapporteur's Report (A/CN.4/46).

Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS.

Present:

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

Secretariat: Mr. Ivan 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/L.35) (*continued*)

CONSIDERATION OF THE DRAFT COMMENTS SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the comments on the articles in the Draft on Arbitral Procedure (A/CN.4/L.35).[1]

[1] Mimeographed document only. It was incorporated, with drafting changes, in the "Report" of the Commission as Chapter II (see vol. II of the present publication). Drafting changes are given in the present summary records.

Comment on article 4 [5 and 6] *(resumed from the 175th meeting)*

2. Mr. SCELLE submitted his new draft of the comment on article 4, prepared in the light of the discussion in the Commission at its 175th meeting.[2] The text read as follows:

"The above article is generally applicable, whether the undertaking to have recourse to arbitration derives from the *compromis* or whether it is anterior thereto.

Paragraph 1 affirms the freedom of the parties in the choice of judges.

"Paragraph 2 stipulates that the arbitrators should be persons of recognized competence in international law. This is not an inflexible rule, however. The Commission did not wish to exclude cases in which the technical nature of the issue might lead the parties to choose judges not exactly fulfilling the condition laid down in this paragraph. This is the sense of the words 'with due regard to the circumstances of the case'."

"Similarly, the Commission did not wish to prohibit the appointment, as arbitrators, of heads of State or important political personages, although this practice is sometimes hardly calculated to enhance the judicial nature of arbitration.

"By its very silence, the Commission also implicitly retained the possibility of recourse to so-called national arbitrators; for after provisionally adopting a clause to the effect that the sole arbitrator, or the majority of the arbitrators, should be chosen from among nationals of States having no interest in the dispute, it decided to delete that provision because it would preclude the constitution of a tribunal consisting of two national arbitrators, and sometimes even of a tribunal of three members.

"The Commission did not even see fit to recommend the constitution of an arbitral tribunal of five members, as was done in Article 22 of the revised General Act.

"Hence it appears that, in article 4 of the present draft, the intention was to give precedence to the principle of full freedom of the parties in the choice of judges over that of non-political arbitration. Nevertheless, the discussions which took place showed that the Commission did not overlook the importance of the progress to be made by giving arbitration a more judicial form. It subsequently endeavoured to promote such progress in many other articles of the draft, such as articles 5, 7 and 8 on the immutability of the tribunal; articles 11, 12, 13, 16 and 21 on the powers of the tribunal, and finally in chapters VI and VII on revision and annulment."

Fifth and sixth paragraphs

3. Mr. el-KHOURI proposed the deletion of the fifth and sixth paragraphs which seemed to imply criticism of the action taken by the Commission.

4. Mr. SCELLE said he would prefer the paragraphs to stand since they explained clearly the stages by which the Commission reached its decision on article 4. He was particularly anxious to retain the explanation of why the Commission had decided to delete the provision reading: "The sole arbitrator or the majority of the arbitrators shall be chosen from among nationals of States having no special interest in the case".

5. Mr. LIANG (Secretary to the Commission) thought the English text of the sixth paragraph ambiguous; it seemed to suggest that the Commission had substantial objections to article 22 of the Revised General Act for the Pacific Settlement of International Disputes. He suggested that the paragraph be redrafted as follows:

"The Commission did not consider it necessary to follow the precedent of article 22 of the Revised General Act, which requires the constitution of an arbitral tribunal of five members."

6. Mr. SCELLE said he was prepared to withdraw the sixth paragraph.

7. Mr. CÓRDOVA agreed with Mr. Liang that the argument in the sixth paragraph was obscure.

8. Mr. LAUTERPACHT considered that there was a *non sequitur* in the sixth paragraph, which seemed to imply that the Commission had rejected the provisions of article 22 of the Revised General Act because it did not wish to ensure that the majority of the arbitrators were from States having no interest in the case.

9. Mr. HUDSON proposed that the fifth and sixth paragraphs be replaced by the following text:

"The Commission considered a provision in line with article 22 of the Revised General Act, but it did not think that as many as five members of a tribunal were necessary in all cases and in consequence it could not recommend that a majority should be nationals of States having no interest in the dispute."

10. Mr. el-KHOURI withdrew his proposal for the deletion of the fifth and sixth paragraphs in favour of Mr. Hudson's text.

