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Summary record of the 73rd meeting

Topic:
Arbitral Procedure

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arbitration, the parties must be entirely free to appoint their arbitrators. Those arbitrators, in their turn, would appoint the umpire. In that kind of arbitration, neutrality of the judges could not be insisted on. In the case of international arbitration, however, neutrality was indispensable. There were gaps in the text proposed by Mr. Scelle. It made no mention, for example, of the quorum required for a decision by the tribunal. He thought that an addition should be made to the text to cover that point.

77. Mr. CÓRDOVA drew attention to Article 31 of the Statute of the International Court of Justice dealing with the nationality of judges, which made provision for States parties to a dispute being represented in the Court by judges of the parties' nationality. If the Commission accepted that principle, there could be no question of its imposing restrictions on a judge on account of his past activities. It was recognized that Governments on the whole believed, when they appointed one of their nationals, that he would take their point of view. But it was the judge's duty to judge objectively. The text proposed by Mr. Hudson was drafted in too general terms. Mr. Hudson used the words " active part ". What did he mean by the word " active " ? Did he mean that a person who had acted as advisor to his government in a dispute submitted to arbitration, or who had participated in a judgment in connexion with that dispute, had thereby taken an " active part " ? The Commission must decide whether it meant to allow States parties to a dispute to appoint arbitrators of their own nationality, or to forbid such appointments.

78. Mr. YEPES thought that *ad hoc* judges were always open to challenge. In article 17, paragraph 2 and article 31, paragraph 6, the Statute of the International Court of Justice allowed the Court to object to *ad hoc* judges.

79. Mr. SCELLE pointed out that the question of objection was dealt with later in his text.

80. Mr. SPIROPOULOS felt that the Commission was faced with a difficult situation which had no simple solution. He thought that the formula proposed by Mr. Hudson was the only one which the Commission could accept. The most that could be expected of governments was that they should not appoint persons who had already actively participated in investigating or settling the dispute submitted to arbitration. It was a very delicate matter to limit the rights of States. It was necessary in the present case, but care should be taken not to go too far. He did not think that the Commission could fill in the gaps to which Mr. Scelle had referred. He asked the Commission to adopt Mr. Hudson's formula which, as he had already said, appeared to him to represent the maximum that could be provided for.

81. Mr. SCELLE accepted Mr. Hudson's formula. The question of the nationality of judges would come up again when the Commission came to consider the next point in his report, which dealt with objection. The question before the Commission at the moment, however, was one which should be settled within the tribunal itself. In his view the arbitrators constituting the tribunal ought to decide any doubt, and whether or not an arbitrator should participate in the judgment of the case. If the doubt was serious, one of the other arbitrators would certainly propose disqualification. That, however, was a matter to be considered later.

82. The CHAIRMAN felt he was right in saying that the members of the Commission accepted Mr. Hudson's formula.

83. Mr. HUDSON said that his formula was a direction to the Rapporteur, and that it was not necessary for it to be put to the vote.

The meeting rose at 1.5 p.m.

73rd MEETING

Friday, 21 July 1950, at 10 a.m.

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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) (continued)

PARAGRAPH III OF THE PROPOSED DRAFT TEXT (*continued*)

1. Mr. SCELLE said that on the previous day the Commission had rejected the fourth sub-paragraph, under which the tribunal would decide in case of doubt whether an arbitrator could participate in the judgment of a case. He explained that the tribunal, or in some cases a third-power arbitrator, might be called on to give an opinion as to the qualifications of an arbitrator to sit on the tribunal. The question was taken up again in connexion with objections. Once a tribunal was set up, it was an organ of a particular international body; hence, its composition could no longer be changed. National arbitrators could not be interfered with. They were nominated by the two parties; the tribunal was above the parties and had no further connexion with

them, even where the arbitrators were national judges. The object of the report was to correct questionable procedure in the past. The tribunal must be safeguarded from diplomatic bargaining. It must be a genuine tribunal, making its awards on the basis of respect for law, as stated in article 37 of The Hague Convention of 1907.

1 a. The chief point in the report was the constitution of the tribunal. The tribunal must be set up prior to the *compromis*. The entire report was based on that notion. The procedure to be aimed at was that if the parties did not agree on the drafting of the *compromis,* the tribunal would draft it. The notion was to be found as far back as the 1907 Convention (article 53). The tribunal was now in charge of the issue, not the parties.

2. Mr. HUDSON asked whether article 53 had ever been invoked. He personally had never found that the article had the slightest effect, and he had come to the conslusion that it was illusory.

3. Mr. SCELLE did not think the Commission had been convened to record government practice where such practice was faulty. At the same time, governments were not obliged to accept the Commission's pronouncements. As article 37 stated, disputes should be settled " on the basis of respect for law ", and not on the basis of law half-undermined. If the Commission felt that the only possible course was to continue as before, the report under discussion was pointless.

4. Mr. el-KHOURY remarked that Mr. Scelle had not said whether the nomination of a national arbitrator was subject to acceptance by the other party. With regard to the quorum, he would like to know whether the whole arbitration tribunal must sit, or whether a majority of the members was sufficient.

