

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1952

Volume I

*Summary records
of the fourth session*

4 June - 8 August 1952

UNITED NATIONS



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New York, 1958



NOTE

The present volume contains the summary records of the fourth session of the Commission (135th to 183rd meetings); in accordance with General Assembly resolution 987 (X) of 3 December 1955, they are printed in English only; they include the corrections to the provisional summary records which were requested by members of the Commission and such drafting and editorial modifications as were considered necessary; in particular, working papers submitted during the session were incorporated in the summary records.

Volume II contains the studies, special reports and principal draft resolutions presented to the Commission for or during its fourth session. In accordance with resolution 987 (X), they are printed in their original language only.

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FOURTH SESSION

135th MEETING

Wednesday, 4 June 1952, at 4 p.m.

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*Chairman : Mr. Shuhsy HSU, First Vice-Chairman ;
later : Mr. Ricardo J. ALFARO.*

Present :

Members : Mr. J. P. A. FRANÇOIS, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. A. G. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Opening of the session

1-4. The CHAIRMAN said that, in the absence of the Chairman, Mr. Brierly, who had resigned from the Commission, a step that was regretted by all, the honour fell to him, as First Vice-Chairman of the Commission, elected at the third session, to declare open the fourth session of the International Law Commission.

Election of Officers

5. The CHAIRMAN said that, according to the agenda for the meeting the Commission would now proceed to the election of its officers, who would serve for a term of one year. He recalled that the Commission had decided at its first session that the rules of procedure of the General Assembly relating to the procedure of the latter's committees should apply to the Commission's procedure, and that the Commission should adopt its own rules of procedure when the need arose.¹ Rule 103 of the General Assembly's rules of procedure provided that elections of officers "shall be held by secret ballot". He asked what was the sense of the Commission in that regard.

¹ See *Yearbook of the International Law Commission, 1949. Report to the General Assembly*, para. 5, p. 278.

6. Mr. HUDSON pointed out that the President and the Vice-President of the International Court of Justice were elected by secret ballot, which seemed to him a wise procedure for the Commission to adopt. He accordingly moved that the Commission should, at the present session, abide by rule 103 of the rules of procedure of the General Assembly and elect its officers by secret ballot.

7. Mr. SCELLE supported Mr. Hudson's motion.

Mr. Hudson's motion was carried.

A secret ballot was taken for the election of the Chairman of the Commission.

Number of votes cast : 8

Number of invalid ballots : nil

Required majority : 5

Number of votes obtained :

Mr. Alfaro 5

Mr. Sandström 2

Mr. François 1

Mr. Alfaro, having secured the required majority, was elected Chairman of the Commission.

Mr. Alfaro took the Chair.

8. The CHAIRMAN expressed his gratitude for the honour done to him. He would do his utmost to ensure that the work of the fourth session of the Commission was as fruitful and effective as possible.

A secret ballot was taken for the election of the First and Second Vice-Chairman and rapporteur of the Commission.

Number of votes cast : 8

Number of invalid ballots : nil

Required majority : 5

Mr. François, having secured 6 votes, was elected First Vice-Chairman of the Commission.

Mr. Amado, having secured 7 votes, was elected Second Vice-Chairman of the Commission.

Mr. Spiropoulos was unanimously elected rapporteur.

Tribute to the memory of Miss E. Scheltema

9. Mr. YEPES, supported by Mr. HUDSON, considered that it would be appropriate for the Commission to pay tribute to the memory of the late Miss Elizabeth Scheltema, formerly member of the Legal Department of the United Nations Secretariat, who had served the Commission with such signal devotion.

Mr. Yepes' proposal was adopted, and the Commission stood and observed one minute's silence as a tribute to the memory of Miss E. Scheltema.

10. Mr. FRANÇOIS, speaking as a countryman of Miss Scheltema, thanked the Commission for its tribute to her. Her death was a heavy loss to the Commission and to the Netherlands, of which country she had been one of the most distinguished women lawyers. He would convey the Commission's condolences to her family.

11. Mr. KERNO (Assistant Secretary-General) said that it was no exaggeration to state that Miss Scheltema had worked herself to death. Had she been less conscientious and less imbued with a sense of duty she would have been alive still. He had been charged to convey to her family the condolences expressed by the Sixth Committee of the General Assembly, and he had been moved to hear the tribute paid to her by members of the Commission who, having been more closely associated with her, were in an excellent position to appreciate her work.

Adoption of the provisional agenda for the fourth session (A/CN.4/52)

12. Mr. HUDSON moved that the provisional agenda ² be adopted, but that the order in which the various items therein should be taken up should be left for determination at a later stage.

Mr. Hudson's motion was carried.

13. Mr. HUDSON said that he would like two matters to be considered under the item of the agenda entitled "Other business", the first relating to the summary records of the Commission and the second to the establishment of a standing drafting committee of the Commission.

14. The CHAIRMAN asked Mr. Hudson to give some indication of the nature of his proposal concerning the summary records, so that he (the Chairman) might have some idea as to when the matter should be taken up.

15. Mr. HUDSON said that he had had occasion to ask himself whether lengthy summary records served any purpose, in view of the fact that when the Commission adopted texts it issued a commentary to them. Perhaps nothing more was needed than very brief minutes recording amendments proposed to texts and decisions taken, without details of the discussions that had led up to those actions.

16. The CHAIRMAN said that such a radical measure could not be examined at once, but might be taken up at the next meeting.

² The provisional agenda (A/CN.4/52) read as follows :

1. Filling of casual vacancy in the Commission (Article 11 of the Statute).
2. Arbitral procedure.
3. Law of treaties.
4. Régime of the high seas.
5. Régime of territorial waters.
6. Nationality, including statelessness.
7. Date and place of the fifth session.
8. Other business.

17. Mr. LIANG Secretary to the Commission) said that Mr. Hudson's doubts as to the value of the summary records of the Commission were not shared in all quarters ; for example, the Institute of International Law thought so highly of them that it considered that they should be printed.

It was agreed that Mr. Hudson's proposal concerning summary records should be considered at the next meeting.

It was also agreed to add to the agenda, under the item "Other business", Mr. Hudson's second proposal relating to the establishment of a standing drafting committee.

18. Mr. LIANG (Secretary to the Commission) expressed the hope that the Commission would take up the item relating to the date and place of the fifth session fairly early, so as to allow time for the necessary consultations with Headquarters.

19. It would also be desirable if the item relating to the filling of casual vacancies in the Commission could be taken early, in order to enable the new members to join in the Commission's work as quickly as possible.

20. The Secretariat had placed the item relating to arbitral procedure at the head of the agenda, as it was a subject which had not been taken up at the third session but had been held over for consideration at the present session.

Filling of casual vacancies in the Commission

21. Mr. HUDSON proposed that the question of the filling of the casual vacancies in the Commission should first be discussed at a private meeting of the members of the Commission.

It was so agreed.

22. Mr. KERNO (Assistant Secretary-General) said that on his arrival in Geneva he had received a letter from Mr. Koretsky confirming his telegram of 22 May, the text of which had already been transmitted to all members of the Commission. Mr. Koretsky stated in his letter that the state of his health did not permit him to continue to carry out his duties as a member of the Commission, that he was accordingly submitting his resignation, and that he requested that the Commission be informed accordingly. Mr. Koretsky recommended that the Commission should elect in his place Mr. F. I. Kozhevnikov, Professor of International Law, whose name had been on the list of Soviet Union candidates at the time of the election of the members of the Commission at the third session of the General Assembly in 1948.

23. He (the Assistant Secretary-General) had also received from the Minister of the Soviet Union to Switzerland a list of Mr. Kozhevnikov's principal works in the field of international law, and would make it available to all members.

The meeting rose at 5.5 p.m.

136th MEETING*Thursday, 5 June 1952, at 11.30 a.m.***CONTENTS**

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*Chairman : Mr. Ricardo J. ALFARO.***Present :**

Members : Mr. J. P. A. FRANÇOIS, Mr. Shuhs Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

**Filling of casual vacancies in the Commission
*(continued)***

1. Mr. HUDSON proposed that in view of Mr. Brierly's resignation, the Commission should declare the existence of a casual vacancy and proceed to fill it, in accordance with article 11 of its Statute.

2. Mr. el-KHOURI seconded Mr. Hudson's proposal.

3. Mr. YEPES proposed that the Chairman should address a letter to Mr. Brierly, expressing the Commission's regret at the resignation of one who, as Chairman during 1951 and special rapporteur on the law of treaties, had made signal contributions to the work of the Commission.

The proposals of Mr. Hudson and Mr. Yepes were adopted.

4. The CHAIRMAN called for nominations for a successor to Mr. Brierly.

5. Mr. HUDSON proposed the election of Mr. H. Lauterpacht.

6. Mr. YEPES seconded that proposal.

Mr. Lauterpacht was unanimously elected a member of the Commission to fill the casual vacancy arising out of the resignation of Mr. Brierly.

7. Mr. HUDSON proposed that the Commission should also declare that a casual vacancy existed as a result of Mr. Koretsky's resignation.

8. Mr. el-KHOURI seconded Mr. Hudson's proposal.
Mr. Hudson's proposal was adopted.

9. The CHAIRMAN called for nominations for a successor to Mr. Koretsky.

10. Mr. el-KHOURI proposed the election of Mr. F. I. Kozhevnikov.

Mr. Kozhevnikov was unanimously elected a member of the Commission to fill the casual vacancy arising out of the resignation of Mr. Koretsky.

11. Mr. HUDSON thought that all members of the Commission present regretted the fact that one member had so far been unable to attend any of the Commission's sessions. He accordingly proposed that the Chairman communicate with Mr. Zourek, asking him whether he would be able to attend the present session, and requesting a prompt reply.

Mr. Hudson's proposal was adopted.

**Addition to the agenda for the fourth session: Review
of the Statute of the Commission**

12. Mr. HUDSON proposed that the question of the review of the Statute of the Commission be placed on the agenda for the present session.