11. Mr. SCELLE said he would be prepared to accept Mr. Hudson's text provided it were made clear that, although in drafting article 4 the Commission had intended to safeguard the freedom of the parties, most of the other articles in the draft were designed to strengthen and develop non-political arbitration.

12. Referring to Mr. Lauterpacht's remarks on the sixth paragraph, he said that, although the Commission had rejected the provision originally embodied in article 6 for the reason that, as Mr. Hudson had pointed out, it would preclude the appointment of national arbitrators in the case of tribunals of two persons, it had never been opposed to the principle that there should be as many arbitrators as possible from disinterested States. As the Commission was aware, he himself considered that a tribunal consisting of two arbitrators was an arbitral tribunal in form only, since it became virtually a conciliation commission, the only

[2] See summary record of the 175th meeting, paras. 65—83.

difference being that the award of the former was binding.

13. Mr. LAUTERPACHT said that, as the special rapporteur attached importance to the comment on article 4 showing clearly the reason why the Commission had reversed its provisional decision on former article 6, he would propose an alternative text for the fifth paragraph to be followed by the Secretary's wording to replace the sixth paragraph. His text read as follows:

> "The article does not exclude the possibility of the arbitrators or the majority of the arbitrators being nationals of the parties to the dispute. After provisionally adopting a clause to the effect that the sole arbitrator or the majority of the arbitrators should be chosen from among nationals of States having no interest in the dispute, it decided to delete that provision because it would preclude the constitution of a tribunal consisting of two arbitrators or of two nationals and an umpire."

14. Mr. FRANÇOIS said that he was not in favour of drawing a distinction between the arbitrators and the umpire.

15. Mr. CÓRDOVA suggested that it was possible to refer instead to a presiding arbitrator from another State.

16. Mr. SCELLE said it was undeniable that in practice the role of an umpire was decisive when the arbitrators failed to reach agreement.

17. Mr. FRANÇOIS said he strongly deprecated the tendency to assume that national arbitrators inevitably acted as agents of their governments. Numerous examples could be quoted of national arbitrators who had acted with perfect impartiality.

18. Mr. SCELLE thought Mr. François was being a little unrealistic.

19. Mr. el-KHOURI asked whether Mr. Lauterpacht would be prepared to omit from his text any reference to the fact that the Commission had reversed its decision on former article 6.

20. Mr. LAUTERPACHT said that, in order to meet Mr. el-Khouri's point, he would amend the final phrase in his text by the substitution of the words "it decided that such a provision" for the words "it decided to delete that provision because it". He thought there seemed to be general agreement on his text, but that it might require some verbal modifications. It should therefore be put to the vote in substance only. If adopted, it would be followed in the same paragraph by the wording suggested by the Secretary to replace the sixth paragraph, preceded by the phrase: "For the same reason".

Mr. Hudson's text was rejected by 7 votes to 2 with 1 abstention.

The substance of Mr. Lauterpacht's text to replace the fifth paragraph was adopted by 8 votes to none with 2 abstentions.

The Secretary's text to replace the sixth paragraph was adopted by 8 votes to none with 3 abstentions.

Mr. Lauterpacht's proposal to preface the Secretary's text for the sixth paragraph by the words: "For the same reason" was adopted by 8 votes to none with 3 abstentions.

Seventh paragraph

21. Mr. HUDSON proposed the deletion of the seventh paragraph. Mr. SCELLE said that he attached great importance to the fact that the whole draft was based on the attempt to put an end to political and diplomatic arbitration. He also wished to bring out that a choice had to be made between two concepts of arbitration, diplomatic and judicial. If the seventh paragraph were deleted he would incorporate its substance, probably at greater length, in the introduction.

22. Mr. KOZHEVNIKOV was against the retention of the seventh paragraph because it was unfitting for the Commission to appraise its own work in the commentary.

Mr. Hudson's proposal was rejected by 6 votes to 5.

23. Mr. LIANG (Secretary to the Commission) suggested that the meaning of the phrase: "the progress to be made by giving arbitration a more judicial form" was obscure; it might be replaced by the words: "emphasizing the juridical character of arbitration".

24. Mr. LAUTERPACHT considered that what the special rapporteur had in mind was the importance of safeguarding the judicial character of arbitration. He would support the Secretary's wording provided the word "juridical" were replaced by the word "judicial".