5. Mr. SCELLE, answering the earlier question, said he regarded arbitrators as the arbitrators for both parties, and a tribunal as only constituted when both parties had accepted all the arbitrators. A State had no right to change its arbitrators, and an arbitrator had no right to resign, any more than a judge. He could do so only with the consent of both parties; otherwise he was no longer a judge. Surely a judge was only at liberty to resign where a government had accepted his resignation. A tribunal was an institution above either party. A judge fulfilled a public function and no one had a right to abandon such a function once it had been accepted. As to the quorum, when a judge withdrew, it was more often than not at the bidding of his government, which was anxious to wreck the arbitration proceedings—an inadmissible situation. As his report showed, he was concerned first of all with the constitution of the tribunal, and only considered the *compromis* in the second place.

6. Mr. HUDSON pointed out that generally speaking, the *compromis* itself set up the tribunal.

7. Mr. SCELLE agreed that that was generally true, but that it was one of the major defects of the current procedure. Parties were free to proceed in that way, but if they did not agree, the first thing to be done was to set up a tribunal which would then establish the *compromis*. The procedure was the same as in domestic law. If two parties appeared before a court and the case was not ready for hearing, the court might say — get your case ready or we shall decide it on the facts available.

8. Mr. AMADO said that the essential point in arbitration was not the fact that the tribunal was chosen by the parties. The linch-pin of the whole system of the arbitration was the *compromis*. Mr. Scelle appeared to call for two *compromis*: one to set up the tribunal, and then the *compromis* proper. Such a procedure was to much of an innovation that it would be well to consider whether it was feasible. The *compromis* was the basis on which the arbitration structure was erected; Mr. Scelle appeared to wish to divide it up, and to make it two-storeyed.

9. Mr. SCELLE thought a distinction was called for. The basis of arbitration was not the *compromis*, but the undertaking to submit issues to arbitrators. States must be brought to do so. He agreed that the Commission should urge States to draw up a *compromis* if they could agree; and if not, to endeavour to set up a tribunal which in turn would draw up the *compromis*. If they did not set up such a tribunal, it would be set up in conformity with article 23 of the General Act. Thus States had full latitude, where they agreed. Otherwise the tribunal established the *compromis*.

10. Mr. AMADO did not see how arbitrators could negotiate a *compromis*. Such negotiations were political operations.

11. Mr. SCELLE pointed out that there was nothing new involved. The obligatory *compromis* had been contemplated at The Hague Conferences of 1899 and 1907. Thirty years ago it had been decided that the tribunal should establish the *compromis*. If two States undertook to appear before arbitrators, from the legal point of view they must no longer be left a loophole. The Commission was trying to find out how States could be made to respect their obligations.

12. Mr. HUDSON asked the Rapporteur to mention a case in which article 53 of the Hague Convention had been applied and the *compromis* had been established by the tribunal.

13. Mr. SCELLE could not think of an example off hand. All writers who had studied the question of arbitration procedure, including J. C. Witenberg, had considered that the 1907 Convention should be applied.

14. Mr. el-KHOURY observed that in civil procedure, the arbitrator chosen by the parties established the *compromis*. But he did not think that was the case in international arbitration.

15. Mr. SCELLE said he had followed treaties published over a long period, and the procedure adopted by various States. If the Commission was to confine itself to the practice of chanceries, there was no point in convening experts on law to study the problem; it would be better to convene members of the chanceries.

16. Mr. SPIROPOULOS thought that the point on which Mr. Scelle and the other Members of the Commission differed was that the latter appreciated more fully the position of States which desired to retain a

certain freedom of action and to be in a position either not to appoint an arbitrator, or having done so, to withdraw him or to find some other way of avoiding arbitration. It was a normal practice for States to have a certain option not to have recourse to arbitration. In the case of a court whose compulsory jurisdiction had been accepted, there was no way of escaping that jurisdiction. Mr. Scelle would make arbitration compulsory as in the case of the International Court. He wanted all cases to be able to be brought before a tribunal for award. It was a proposal worth considering by the Commission. The question would then arise whether, in view of the desire of governments for a certain freedom of action, the Commission could urge that. It was a matter that called for reflection.

17. Mr. SCELLE was ready to grant full liberty to governments so long as they acted in good faith; but the moment they ceased to act in good faith, there must be some organ to prevent them from evading their obligations. Legally spreaking, they could no longer evade arbitration.

18. Mr. AMADO was afraid that if the Commission aimed too high it might lose the little it had gained so far in arousing the interest of the various countries in arbitration.

19. Mr. SCELLE pointed out that States were not obliged to sign the Convention, but by drafting it the Commission would be formulating the law. Parties to a dispute invariably tried to defeat the law. Litigants were never honest. In a lawsuit, all that concerned them was their own interest.

20. Mr. AMADO recalled that a great many States had refused to accept the compulsory jurisdiction of The Hague Court in its entirety. He could speak with some confidence, since Brazil was a pioneer in the matter. He fully agreed with Mr. Scelle, but he could not see how to change the situation in practice. States were only States, and must be taken for what they were worth. He did not see how the problem of the *compromis* could be split up.