13. Mr. KERNO (Assistant Secretary-General) recalled that the question raised by Mr. Hudson had been dealt with by the Commission at its third session.¹ The Commission had decided to submit a certain "fundamental recommendation" in pursuance of General Assembly resolution 484 (V), and had refrained from making detailed suggestions concerning desirable amendments until it was apprised of the General Assembly's attitude towards that recommendation. In resolution 600 (VI), the General Assembly had decided "for the time being not to take any action in respect of the revision of the said Statute until it has acquired further experience of the functioning of the Commission". It was for the Commission to decide whether to study the question further.

14. Mr. HUDSON pointed out that in view of resolution 600 (VI) of the General Assembly it could be concluded either that resolution 484 (V) was no longer operative, or that the Commission was still required to submit recommendations concerning revisions of the Statute other than that for full-time membership, which had already been disposed of for the time being by resolution 600 (VI). In his view, the second interpretation was the correct one, particularly in view of the fact that it would appear to be opportune for the Commission to submit recommendations to the next session of the General Assembly so that, if adopted, they could come into effect in time for the election of new members of the Commission in 1953. The question of review of the Statute of the Commission should therefore be placed on the agenda for the present session, although its consideration should be deferred until the arrival of Mr. Córdova, special rapporteur for the question.

¹ See summary records of the 83rd, 96th, 97th, 112th and 134th meetings in *Yearbook of the International Law Commission, 1951*, vol. I.

15. Mr. LIANG (Secretary to the Commission) said that Mr. Córdova had informed him that since the Commission's recommendation on the question of full-time membership had been settled for the time being by General Assembly resolution 600 (VI), he had not deemed it necessary to draw up a written report.

16. Mr. HSU supported Mr. Hudson's proposal. In his view, resolution 484 (V) was still operative.

17. Mr. SCELLE pointed out that the General Assembly had for the time being rejected the proposal that the Commission should be put on a full-time basis, but that it had not considered the question of ensuring some continuity of the Commission's work between one session and another. There was therefore no reason why the Commission could not consider that latter question further if it adopted Mr. Hudson's proposal, which he supported.

18. Mr. KERNO (Assistant Secretary-General) said that his interpretation of General Assembly resolution 600 (VI) was the same as that of Mr. Hudson.

19. Mr. el-KHOURI also supported Mr. Hudson's proposal.

It was agreed that the question of the review of the Statute of the Commission should be placed on the agenda for the present session.

Summary records of the Commission²

20. Mr. HUDSON said that he had had the unfortunate experience of having some extemporaneous remarks made by him in the course of the Commission's discussions quoted as though they were an *ex cathedra* pronouncement. If members of the Commission were to be held to every word they said, they would naturally have to weigh their remarks far more carefully in advance, and the liveliness of the Commission's debates would suffer. He understood that the Commission on Narcotic Drugs recorded only its decisions, and he suggested that the International Law Commission adopt the same practice, although prepared statements made by special rapporteurs might also be included in the records if the rapporteurs so requested.

21. Mr. SCELLE did not agree that the Commission's records should be limited to decisions. If the discussions which led up to those decisions were not recorded, there would be no indication of the reasons for which they had been taken. Many others shared his view, and it had even been suggested that the Commission's records should be printed. He agreed with Mr. Hudson that the summary records could at times appear to place undue emphasis on remarks thrown out at random in the course of a discussion. The Secretariat should therefore not be content with reproducing what was said, but should attempt the more difficult task of summarizing it. The summary records might, therefore, perhaps be

made somewhat briefer, so that members would have time to check the provisional records thoroughly.

22. Mr. LIANG (Secretary to the Commission) said that the summary records had been warmly praised not only by members of the Commission, but also by outside sources. The late Miss Scheltema had devoted her full time to making them as accurate and complete as possible. The task was so time-consuming that, for a period during the third session, she had had to be assisted by another member of the Legal Department. Obviously, the length of the summary records would depend on the subject-matter with which they dealt. Procedural questions could be treated very briefly, but in the case of discussions on substance — the question of the continental shelf, for example — the records had to be relatively full if they were to be of value to scholars of international law. Moreover, if the Commission were to win widespread support for its work, it must bring it to the attention of a wider public than the legal profession alone, and a bare record of decisions would scarcely suffice for that purpose.

23. As Mr. Scelle had said, it was more difficult to summarize than to reproduce, and the Commission's Secretariat, the staff of which had already been reduced from eight to four, could not devote any more time to the summary records than it had done in the past. He wondered, therefore, whether the Commission could not agree that in future the summary records should, in general, be somewhat briefer than in the past, but that it should recognize that, for certain discussions, relatively full records would be necessary.

After some discussion, *Mr. Liang's suggestion was adopted.*

The meeting rose at 12.50 p.m.

137th MEETING

Friday, 6 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. J. P. A. FRANÇOIS, Mr. Shuhsí Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

² See summary record of the 135th meeting, paras. 13—17.

**Arbitral procedure (item 2 of the agenda) (A/CN.4/18,
A/CN.4/46)**

GENERAL DEBATE

1-2. Mr. SCELLE, opening the discussion as special rapporteur on arbitral procedure, said that his second report (A/CN.4/46)¹ dealt with matters already discussed in connexion with his first report (A/CN.4/18).²

3. His point of departure was that undertakings to resort to arbitration were often not carried out, and that governments sometimes sought to evade obligations which they had entered into at an earlier stage. He had quoted a number of examples in his first report, and had indicated that it was impossible at present to oblige a recalcitrant government to honour its undertaking. Some had adduced that argument in respect of the stand taken by the Iranian Government, in its dispute with the Anglo Iranian Oil Company, in claiming that its commitments under the Agreement for a Concession of 29 April 1933 had no longer any force, as a result of its recent nationalization of the oil industry.

4. Arbitration was one source of international jurisprudence, and it was a field in which public opinion was an important factor. If the number of undertakings to resort to arbitration that were not honoured tended to increase, the whole system of arbitration would fall into disrepute, and international law would lose one of its means of enforcement. It was therefore incumbent upon the Commission to consider the obstacles to arbitral procedures, and to see what means for their removal were available.

5. One of the principal abstacles to applying a compromissory clause occurred when a party declared its undertaking to be no longer valid, or invoked the principle of *rebus sic stantibus*. For that reason he considered it necessary to entrust the preliminary issue of arbitrability, if it were in dispute, to some judicial organ of an international character, which he considered should be a Chamber of Summary Procedure of the International Court of Justice. Apart from giving judgement, the Chamber might also prescribe measures to protect the interests of the parties pending the final award. He had taken up that proposal in his first report, but the Commission had reached no definite decision, although it had viewed it favourably.

6. Another frequent cause of failure of arbitral procedure was the difficulties associated with the constitution of the tribunal. Each party was concerned about selection of arbitrators, and there again he believed that the intervention of an international authority would be valuable. He was therefore in favour of recourse being had to the procedure prescribed in article 23 of the Revised General Act for the Pacific Settlement of International Disputes,³ in cases where the

parties were themselves unable to agree on the constitution of the tribunal.

7. The procedures he had proposed both with regard to the arbitrability of a dispute and with regard to the constitution of the tribunal were thus not new.

8. He also wished to emphasize the immutability of the tribunal. Once the arbitrators had been appointed the composition of the tribunal must remain unchanged, unless a vacancy occurred for reasons beyond the control of the contending governments. The arbitrators, once appointed, would have to divest themselves of every national allegiance, and act as independent and impartial judges.

9. He supposed that his conclusions about the need for an international authority to decide the issue of arbitrability and to constitute the tribunal in cases of disagreement between the parties, and about the need to ensure that the tribunal would be in a position to pursue the case to the end and make an arbitral award which would be carried out in good faith, would be generally accepted. The only delicate aspect of the problem was the nature of the disputants, and there it must be remembered that the rules of law were as binding upon States as they were upon individuals. He had not proposed an authoritarian system that would violate the freedom of States, since they were free to resort to arbitration and to choose the arbitrators. He was proposing a procedure similar to that set forth in the so-called optional clause of the Statute of the International Court of Justice, namely, Article 36, paragraph 2.

10. Since the appearance of his second report (A/CN.4/46) he had sought to fill a gap in his documentation by submitting to the Commission a supplementary note (A/CN.4/57),⁴ to which were annexed the rules of conciliation and arbitration of the International Chamber of Commerce, which showed that the problems met with in commercial disputes were analogous to those arising between States. The International Chamber of Commerce had found that many firms which had bound themselves to observe the rules laid down now claimed that their undertakings no longer had force. It had accordingly provided for a Court of Arbitration composed of eminent lawyers, which had much the same functions as would be laid upon the International Court of Justice under the proposals made in his report. Article 10 of the rules of the International Chamber of Commerce was particularly important, inasmuch as it laid down that, should the defendant refuse or fail to submit the dispute to arbitration, the Court of Arbitration would order that the arbitration proceed, such refusal or absence notwithstanding.

11. He suggested that in the light of the foregoing general considerations the Commission might discuss, article by article, the second preliminary draft on arbitral procedure which he had presented in the annex to his second report (A/CN.4/46).

12. Mr. HUDSON wondered why Mr. Scelle should

¹ See text in *Yearbook of the International Law Commission, 1951*, vol. II, pp. 110—120.

² See text in *Yearbook of the International Law Commission, 1950*, vol. II, pp. 114—151.

³ *United Nations Treaty Series*, vol. 71, pp. 102—126.

⁴ See text in vol. II of the present *Yearbook*.

have referred to the dispute between the Iranian Government and the Anglo-Iranian Oil Company, as he (Mr. Hudson) had assumed that the Commission was dealing with international arbitration alone.

