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Summary record of the 70th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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mote the progress of law. As for the protection of humanity's major interests—that, he thought, could not be ensured by international codification. The Commission was dealing with the protection of mariner sources and particularly with the conservation of fish. In his view, such protection was a matter to be dealt with under the administrative law of the various countries concerned, and the Commission had no power to carry out codification work in that field. He did not dispute the need for protecting certain of humanity's interests, but if the Commission tried to ensure such protection, its reports and draft codes would be encumbered with a plethora of detailed provisions, with the sole result that they would become unacceptable for governments precisely because of the accumulation of rules they contained.

136 a. The Commission was at that moment discussing the proclamations of President Truman and the Government of Chile. Could it accept President Truman's suggestions ? Was it prepared to agree to the limit of 200 nautical miles claimed by Chile for its protection zone ? The Commission, he thought, could not accept such rules as standards of international law for the protection of particular interests.

137. Mr. HSU reminded Mr. Spiropoulos of the terms of article 23 of the Commission's Statute. He asked why that article had been included if the purpose had not been to enable the Commission to fill in gaps in existing international law, to develop international law and to see whether and to what extent such development was acceptable. Article 23 had been given its present wording precisely because the Commission had a task of a very varied nature. It even enjoyed the right to recommend the General Assembly to convoke a conference to conclude a convention based on texts drawn up by the Commission. He therefore did not share the fears of Mr. Spiropoulos. There was no danger in the Commission's wishing to take action in another field. The Commission's task was to examine the subject and try to reach the best possible results.

138. Mr. SANDSTRÖM agreed with Mr. Spiropoulos' view that a particular code should not be a conglomeration of miscellaneous ingredients and particularly of administrative details. In the present instance, it was not the Commission's task to lay down protective measures, which were a matter for administrative decision, but to decide whether there was a right to adopt such measures and how far that right extended.

139. Mr. KERNO (Assistant Secretary-General) pointed out that, in pursuing its work of codification, the Commission should make a distinction between (1) zones for the protection of marine resources, and (2) zones of fiscal, customs and sanitary control. A large number of countries had found themselves insufficiently protected by territorial waters in fiscal, statute customs and sanitary matters and there was therefore " extensive State practice " in the matter of the contiguous zone.

139 a. Thus, in adopting Mr. Hudson's proposal, the Commission had carried out a task of codification proper. In the case of fish protection, the situation was different, and the Commission was faced instead with a question of progressive development. The Rapporteur could therefore examine the question and make suggestions the following year. One point to be established was whether littoral States should be given a kind of " trustee " role which they would perform in the general interest. It should be added that, in principle, the need for the protection of marine resources was felt everywhere, even outside a " contiguous " zone.

140. The CHAIRMAN shared Mr. Spiropoulos' view that the Commission should not go into too much detail. But in the present instance the questions before them were far from matters of detail. The Commission was enquiring into the extent of the competence of States in the matter of fishery control. The Commission was not exceeding its functions in seeking to establish and delimit the right of control which countries could exercise in the matter of fish protection and conservation. That was a point of prime importance on which it should define its attitude.

141. Mr. FRANÇOIS thought that the discussion they had just had would provide him with sufficient data from which to draw up his report for the following year.

142. The CHAIRMAN concluded by saying that at its next session the Commission would attempt, on the basis of Mr. François' further report, to discover a formula defining the rules concerning the competence of littoral States in the matter of fish protection and conservation in the waters of the contiguous zone and the high seas, on the understanding that provision would have to be made for a limit within which such right of protection could be exercised.

The CHAIRMAN declared the general discussion on Mr. François's report closed, and agreed that the Commission should take up consideration of his report at the next meeting.

The meeting rose at 5.55 p.m.

70th MEETING

Tuesday, 18 July 1950, at 10 a.m.

CONTENTS

Chairman: Mr. A. E. F. SANDSTRÖM.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-

KHOURY, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

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: report by Mr. Scelle (item 6 of the agenda) (A/CN.4/18)

The CHAIRMAN called upon the special rapporteur to submit his report.

GENERAL COMMENTS

1. Mr. SCELLE, commenting on his report, explained that he had confined his investigations to arbitration between States, or inter-governmental arbitration, in other words, arbitration in the sense of Article 37 of The Hague Convention of 1907 on the pacific settlement of international disputes, which had for its object " the settlement of disputes between States by Judges of their own choice and on the basis of respect for law ". In the latter connexion he had been obliged to abandon the purely legal conception in order not to eliminate the *amiable compositeur*. Judgment *ex aequo et bono* was included in the definition under Article 37 because the arbitrator then passed judgment by analogy and on the basis of respect for law. On the other hand, the *amiable compositeur* often acted contrary to law. But arbitration and friendly settlement were traditionally taken together and he had followed that principle in his report.

1 a. His task was facilitated by the fact that the ground had already been largely covered. Codification in this field had begun as long ago as 1899 and 1907. The main difficulty was to define custom, since it varied. The General Assembly of the United Nations, at its 1949 session, had renewed and revised the General Act of Arbitration, which provided a basis for codification. He had kept as closely as possible to previous works and borrowed a wide variety of procedures already adopted.