The Secretary's wording as amended by Mr. Lauterpacht was adopted.

25. Mr. LAUTERPACHT proposed, as a consequential amendment, that the last sentence in the paragraph should read: "It endeavoured to pursue the same object in many other articles, etc."

Mr. Lauterpacht's amendment was adopted.

Comment on article 11 [19][3]

26. Mr. YEPES suggested that, in the second sentence, the word "traditional" be replaced by the word "customary".

27. Mr. LAUTERPACHT considered that it was hardly appropriate to describe an article as traditional. The second sentence therefore might be reworded to read: "It is in accordance with the accepted practice of arbitration".

28. Mr. HUDSON said that, although he supported the principle in article 11, he could not agree that it was either traditional or was accepted in practice.

[3] The comment on article 11 read as follows: "This article formulates a general principle, and calls for no comment. In fact, it is traditional."

29. Mr. LAUTERPACHT observed that the principle embodied in article 11 was perhaps the most widely acknowledged of the principles laid down in the draft.

30. Mr. SCELLE agreed with Mr. Lauterpacht.

31. Mr. CÓRDOVA said he could not accept Mr. Lauterpacht's wording since article 11 was not only in accordance with the accepted practice but also represented a principle of law.

32. Mr. YEPES proposed the substitution, for the comment on article 11, of the following: "This article, which states a general principle of law, calls for no comment".

33. Mr. LAUTERPACHT accepted Mr. Yepes' proposal.

34. Mr. KOZHEVNIKOV proposed the deletion of the second sentence of the comment on the ground that it was highly controversial.

Mr. Kozhevnikov's proposal was rejected by 7 votes to 3.

Mr. Yepes' proposal was adopted by 7 votes to none with 3 abstentions.

Comment on article 12 [20] [4]

First paragraph

No observations.

Second paragraph

35. Mr. HUDSON said that he did not have sufficient knowledge of the municipal law of all countries to judge whether the statement in the second sentence was well-founded.

36. The third and fourth sentences seemed to him contradictory. If the principle that a finding of *non liquet* was inadmissible was self-evident, it was impossible to argue that its acceptance marked a great advance in the development of judicial arbitration. It was also doubtful whether one could subscribe to the argument in the fifth sentence, that paragraph 2 of article 12 reduced the possibility of arbitral awards being challenged on grounds of action *ultra vires.*

37. Mr. LAUTERPACHT agreed with Mr. Hudson's criticism of the third and fourth sentences. He also doubted whether the last sentence had much relevance to article 12.

38. On the other hand, while endorsing the view put forward by the special rapporteur in the second sentence, he wondered whether the second paragraph as a whole served any purpose, since article 12 was self-explanatory and the provisions of paragraph 1 of the article were such as to leave no room for a finding of *non liquet.*

39. Mr. SCELLE said he was prepared to withdraw the second paragraph.

40. Mr. CÓRDOVA considered it important to state that the provisions of article 12 reduced the possibility of a finding of *non liquet.*

41. Mr. LIANG (Secretary to the Commission) said that although it might be correct to say that prohibition of a finding of *non liquet* was a general rule common to most systems of municipal law, he doubted whether it was universally recognized as constituting a definite dereliction of duty on the part of a judge "to refuse judgment on the grounds of the silence or obscurity of the law".

42. Mr. SCELLE observed that the Commission had been practically unanimous in condemning findings of *non liquet,* a view to which he attached the greatest importance since a judge who refused to give judgment was not carrying out his functions as the protector of the public peace. From the sociological point of view, jurisdiction was anterior to legislation. In the early stages of development in any country, judges performed their functions even when there was no law, and in that way discharged their vital duties of settling disputes.

43. Mr. LAUTERPACHT proposed that the entire text of the comment on article 12 be replaced by the following:

> "The effect of this article, in so far as it adopts the substance of paragraph 1 of article 38 of the Statute of the International Court of Justice as the basis of the law to be applied by the arbitral tribunal, is to exclude the possibility of *non liquet.* However, the Commission has thought it important to put expressly on record that this is the intention and the effect of paragraph 1 of article 12."

44. Mr. SCELLE said that Mr. Lauterpacht's alternative text would be acceptable to him, provided

[4] The comment on article 12 read as follows:

"Paragraph 1 gives a directive designed to guide the tribunal in applying the law, in cases where the parties have not stipulated in the *compromis* that the tribunal shall make its award in accordance with their own views as to the law applicable.