13. Mr. SCELLE agreed with Mr. Hudson that it was the Commission's business to consider international arbitration. He had merely quoted the example to which Mr. Hudson had objected in order to bring out the kind of difficulties to which compromissory clauses gave rise. The Iranian Government claimed that the Agreement for a Concession of 1933 was an instrument concluded between a government and a private company, whereas the United Kingdom Government affirmed that the agreement was of an inter-governmental character, similar to a treaty, having been concluded as the result of a settlement of a dispute between the two governments, in which the Council of the League of Nations had intervened. He had quoted that example with one object only, namely, to demonstrate the similarity of arbitration problems and procedure whatever the parties, be they States, private companies or individuals. He took no position with regard to the substance of the dispute. He believed that the technique of arbitration should be based on the same principles, regardless of whether it affected governments, individuals, or private companies, subject to the difference that it was easier to impose on individuals than on Governments the obligation to submit to arbitration.

14. Mr. HUDSON, observing that his question had not yet been answered, said that if Mr. Scelle's second preliminary draft on arbitration procedure contained in the annex to his second report (A/CN.4/46) was intended to apply to more than international disputes alone, he would have considerable difficulty in discussing it.

15. He agreed that international arbitration might have certain common features with other forms of arbitration. Nevertheless, it must be remembered that a dispute between private parties might be subject to legislation which differed from public international law.

16. Mr. SCELLE was in agreement with Mr. Hudson that the draft on arbitration procedure should be confined to international arbitration alone, as had been, indeed, his first report (A/CN.4/18), which had been based on the definition of arbitration contained in the 1907 Hague Convention for the Pacific Settlement of International Disputes. In studying the problem of arbitration he had recognized the extent to which the basic principles were generally applicable, regardless of the character of the parties. The methods of removing obstacles to international arbitration which the Commission should seek to formulate would thus be pertinent to other types of arbitration, though, of course, certain more drastic remedies which could be imposed in cases concerning private individuals would not be acceptable to States.

17. He had cited the provisions laid down by the International Chamber of Commerce because they obviously contained an international element.

18. Mr. YEPES, paying tribute to Mr. Scelle for his lucid and informative introductory statement, expressed pleasure that a jurist of his authority should have emphasized the important role which the Commission was called upon to play in the development of international law.

19. He agreed with Mr. Scelle as to the responsibilities which should be laid upon the International Court of Justice for determining the arbitrability of a dispute, and for constituting a tribunal in cases where the parties were unable to agree upon its composition. The International Court, with its profound sense of responsibility and unquestionably high competence, was clearly qualified to discharge those responsibilities.

20. He was gratified to see that Mr. Scelle had borrowed certain ideas from the Pact of Bogotá (American Treaty on Pacific Settlement) of 1948,⁵ thus recognizing the important contribution that that Treaty had made to the development of international law in respect of the pacific settlement of disputes.

21. Mr. HUDSON asked that, to facilitate discussion, members of the Commission be supplied with copies of the texts of the 1907 Hague Convention for the Pacific Settlement of International Disputes, the Pact of Bogotá and the Revised General Act for the Pacific Settlement of International Disputes.

22. The CHAIRMAN said that he would ask the Secretariat to make the necessary arrangements to see that Mr. Hudson's wish was met.

23. Mr. HUDSON said that he had been struck by the second paragraph on page 11 of Mr. Scelle's second report, and asked where the relevant provision occurred in the draft on arbitration procedure.

24. Mr. SCELLE said that the provision in question was to be found in article 12 of his draft. It was a procedure which would become necessary if there was some obstacle to the parties signing at once a general *compromis* prescribing all the main problems to be settled in the dispute. If the classical arbitral procedure could be applied without hindrance, the first 11 articles of his draft would not come into play.

25. Article 12 was not new, but had been borrowed from the Hague Convention of 1907. He would like in that context to emphasize that the obligation to have recourse to arbitration did not necessarily lie in the *compromis*. Its source was the compromissory clause in the relevant instrument or agreement.

26. The International Chamber of Commerce, which had met with difficulties similar to those which occurred in disputes between States, had included a provision in its rules on arbitration, under which if both parties, or one of them, refused to sign a *compromis*, they would not thereby be exonerated from accepting arbitration and abiding by the decision reached.

⁵ Pan American Union, *Law and Treaties Series* No. 24. Also in *United Nations Treaty Series*, vol. 30, pp. 55—116.

27. Mr. KERNO (Assistant Secretary-General) said that he had been most interested in Mr. Scelle's view, developed in the introduction to his second report (A/CN.4/46) — namely, that the task of the special rapporteur was to submit a text which had been scientifically studied, and not to confirm facile solutions which States would find it easy to accept merely because they entailed no commitment. The Commission's task consisted of both the codification and the development of international law.

28. Mr. HSU agreed with Mr. Scelle about the Commission's tasks, one of which was to recommend improvements in existing international law.

29. The general discussion on arbitration being concluded, the CHAIRMAN invited the Commission to proceed to the examination, article by article, of Mr. Scelle's Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46).

ARTICLE 1*

30. Mr. LIANG (Secretary to the Commission) observed that the phrase "may arise eventually" was not a correct translation of the French text, and might be replaced by the expression "may possibly arise".

31. Mr. el-KHOURI suggested that the matter of drafting be referred to the Standing Drafting Committee which Mr. Hudson had suggested should be set up.

It was so agreed.

32. Mr. HUDSON asked whether the first sentence of article 1 served any useful purpose. He thought it was a self-evident statement of fact which need not be made.

33. Mr. el-KHOURI pointed out that the intention of article 1 was to make clear the compulsory character of compromissory clauses in international instruments.

34. Mr. YEPES pointed out that the first sentence of article 1 of Mr. Scelle's draft was similar to the first paragraph of article 39 of the 1907 Hague Convention for the Pacific Settlement of International Disputes.

35. Mr. SCELLE agreed with Mr. Yepes that the first sentence of article 1 was based on the wording of article 39 of the 1907 Convention which read as follows :

"The arbitration convention is concluded for questions already existing or for questions which may arise eventually."

"It may embrace any dispute or only disputes of a certain category."

The purpose of that provision was to indicate that the obligation to arbitrate derived from an undertaking

contained in an instrument or agreement on which it was based, and not from the *compromis* alone. He agreed that it was a truism, but felt that it was one which needed to be stated.

36. Mr. HUDSON asked why Mr. Scelle had altered the wording of the Hague Convention, which placed "questions already existing" before "questions which may arise eventually", an order which appeared more logical. Moreover, the words "compromissory clause or undertaking to have recourse to arbitration" seemed to suggest two different things; in fact, they were surely one and the same. He suggested that the word "questions" should be replaced by the word "dispute". He still saw no reason, however, why the first sentence should be included at all.

37. Mr. SCELLE said that article 1 must be read in connexion with article 2, which laid down the procedure in the event of disagreement as to the arbitrability of a dispute. Such disagreement would only arise if the undertaking to have recourse to arbitration applied to disputes which might arise in future, or, in other words, was abstract rather than concrete. For that reason — that was, because they were more important in connexion with what followed — he had referred to such disputes first; but he would have no objection to reversing the order. In the second phrase mentioned by Mr. Hudson, the words following the conjunction "or" were descriptive of those preceding it, not alternative to them; one and the same thing was meant, not two.

38. Mr. LIANG (Secretary to the Commission) referring to a previous remark made by Mr. Hudson, pointed out that the term "the arbitration convention" as used in article 39 of the 1907 Hague Convention for the Pacific Settlement of International Disputes obviously meant any arbitration convention to be concluded in the future. That term consequently corresponded to the term "compromissory clause" as used in article 1 of Mr. Scelle's draft. For the sake of clarity, he would suggest the use of the term "an arbitration convention" in place of the words "compromissory clause" in article 1, for the reason that they meant virtually the same thing. It would be desirable to obviate all confusion between the terms "compromissory clause" and "*compromis*", as the latter was used in subsequent articles of Mr. Scelle's draft. Such confusion might not arise in the mind of a lawyer, but the general reader might not be able to grasp the difference.

39. Mr. SCELLE agreed that the words "compromissory clause or" might be deleted from article 1.

It was so decided.

40. After some further discussion of drafting points concerning the first sentence of article 1, Mr. HUDSON said that as his proposal that that sentence be deleted had found no support, he would withdraw it. He would, however, suggest that the sentence be amended to read :

* Article 1 read as follows: "The compromissory clause or undertaking to have recourse to arbitration may apply to questions which may arise eventually or to questions already existing. Whatever the instrument or agreement on which it is based, the clause is strictly obligatory and must be implemented in good faith."

"An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future."

Mr. Hudson's suggestion was adopted, subject to any further drafting amendments made by the Standing Drafting Committee which it had been proposed should be set up.

41. Mr. el-KHOURI, referring to the second sentence of article 1, said that, in accordance with Articles 33 and 36 of the Charter of the United Nations, recourse to arbitration should also be made obligatory when the General Assembly or the Security Council recommended the parties to a dispute to settle it by arbitration. He proposed that a sentence to that effect be added to article 1.

42. The CHAIRMAN suggested that consideration of that proposal be deferred until the Commission had completed its consideration of the existing text of article 1.

It was so agreed.

43. Mr. YEPES said that he had understood it to be Mr. Scelle's view that the agreement from which an undertaking to have recourse to arbitration resulted could be verbal in nature. In his view, it would be extremely dangerous to endeavour to make verbal agreements between States legally binding, and he could not accept the present wording of article 1. He accordingly proposed that it be amended in such a way as to make it clear that the agreement referred to must be a written instrument.

44. Mr. SCELLE confirmed that it was his view that if the agreement could be proved it should be legally binding, even if it did not exist in writing. He again drew attention to the connexion between articles 1 and 2; if the existence of a verbal agreement to have recourse to arbitration was contested by one of the parties, it would be the responsibility of the Chamber of Summary Procedure of the International Court of Justice to render judgment on the existence of the agreement, and hence on the arbitrability of the dispute.