2. Mr. HUDSON said he regarded the General Act of Arbitration of 1928 as the most important, adding that it had been ratified by a number of States, whereas the revised General Act had only been ratified by one State.

3. Mr. SCELLE, referring to innovations, said that arbitration as conceived in earlier attempts at codification left almost complete freedom to the parties. While a solution was offered, none was imposed except where an agreed undertaking existed. It might be observed that the " effectiveness " of arbitration procedure was always uncertain, since there were always plenty of loopholes. States apparently regretted having accepted arbitration and sought to evade their obligations. The report was designed to find methods of forcing Governments to observe the obligation to resort to arbitration and to implement arbitral awards. A prominent position was given in many texts concerning arbitration to the intervention of politicians and to political objectives. Arbitration should be " depoliticalized " and " jurisdictionalized ". Normally, when a court of arbitration was set up, politicians were appointed to serve on it. In a recent case the Secretary-General of the United Nations had been called upon. He was opposed to such procedure, and thought the proper course would be to appeal to the President of the International Court of Justice.

3 a. He had thought it necessary to submit directly a number of texts the central idea of which might be adopted by the Commission. This preliminary draft was subdivided into 16 paragraphs, each of which dealt with a particular point.

4. Mr. HUDSON agreed with the method of work outlined by the Rapporteur.

Paragraph I of the proposed draft text

5. Mr. SCELLE said that the acceptance of a compromissory undertaking, on whatever grounds, created a new legal situation. Arbitration was founded on the undertaking by States to settle an existing dispute or any future dispute in such a way as to ensure that no disagreement on a specific subject remained between them. Such an undertaking laid an absolute obligation on States in international jurisprudence. It was not a contractual obligation, but a legal principle which they should not be able to evade. It was a new rule in law which was legally valid. Such undertakings might be extremely varied in origin. There might be a special or concrete undertaking, or an abstract undertaking on a series of questions. They might be embodied in general or special treaties; or again, they might be based on an exchange of letters, or even be purely verbal. But of all methods the solemn instrument was the best.

5 a. The compromissory clause was designed to remove a cause of friction in the legal relations between States by introducing a judge to propound the law and to make a compulsory award. Two difficulties had to be faced in examining this problem. Firstly, there was the question of the designation or the " arbitrability " of the dispute. It had to be ascertained whether a dispute was covered by the undertaking given by both States to resort to arbitration, and the undertaking concerned might be either abstract or concrete. The nature of the dispute might itself be in dispute. Then someone must arbitrate between the States and decide whether the dispute was covered by the treaty. In that respect the field was not clear, since the problem had already been raised in the treaties of arbitration concluded by the United States in 1911 and 1913. That was a point which his report had omitted to deal with. The question had been studied by two United States Secretaries of State, Messrs. Bryan and Knox, who had suggested the use in such cases of commissions of inquiry responsible for examining the nature of the dispute and deciding whether there was an obligation to resort to arbitration, in other words, to decide a question of fact and interpretation. But that was somewhat outside the scope of an ordinary commission of inquiry, since it entailed actual pre-arbitration or the settlement of a legal question by the commission of inquiry concerned. He would

prefer to entrust such a task to a legal rather than a political organ. That conception had not yet emerged when the treaties of 1911 and 1913 were concluded and Messrs. Bryan and Knox put their idea into practice. He would like to go a little further and say that the question should be settled by a judge and that that was an absolute obligation. In 1911 they had not dared to go as far as that. A commission of six members had been set up and its decision, to have binding force, had to be voted by five members. If the same verdict was returned by five members, including four nationals, there was obviously no doubt about the question. But he thought the matter should be referred to the International Court of Justice for a decision binding on the parties. That could be done by means of summary procedure and direct application. He suggested the conclusion of a convention under which States would undertake to submit such questions to the International Court of Justice by direct application. Since the more diligent party would be the one to petition the Court, one party might compel the other to submit the quarrel as to the arbitrability of the dispute to the Court.

5 b. For the sake of preserving the essence of the arbitration procedure—namely, its superior flexibility as compared with jurisdictional procedure—he would agree that the method of settling this preliminary question might be left to the parties. This he had stated in the interpolation at the end of the second sub-paragraph of paragraph I of the proposed preliminary draft text, on page 93 of his report: " (except where the parties to the dispute have expressly agreed on a different procedure for deciding this preliminary question) ". But it would be more in accordance with the spirit of arbitration to state that the International Court of Justice already had coercive competence. The preliminary draft text on page 93 contained the ideas he had just outlined: " the compromissory clause or undertaking to have recourse to arbitration may apply to questions which may arise eventually or to questions already existing ". Thereafter he had merely reproduced the text of Article 39 of the 1907 Convention: " Whatever the instrument or agreement on which it is based, the clause is strictly obligatory and must be implemented in good faith ". That point must be stressed. " In the event of dispute as to whether this obligation exists, the matter shall be referred to the International Court of Justice by a direct application submitted by the more diligent party, and the International Court of Justice shall pronounce final and binding judgment on the arbitrability of the dispute in a Chamber of Summary Procedure and in application, in particular, of Articles 29 and 41 of its Statute (except where the parties to the dispute have expressly agreed on a different procedure for deciding this preliminary question) ". As could be seen, the text might be subdivided.