"Paragraph 2 contains one of the most important stipulations in the whole draft. It is derived from a general rule common to most systems of municipal law, according to which it is a definite dereliction of duty for a judge to refuse judgment on the grounds of the silence or obscurity of the law (Article 4 of the French Civil Code, Article 2 of the Swiss Civil Code, etc.). The Commission felt bound to accept this principle, as something self-evident, almost without discussion. This marks a great advance in the development of jurisdictional arbitration. At the same time, the paragraph reduces the possibility of challenging the arbitral award on grounds of action *ultra vires,* since it refers both to the rules of law inserted in the *compromis* by the parties, and to rules of general international law based on the sources enumerated in Article 38 of the Statute of the International Court of Justice.

"Since the possibility of a *non liquet* was thus ruled out, the Commission agreed that it was advisable to delete two of the articles from the rapporteur's preliminary draft (Articles 21 and 22), which referred to certain exceptional cases in which the equivalent of a finding on *non liquet* might be brought when the conduct of the parties made it impossible for the tribunal to render its award. The possibility of such a finding had, however, to be restored to cover the case referred to in Article 23 below."

mention were made of the fact that the provisions of article 12 marked an advance. Findings of *non liquet* had not been infrequent in the past and had indeed been regarded as a normal possibility.

45. Mr. LAUTERPACHT said that he would be prepared to meet Mr. Scelle's point by inserting the words "for the progress of international law" after the words "the Commission has thought it important", in the last sentence of his text.

46. Mr. YEPES said he could support Mr. Lauterpacht's text, provided it were amplified by reference to the substance of the second sentence of the second paragraph of the original comment. It was important to state that the principle in paragraph 2 of article 12 was derived from a general rule common to most systems of municipal law. Such a rule was recognized in Islamic law countries and, to the best of his knowledge, in the Soviet Union.

47. Mr. SCELLE said that, if Mr. Yepes was correct, he would be pleased to add a reference to the Soviet Civil Code in the parentheses at the end of the second sentence.

48. Mr. KOZHEVNIKOV opposed the inclusion of references to particular systems of municipal law in the comment. It was not easy to draw analogies between the rules of municipal law and rules of international law.

49. Mr. KERNO (Assistant Secretary-General) also considered it undesirable to refer to the civil codes of particular countries.

50. Mr. SCELLE considered it important to indicate that the principle in paragraph 2 of article 12 was derived from a virtually universal rule. There was an underlying unity between municipal and international law.

51. Mr. KOZHEVNIKOV disagreed. Arbitral procedure and theory, to which the Commission must confine itself, had certain distinctive features which had no parallel in municipal law. Nor did he share Mr. Scelle's view of the essential unity of law — a view which had been explicitly rejected by the General Assembly in its resolution 174 (II), which laid down that the Commission should be composed of persons "representing as a whole the chief forms of civilization and the basic legal systems of the world".

52. The CHAIRMAN, speaking as a member of the Commission, endorsed Mr. Yepes' view that the comment on article 12 must indicate that the principle in paragraph 2 of that article was derived from a general rule common to most systems of municipal law.

53. Mr. ZOUREK opposed the mechanical transposition of principles relating to domestic judicial bodies to arbitral tribunals, since there were certain fundamental differences between the two. Municipal law represented a complete system whereas there were many matters pertaining to the relations between States on which no international law existed. The problems associated with arbitration could not be resolved by reference to recognized principles of municipal law. If any parallels were to be drawn, and he doubted whether it could be done successfully, they must be sought in the field of private domestic arbitration.

54. Mr. YEPES proposed that the following text, to replace the first four sentences of the second paragraph, be added to the text proposed by Mr. Lauterpacht:

> "Paragraph 2 contains one of the most important stipulations in the whole draft. It corresponds to the general rule of law recognized in a large number of the juridical systems of the world according to which a judge may not refuse judgment on the ground of the silence or obscurity of the law. The Commission considered that adoption of this principle marked a great advance in the development of judicial arbitration."

Mr. Yepes' proposal was adopted by 7 votes to none with 3 abstentions.