45. Although he had not in mind any specific examples of verbal agreements between States to have recourse to arbitration, agreements on other questions between States were often verbal, and if Mr. Yepes's reasoning were followed to its logical conclusion it could be argued that such agreements should only be accepted as valid if they were ratified. He recalled that in the *Legal Status of Eastern Greenland* case, the Permanent Court of International Justice had held an oral declaration (the Ihlen declaration) by the Norwegian Minister for Foreign Affairs, made on behalf of his Government in respect of a question falling within his province, to constitute an undertaking which was binding upon the country to which the Minister belonged.⁷ He urged the Commission not to be too formalistic in its approach.

⁷ See Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, Series A/B, No. 53, pp. 69—73.

46. Mr. YEPES pointed out that Article 102 of the Charter provided that "... every international agreement entered into by any Member of the United Nations . . . shall as soon as possible be registered with the Secretariat and published by it", which showed that by "agreement" a written agreement was meant.

47. Mr. SANDSTRÖM suggested that the words "Whatever the instrument or agreement on which it is based" be deleted, so as to leave the question of the form of agreement entirely open.

48. Mr. YEPES said that he could accept Mr. Sandström's suggestion.

49. Mr. SCELLE felt that the words which it was suggested should be deleted were an essential part of article 1. As the Commission was only considering arbitration between States, however, and as he had already indicated that the rules governing arbitration between States could reasonably be made stricter than those governing arbitration in which one or both of the parties were individuals, he would agree to adding to article 1 some such phrase as:

"provided that at least the basis of proof (*commencement de preuve*) can be produced in writing."

50. Clearly the International Court of Justice would require formal proof in important disputes, but he saw no reason why it should not be left to its discretion to accept, for example, an exchange of letters between administrations in disputes of lesser importance.

51. Mr. SANDSTRÖM and Mr. YEPES feared that it would be going much too far to introduce the French-law concept of "basis of proof" (*commencement de preuve*) in a document governing relations between States.

52. Mr. KERNO (Assistant Secretary-General) suggested that the question of proof might be more appropriately dealt with in article 2.

53. Mr. SCELLE agreed.

54. Mr. HUDSON asked whether Mr. Scelle could agree to the second sentence of article 1 being amended to read:

"Whatever the instrument or agreement from which it results, the undertaking constitutes a legal obligation, which ought to be carried out in good faith".

55. Mr. SCELLE accepted that wording.

Mr. Sandström's proposal that the words "Whatever the instrument or agreement on which it is based" be deleted having been put to the vote, 4 votes were cast in favour and 4 against. The proposal was accordingly rejected.

The wording suggested by Mr. Hudson was adopted by 6 votes to none, with 1 abstention.

56. Mr. YEPES explained that he had abstained because that wording did not preclude verbal agree-

ments. He accordingly proposed that an additional sentence be added to article 1, reading:

"The undertaking to have recourse to arbitration must be in writing".

57. Mr. HUDSON said that the Commission should not prejudge its consideration of the Law of Treaties. He saw no need to specify details of how the undertaking was to be entered into. It would be sufficient if it could be proved that it had in fact been entered into.

58. Mr. el-KHOURI said that he had only been able to vote in favour of the wording suggested by Mr. Hudson because he could not imagine two States concluding in practice a verbal agreement to have recourse to arbitration.

Further discussion of article 1 was deferred.

The meeting rose at 1 p.m.

138th MEETING

Monday, 9 June 1952, at 3 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. J. P. A. FRANÇOIS, Mr. Shuhsy Hsu, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Welcome to members of the Commission newly present

1-5. The CHAIRMAN extended a welcome to Mr. F. I. Kozhevnikov and Mr. H. Lauterpacht, the newly elected members of the Commission, and also to Mr. J. Zourek, who was attending a session of the Commission for the first time.

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) (*continued*)

6. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft

on Arbitration Procedure (annex to document A/CN.4/46) in the second report of the special rapporteur.

ARTICLE 1 (*continued*)

7. Mr. KOZHEVNIKOV said that closer acquaintance with the Second Report on Arbitration Procedure submitted to the Commission by the special rapporteur, which included the Second Preliminary Draft on Arbitration Procedure, had imbued him with the firm conviction that the fundamental theses and premises on which the specific proposals constituting the conclusions of that report were based were totally unacceptable from the standpoint of the generally accepted principles of current international law.

8. Even if the observation — on the substance of which he would express no opinion for the time being — that the elements of a code of arbitration procedure already existing in a number of international conventions were accepted, the Commission's task would merely consist, as was in fact made clear in the report, in harmonizing and developing those elements. In other words, the provisions of the special rapporteur's draft should have proceeded from the basis principles of international law relating to the inherent nature of arbitration as a recognized institution of that law.

9. The draft, however, went further, and in his view conflicted with the very essence of international arbitration, which essence the special rapporteur had himself endorsed to some extent. The special rapporteur pointed out that international arbitration differed from international jurisdiction in the proper sense of that term inasmuch as, *inter alia*, it was left to the discretion of the parties concerned to determine the questions in dispute and to select the arbitrators. He did not propose for the time being to go into the substance of the question of the so-called international judicial authority, but merely wished to draw attention to that definition of international arbitration. He wished also to point out that governments usually used different procedures to conclude the *compromis* and to appoint arbitrators respectively.

10. The report referred to the necessity for providing, in the absence of agreement between the parties, for intervention by an international authority whose decisions would be binding, and which, in the special rapporteur's opinion, might well be the International Court of Justice itself. That contention, which conflicted sharply with the basic principles of international arbitration, seemed to him (Mr. Kozhevnikov) to give rise to a somewhat curious situation.

11. The competence of the International Court of Justice was, as all knew, optional. But the report of the draft on arbitration procedure sought to confer on international arbitration in that respect a character that not even the International Court itself enjoyed. The draft further provided that the arbitral tribunal could be set up even before the conclusion of the *compromis* , which would give it very wide powers. It was clearly impossible to admit such contentions if the Commission wished to

abide by the generally accepted fundamental principles of international law.

12. Hence the texts before the Commission were unacceptable, since they ran counter to the essence of international arbitration—the free consent and independence of the parties in matters relating to the determination of the procedure—and laid down an inequitable principle in providing for possible intervention by the International Court of Justice.

13. The Commission should therefore reject the texts before it. Since it had already decided to deal with the codification of arbitration procedure (although in his view it was not essential to do so at the present juncture, least of all as a matter of first priority), the whole question of international arbitration should be studied afresh in the light of the generally accepted principles of international law relating to it, to which he had already referred.

14. Mr. SCELLE was sorry if he had failed to make it clear in his report that his draft was intended to be binding only on those States which accepted it, in the same way as, under Article 36, paragraph 2, of the Statute of the International Court of Justice, the Court's compulsory jurisdiction was binding only on those States which recognized it. The only aim of his draft was to make sure that States which entered into an undertaking to have recourse to arbitration accepted an effective procedure for carrying out the arbitration.

15. The CHAIRMAN felt that the Commission could not re-open the general debate on Mr. Scelle's report, the main lines of which it had already accepted. It must confine itself to considering his draft article by article, and he recalled that Article 1 had already been tentatively adopted with certain amendments, but that Mr. YEPES¹ and Mr. el-Khoury² had proposed additions to it. He therefore invited comments on the former's proposal, which was to add a sentence reading "The undertaking to have recourse to arbitration shall be made in writing".

16. Mr. SCELLE thought that the texts adopted by the Commission at its present session should be regarded as final, subject only to any editorial changes that might be made by the Standing Drafting Committee which, it seemed to be agreed, was to be set up.

17. As had been pointed out at the very close of the preceding meeting,³ the amendment proposed by Mr. YEPES related to the admissibility of evidence, and might therefore be considered to be out of place in a general introductory article. It might be usefully considered, however, in connexion with the provisions governing the arbitral tribunal's procedure. He would, however, accept the Commission's views as to where the amendment should be placed, but would merely suggest that, in order that there should be no doubt about the fact that it did not necessarily require a treaty, properly speaking, it should be re-worded as follows:

¹ See summary record of the 137th meeting, para. 56.

² *Ibid.*, paras. 41 and 42.

³ *Ibid.*, para. 57.

"The undertaking shall result from a written document."

18. Mr. YEPES accepted that wording.

19. Mr. HSU felt that the question raised by Mr. YEPES should be dealt with under the Law of Treaties, and that his amendment should not therefore be included in the draft convention on arbitral procedure.

20. Mr. LAUTERPACHT agreed. At present he could see no reason why arbitration agreements should necessarily be written instruments. The International Court of Justice had ruled, in a number of instances, that States could be bound otherwise than by written treaties. There might be reasons for that limitation imposed upon the method of bringing about the obligation to submit a dispute to arbitration, but the Commission should at any rate have time to consider Mr. YEPES' proposal further.

21. Mr. SCELLE said that he personally agreed with Mr. Lauterpacht, but that if a majority of the Commission agreed with Mr. YEPES that undertakings to have recourse to arbitration were so important that they should be committed to writing, the draft at present under consideration, and not the text the Commission was drawing up on the Law of Treaties, would be the proper place so to provide. An undertaking to have recourse to arbitration could arise from many instruments or agreements other than "formal treaties", at any rate in the narrow sense in which he interpreted those words.

22. Mr. el-KHOURI recalled that at the third session the Commission had agreed that the words "formal treaties" should be understood in that narrow sense. As he had indicated at the preceding meeting,⁴ he had accepted the amended text of article 1, without the addition proposed by Mr. YEPES, on the assumption that undertakings to have recourse to arbitration were so important that in practice States would never assume them verbally. If the Commission agreed that that was the only reasonable assumption, he thought Mr. YEPES' point would be adequately met.

23. Mr. LAUTERPACHT asked whether, in the event of the Security Council being seized of a dispute between two States and adopting a resolution recommending them to settle the dispute by arbitration, and in the event of the two States agreeing to that recommendation, the Security Council's resolution would constitute a written document under the terms of Mr. YEPES' amended proposal.