6. Mr. HUDSON said he had examined the first paragraph of the preliminary draft text and was somewhat disconcerted at the juxtaposition of the compromissory clause and the undertaking to have recourse to arbitration. The compromissory clause was the undertaking to resort to arbitration in a special case and did not, he thought, appear in treaties of arbitration. In his view, the true distinction was that between provisions concerning disputes in general and those concerning specific disputes.

6 a. He recalled the difficulties which had arisen in connexion with declarations made under article 36, paragraph 2, of the Statute of the Court, because certain declarations referred only to future disputes, while others referred to dispute which had arisen after a certain date. It was frequently difficult to determine the exact date when a particular dispute had arisen.

6 b. The second sentence of the first sub-paragraph of paragraph I had his full support. With regard to the second sub-paragraph, he asked whether the introductory words " In the event of disputes as to whether this obligation exists ", accurately represented the Rapporteur's views. The English text of the footnote to paragraph 15 of the report—the sense of which, in his view, differed from that of the French text—ran:

> " Article III . . . It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this Treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this Treaty ".

He thought that was a more concise rendering of what the Rapporteur wished to say. The question was not whether the obligation existed or not, but whether it applied to a particular dispute. He thought the text should be reworded along the lines of Article III.

6 c. With regard to the terms used, he considered that " questions " should be replaced by " disputes " in the English text. The word " direct " before " application " was unnecessary and the phrase " the more diligent party " might be replaced by " one of the parties ". Further, there was no need to state that the judgment would be " final and binding " since every decision of the Court was final. So far as " arbitrability " was concerned, he thought the term rather vague. The question was whether the dispute belonged to the category of disputes to which the treaty of arbitration applied.

6 d. In his view the reference to articles 29 and 41 of the Statute of the International Court of Justice was open to question. Article 29 merely provided for the creation of a Chamber of Summary Procedure which had existed since 1922. Article 41 dealt with measures of conservation and he failed to see its application to the question under discussion. Its actual words were: " The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party ". That was not the situation which the report envisaged here. The Rapporteur might perhaps be prepared to consider the deletion of the phrase: " and in application, in particular, of Articles 29 and 41 of its Statute ". In conclusion, he warmly welcomed the principle behind the last sub-paragraph.

7. Mr. LIANG (Secretary to the Commission) refer-

ring to certain inaccuracies in the English text of the report, said that the translation had been done very hurriedly because the report had been received rather late. As an example, the phrase " questions which may arise eventually ", on page 14 of the mimeographed English text, was an incorrect rendering of the corresponding French phrase " contestations éventuelles " and should be replaced by " questions which may possible arise ". Similarly, the rendering of " question préjudicielle " by " pre-judicial question " might give rise to misunderstandings.

8. Mr. SCELLE fully agreed with Mr. Hudson except with regard to his observation on articles 29 and 41 of the Statute of the International Court of Justice, and there he thought he differed from Mr. Hudson mainly in the matter of terminology. He had borrowed the rather special terms of procedural jargon as used in the French courts, which sometimes differed from that used in English courts. The addition of the word " direct " to " application " was unnecessary; but it was the normal practice in French. So far as the " final and binding " judgment was concerned, he had used the expression because at a later stage in his report he expressed the view that the arbitral judgment should not be regarded as final and binding. He had intended to show that the decision on the arbitrability of a dispute should be immediate and final.

9. Mr. HUDSON observed that the Court was bound by its Statute, article 61 of which stated that application might be made for the revision of any judgment, whereas article 60 stated that " the judgment is final and without appeal ".

10. Mr. SCELLE said that he did not dream of modifying article 61, and that he had used the terms of article 60.

11. Mr. HUDSON accepted the repetition of the words " final and binding ", but said that the provisions of article 61 could not be evaded.

12. Mr. SCELLE had alluded to article 29 to show that the Chamber of Summary Procedure was referred to; but he was prepared merely to insert a note " see Articles 29 and 41 of the Statute ". He would repeat that the text before the Commission was not final. His intention was to indicate that resort to the Chamber of Summary Procedure was obligatory. The position was different with regard to article 41. He was well aware that the latter applied only when a case was pending; but the Statute required broadening to some extent. He thought his proposal was valuable, however bold it might be. It one of the parties to a dispute intended to evade arbitration, he could kill the suit by changing its nature. A State might claim that it was not obliged to resort to arbitration, but it might also decide to act in such a way as to eliminate the suit.

13. Mr. YEPES asked the Rapporteur whether it was his view that the Court could adopt measures of conservation before taking a decision on the arbitrability of a dispute.