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

55. Mr. KERNO (Assistant Secretary-General) suggested that it be left to the special rapporteur to decide whether the text proposed by Mr. Yepes should precede or follow that proposed by Mr. Lauterpacht.

It was so agreed.

Third paragraph

56. Mr. SCELLE withdrew the third paragraph, which contained a statement of his own views, since he considered that the first and second paragraphs adequately explained the opinions and decisions of the Commission as a whole.

Comment on article 13 [24]

57. Mr. SCELLE pointed out that only the first paragraph of the comment applied to article 13. The second paragraph applied to the article (originally article 23) whose deletion the Standing Drafting Committee had recommended, but which the Commission had decided to retain, subject to changes in wording.[5]

Comment on article 14 [23][6]

58. Mr. SCELLE proposed that, in view of the decision of the Commission to retain the original article 23, with some amendments, the comment on that article, at present included as the second paragraph of the comment under article 13, be amended to read as follows:

> "The Commission adopted a separate provision embodying the principle of equality of the parties in the application of the rules of procedure, non-observance of which by the tribunal would justify an

[5] See summary record of the 174th meeting, para. 10.

[6] In document A/CN.4/L.35 this article was unnumbered.

appeal for the annulment of the award (see paragraph (*c*) of article 30). The Commission thought that this was an important provision which deserved to be made the subject of a separate article".[7]

Mr. Scelle's proposal was adopted.

Comment on article 15 [24][8]

First paragraph

59. Mr. HUDSON suggested the deletion of the first sentence, which read as follows:

"This article is concerned with the important question of evidence."

It was so agreed.

60. Mr. YEPES proposed the addition of the words "of customary law" after the words "an incontrovertible principle".

It was so agreed.

Second paragraph[9]

61. Mr. LIANG (Secretary to the Commission) suggested that in the third sentence the words "the meaning and scope of a domestic law" be replaced by the words "the meaning and scope of a rule of municipal law".

It was so agreed.

62. Mr. HUDSON suggested the deletion of the words "gave rise to a discussion of some length. It", of the words "once and for all" and of the words "In this matter its role is never merely passive".

63. Mr. SCELLE suggested that the words "In this matter its role is never merely passive" were of some significance, as the rule followed by the International Court of Justice was that the parties had merely to prove the existence of a rule of municipal law. If it was thought, however, that those words were so concise as to be misleading, he had no objection to their deletion; he could accept the other suggestions made by Mr. Hudson.

Mr. Hudson's suggestions were adopted.

64. Mr. HUDSON and Mr. LAUTERPACHT suggested that it was necessary to add at the end of the third sentence the words "and ordered by the tribunal" after the words "requested by the other party".

It was so agreed.

65. Mr. LIANG (Secretary to the Commission) pointed out that the word "penalty", in the English text of the last sentence of the paragraph, was inappropriate in connexion with arbitration procedure.

66. Mr. SCELLE said that the word "*sanction*", which was used in the French text, was much broader in meaning than the word "penalty". The sanctions he had in mind were moral sanctions, but to some schools of thought, at least, were none the less real for that. If the reference to sanctions was deleted, the whole sentence could be deleted, since without it the comment merely repeated the text of the article.

It was agreed that the last sentence of the second paragraph be deleted.

Third paragraph[10]

67. Mr. CÓRDOVA suggested the deletion of the word "however".

It was so agreed.

68. Mr. CÓRDOVA pointed out that the present wording of paragraph 4 of the article appeared to mean that, if one of the parties was unwilling that the tribunal should visit the scene with which the case before it was connected, the tribunal could not do so, even if the other party was prepared to meet all the expense involved. The Commission might make clear in the comment that such was not its intention.

69. Mr. KERNO (Assistant Secretary-General) observed that the Commission had not considered the point raised by Mr. Córdova. Even if it was valid, therefore, it did not appear that it was in a position to make the suggested addition to the comment.

70. Mr. LAUTERPACHT thought that the only possible interpretation of the present text was that which Mr. Córdova had given. His point could only be met by altering the text.

70a. Mr. LIANG (Secretary to the Commission) felt that, in any event, in adopting the provision contained in paragraph 4, the Commission had not been guided only by considerations of expense to the parties.

71. Mr. SCELLE and Mr. HUDSON suggested that in those circumstances the third paragraph of the comment should be deleted.

It was so agreed.