24. Mr. YEPES and Mr. SCELLE said that in such a case the Security Council's resolution would be regarded as such written document.

25. Mr. LAUTERPACHT said that in that event he had no further objection to Mr. YEPES' amended proposal.

⁴ *Ibid.*, para. 58.

*Mr. Yépes' proposal, as amended by Mr. Scelle, was adopted by 4 votes to none, with 4 abstentions.*⁵

26. Mr. el-KHOURI said that as the Commission was drafting a convention on arbitration procedure which would be submitted for approval to the General Assembly, it would be desirable to link it up with the relevant provisions of the Charter; for the Charter was far from silent on the subject of arbitration. Article 33 provided that: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution" by various alternative means, including arbitration, and that "The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means". Article 36 provided, *inter alia*, that the Security Council might recommend appropriate procedures or methods of adjustment for the pacific settlement of disputes of the nature referred to in Article 33. The action taken by the Security Council under Articles 33 and 36 clearly constituted decisions of the Security Council, and under Article 25 of the Charter the Members of the United Nations agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter". He therefore proposed that, in order to make the draft convention more complete and to contribute to the maintenance of international peace in accordance with the principles of the Charter, the following paragraph be added to Article 1:

"The resolutions of the Security Council taken under the second paragraph of Article 33 of the Charter, calling upon the parties to arbitrate, or under the first paragraph of Article 36, recommending arbitration for the pacific settlement of any dispute or situation likely to endanger the maintenance of international peace and security, constitute an obligation on the parties to have recourse to that method of adjustment."

27. Mr. FRANÇOIS said that Mr. el-Khoury's proposal was extremely interesting, but that, as a proposal that sought to make arbitration compulsory, it was quite outside the field of arbitration procedure and could not therefore be discussed at the present time.

28. Mr. SCELLE agreed. The proposal was neither more nor less than a proposal to amend the United Nations Charter, for he had read a number of commentaries on Articles 33 and 36 of the Charter, and none of them went so far as to attribute obligatory force to the Security Council's recommendations, as did Mr. el-Khoury in his interpretation of those articles.

⁵ Article 1, as tentatively adopted, read as follows:

"1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future. Whatever the instrument or agreement from which it results, the undertaking constitutes a legal obligation, which ought to be carried out in good faith.

"2. The undertaking shall result from a written document."

29. Mr. HSU agreed that the proposal could not be discussed in connexion with the item at present under consideration, though he was by no means sure that it was at variance with the existing text of the Charter.

30. Mr. ZOUREK did not think that it was the intention of the Charter that all decisions of the Security Council should be regarded as legally binding on States Members of the United Nations. Recommendations made under Articles 33 and 36 did not in his opinion fall within the category of binding decisions.

31. Mr. el-KHOURI could not agree that his proposal was in conflict with the text of the Charter, which in his view was perfectly clear. As his proposal had found no support, however, he would withdraw it, provided that it was mentioned in the summary records.

ARTICLE 2, PARAGRAPH 1⁶

32. Mr. SCELLE recalled that article 2 had already been tentatively adopted by the Commission in the form in which it appeared in the second preliminary draft (A/CN.4/46). The procedure proposed therein constituted no innovation. It often happened that the parties disagreed as to whether a dispute fell within the scope of a prior undertaking to have recourse to arbitration, or whether or not that undertaking still applied as a consequence of the *rebus sic stantibus* clause coming into operation. In order that the matter might not rest there, a whole series of international agreements concluded between the United States of America and other countries had provided that such disagreements should be submitted to the commissions of inquiry referred to in the Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes. In his view, it would be more appropriate for such differences to be referred to the highest judicial authority, namely, the International Court of Justice, although he proposed that, in order to avoid delay, the judgement be rendered by the Court's Chamber of Summary Procedure.

33. He would again point out to Mr. Kozhevnikov that the procedure laid down in article 2 would only be binding on those States which accepted the draft procedure under discussion when cast in the form of a convention.

⁶ Article 2 read as follows:

"If the parties disagree as to the existence of a dispute, or whether an existing dispute is 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 of Summary Procedure of the International Court of Justice by a written application from either party and the judgment rendered by the Chamber of Summary Procedure shall be final and without appeal.

"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."

34. Mr. FRANÇOIS agreed with the provisions of article 2 in principle, seeing that they would be binding only on States which accepted the convention, but doubted the wisdom of providing that disagreements as to the arbitrability of a dispute should be brought before the International Court's Chamber of Summary Procedure, whose standing in the legal world was by no means so high as the Court's, and to which no case had in practice been referred. Moreover, all legal systems were represented in the Court itself, whereas that was not the case with the Chamber of Summary Procedure. Neither had the Court itself so many cases on its hands that it would be unable to deal with the few extra cases of disagreement as to the arbitrability of a dispute. He therefore proposed that in article 2 the International Court of Justice be specified instead of its Chamber of Summary Procedure. If the parties to a dispute so desired, the question of its arbitrability could of course be referred to the latter organ instead of to the International Court itself even if his suggestion were adopted, by virtue of the words "in the absence of agreement between the parties upon another procedure for dealing with it".

35. Mr. LAUTERPACHT said that he would not, at present, comment on article 2 as a whole, except to point out that it obviously constituted an important new departure, inasmuch as the normal procedure in the past had been for disagreements as to whether a dispute came within the scope of the obligation to have recourse to arbitration to be decided, at least in the first instance, by the arbitrators.

36. If the procedure proposed by Mr. Scelle was to be adopted, he would support the amendment suggested by Mr. François. For example, a decision whether the circumstances in which an undertaking to have recourse to arbitration had been entered into had altered so much as to make the undertaking no longer valid was obviously so important that it could properly only be taken by the International Court of Justice itself.

37. Mr. SCELLE said that Mr. Lauterpacht's substantive objection had already been raised when arbitral procedure had been under discussion at an earlier stage of the Commission's work; but the difficulty was that the issue of whether or not there was an undertaking to have recourse to arbitration could not be referred to a tribunal which did not yet exist. He had therefore proposed that the issue be submitted to a permanent tribunal so as to prevent a party that denied the validity of its undertaking from frustrating the arbitral procedure by refusing to conclude a *compromis* or to designate arbitrators.

38. It had been the practice of the United States Government to meet such contingencies by providing for the establishment of a commission of inquiry to decide the issue of arbitrability, and a clause to that effect had been inserted in over one hundred treaties. He had decided, however, that such a method might lead to delay. He had accordingly proposed that if there was disagreement between the parties as to the existence of a dispute the question should be referred to the

Chamber of Summary Procedure of the International Court of Justice.

39. Mr. François had argued that little confidence was felt in that Chamber, and that as the International Court was not overburdened with work it might itself deal with any such cases as might arise. It must be recognized, however, that if that procedure was followed much more work would fall to the International Court, since many States which had hitherto been unable to bring a case to arbitration would thereby be enabled to do so. But as he had no particularly strong views on the point he would be prepared to abide by the opinion of the majority.

40. Mr. YEPES supported Mr. François' amendment.

41. The CHAIRMAN put to the vote Mr. François' proposal that the words "the Chamber of Summary Procedure of" be deleted from the first paragraph of article 2.

Mr. François' proposal was adopted by 6 votes to 1.

42. Mr. KOZHEVNIKOV said the vote had been taken so rapidly that he had had no time to move the deletion of article 2 as a whole, which article, as he had already stated, appeared to him contrary to the whole principle of arbitration.

43. The CHAIRMAN observed that Mr. Kozhevnikov could vote against article 2 when it was put to the vote as a whole.

44. Mr. SCELLE said that Mr. Lauterpacht had indicated to him in private conversation that it was not entirely clear from the first paragraph of article 2 that recourse would only be had to the Court if no arbitral tribunal had been set up. He would have no objection if that point were met by the insertion of the words "prior to the establishment of an arbitral tribunal" after the word "If" at the beginning of the paragraph.

Mr. Scelles' amendment was adopted by 6 votes to none, with 2 abstentions.

ARTICLE 2, PARAGRAPH 2

45. Mr. FRANÇOIS considered that the words "pending a final arbitral award" went too far, since once a tribunal had been constituted it must be empowered to modify any interim measures indicated by the International Court of Justice.

46. He accordingly proposed that those words be replaced by the words "pending the constitution of the arbitral tribunal".

47. Mr. SCELLE agreed with Mr. François' views, but explained that he had prepared the text of the second paragraph in conformity with the decision taken by the Commission at its second session. Furthermore, Mr. Hudson had then argued that the provisional measures must remain in force so long as it was necessary to prevent one party from altering the material

situation, and he himself wondered whether a tribunal was competent to modify a decision of the Court.⁷

48. Mr. LAUTERPACHT seconded Mr. François' amendment.

Mr. François' amendment was adopted by 6 votes to none, with 2 abstentions.

49. Mr. LIANG (Secretary to the Commission) asked whether he was right in thinking that the phrase "pending a final arbitral award" referred both to the phrase "the realization of the arbitration" and to the phrase "for the protection of the interests of the parties". The English text did not appear clear on that point.

50. Mr. SCELLE replied that the Secretary's supposition was correct.

51. Mr. LIANG (Secretary to the Commission) asked for an explanation of the precise meaning of the words "*la réalisation de l'arbitrage*". He presumed that they referred merely to the carrying-out of the process of arbitration.

52. Mr. LAUTERPACHT was also uncertain whether the phrase referred only to bringing about arbitration proceedings, and whether it did not include giving effect to the final arbitral award.

53. Mr. SCELLE said that the words in question were intended to refer to arbitral proceedings up to the moment when the final award was made. In order to make that clear, he would be ready to substitute for that phrase the words "the completion of the arbitration proceedings".

54. Mr. LAUTERPACHT realized that article 41 of the Statute of the International Court of Justice was the source of the word "indicate", but it was well known that that term had given rise to controversy, since it had been interpreted as meaning that provisional measures laid down by the Court were not obligatory.