14. Mr. SCELLE replied in the affirmative.

15. Mr. YEPES thought that should be brought out more clearly in the text.

16. Mr. SPIROPOULOS, referring briefly to the question of method, asked whether the Commission, which had before it a text and proposals occupying 6-8 pages, intended to discuss the latter in a general way or to make a detailed study. For the time being only the guiding principles of Mr. Scelle's report should be discussed. The criticism of words here and there would only be of limited use. He thought that discussion should be limited to the guiding principles of the draft. The main point was whether, in the event of a divergence of views on arbitrability, the question could be settled by the arbitral tribunal or should be submitted to the International Court of Justice. Mr. Hudson had rightly asked what was to be understood by arbitrability. The question was that of the entering of a demurrer or a plea in bar by one of the parties which claimed that the Court had no competence.

17. Mr. SCELLE disagreed. At that stage there was merely an undertaking to resort to arbitration; but the Court had not been formed, so that it could not be claimed that it was not competent. The only point in dispute was whether the parties were bound by a bare undertaking, that was to say, an abstract undertaking to submit any one of a more or less wide range of questions to arbitration. The question of arbitrability would arise where a dispute occurred and one of the parties maintained that it was not covered by the undertaking.

18. Mr. SPIROPOULOS asked whether abstract undertakings of that type existed.

19. Mr. SCELLE replied that all special or general treaties of arbitration were abstract undertakings. The compromissory clause was an abstract undertaking because, when it was accepted, the circumstances of any future dispute were unknown.

20. Mr. SPIROPOULOS said he was acquainted with many treaties of arbitration all of which, when referring to arbitration, indicated the procedure to be adopted. He had never seen a convention which did not contain such an indication, even if only in the form of a reference to the Hague Convention of 1907. Assuming that there was a very general provision on arbitration, he asked who would be competent to settle the question of arbitrability.

21. Mr. SCELLE replied that no one would be competent if no provision as to competence existed. That was why the treaties signed by Messrs. Bryan and Knox had provided for commissions of inquiry, a procedure stipulated in over a hundred treaties concluded between the United States of America and other States.

22. Mr. SPIROPOULOS asked whether it was not the Rapporteur's view that, when a treaty stated that the parties had agreed to resort to arbitration and to observe the terms of the Hague Convention, the Court would be competent to pass judgment.

23. Mr. SCELLE did not think so, since the party denying the arbitrability of the dispute was opposed to the setting up of the Court.

24. Mr. SPIROPOULOS observed that that would be a violation of international law.

25. Mr. SCELLE asked who would be judge in that case. Denials of arbitrability were frequent. Disputes of this kind should be submitted, not to commissions of inquiry, which were generally composed of politicians, but to the International Court of Justice.

26. Mr. SPIROPOULOS assumed that the arbitral tribunal would be set up beforehand.

27. Mr. SCELLE replied that, in that case, a certain freedom could be left to the parties, as he had provided at the end of the second sub-paragraph of paragraph I. But where no tribunal existed there was no provision under international law. That point should be clarified.

28. Mr. SPIROPOULOS observed that the judge of the action was the judge of the exception.

29. Mr. SCELLE said that the adage held good when the Court had been formed and was then judge with regard to its own competence.

30. Mr. SPIROPOULOS pointed out that in such a case Mr. Scelle did not suggest an application to the International Court of Justice.

31. Mr. Scelle thought that there would be no point in such an application. In the general structure of the draft which he had submitted, the first difficulty, as he had already pointed out, was the question whether the dispute was arbitrable or not, while the second was the setting up of the tribunal.

32. Mr. SPIROPOULOS thought that a State which did not wish to resort to arbitration and refused to set up the tribunal would be violating international law.

33. Mr. SCELLE disagreed, because the dispute might not be arbitrable. A State would not be violating international law if the dispute was not covered by the provisions of its contractual obligations. Whether there had been a violation of international law would remain unknown until the judge had made his award.

34. Mr. SPIROPOULOS asked Mr. Scelle whether he thought there was an obligation to submit to arbitration the dispute concerning the application of the Peace Treaties by Bulgaria, Hungary and Romania.

35. Mr. SCELLE replied that that was a matter which should be submitted to the International Court of Justice for decision.

36. Mr. SPIROPOULOS recalled that the International Court of Justice had declared that it was obligatory to set up the tribunal.[1]

37. Mr. CÓRDOVA thought that Mr. Scelle had in mind two cases. In the first there existed a general compromissory clause, the parties having agreed beforehand to submit to arbitration any matter outside the national jurisdiction. Provision was made for the appointment of arbitrators when an actual case occurred. When it did occur, one of the parties thought it was arbitrable and the other disagreed, so that the question had to be submitted to the International Court of Justice. If the arbitral tribunal had already been formed the procedure should be different; but all the text said was that " in the event of dispute as to whether this obligation exists, the matter shall be referred to the International Court of Justice ". Hence it seemed to be suggested that all cases would be referred to the Court, whereas that would occur only where the parties had not set up an arbitral tribunal.