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[7] In document A/CN.4/L.35 this last sentence read as follows: "The Drafting Committee thought that this provision was self-evident and decided to delete it. The substance of the provision recurs in Article 30 (c), however, as obviously discrimination against either of the parties constitutes a serious departure from a fundamental rule of procedure."

[8] Corresponds to article 14 in document A/CN.4/L.35.

[9] The second paragraph read as follows:

"Paragraph 2 gave rise to a discussion of some length. It lays down once and for all the essential powers of the tribunal. A party has no right to refuse to produce evidence in its possession when this is requested by the other party. The tribunal itself may take any action with a view to the production of evidence, including steps to determine the meaning and scope of a domestic law. In this matter its role is never merely passive. If the parties refuse to comply with its orders regarding production of evidence, the tribunal can apply a penalty by taking note of their refusal."

[10] The third paragraph read as follows:

"Paragraph 4, however, prevents it from ordering *proprio motu* a visit to the scene with which the dispute is connected. The Commission was guided by the desire to avoid putting the parties to considerable expense without their consent."

Fourth paragraph [11]

72. Mr. HUDSON proposed the deletion of the fourth paragraph.

It was so agreed.

Comment on article 16 [27] [12]

First paragraph

73. Mr. SCELLE proposed that, in view of the changes which had been made in the text of article 16, the first sentence of the comment be amended to read as follows:

"The article on counter-claims is designed to enable the tribunal to rule on all questions bearing on the subject of the dispute and to make a complete settlement of the dispute."

74. He also proposed the deletion of the second sentence, which bore on a point on which the Commission had not reached agreement.

Mr. Scelle's proposal were adopted.

Second paragraph

75. Mr. SCELLE proposed the deletion of the second paragraph, which was no longer necessary in view of the changes made in the text of the article.

It was so agreed.

Comment on article 17 [26] [13]

76. Mr. SCELLE proposed that, in view of the changes made in the text of article 17, the second sentence of the comment on that article be amended to read as follows:

"The word 'prescribe' implies an obligation on the parties to take the measures prescribed." [14]

It was so agreed.

Comment on article 18 [29] [15]

No observations.

Comment on article 19 [30] [16]

77. Mr. HUDSON suggested that, for the sake of consistency, the comment on article 19 be amended to read as follows:

"This article requires no comment." [17]

It was so agreed.

The meeting rose at 1.5 p.m.

[11] The fourth paragraph read as follows:

"The Commission deleted all reference to presumptions."

[12] Corresponds to article 15 in document A/CN.4/L.35. The comment read as follows:

"The article on claims and counter-claims is designed to enable the tribunal to rule on all questions bearing on the subject of the dispute. It partly reverses the Commissions' rejection of the principle laid down in article 13 of the League of Nations Covenant and even uses the words 'complete settlement of the dispute'.

"The fact that the English and French texts are not in complete conformity is due to the technical peculiarities of Anglo-Saxon or Latin procedure; the sense and scope of the articles are, however, identical in the two texts."

[13] Corresponds to article 16 in document A/CN.4/L.35.

[14] Instead of "The article reaffirms the duty of the parties to take the measures indicated".

[15] Corresponds to article 17 in document A/CN.4/L.35.

[16] Corresponds to article 18 in document A/CN.4/L.35.

[17] Instead of "These necessary provisions, particularly that in paragraph 2, are self-explanatory".

178th MEETING

Friday, 1 August 1952, at 3.15 p.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS.

Present:

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

Secretariat: Mr. Ivan 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).

Law of treaties (item 3 of the agenda)

1. The CHAIRMAN stated that, at the third session of the Commission, the special rapporteur on the law of treaties, Mr. Brierly, had presented a second report (A/CN.4/43) which included a number of draft articles; those articles had been considered at eight meetings and tentative texts provisionally adopted. He had then been asked to present to the Commission at its fourth session a final draft, together with a commentary, and to "do further work on the topic of the law of treaties as a whole and to submit a report thereon to the Commission.[1] Mr. Brierly had according prepared a third report on the law of treaties (A/CN.4/54), con-

[1] Report of the International Law Commission covering the work of its third session (A/1858) para. 75, *Official Records of the General Assembly, Third Session, Supplement No. 9.* Also in *Yearbook of the International Law Commission, 1951*, vol. II, p. 139.