55. Mr. Hudson, in the second edition of his book "The Permanent Court of International Justice",⁸ had changed his previous opinion on the subject and expressed the view that there was a legal obligation on parties to comply with the measures indicated by that Court.

56. In view of the element of uncertainty to which the word "indicate" had given rise, perhaps the special rapporteur might consider an alternative for it.

57. Mr. KERNO (Assistant Secretary-General) said that Mr. Scelle had used the word *prévoir* in the French text of article 2, and not the word *indiquer* as used in the French text of the Statute of the International Court. He presumed that that change had been made deliberately.

⁷ See summary record of the 70th meeting, para. 49. *Yearbook of the International Law Commission, 1950*, p. 245.

⁸ *The Permanent Court of International Justice 1920—1942* (New York, The McMillan Company, 1943).

58. Mr. SCELLE confirmed that he had used the word *prévoir* in the sense that the measures decided upon by the Court were obligatory, but he would be prepared to make his meaning clearer by substituting the word "*prescrire*", which should be rendered by the word "prescribe" in the English text.

59. The CHAIRMAN said there seemed to be general agreement that the second paragraph be amended to read as follows :

"The judgment given by the Court may also prescribe the measures to be taken by the parties for the completion of the arbitration proceedings and for the protection of the interests of the parties, pending the constitution of the arbitral tribunal."

60. He suggested that that text be adopted, subject to review by the Standing Drafting Committee to be set up.

It was so agreed.

Article 2 as amended, was adopted by 6 votes to 2.⁹

61. Mr. ZOUREK said that article 2 embodied a procedure entirely different form that laid down in the 1907 Hague Convention for the Pacific Settlement of International Disputes, which provided for an obligatory *compromis*. He would like to know what the relation between the two systems would be.

62. The CHAIRMAN observed that the purpose of article 2 had been fully discussed by the Commission in the course of the latter's examination of the special rapporteur's first report (A/CN.4/18), after which the present text had been prepared by Mr. Scelle. He did not consider that the whole question could now be re-opened.

63. Mr. YEPES, raising the question of method, suggested that it would be more logical for the Commission to take up article 12 before articles 3 to 11, since in most cases the *compromis* provided for the constitution of the tribunal.

64. Mr. SCELLE regretted that Mr. Yepes should have made that suggestion, from which it appeared that one of the main principles upon which the Second Preliminary Draft on Arbitration Procedure was based, namely, that arbitration should take place even if there was no *compromis* agreed upon by the parties, had not been fully understood. As he had already had occasion

⁹ Article 2, as tentatively adopted, read as follows :

"1. If, prior to the establishment of an arbitral tribunal, the parties disagree as to the existence of a dispute, or whether an existing dispute is 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 International Court of Justice by a written application from either party and the judgment rendered by the Court shall be final and without appeal.

"2. The judgment given by the Court may also prescribe the measures to be taken by the parties for the completion of the arbitration proceedings and for the protection of the interests of the parties, pending the constitution of the arbitral tribunal."

to emphasize, it was a fundamental error to suppose that the undertaking to have recourse to arbitration always had its origin in the *compromis*. Article 3 of his draft made the immediate constitution of a tribunal obligatory. Without such a provision no progress whatsoever could be made, since a recalcitrant party might refuse to designate arbitrators. If the constitution of a tribunal were imposed upon such a party it would be for that tribunal to prepare the *compromis* in the face of the opposition of one of the parties. His proposal in no way implied a violation of sovereignty, since it was intended to form part of a convention to which any State would be free to adhere or not as it chose. However, once a State had entered into such an obligation it would have to carry it out in good faith.

65. What he was proposing was no innovation, and was consonant with article 23 of the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly on 28 April 1949.¹⁰ According to that article, if agreement could not be reached on the constitution of the arbitral tribunal within a period of three months the necessary appointments were to be made by the President of the International Court of Justice. He himself had, at the 137th meeting of the Commission, referred to the arbitration procedure of the International Chamber of Commerce¹¹ precisely because that procedure laid down that even if agreement were not reached on a *compromis* arbitration must still take place.

66. He could not stress too strongly the importance of preventing States from frustrating arbitral proceedings and evading their legal obligations by invoking procedural arguments.

67. Mr. YEPES entirely agreed with Mr. Scelle's views. His proposal merely related to the Commission's method of work.

68. The CHAIRMAN suggested that the question of the order of the articles should be left to the Standing Drafting Committee which it was proposed to set up. In the meantime, it might be preferable to follow the order in the special rapporteur's text.

It was so agreed.

The meeting rose at 6.5 p.m.

¹⁰ United Nations Treaty Series, vol. 71, p. 115.

¹¹ See summary record of the 137th meeting, para. 10.

139th MEETING

Tuesday, 10 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) (continued)

1. The CHAIRMAN, after welcoming Mr. Gilberto Amado, Second Vice-Chairman of the Commission, who had been unable to attend the earlier meetings of the session, invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitration Procedure contained in the special rapporteur's second report (annex to document A/CN.4/46).

ARTICLE 3¹

2. Mr. SCELLE recalled that in his proposed preliminary draft text he had not specified a period within which the tribunal had necessarily to be constituted, but had merely provided for "a reasonable time"² (A/CN.4/18, p. 93). However, as certain members of the Commission had felt that that expression was too vague, he had now specified a period of six months.

3. Mr. LIANG (Secretary to the Commission) said that the words "within six months after recognition by the parties... of the arbitrable nature of the dispute" raised the question whether some special act or procedure of recognition was envisaged, for if not it might sometimes be difficult to determine exactly from what date the period would start to run. If some special act or procedure of recognition was in fact envisaged, should it not be provided for expressly in the text?

4. Mr. SCELLE said that the period of six months would start to run from the time when the parties agreed

¹ Article 3 read as follows :

"If the dispute is of the kind referred to in the undertaking to resort to arbitration, the parties shall, within six months after recognition by the parties or by the International Court of Justice of the arbitrable nature of the dispute, constitute an arbitral tribunal or appoint a sole arbitrator by mutual agreement. This may be done either by means of a clause to that effect in the arbitral *compromis*, if the parties agree to accept the various stipulations thereof, or in a special conventional instrument relating solely to the constitution of the tribunal. The tribunal shall, in any case, be constituted within the period of six months specified above."

² A/CN.4/18, p. 93 (mimeographed English text). See Yearbook of the International Law Commission, 1950, vol. II, p. 148, for printed French text.

to resort to arbitration or from the time when the International Court of Justice enjoined them to do so. The text was clear.

5. Mr. el-KHOURI thought that a delay of six months was too long. Article 23 of the Revised General Act for the Pacific Settlement of International Disputes provided for a period of three months only.³ The article under consideration would present any party which wished to avoid arbitration altogether, or to avoid it for as long as possible, with an unfair advantage if the period allowed for the constitution of the tribunal was as long as six months. In his view, the question should be left to the parties; if one party felt that the other was unduly delaying constitution of the tribunal, it should be able to invoke the procedure provided for in article 4 without waiting six months. The parties should begin taking steps to constitute the tribunal immediately the arbitrability of the dispute had been established.

6. Mr. SCELLE agreed with Mr. el-KHOURI that there were disadvantages in fixing a time-limit of six months. He himself could see no objection to the term "within a reasonable time", it being understood that it would be for the International Court of Justice to determine whether such reasonable time had expired.

7. Mr. AMADO and Mr. YEPES felt that the phrase "within a reasonable time" was too vague, and that a time-limit must be specified, the latter adding, however, that six months was too long.

8. Mr. LIANG (Secretary to the Commission) suggested that if it were agreed to retain mention of a specific time-limit, the difficulty to which he had referred might be alleviated if the phrase were amended to read "within... months after the arbitrable nature of the dispute has been agreed upon by the parties or recognized by the International Court of Justice".

9. He wondered, however, whether article 3 could not be simplified if it were linked only with article 2, which dealt with cases where there was disagreement between the parties as to the arbitrable nature of a dispute, and not with article 1 as well. For if there was no disagreement there would presumably be no difficulties concerning the constitution, as distinct from the composition, of the tribunal.

10. Mr. FRANÇOIS agreed that a definite time-limit should be prescribed. Otherwise there would be a danger that the more diligent party might invoke the provisions of article 4 and thus seize the International Court of Justice of the matter before the parties had made every effort to agree on the constitution of a tribunal.

11. He pointed out, moreover, that the last sentence of the present text merely repeated what went before, and that the phrase "if the parties agree to accept the various stipulations thereof", after the words "the arbitral compromis", also appeared superfluous.

12. Mr. SCELLE agreed to the deletion of that phrase and of the last sentence of article 3.

13. Mr. LAUTERPACHT thought that the first phrase, reading "If the dispute is of the kind referred to in the undertaking to resort to arbitration", was also unnecessary. He agreed that the time-limit for the constitution of the tribunal should be specified, but saw no reason to depart from that laid down in article 23 of the Revised General Act for the Pacific Settlement of International Disputes, namely, three months. He was chiefly concerned, however, about the suggestion that it should be necessary for the parties expressly to recognize that the dispute came within the scope of the obligation to have recourse to arbitration. In that respect, he agreed with the point made by the Secretary. He also had doubts regarding the expression "arbitrable nature of the dispute". The crux of the matter was whether the dispute came within the scope of the obligation to have recourse to arbitration, an expression used in article 2, already adopted by the Commission.

14. In the light of those observations and the two proposals made by Mr. François, he accordingly submitted an alternative text to replace the whole of article 3.

15. The CHAIRMAN suggested that, before taking up Mr. Lauterpacht's proposal as a whole, the Commission should first settle the question of the time-limit for the constitution of the tribunal.