38. Mr. SCELLE agreed that the sentence was not sufficiently clear.

39. Mr. el-KHOURY said he wished to begin by congratulating Mr. Scelle on the excellent report which he had submitted to the Commission. So far as the preliminary draft text prepared by Mr. Scelle was concerned, he noted that the first sub-paragraph of paragraph I referred to the obligation to have recourse to arbitration, and that the second sub-paragraph referred to the question of arbitrability.

39 a. He thought it advisable to draw the Commission's attention to the special situation of eastern countries which applied Islamic law, under which arbitration procedure could never be obligatory. Even when a State agreed to accept the rules of arbitration procedure, it could always refuse to apply them to the settlement of a specific dispute. Furthermore any arbitral judgment had to be submitted to a regularly constituted national court which would pronounce on the validity of the judgment and give the *exequatur*. Islamic States could hardly accept rules at variance with Islamic law which, as he had already stated, did not accept arbitration as obligatory and under which only legally constituted tribunals were competent to settle disputes. He would therefore prefer arbitration procedure to be optional.

39 b. In the field of international law there was no court competent to ensure the observance of compulsory arbitration procedure, and he thought that could be achieved only my means of agreements whereby States undertook to apply compulsory arbitration procedure to any disputes arising between them. Furthermore, Article 33 of the Charter of the United Nations contained provisions for the pacific settlement of disputes. Paragraph 2 of the said Article stated that " the Security Council shall, when it deems necessary, call upon the parties to settle their dispute " by means of their own choice. Paragraph 1 of the same Article listed possible methods of settlement as " negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements " or other pacific means. But these provisions were in no sense obligatory.

39 c. Nevertheless he thought it advisable, in view of the progress and development of international law, to provide some means or other of establishing a compulsory arbitration procedure. In his view the best means was the conclusion of conventions between States desirous of establishing such procedure. But in eastern countries even such conventions were not obligatory wherever any one of their provisions was contrary to Islamic law. Such conventions could only be deemed obligatory by eastern countries where they were in complete harmony with Islamic law. If the method of conventions or agreements was not adopted, there was little likelihood of creating an authority capable of making arbitration compulsory. In these circumstances

[1] International Court of Justice, Report of judgments, advisory opinions and orders, 1950, p. 65 et seq.

it was the International Court of Justice which might, in view of its prestige, be regarded as the competent authority in the matter.

39 d. Moreover, experience showed the preference of governments for settling disputes through domestic tribunals rather than by the arbitration procedure. So far as arbitrability was concerned, the decision should be left to the parties to the dispute. In the conventions to which he had referred, the Contracting States could specify the cases in which they must have recourse to arbitration. Failing such clauses they might agree to apply whatever arbitration procedure might be agreed between the parties in each case.

39 e. In conclusion he thought that, in accordance with Article 33 of the Charter of the United Nations, arbitration procedure should be optional rather than obligatory. He feared that, if the principle enunciated by Mr. Scelle were adopted, many countries would hesitate to accept or to ratify the convention.

40. Mr. KERNO (Assistant Secretary-General) pointed out that the International Court of Justice was that very day rendering its judgment on the obligation of States to appoint representatives to the commissions of arbitration provided for in the treaties.

41. Mr. YEPES asked Mr. Scelle whether the arbitrability of the dispute was, in his view, a *de facto* or a *de jure* question.

42. Mr. SCELLE said he regarded it as a *de jure* question. The Court examined the facts and decided whether the dispute was arbitrable or not. That decision of the Court's was itself a form of arbitration. Nevertheless, the Court could not deal with the question without examining the facts, and that examination was a *de facto* question. But when it gave a verdict on the facts, that was a *de jure* question. The situation was the same as for national courts.

43. Mr. ALFARO warmly congratulated Mr. Scelle on the report he had submitted. He himself supported the principle that arbitration should be made effective and obligatory. The report was an excellent initial step towards that goal. But it might perhaps be wondered whether the text as drafted by Mr. Scelle should be adopted as it stood. He was inclined to consider that it should be modified in certain respects with scrupulous regard, however, to its guiding principles.

43 a. The compromissory clause was a new departure in treaties, which frequently contained a provision to the effect that every dispute arising from the interpretation of clauses in the treaty should be submitted to arbitration. That was the sort of obligation which the Commission was then discussing.

43 b. As regards the question of arbitrability, Mr. Scelle's suggestion that disputes as to the existence of the obligation to have recourse to arbitration should be submitted to the International Court of Justice struck him as excellent. The Court existed and was, in his view, the only tribunal competent to decide the arbitrability of a dispute. That was a *de jure* question. The Hague Conventions of 1899 and 1907 already provided international arbitration procedure for the pacific settlement of international disputes. The Inter-American General Treaty of Arbitration, signed at Washington on 5 January 1929, made disputes of the kind referred to in article 36 of the Statute of the International Court of Justice subject to arbitration. A later text had excepted cases coming under the domestic jurisdiction of States and cases where the dispute concerned three States one of which was not a party to the Convention on Arbitration concluded between the two other countries.[2] If a dispute had arisen between States A and B, and State A accepted arbitration, whereas State B held that the matter came under its domestic jurisdiction, the treaties offered no solution, whereas Mr. Scelle's proposal furnished the possibility of arbitration in such a case.