21. Mr. SCELLE argued that arbitration was intended for parties not wishing to appear before the International Court. If they acted in good faith, they could proceed freely; but if they refused to set up the tribunal, it must still be set up. The previous day, the Commission had voted in favour of article 23 of the General Act of Arbitration. He had felt that the question was settled, though he had not been sure. Certain writers had stated that a tribunal could waive the *compromis*. The tribunal and not the parties governed the suit. If there were to be justice, the tribunal representing the international community must take charge. Authors like Lauterpacht and Fischer Williams shared his opinion.

21 a. The question on which his own view differed from that of some of the members of the Commission at present was that of sovereignty. To say that States could evade justice was a poor interpretation of sovereignty. The question was whether sovereignty implied the right for a State to apply its regular jurisdiction, or whether it implied the right to take arbitrary action. Some members of the Commission were championing arbitrary action.

22. Mr. ALFARO said he had always been greatly interested in the question of international arbitration. He knew by experience that, generally speaking, a State which had done an injury to another State tried to avoid arbitration. He had been rapporteur on the question of the pacific settlement of international disputes during the Pan-American Conference at Havana in 1928. In his report, he had advocated a system of pacific settlement by which, once a dispute had arisen, the parties could not avoid arbitration. The Conference had not accepted his proposal, but it had been persuaded to advocate the obligatory principle—which had brought about the 1928 - 1929 conventions on conciliation and arbitration. There were obligatory arbitration treaties in force between some of the Latin American republics. In principle—like Mr. Scelle—he favoured any system making arbitration compulsory. Once a State had agreed to submit a dispute to arbitration, it should not be able to avoid doing so.

22 a. With regard to the setting up of the tribunal, whether the *compromis* should always precede the establishment of the tribunal was a matter of practical expediency. It must be allowed that, before agreeing to arbitration, a State should be permitted to go into the matter; but where it had accepted a general clause requiring it to submit to arbitration, there could be no way out of arbitration, once a tribunal had been set up. Hence the logical conclusion was to entrust the drafting of the *compromis* to the tribunal. Failing a general arbitration clause, States which occasionally had recourse to that method of settling disputes drafted the *compromis* before setting up the tribunal; but States could agree beforehand on the composition of the tribunal. That would mean a double *compromis,* which appeared to worry Mr. Amado. But if the provisions in the report were adopted, States would take great care to draft the *compromis* at the same time as they set up the tribunal. States must be deprived of the possibility of evading arbitration once they had undertaken to submit their disputes to arbitration. He would vote on those lines.

23. Mr. YEPES found himself somewhat perplexed. Some speakers had discussed the right of withdrawing a national judge, and the right to challenge an arbitrator, others had discussed the *compromis*. He would like to know what exactly was the subject of the discussion.

24. Mr. SCELLE agreed that the discussion had strayed from its course; the Commission should have again taken up the discussion where it had left off the previous day—namely, on the question of objection to one of the arbitrators. He had gained the impression that when decisions had been taken, some members of the Commission did not like the arguments in his report so lucidly outlined by Mr. Alfaro. Once the principle of arbitration was admitted, there should be no possibility for a party to escape from it. It could happen that parties acted in good faith. In the Franco-German case of the Casablanca deserters,[1] neither party had

attempted to evade arbitration. It was a perfect example of what arbitration should be.

25. Mr. YEPES said he would like to speak on the question whether an arbitrator appointed by a State and losing its confidence could be withdrawn by that State.

26. Mr. SCELLE considered that a State had no right to withdraw its arbitrator. If it did so, the tribunal should continue to examine the case, as had happened with the Franco-Mexican Commission. [2] The tribunal still stood, and made its awards without the participation of the arbitrator who had been withdrawn. Members were aware of the case of the Hungarian optants, and the way in which the Council of the League of Nations had proposed a solution contrary to common legal honesty. It was an example of the way in which a political organ could pronounce a decision in defiance of its obligations. The Council of the League of Nations had declared that it was bound to appoint arbitrators, but had intimated that if the parties fell in with its wishes, it would not do so. It was a scandalous example of the introduction of politics into law.

27. Mr. YEPES said that the great weakness of arbitration lay in its actual definition. An award was made by arbitrators appointed by the interested States. He was in favour of compulsory arbitration, but he was also in favour of renouncing it and recommending instead the compulsory jurisdiction of a court of law. According to the principle of arbitration, if an arbitrator were chosen by one of the parties and lost the confidence of that party, the latter was no longer bound by the award.

28. Mr. SCELLE contended that Mr. Yepes' view was not in keeping with legal doctrine.

29. Mr. YEPES upheld the principle of arbitration. If compulsory jurisdiction were called for, all disputes should be brought before the International Court of Justice. A national judge on an arbitration tribunal might be compared to the *ad hoc* judge of the International Court, who could always be withdrawn at a State's request. The basic fact must be recognized that arbitration was an imperfect way of settling disputes. In 1948, at the ninth Pan-American Conference in Bogotá, it had been decided to put arbitration into the background in favour of giving full jurisdiction to the International Court of Justice. In codifying arbitration, the Commission should start out from the principle that it was an imperfect type of jurisdiction where a State was at once judge and litigant.