16. Mr. SCELLE said that it was most desirable that undue delay in the constitution of the tribunal should be avoided. The present text, taken in conjunction with article 4, would permit a delay of nine months, which, in his opinion, would be much too long for the great majority of cases. But if the time-limit were to be specified, it would obviously have to cover those few cases where comparatively lengthy delay was reasonable. For that reason he would prefer the phrase "within a reasonable time"; after all, one of the outstanding advantages of arbitration was its flexibility. It was, however, for the Commission to decide whether it wished to specify the period.

The Commission decided by 6 votes to 4 that the time-limit for the constitution of the tribunal should be specified.

After further discussion, the Commission decided by 6 votes to 1, with 3 abstentions, that the time-limit for the constitution of the tribunal should be three months.

17. Mr. ZOUREK, after recalling that Mr. Lauterpacht had suggested the deletion of the first phrase from article 3, said that, in his opinion, even if that phrase was not perhaps absolutely necessary, it was extremely useful, inasmuch as it made it clear that the arbitral procedure laid down only covered cases where there was a prior undertaking to have recourse to arbitration.

18. Mr. YEPES agreed that the phrase enhanced the intelligibility of the text.

19. Mr. LAUTERPACHT thought that it did rather the opposite, in that it seemed to add a conditional element where in fact there was none.

³ United Nations Treaty Series, vol. 71, p. 115.

20. Mr. AMADO agreed with the view expressed by Mr. Lauterpacht.

21. Mr. KOZHEVNIKOV proposed the deletion of the words "or by the International Court of Justice" from article 3.

22. The CHAIRMAN thought that that proposal might be discussed in connexion with Mr. Lauterpacht's amendment.

23. Mr. ZOUREK requested that further discussion of article 3 be deferred until Mr. Lauterpacht's proposal had been translated and distributed in English and French.

It was so agreed.

ARTICLE 4⁴

24. Mr. YEPES asked whether the last sentence of article 4, which seemed to him to contain a self-evident affirmation, was necessary.

25. Mr. SCELLE said that he was in favour of emphasizing the binding nature of arbitral awards.

26. Mr. KERNO (Assistant Secretary-General) said that, although he had sympathy with Mr. Scelle's preoccupation, he wondered whether it was necessary to emphasize everywhere the obligatory character of arbitral procedure.

27. Mr. el-KHOURI considered that the second sentence of article 4 should be deleted. Once a matter had been referred to an arbitral tribunal, there would be no need for a further delay of three months.

28. Mr. SCELLE said that he would prefer that that sentence be retained, since it gave a certain latitude to the parties. He had gained the impression that, when discussing his first report, the Commission had favoured such a provision. The trend now appeared to be towards greater stringency.

29. Mr. LIANG (Secretary to the Commission) suggested that it would be preferable to incorporate in the article the whole of article 23 of the Revised General Act for the Pacific Settlement of International Disputes, rather than to make a mere reference to it.

30. Mr. HSU agreed with the Secretary.

31. The CHAIRMAN pointed out that, if the Secretary's suggestion was adopted, the article would

begin with the words "If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the following procedure".

32. Mr. KOZHEVNIKOV proposed the substitution of the word "they" for the words "each of them", and the insertion of the words "by mutual agreement" after the word "right", in article 4.

33. Mr. SCELLE said that Mr. Kozhevnikov's amendment was quite unacceptable to him, as it ran counter to the whole spirit of article 4, which was designed to provide a method of obliging a recalcitrant party to accept arbitration.

34. Mr. YEPES said that in the light of the foregoing discussion he would formally move the deletion of the last sentence of article 4.

35. Mr. SCELLE said that if article 23 of the Revised General Act were embodied *in toto* in the draft it would replace article 4, and he would have no objection to it.

36. Mr. LAUTERPACHT said that he too was in favour of the substitution of the text of article 23 of the Revised General Act for article 4. But if that was done, the former would have to be slightly amended so as to refer to the second of the two contingencies envisaged in article 4. His point would be met if the words "or of the decision of the International Court of Justice taken in conformity with article 2(1) above," were inserted after the words "an arbitral tribunal" in paragraph 1 of article 23 of the Revised General Act.

37. Mr. ZOUREK said that there were methods of proceeding, when a difference arose between the parties, other than that laid down in article 23 of the Revised General Act. He had in mind, for example, that contained in article 45 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. What would be the position of signatory States to such instruments vis-à-vis the proposed convention? Which of the systems would be binding?

38. Mr. SCELLE said that Mr. Zourek had raised a very pertinent point, but one which he (Mr. Scelle) believed was covered by the second sentence of article 3 in his own draft. He had rejected the procedure laid down in the 1907 Hague Convention as being more complicated and lengthy than that prescribed by the Revised General Act.

39. Mr. YEPES proposed that the text of paragraph 1 of article 23 of the Revised General Act be amended, with a view to its inclusion in the draft convention, to read as follows:

"If the appointment of the members of the arbitral tribunal is not made within a period of three months, as provided in Article 3 above, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments."

40. The CHAIRMAN ruled that further discussion on

⁴ Article 4 read as follows:

"If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the procedure prescribed in article 23 of the General Act on arbitration. The period of three months prescribed in paragraph 3 of the said article shall be added to the period of six months prescribed in article 3 above. The tribunal, when thus constituted, shall hear the case and its judgment shall be binding."

article 4 be deferred pending the circulation of Mr. Yépes' amendment in writing in both English and French.

ARTICLE 3 (*resumed from above*)

41. The CHAIRMAN invited the Commission to resume its consideration of Mr. Lauterpacht's amendment to article 3, which was now available in both working languages. The text, which would replace the existing one in its entirety, read as follows :

"The Parties shall within three months of the request made for the constitution of the tribunal or the decision of the International Court of Justice in conformity with Article 2, paragraph 1, set up an arbitral tribunal or appoint a sole arbitrator by mutual agreement. This may be done either in the *compromis* agreed by the parties or in a special instrument."

42. Mr. SCELLE pointed out that the French text, unlike the English version, called for revision, since the words "*soit par le compromis adopté par elles*" suggested that a *compromis* already existed.

43. Mr. LAUTERPACHT asked whether the sense would be made clearer if the words "to be" were inserted after the words "in the *compromis* " in the last sentence.

44. Mr. SCELLE agreed that if that amendment were translated by the word "*éventuel*" or the words "*à intervenir*", his objection would be met.

45. Mr. LAUTERPACHT said that the text might be made even clearer if reference were made to "a *compromis* " instead of "the *compromis* ".

46. Mr. AMADO said that such a substitution was totally unacceptable, since what was in question was an arbitral *compromis* and no other. The indefinite article would be quite inappropriate.

47. Mr. SCELLE said that he would agree to the French text reading : "*Elles pourront le faire soit dans le compromis à intervenir soit dans un instrument conventionnel spécial.*"

48. Mr. AMADO could not support that text.

49. Mr. SCELLE proposed, in order to meet Mr. Amado's views, that the text should read : "*Elles pourront le faire soit dans le compromis soit dans un instrument conventionnel spécial.*"

50. Mr. LAUTERPACHT supported Mr. Scelle's final version, which would be rendered in English "This may be done either in the *compromis* or in a special instrument."

Mr. Scelle's final version was accepted.

Mr. Lauterpacht's amendment, as amended by Mr. Scelle's proposal, was adopted by 7 votes to none, with 2 abstentions.

ARTICLE 5⁵

51. Mr. FRANÇOIS did not consider that article 5 had been drafted very felicitously.

52. Mr. AMADO asked whether the words "the parties may act in whatever manner they deem most appropriate" had any real meaning.

53. Mr. SCELLE replied that the phrase constituted recognition of the fact that the parties were free to designate the arbitrators, which was the core of arbitral procedure. His concern had been to be as liberal as possible in that respect, in order not to depart too far from tradition.

54. Article 5 was in the nature of a recommendation as to how the parties were to proceed. It bore strong resemblance to a number of provisions in the 1907 Hague Convention for the Pacific Settlement of International Disputes : provisions which were optional, and in no way obligatory. Of course, the whole article could be dropped as being a self-evident statement. The same argument might, however, have been adduced against numerous articles of The Hague Convention.

55. Mr. LAUTERPACHT asked what organ or organs the special rapporteur had in mind in referring to "an existing judicial body". Was it national or international? If the latter, presumably it could only be the International Court of Justice.

56. Mr. SCELLE said that he had both types in mind. For example, the French *Cour de cassation* and the Senate of Hamburg had both acted as arbitrators.

57. Mr. LAUTERPACHT said that, in the light of Mr. Scelle's explanation, he must declare that the phrase raised a wider issue than had at first occurred to him. He did not know of any case in which the International Court of Justice had been called upon to act as arbitrator. If Mr. Scelle had that possibility in mind, it would be difficult for him to accept the proposal.

58. Mr. SCELLE recalled that it was contended that the Permanent Court of International Justice in effect consented to act as arbitrator when it decided a case *ex aequo et bono*, if the parties agreed thereto.

59. Mr. LAUTERPACHT said that it would be useful if the Commission could obtain more information on whether the Permanent Court of International Justice had acted as an arbitrator or had merely been asked to do so. As he saw it, the International Court of Justice could only act in accordance with its Statute, namely, as a court applying the rules of law or deciding a case *ex aequo et bono*, in which eventuality it would not be acting as an arbitrator. Both judicial settlement and arbitration were based on the application of rules of law.

⁵ Article 5 read as follows :

"When the arbitrator or members of the arbitral tribunal are appointed by mutual agreement, the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator, to an existing judicial body or to a tribunal constituted as they think fit."

60. Mr. el-KHOURI said that article 5 clearly did not mean that when the arbitrator or members of the tribunal had already been appointed the parties could act in whatever manner they deemed most appropriate, but that they could do so in cases where the arbitrator or tribunal were appointed by mutual agreement. All ambiguity would be removed if the words "to be" were inserted after the words "the arbitral tribunal are".