43 c. So far as the references to articles 29 and 41 of the Statute of the International Court of Justice were concerned, he thought they were justified in the case of article 29, but with regard to article 41 it was hard to conceive of special cases in which measures of conservation were necessary, except cases of conflicts between two States in the course of which one of the States sought to damage the interests of the other after the arbitration procedure had been instituted. It was clear that measures of conservation might serve to prevent the interests of one of the States parties to the dispute being injured so long as the arbitral judgment had not been rendered. Hence, he thought the reference to article 41 was of value. In brief he considered that, subject to some re-wording of the text, paragraph I expressed an essential principle and it had his full support.

44. Mr. FRANÇOIS also congratulated the Rapporteur on his work and said he merely wished to ask him a question. It had been said that no institution existed at the present time capable of making resort to arbitration obligatory. He asked the Rapporteur whether the International Court of Justice was not such an authority in the case of States which had accepted the optional clause contained in Article 36, paragraph 2, of its Statute.

45. Mr. SCELLE replied in the affirmative, adding that he would mention the fact in paragraph I and that the provision in the said paragraph under which the International Court of Justice became such an authority was in no sense a new departure.

46. The CHAIRMAN noted that Mr. Alfaro had very clearly defined the scope of paragraph I as formulated by Mr. Scelle and thought that the Commission as a whole favoured acceptance of this point, excepting perhaps Mr. el-Khoury, who considered that countries observing Islamic Law could not accept the compulsory arbitration procedure. He thought that the Commission might leave it to Mr. Scelle to pay due regard in his next report to the opinions expressed by the members.

47. Mr. SCELLE said that Mr. Hudson had just suggested to him a text which seemed to him superior to his own and which he accepted. It read as follows:

[2] Article 26 of the draft peace code submitted by Mexico to the Montevideo Conference of 1933.

" If the Parties disagree as to the existence of a dispute or whether an existing dispute it within the scope of the obligation to have recourse to arbitration, this question may, in the absence of agreement between the Parties upon another procedure for dealing with it, be brought before the Chamber for Summary Procedure of the International Court of Justice by a written application, and the judgment rendered by the Chamber for Summary Procedure shall be final and without appeal ".

47 a. He pointed out that Mr. Hudson mentioned both cases, namely the question of disagreement as to the existence of a dispute and the question whether a dispute was within the scope of the obligation to have recourse to arbitration, whereas he himself had not specified these two cases in his draft, and he considered that they should be mentioned separately. So far as the reference to article 41 of the Statute of the International Court of Justice was concerned, he thought that the only difference of opinion between some members of the Commission and himself was as to whether the International Court of Justice could apply the provisions of the said article 41.

48. Mr. BRIERLY thought that the difficulty could be solved by omitting the reference to article 41 of the Statute of the International Court of Justice, while at the same time inserting in Mr. Scelle's draft convention some provisions on the lines of the provisions in the said article 41.

49. Mr. HUDSON pointed out that the Chamber for Summary Procedure of the International Court of Justice could always indicate the measures of conservation provided for in article 41 of the Statute, so that no reference to them was necessary. Nevertheless such measures would continue in being until such time as the Court had passed judgment, but not after that judgment. In some cases the decision would be immediate and the provisional measures would be suspended. He thought that there was no substantial difference between Mr. Scelle's point of view and his own.

50. Mr. SCELLE replied that he thought there was a difference, in the sense that the Court might, through its Chamber for Summary Procedure, decide on measures of conservation only in cases where such measures were aimed at preserving the *status quo* existing at the time when the dispute was referred to the Court. It was only in such cases that these measures could be decreed. For example, in the case of a dispute between two riparian States concerning a watercourse, where one of the States refused to accept arbitration and to attain its ends—i.e. to evade arbitration—diverted the waters of the river, the adoption of measures of conservation was impossible because the *status quo* had been modified before the dispute had been referred to the Court and could not be restored. He wished to avoid such a situation. The Court should be in a position to take such measures with a view to facilitating arbitration on the basis of the maintenance of the *status quo* which was the cause of the dispute. He thought that the Court should adopt measures of conservation, on the understanding that, when the maintenance of the *status quo* was no longer essential, its decision would cease to apply.

51. Mr. CÓRDOVA considered the text submitted by Mr. Hudson excellent, but regretted that it made no mention of measures of conservation and no reference to article 41 of the Statute of the International Court of Justice. He regarded the latter as very important and said it must not be forgotten that the cases in question were referred to the Court in pursuance, not of its Statute, but of the treaty of arbitration.

52. Mr. HUDSON replied that the Court could take no action outside its Statute. If article 41 of the latter was mentioned, reference would also have to be made to all the subsequent articles of the Statute which dealt with procedural points. Although it did not mention the various articles, the text which he had proposed entailed an obligation on States to defer to the Court and to its Statute as soon as the dispute was referred to the Court. He added that, despite the obligatory character of the Articles of the Statute, the decision with regard to the adoption of measures of conservation took effect only if it was based on a judgment of the Court and was notified to the parties.