30. Mr. SPIROPOULOS pointed out that the Commission was discussing several questions at once. A few moments ago, it had been discussing Mr. Scelle's proposal—a very important innovation. He would like to know what the Commission proposed to examine next. The main question was whether the *compromis* could be established by the arbitrators.

31. Mr. SCELLE said the Commission was discussing the question of objection to arbitrators.

32. The CHAIRMAN thought it would be better to continue examining the binding force of arbitration conventions, and he asked Mr. Scelle it if would not be advisable to give some pointers as to whether the arbitration Convention was binding, and whether an arbitrator could be withdrawn.

33. Mr. SCELLE replied that the withdrawal of a judge was a separate question. When a State undertook of its own accord to appear before an arbitrator, should it be allowed the option of failing in its undertaking? That was the question.

34. Mr. AMADO read out the following passage from Mr. Scelle's report: "A 'national' arbitrator may not withdraw or be withdrawn by the government which has appointed him. Should this occur, the tribunal is authorized to continue the proceedings and to render an award which shall be binding. If the withdrawal prevents the continuation of the proceedings, the tribunal may request that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him." (para. III, last sub-paragraph) That was the main question.

35. The CHAIRMAN said that the Commission was engaged in a general discussion on that particular point in the draft.

36. Mr. SPIROPOULOS thought that States should be prevented from making arbitration impossible by their behaviour. The provisions of the proposed Convention would, after all, only be binding on States signing it. If a State undertook to accept arbitration and had not signed the Convention, it could continue to follow the diplomatic method. Hence, there was no risk for States which had not signed: but States signing the Convention would be opting for the procedure under which they could not evade their obligations. It would be a useful innovation to establish a procedure which added something to the strncture of international law.

36 a. His experience with arbitration had been unfortunate. Most States endeavoured to avoid arbitration. Where they accepted it, it was frequently in order to obtain some advantage in other negotiations. The idea of laying down conditions which made evasion of arbitration impossible was most judicious. As he had said, there was no risk involved in adopting those conditions, since States not wishing to bind themselves had merely to refrain from signing the Convention.

37. Mr. CÓRDOVA saw nothing new in Mr. Scelle's text. It involved no more than the application of the principle that parties to an undertaking must carry out that undertaking in good faith. If they did not wish to do so, they put themselves outside the law. In a dispute between the United States of America and Mexico,[3] the American judge had not been willing to sign the award rendered by Mr. Alfaro, as third arbitrator, and the Mexican judge; and he had withdrawn, as of course

[1] Arbitration of 24 November 1908; Award of 2 May 1909 (*American Journal of International Law*, 1909, 766).

[2] A. H. Feller, *The Mexican Claims Commissions*, pp. 69 - 76.

[3] A.H. Feller, "The International Fisheries Case" (1931), *The Mexican Claims Commissions* (1935), p. 193.

was his right. The important point was that the tribunal had the power to settle the issue. The tribunal must not lose its jurisdictional authority because a national judge withdrew. Discussions had been carried on for many years at the diplomatic level, and in the end the United States to its credit had accepted the decision. The principles of international law were sufficient to warrant the statement that a State could not evade an undertaking to which it had given its word. That was no innovation; it was merely a question of codification.

38. Mr. SCELLE agreed with Mr. Córdova. The articles he had proposed left the parties the option of appointing another arbitrator; " If the withdrawal prevents the continuation of the proceedings . . ." The situation might well arise. It could happen that only one arbitrator was left, or that the remaining national arbitrator and the third arbitrator could not reach agreement. He continued to read out the passage: ". . . the tribunal may request that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him." That provision had been inserted to prevent a tribunal being made impotent to render an award.

39. Mr. CÓRDOVA observed that the situation was hardly likely to arise, since the arbitrators were three in number.

40. Mr. SCELLE replied that it arose frequently. A judge withdrew. Two judges remained, and it was quite possible that they might not agree. The Commission's concern was that the situation should be regularized so as to settle the issues involved.

41. Mr. CÓRDOVA took an example where there were three arbitrators, none of whom withdrew, and all holding different opinons. In such circumstances, they would be unable to render an award.

42. The CHAIRMAN pointed out that such a case could only arise if it had not been stipulated that the chairman or umpire would have the casting vote.

43. Mr. CÓRDOVA could not accept the solution suggested. If an arbitrator withdrew and were not replaced, the International Court of Justice would intervene. It was as if the parties had accepted its compulsory jurisdiction. But by opting for arbitration, they showed that they did not wish to submit their dispute to the Intternational Court. Where an arbitrator withdrew, the remaining arbitrators could render the arbitration award on their own.

44. Mr. el-KHOURY thought the general discussion of the problem of arbitration would enable the special rapporteur to take cognizance of the Commission's opimion and to make the necessary alterations to his report. It would be well for the point concerning compulsory arbitration to be embodied in the Commission's work on the development of international law; but it should be in a form acceptable to States signing the Convention. A number of States had notoriously not yet accepted as compulsory the jurisdiction of the International Court of Justice as laid down in article 36, paragraph 2 of its Statute. How could they be expected to submit to compulsory arbitration ? In any case, they were aware that the appointment of an arbitrator and the drafting of the *compromis* did not bind them so long as they had not accepted the Convention.

44 a. He would prefer States to accept the principle of compulsory arbitration in a general treaty providing that disputes should be submitted to arbitration. In the absence of a prior agreement, if States concluded a private agreement, they must observe it. Certain conventions called on the parties to a dispute to set up a tribunal. If they did not succeed in doing so, that was one difficulty. If they did not succeed in drafting the *compromis* either, that was another. Where a State accepted the constitution of an arbitration tribunal, but refused to draft the *compromis,* the case would be referred to the International Court, which would itself judge the dispute in its entirety. Hence, States could be asked to accept the principle that if they did not succeed in reaching agreement on the *compromis* and the constitution of the tribunal, the Court would intervene and take the case over. On that basis, States would probably be prepared to accept the Convention. If they were deprived of the right to draft the *compromis* and to set up the tribunal, they would refuse out of hand to accede to the Convention.

44 b. If a judge withdrew, the party which had nominated him would replace him, naturally with the consent of the other party. If that proved impossible, the case would be brought before the International Court of Justice. If it accepted the principle of obligation proposed by Mr. Scelle, the Commission would be making the tribunal an international organ—in fact, a court of justice. The Commission should either draw up a Convention or allow full liberty to the contending parties.

45. Mr. KERNO (Assistant Secretary-General) was not surprised that today's discussion had taken a high-flown and somewhat heated turn. The question at issue warranted it. On one cardinal point, there seemed to be unanimity in the Commission—namely, that parties were free not to bind themselves to appear before an arbitrator, but once they had bound themselves to do so, they must carry out their obligations in good faith. To have settled that as a starting point was a decided achievement. Although arbitration raised great difficulties, they must be surmounted in spite of breach of faith on either side. Some members of the Commission had been rather alarmed that the report should stress what the arbitrator could and could not do. If the accent were put rather on what the tribunal could or could not do, many of their fears would be allayed.

46. Mr. HUDSON was surprised that the words " compulsory " and " binding " should be mentioned so often in the discussion of arbitration. If the obligation to arbitrate existed but there was no arbitration tribunal when the obligation was undertaken, a distinction must be made between (1) the constitution of the tribunal, and (2) the competence of the tribunal set up. The general question was how far the two points could be left to be settled by the parties, or how far the solution of the difficulties which arose could be enforced on the parties by conventional law. In Mr. Scelle's report, those two questions—the composition of the tribunal and the

fixing of its competence—would be settled consecutively. He felt that the two points were inter-connected. In his experience, they invariably went together. He hoped that the way in which he proposed to formulate the problem would simplify the discussion. He suggested that the Commission give its opinion on the following points: (1) how far could the two questions be left to the parties ? and (2) how far could the settlement of the two questions be enforced on the parties by conventional law on arbitration procedure ?

46 a. He was concerned about the wide scope of the measures which the Rapporteur would like to introduce. So categorical a manner of drafting the text would probably reduce the number of countries prepared to accept the arbitration procedure which the Commission was attempting to establish; and recourse to arbitration would certainly be far less frequent in those circumstances. It was out of the question not to allow parties a good deal of latitide in the constitution and competence of the tribunal.

46 b. The next question which would arise was the functioning of the arbitration tribunal. Apropos of that, the first sentence of the final sub-paragraph of paragraph III of the proposed text stated: " A ' national ' arbitrator may not withdraw or be withdrawn by the government which has appointed him." There were numerous reasons why an arbitrator might withdraw or be withdrawn. He might withdraw on grounds of illness, or for other reasons of *force majeure*. The report did not appear to admit of such reasons. The second sentence of the same paragraph struck him as being in contradiction to the sentence he had just quoted. It read: " Should this occur, the tribunal is authorised to continue the proceedings and to render an award which shall be binding." Thus, it recognized that withdrawal of an arbitrator could occur. Did the principle in the second sentence actually exist in current law ? He did not think so, though it ought to exist. A well drafted *compromis* would cover the case. The only case in point he knew of was that of the *Lena Goldfields Co. Ltd.* Arbitration.[4] The other three instances he could recall involving the withdrawal of an arbitrator were: first, the well known case of the Hungarian optants, a not very edifying episode. Arbitration had not been possible because of the withdrawal of one of the arbitrators; second, the Franco-Mexican Arbitration.[5] During that hearing, the Mexican member of the Commission had withdrawn, or had not attended the meetings. In spite of that, the French member of the Commission and the chairman had rendered their award. Mexico had lodged a protest against the award, declaring that it was invalid. Agreement had finally been reached between the parties, but without deciding the question of principle regarding the replacement of an arbitrator who withdrew or was withdrawn; third, the final award rendered by the mixed German and American Commission in the *Black Tom Explosion* Case.[6] The circumstances of that case were rather unusual. The Commission consisted of two American members and one German. The latter had withdrawn, and the Commission had rendered a limited award merely asking that certain funds already in United States hands should be paid over to the United States.

46 c. If it were now maintained that the report reflected the present state of the law, he could not agree. He was quite prepared to admit that the law should be in conformity with the principles formulated by the rapporteur. But since that was not the case, he would rather the question of replacement of an arbitrator who withdrew or was withdrawn were stipulated in the *comprimis* or arbitration treaty between the parties. He requested the Rapporteur to look into the question as one which should be settled between the parties by means of an agreement.