53. Mr. SCELLE accepted Mr. Hudson's text, while regretting that it contained no reference to the question of measures of conservation, although he agreed with Mr. Hudson that such a reference was unnecessary inasmuch as the Court and the parties to the dispute were bound by the Statute of the Court and could not depart in any way from its provisions.

54. Mr. CÓRDOVA thought that article 41 meant that the *status quo* should be maintained. But as soon as the Court had decided that the case referred to it was arbitrable, the measures of conservation would cease to apply. He thought that the maintenance of the measures of conservation after judgment had been passed by the Court could be provided for by means of a convention.

55. Mr. HUDSON repeated that in his view the Court could not depart from the provisions of article 41 of its Statute. Mr. Córdova's object might be achieved if the parties, after referring the question of arbitrability to the Court, also referred to it, without mentioning article 41 of the Statute, a second question, namely what measures of conservation the Court could prescribe for the period up to the time when the arbitral judgment was rendered.

56. Mr. YEPES was of opinion that the International Court of Justice had the right to prescribe measures of conservation as soon as a case was referred to it under article 40.

57. Mr. SCELLE replied that such measures ceased to be applicable as soon as the Court had rendered judgment, but they should be maintained until that moment and the parties could so decide in the treaty of arbitration.

58. Mr. CÓRDOVA thought the Rapporteur should express this view clearly in his report. It was an idea regarding the continuation of the *status quo* which should be explicitly stated in the report.

59. Mr. HUDSON thought that a mere reference to

article 41 of the Statute of the International Court of Justice would not cover the cases which Mr. Córdova had in mind. The most important article of this Statute from the point of view of such cases was article 53, which was the one that should be quoted. He had just prepared a text which might be included in Mr. Scelle's preliminary draft and which would, in his opinion cover the cases mentioned by Mr. Córdova. It read as follows:

> "The judgment given by the Chamber may also indicate the steps to be taken by the Parties for the realization of the arbitration and for the protection of the interests of the Parties pending a final arbitral award."

The principle concerning measures of conservation was a good one, but the circumstances in which such measures could be prescribed should be defined.

60. The CHAIRMAN proposed that it be left to the Rapporteur to examine the two texts submitted by Mr. Hudson and take them into consideration in the conclusions of the report which he would submit in the following year.

61. Mr. SCELLE agreed with this proposal, adding that he was completely satisfied with both texts.

62. Mr. HUDSON replied that he himself was opposed to the second text which he had just submitted and that he had prepared it merely for the Rapporteur's guidance.

63. Mr. KERNO (Assistant Secretary-General) thought that, so far as the consensus of opinion within the Commission was concerned, a distinction should be made between the two texts submitted by Mr. Hudson. The first of these texts was acceptable to the Commission, whereas the second, which was a suggestion for the Rapporteur's use, did not, in his view, meet with the unanimous approval of the Commission.

64. The CHAIRMAN thought that the whole question should be left to Mr. Scelle.

Paragraph II of the proposed draft text

65. Mr. SCELLE explained that paragraph II dealt with the setting up of the arbitral tribunal. After reading the first sub-paragraph, he said that it was not a proposed article, but was intended to form a link between paragraphs I and II and was therefore merely a transitional provision.

66. Mr. HUDSON requested Mr. Scelle to revise the wording of his text, with particular reference to the expressions "cannot be settled" and "a reasonable time", the sense of which should perhaps be defined. He again noted that Mr. Scelle referred to the obligation of States to appoint an arbitrator or to set up an arbitral tribunal. He wondered whether the appointment of an arbitrator could be the equivalent of the setting up of an arbitral tribunal.

67. Mr. SCELLE replied that he regarded the appointment of an arbitrator and the setting up of an arbitral tribunal as identical. A single arbitrator constituted a court competent to undertake arbitration. The meaning of this paragraph in his report was that once the arbitrability of a dispute was established, the parties should be left free to nominate an arbitrator or an arbitral tribunal in accordance with their undertaking to accept arbitration. The "reasonable time" allowed for the possibility of the parties amicably settling the dispute without recourse to arbitration. After reading the second sub-paragraph of paragraph II of his report, he said the best method in that connexion was to follow the procedure prescribed in the General Act of Arbitration, as revised by the General Assembly.

68. Mr. HUDSON agreed with the idea formulated in the second sub-paragraph, but said he was opposed to the reference to articles 22 and 23 of the General Act of Arbitration, adding that the said articles had not been amended when the Act was revised.[3]

69. Mr. SCELLE stated that the second sub-paragraph was not a finished text, but merely a draft designed to convey his idea, which the Commission might amend if it so desired.

70. Mr. CÓRDOVA asked whether a time limit should not be set for the appointment of an arbitrator or the setting up of an arbitral tribunal by the parties. If that was not done there was a danger that one or other of the parties might procrastinate.