47. Mr. SCELLE agreed that what he was advocating was not a universally recognized principle of international law. But there were precedents. He accepted Mr. Hudson's notion, provided the question of replacement of an arbitrator were stipulated in the *compromis*. But he could not accept it if it were not laid down in the *compromis*. His concern was to establish a principle. He would like to go further than the existing law, since he considered that the Commission was not called upon merely to record the positive law on the subject.

48 - 51. Mr. HUDSON, reverting to the Rapporteur's statement that The Hague Convention of 1907 called for revision, said he too felt that revision was desirable. In particular, he would like to see article 52 altered by a supplementary clause stipulating that the *compromis* should set forth the measures to be applied in the event of withdrawal of an arbitrator. If the Rapporteur's draft also stipulated that the question should be settled in the *compromis* itself, he would have not further objection to the paragraph in question. At all events the provisions of article 53 of the 1907 Convention ought not to be incorporated. They went much too far and had the further drawback of being unduly complicated.

Mr. el-KHOURY took the chair.

52. The CHAIRMAN requested Members of the Commission not to repeat in their speeches all the arguments already put forward during the discussions.

63. Mr. ALFARO said he had a comment to make on the final sentence of the last sub-paragraph of paragraph III of the proposed text. It would appear to indicate that, in the event of an arbitrator withdrawing or being withdrawn the tribunal could ask for the absent arbitrator to be replaced by the government in question. If the government did not replace him, the tribunal could ask the President of the International Court of Justice to replace him. Article 45 of The Hague Convention of 1907 was based on a similar notion.

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[4] *Lena Goldfields Co. Ltd. v. USSR*, Arbitration award of 2 September 1930, in Lauterpacht, *Annual Digest of public international law cases*, 1929/30, p. 426.

[5] See footnote 2.

[6] *Lehigh Valley Railroad Co. Agency of Canadian Car and Foundry Co. Ltd. etc.* (United States v. Germany), Second Arbitration Award of 30 October 1939 (Hackworth, *Digest of International Law*, vol. VI, pp. 90 - 97; 130 - 136).

54. Mr. SCELLE said that the only reason why he had inserted the paragraph in his report was that he wanted to avoid approaching a political authority for the replacement of an absent arbitrator. He wanted a judicial authority to be approached.

55. Mr. BRIERLY asked whether the Commission could not pass on from the paragraph in question. It would be easy enough if Mr. Scelle were prepared to delete the first sentence of the paragraph.

56. Mr. SCELLE was reluctant to agree to deleting the sentence. The principle involved in the sentence was precisely what he wanted to establish. At the same time, if the Commission were opposed to it, he would study the entire problem afresh, and possibly a year hence could return with another formula which might be less categorical. But he felt he must refer to the far too frequent fact that governments resorted to withdrawal of their arbitrators so as to sabotage arbitration. That had happened during the case of the Hungarian optants. Withdrawal in that manner should be regarded as fraudulent and inadmissible. But there were instances where there was no question of fraud — illness of the arbitrator, or his inability to attend the arbitration proceedings for reasons of *force majeure*. The sentence in question did not apply to such cases.

57. Mr. YEPES said that an arbitrator might withdraw or be withdrawn on the grounds that he had lost the confidence of his government.

58. Mr. SCELLE replied that that was precisely what he wanted to avoid. His basic concept was that once a tribunal had been set up, the arbitrators were the arbitrators for both parties. If there was only a single arbitrator, he was the arbitrator for both parties; if there were three of them, the situation was exactly the same. The arbitrators were in all cases arbitrators for both parties. He thought the Commission was unanimous on that principle, and he was sure too that it accepted his contention that the Commission's function was not merely to formulate the law or to enlarge upon it; it had also to point out to the various States that they should aspire to justice. He was not prepared to admit that a party had the right to sabotage arbitration by the simple expedient of withdrawing the arbitrator it had appointed.

59. The CHAIRMAN thanked Mr. Scelle for his statement. Mr. Scelle was evidently willing to go into the whole problem again and to draft the final sub-paragraph of paragraph III less categorically, so that the Commission would be able to reach agreement on it the following year.

60. Mr. HUDSON suggested the omission of the final sentence of the paragraph as not being in keeping with the sentence that preceded it.

61. Mr. SCELLE said he had added the sentence to allow greater latitude in the event of the replacement of an absent arbitrator, and to give the whole paragraph a less peremptory character. At all events, a provision of that nature was called for. A case might arise, for example, where, following the withdrawal of an arbitrator, the two remaining arbitrators might wonder whether they should not bring in a finding of *non liquet*. He thought it desirable to prevent that.

62. Mr. FRANÇOIS said Mr. Scelle had stated that once the undertaking to arbitrate had been accepted by the parties, the latter could not evade the obligation to arbitrate. But the point was, what was the undertaking that the parties had accepted. The undertaking was to have recourse to arbitration—namely, to a procedure for the settlement of disputes which left the parties a certain amount of latitude either to agree or to decline to submit any particular issue to arbitration. That latitude allowed to States was what distinguished arbitration from judicial proceedings. The 1899 Hague Convention had been very rough and ready. It had been revised in 1907 with the object of perfecting it. Mr. Scelle wanted still more; he wanted absolute perfection. He personally greatly admired perfection, but he also regarded it with apprehension. A scheme as perfect as the one Mr. Scelle proposed establishing ran the risk of remaining a dead letter. In practice, the less you strove for the more you got. It was better to leave well alone. Theoretically, Mr. Scelle's point of view was entirely justified, but in practice it might prove risky. Hence, he wished Mr. Scelle had been less ambitious, and he hoped he would be prepared to review the proposals he had put before the Commission, and to return a year hence with a text which might be more easily accepted by the various States.

63. Mr. SCELLE found Mr. François' reasoning decidedly convincing. There was much truth in it. As to his objection that compulsory arbitration should not be decisive merely because the parties were prepared to accept arbitration procedure, he could not admit it offhand. In his draft, he had wished to establish precisely that absolute obligation. As he had pointed out, what he advocated in his report had already been contemplated in 1907.

64. Mr. HUDSON regarded the undertaking to arbitrate as the undertaking to reach agreement in due course. The rapporteur would force the parties to dispense with agreement in due course and to accept his method of solving any difficulties which might arise.

65. Mr. SCELLE replied that the undertaking which Mr. Hudson had referred to was no more than an expression of goodwill.

66. The CHAIRMAN thought Mr. Scelle had in mind unconditional acceptance. But there was no doubt that States would lay down conditions. He asked Mr. Scelle in his next report to bear in mind the objections revealed in the Commission. In his opinion, no party should be deprived of the right to raise objections or to lay down conditions.

67. Mr. SCELLE replied that in his report, States were not deprived of that option. What he wanted to avoid was that any party be resorting to obstructionism could hamper the ordinary course of the proceedings—e.g., by withdrawing the arbitrator it had itself appointed. To obviate that possibility his draft laid down certain rules of procedures as in the case of domestic legislation. Bad faith could be found at all stages, and there must be machinery for overcoming it at all stages.

68. Mr. CÓRDOVA felt that the Commission had discussed all aspects of the principle, and could rely on the Rapporteur to submit a text the following year which would take account of the opinions voiced during the debate.

69. Mr. HSU was prepared to accept the final sub-paragraph of paragraph III. The principle it laid down was a sound one. If a country was not willing to accept the arbitration procedure contemplated by the Rapporteur, there were other means and procedures it could apply. But once it submitted to the arbitration procedure, it should not be given the chance of evading it. The principle laid down was excellent. All Mr. Scelle need do was to re-examine it in the light of the present discussion and to re-cast it the next year for further examination and acceptance by the Commission. If States did not ratify it, they could always follow the procedure laid down in The Hague Convention and the General Act.

70. Mr. LIANG (Secretary to the Commission) recalled that Mr. Hudson had referred to the *Lena Goldfields Co. Ltd.* arbitration case. The *compromis* was reproduced in section IV of the " Memorandum on the Soviet doctrine and practice with respect to arbitral procedure ", submitted to the Commission by the Secretariat (A/CN.4/36).

71. Mr. SCELLE pointed out that the Commission had not yet examined the fifth sub-paragraph of paragraph III of his proposed text, referring to the disqualification of an arbitrator. That was the next point to be examined. The question it raised was whether a party could object to one of the arbitrators only on account of a fact arising subsequent to the constitution of the tribunal, unless it could reasonably be supposed to have been unaware of the fact or to have been the victim of fraud. It was a question which arose constantly in domestic law, where an objection was only admitted subject to a great many restrictions. Objections were not admitted in domestic law before the tribunal was constituted. In practice, a party could not in such circumstances object to its own arbitrator or the arbitrator of the other party. The moment a party discovered after the tribunal had been set up that it had been the victim of a fraud, it could lodge an objection. For example, it might happen that the arbitrator had already appeared as judge on the issue, or had already been consulted on the point of contention. Objection could be made to the arbitrator of the party in question or to the arbitrator appointed by the other party. Domestic law granted the right of objection in the case of all arbitrators, including the umpire. That was the principle he had felt should be inserted in his draft text.

72. Mr. HUDSON thought it was a mistake to introduce the principles of domestic law into international law. The only case he knew of where there had been fraud was that of an arbitration case between the United States of America and Mexico.[7] After the arbitration proceedings, Mexico had paid heavy compensation to the United States under the award. But the United States had refunded the money once it discovered that fraud had been committed.

73. Mr. SCELLE pointed out that there was no domestic court of justice or arbitration which had not the right of challenge, which was an elementary principle.

74. Mr. CÓRDOVA said that in domestic law the right of challenge existed because the parties to the issue did not take part in the setting up of the tribunal. He could not see how an international arbitration procedure could give one State the right to disqualify the other State's arbitrator.

75. Mr. SCELLE replied that his draft did not grant such a right absolutely. It granted it only where fresh evidence came to light after the tribunal had been set up. The measure he contemplated was the same as that in force in domestic law on the question of re-hearing, which was admissible only where fresh evidence was forthcoming. To give a very simple example, suppose an arbitrator was nominated, and it was subsequently found that he was mad; would it not be legitimate to disqualify him ? Or suppose it was discovered that an arbitrator had received money from the other party. There could be any number of reasons justifying disqualification; hence, he could not possibly admit that there should be no right of objection.