71. Mr. SCELLE replied that he had thought of setting a time limit, but realized that it would be a rather delicate matter. The term "reasonable time" was well established, having been used in a large number of treaties. He could not see on what basis a definite time limit could be fixed at that stage.

72. Mr. CÓRDOVA pointed out that the General Act of Arbitration fixed a time limit of three months, which should be adopted in the texts prepared by Mr. Scelle.

73. The CHAIRMAN requested Mr. Scelle to consider the suggestion just made by Mr. Córdova.

74. The CHAIRMAN thought the Commission was agreed on the principle expressed in this sub-paragraph, and invited comments on the third sub-paragraph of paragraph II of the preliminary draft text prepared by Mr. Scelle.

75. Mr. HUDSON asked Mr. Scelle why he had put in the last sentence of the third sub-paragraph, namely "the tribunal so constituted shall hear the case and its judgment shall be binding".

76. Mr. SCELLE agreed that it was superfluous and could be omitted.

77. Mr. SCELLE, after reading out the fourth and fifth sub-paragraphs of paragraph II of his preliminary draft text, said that the latter were merely designed to indicate the present state of custom. He thought that the parties should be allowed a certain freedom in the choice of the personalities or judicial institutions they wished to appoint as arbitrators. At the present time a movement was beginning in favour of jurisdictional arbitration, as opposed to diplomatic arbitration, which had long been the rule. He should perhaps add that the appointment of the Head of a State as arbitrator seemed inadvisable to him, since in most cases he would lack legal or technical qualifications.

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[3] General Assembly Resolution 268 (III).

78. Mr. HUDSON said he had difficulty in following Mr. Scelle's reasoning. Many examples existed of successful arbitration by Heads of States. In every case the arbitral award had been drawn up by legal experts, and not by the Head of the State, who had merely signed it.

79. Mr. SCELLE replied that in such cases the legal experts concerned were nearly always diplomats as well.

80. Mr. SPIROPOULOS thought that this sub-paragraph went into too much detail with regard to the persons entitled to be appointed as arbitrators. It was self-evident that the persons appointed as arbitrators would always be properly qualified. It was preferable to say nothing on this point.

81. Mr. CÓRDOVA said that Mr. Scelle's text in no way debarred the Head of a State from being appointed as arbitrator, but merely said that arbitrators should be selected in the light of experience, which was an excellent principle. Nevertheless, he shared Mr. Scelle's view with regard to the Heads of States. The latter would always be inclined to base their decisions on political considerations, and it was essential to avoid arbitral judgments of that type.

82. Mr. el-KHOURY observed that in the previous year certain Eastern countries had appointed two kings to arbitrate and they had rendered a fair and true judgment which, when submitted to the tribunals in the contending countries, had been accepted by them and implemented by the parties. He saw no need to lay down such conditions regarding the appointment of arbitrators, and was even inclined to think that jurists regarded disputes as more complicated than they really were.

83. The CHAIRMAN thought that the Rapporteur had had no intention of restricting the number of persons eligible for appointment as arbitrators.

84. Mr. SCELLE confirmed this view and said that here again he was not proposing the text of an article, but had merely expressed an idea, so that the Commission could amend his text in accordance with its preference for a particular procedure. He personally thought that the arbitration provided for should be jurisdictional rather than diplomatic or political. He had thought so for a long time, and considered that arbitration procedure should be developed along those lines. An arbitral judgment which was a model of its kind was that rendered by Professor Huber in the case of Las Palmas Island. It was a true example of jurisdictional arbitration, and that way lay progress.

85. Mr. HUDSON agreed with Mr. Scelle that it was advisable to restrict the number of arbitrators. It was obvious that in very important cases five arbitrators might be of great value, but in most cases a smaller number seemed preferable. Some consideration should also be given to the financial aspect of the problem, i.e. to the arbitrators' fees, which were usually very high. Some States would hesitate to have recourse to arbitration if it cost them too much. That material aspect of the problem occurred to him because he would not like to see arbitration limited to important international disputes, but would prefer it to form the basis for the settlement of disputes even of lesser importance.

86. Mr. ALFARO pointed out that the term " direct interest " was used in the fifth sub-paragraph. He thought that the reference should be not only to direct interest, but also to indirect interest, and he therefore proposed the addition of the word " indirect ".

87. Mr. SCELLE thought it would be simpler to delete the word " direct " leaving the word " interest " unqualified.

88. Mr. HUDSON said he would prefer the term " special interest ".

89. Mr. KERNO (Assistant Secretary-General) recalled that the Economic and Social Council had referred to the Commission a proposal concerning the question of the nationality of married women, and that the General Assembly had referred to the Commission the question of territorial waters. He requested the Commission to take up these questions with a view to advising the Economic and Social Council and the General Assembly thereon.

90. The CHAIRMAN said that the two questions would be placed on the agenda of the Commission's next meeting.

The meeting rose at 12.55 p.m.

71st MEETING

Wednesday, 19 July 1950, at 10 a.m.

CONTENTS

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

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).

Nationality of married women (Letter from the Secretary-General) (A/CN.4/33)

1. The CHAIRMAN read document A/CN.4/33, in