76. Mr. CÓRDOVA suggested that the cases where objection was permissible should be listed.

77. Mr. SCELLE thought it was unnecessary. The procedure he advocated in the last two sentences of the paragraph in question was sufficient.

78. Mr. SPIROPOULOS thought Mr. Scelle's proposals were truisms, and raised no problem. It might be true that no instances of objection had so far arisen in international arbitration. But they might well arise in the future. In a constructive document such as Mr. Scelle was endeavouring to compile, every possibility must be foreseen. He could not understand why the Commission should hesitate to follow Mr. Scelle's lead and make provision for the possibility of objection. Mr. Scelle's proposal was perfectly well founded. Every safeguard must be provided, not only in the interests of arbitration, but in the interests of governments.

79. The CHAIRMAN pointed out that, if there was a single arbitrator and he was challenged, the International Court of Justice would decide. But who would do so where there were three arbitrators ? Would the other two ?

80. Mr. SCELLE said that where there were three arbitrators, all three, including the arbitrator challenged, would make the decision. In domestic law, a challenged arbitrator remained in his place. He was present while his own case was being discussed, and took part in the decision. Actually, that was a minor matter which could be gone into at a later stage. The essential fundamental question was whether the Commission admitted the challenge or not.

81. The CHAIRMAN thought the question was of the utmost importance, and merited more thorough discussion. He pointed out too that the question of quorum

[7] Claims by Mr. Weil and the La Abia Silvia Mining Co. (Moore, *Digest*, vol. VII, pp. 63 - 68).

arose. The tribunal must be complete before it could pronounce a decision. He did not favour the view that the arbitration tribunal itself could decide in the event of an objection. He would prefer that in such cases it should invariably be left to the International Court of Justice.

82. Mr. HUDSON hoped that the following week the Commission would have time to discuss so important a question again, so as to help the Rapporteur to summarize the members' views when he drew up his report a year hence. There were also all the other paragraphs of Mr. Scelle's draft report to be examined.

83. The CHAIRMAN ruled that the Commission begin discussion on Mr. Alfaro's general report on the following Monday morning, and continue if necessary into its Monday afternoon meeting. He hoped the discussion would not be unduly prolonged.

The meeting rose at 1.5 p.m.

74th MEETING

Monday, 24 July, 1950, at 10 a.m.

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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).

Commission's draft report covering the work of its second session

PART I: GENERAL (A/CN.4/R.7/ADD.1) [1]

1. The CHAIRMAN said the Commission now had several parts of the report before it. Part I was a mere factual summary. It began with Mr. Koretsky's speech, which was fully reported in paragraphs 4, 5, 6 and 7.

Paragraph 12 [2]

2. Mr. YEPES recalled that the previous year he had been instructed to draw up a working paper on the right of asylum, but he had thought it better not to submit it during the current session on the grounds that a case involving the question was pending before the International Court of Justice. The paper was actually ready, and he would like it to be mentioned in the report.

3. Mr. HUDSON suggested that the end of the first sentence " in view of the fact that a case involving the right of asylum was pending before the International Court of Justice " should be deleted, so as to avoid the conclusion being drawn that the International Law Commission considered that it was no longer competent to study a problem once the Court took up a case involving that problem. Surely the reason why the topic had been deferred was that the paper had not been submitted; there was no point in going into detail.

4. Mr. YEPES could not agree to the deletion of the words. The reason why his report had not been submitted was that after some correspondence with the Secretariat he had felt it better to hold it up for the reason already given.

5. The CHAIRMAN suggested the wording: " Mr. Yepes stated that his report was ready, but in view of the fact that a case was pending before The Hague Court he preferred not to have his paper submitted to the Commission." That would avoid creating any precedent, since it would involve only Mr. Yepes' preference, and not a decision on the part of the Commission.

6. Mr. ALFARO suggested that in that case it would be better to recast the first sentence of paragraph 12.

7. Mr. YEPES accepted that suggestion.

8. Mr. SANDSTRÖM wondered whether the final sentence of paragraph 12 was really necessary. In any case the sentence struck him as inaccurate, since the Commission had gone into the possibility of consulting technical bodies.

9. Mr. KERNO (Assistant Secretary-General) said he had already expressed the opinion that the interval between the second and third sessions should not be allowed to go by without consulting certain bodies. The agenda had been adopted; the report should therefore indicate why the Commission had not felt it necessary to discuss item 10.

10. Mr. SANDSTRÖM pointed out that the Commission had not felt it necessary to discuss the item separately, and it would be sufficient to insert the word " separately " in the sentence in question.

[1] Mimeographed document only. Parts of the document that differ from the " Report " are reproduced in footnotes to the summary records. For other parts, see the " Report " in vol. II of the present publication.

[2] Paragraph 12 read as follows:
12. The Commission decided to adopt the foregoing agenda with the exception that consideration of the topic of " the right of asylum " should be postpoued, in view of the fact that a case involving the right of asylum was pending before the International Court of Justice. As no question arose in regard to " co-operation with other bodies ", the Commission did not find it necessary to consider that item at the session under review.