61. Mr. LIANG (Secretary to the Commission) said that there were four possibilities to be envisaged under paragraph 5 : a judicial body, a sole arbitrator, an *ad hoc* tribunal, or an already existing arbitral body, such as a general claims commission.

62. Mr. SCELLE believed that a distinction must be made between arbitral awards and judicial settlements. An arbitrator or an arbitral tribunal had slightly more freedom than a court of justice. Some jurists made a distinction between the principles of *praeter legem* and *contra legem*, and considered that an arbitrator or an arbitral tribunal could act *praeter legem*, though not against the law. That was one of the reasons for maintaining the Permanent Court of Arbitration alongside the International Court of Justice. If the former did not have a greater latitude than the latter in deciding cases, there would be no point whatsoever in maintaining two international judicial organs that would otherwise have precisely the same competence. He admitted that the International Court of Justice could not go outside the law unless it was authorized to do so by the parties.

63. Mr. YEPES proposed that the text of article 5 be replaced by the following words :

"In appointing the arbitrator or members of the arbitral tribunal the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator or to a tribunal constituted as they think fit."

64. Mr. LIANG (Secretary to the Commission) pointed out that the examples quoted by Mr. Scelle all came under the heading of tribunals constituted as the parties thought fit. When the *Cour de cassation* had been asked to act as arbitrator, it had done so as an arbitral tribunal and not as a court. The International Court of Justice, however, had to proceed in accordance with its Statute, and could not go beyond the provisions of that instrument. He was therefore uncertain whether it was within its competence to decide cases otherwise than in accordance with those provisions.

65. The CHAIRMAN observed that it was desirable that article 5 should be drafted in such a way as not to exclude either the Permanent Court of Arbitration or a pre-established tribunal of the kind mentioned by the Secretary.

66. Mr. KERNO (Assistant Secretary-General) suggested that some of the difficulties mentioned in the discussion might be disposed of if the word "appointed" were substituted for the word "constituted" in the final phrase of article 5.

67. Mr. AMADO accepted Mr. Yepes' text, which respected the freedom of choice of the parties in selecting the arbitrator or arbitral tribunal.

The meeting rose at 1 p.m.

140th MEETING

Wednesday, 11 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhs Hsu, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) (continued)

ARTICLE 4 (resumed from the 139th meeting)

1. The CHAIRMAN invited the Commission to consider the amendments proposed by Mr. Yepes and Mr. Lauterpacht to the text of paragraph 1 of article 23 of the Revised General Act for the Pacific Settlement of International Disputes¹ which had been proposed for the incorporation in article 4 of the second Preliminary Draft on Arbitration Procedure annexed to the second report of the special rapporteur (A/CN.4/46). Mr. Yepes' amendment consisted in substituting the words "as provided in article 3 above" for the words "from the date on which one of the parties requested the other party to constitute an arbitral tribunal". Mr. Lauterpacht's amendment sought to insert the words "or the decision of the International Court of Justice taken in conformity with article 2, paragraph 1 above" after the words "to constitute an arbitral tribunal". It was understood that the text of article 4 would begin with an introductory clause as he (the Chairman) had suggested at the preceding meeting.

¹ See summary record of the 139th meeting, paras. 24—40. For the text of article 23, see *United Nations Treaty Series*, vol. 71, p. 115.

2. Mr. YEPES observed that the sense of his amendment was precisely the same as that of Mr. Lauterpacht's, but it was phrased more simply.

3. Mr. SCELLE said that either of the two amendments would be acceptable to him.

4. Mr. LAUTERPACHT said that in that case he would withdraw his own amendment in favour of that submitted by Mr. Yepes.

Mr. Yepes' amendment was adopted.

5. Mr. KOZHEVNIKOV reminded the Commission that at the preceding meeting he had proposed that the words "by mutual agreement" be inserted after the words "shall have the right" in the original text of article 4.

6. Replying to the CHAIRMAN, Mr. LIANG (Secretary to the Commission) said that the adoption of Mr. Yepes' text did not preclude consideration of Mr. Kozhevnikov's amendment, since the latter related to the opening words, namely: "If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the following procedure", of article 4 in the special rapporteur's text slightly amended, which was to serve as an introduction to the text of article 23 of the Revised General Act.

7. Mr. SCELLE recalled that he had explained at the preceding meeting why he was unable to support Mr. Kozhevnikov's amendment.

Mr. Kozhevnikov's amendment was rejected by 6 votes to 2.

8. Mr. ZOUREK observed that article 4 was based on the judicial theory of arbitration. There were, however, partisans of the contractual theory of arbitration, who believed that the competence of the arbitrator or arbitral tribunal derived from the agreement of the parties. He had opposed article 2 of the special rapporteur's draft procedure because it implied the transformation of arbitral tribunals into courts of justice, and would thus undermine the whole contractual principle of arbitration, which was gaining ground in commercial arbitration.

9. For those reasons it would be difficult for him to accept a provision whereby, in cases where the parties failed to agree, a third authority, chosen solely by one alone of the parties to the dispute, would be asked to make the necessary appointments. Some other method analogous to the system envisaged in article 45 of the 1907 Hague Convention for the Pacific Settlement of International Disputes should, in his view, be found, that was, one which would not conflict with the contractual theory of arbitration.

10. Mr. LAUTERPACHT said that if Mr. Zourek could formulate a concrete proposal to give effect to his contentions he should be given time to do so. The Commission must give due consideration to any suggestion which might help to make arbitration more effective.

11. Mr. SCELLE considered Mr. Zourek's attitude to

be out of date. He could not agree that the contractual theory was gaining ground in commercial arbitration. The rules of the International Chamber of Commerce on conciliation arbitration were more stringent than those for international arbitration that he had proposed in his own text.

12. Mr. LAUTERPACHT agreed that the import of Mr. Kozhevnikov's amendment, just rejected, was purely negative and inherently in contradiction with the remainder of article 4. He had felt, however, that Mr. Zourek was prepared to go a little further and had envisaged the possibility of submitting a somewhat more constructive proposal.

13. Mr. KERNO (Assistant Secretary-General) said that the difference of opinion between Mr. Zourek and Mr. Scelle might not be so great as appeared at first sight, since the principle of mutual agreement underlay the whole of the special rapporteur's draft. If the final instrument took the form of an international convention, the provisions would be binding only on the contracting parties, each of which would have agreed in advance to accept certain procedures. Thus, the contractual principle was fundamental to the draft under consideration.

14. The CHAIRMAN put to the vote the three paragraphs of article 23 of the Revised General Act for the Pacific Settlement of International Disputes for incorporation in article 4.

Paragraph 1, as amended by Mr. Yepes, was adopted by 7 votes to 2.

Paragraph 2 was adopted by 7 votes to 1, with 1 abstention.

Paragraph 3 was adopted by 7 votes to 2.

15. Mr. LAUTERPACHT asked for a ruling whether Mr. Zourek would be given an opportunity of presenting an alternative text for article 4.

16. The CHAIRMAN replied that it was open to any member of the Commission to propose the reconsideration of any article.²

² Article 4, as tentatively adopted, read as follows :

"If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the following procedure :

"1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months as provided in article 3 above, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments.

"2. If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen.

"3. If, within a period of three months, the two Powers so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a subject of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointments shall be made by the oldest member of the Court who is not a subject of either party."

ARTICLE 5 (resumed from the 139th meeting)

17. Mr. YEPES, introducing his amendment, which sought to substitute the following text for article 5 :

"In appointing the arbitrator or members of the arbitral tribunal, the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator or to a tribunal constituted as they think fit",

said that his purpose was to simplify the original wording and to eliminate all the possible difficulties that had been mentioned at the preceding meeting. He believed that his wording "to a single arbitrator or to a tribunal constituted as they think fit" would cover all possible contingencies.

18. Mr. AMADO, Mr. LAUTERPACHT, Mr. SCELLE and Mr. ZOUREK supported Mr. Yepes' amendment.

19. Mr. KERNO (Assistant Secretary-General) said that as the draft adopted by the Commission would be circulated to governments together with comments, Mr. Yepes' broad interpretation of his text would be made clear in the comments.

20. The CHAIRMAN suggested that the words "chosen or" should be inserted before the words "constituted as they think fit"; otherwise the provision might be interpreted as being restricted to *ad hoc* tribunals and as excluding existing bodies such as the Permanent Court of Arbitration.

21. Mr. YEPES accepted the Chairman's suggestion.

22. Mr. SCELLE said that Mr. Yepes' text would have been acceptable to him, but he agreed that it was considerably improved by the Chairman's amendment.

23. He understood the reasons for Mr. Lauterpacht's doubts, expressed at the preceding meeting, whether the International Court of Justice could act as an arbitrator, but believed that the parties were free to request it to do so and to render judgment *ex aequo et bono*. At all events, if the Court did not regard itself as competent to deal with such cases it could refuse to do so. The wide scope of Mr. Yepes' text, as amended by the Chairman, provided for every possible eventuality.

24. Mr. el-KHOURI did not believe that there was any need to substitute an alternative text for the original draft of article 5. Any possible ambiguity in the wording of the latter could be removed by inserting the words "to be" between the words "tribunal are" and the words "appointed by mutual agreement".

25. Mr. AMADO considered the Chairman's amendment to be unnecessary. Mr. Yepes' text was perfectly satisfactory as it stood.

26. Mr. SCELLE pointed out that there was no reason why the parties should not select an existing body to act as an arbitral tribunal. That possibility was not provided for in Mr. Yepes' original text, which spoke of a tribunal *constituted* as the parties thought fit.

27. Mr. LAUTERPACHT said that Mr. Yepes' text was acceptable to him either with or without the Chairman's amendment, but he wished to make it very clear that he personally did not visualize the International Court of Justice being asked to act in the capacity of an arbitral tribunal.

28. Mr. HSU said that if the majority of the Commission felt Mr. Yepes' text to be adequate, he would not oppose it; but he wondered whether it brought out as clearly as did the special rapporteur's text for article 5 the fundamental principle of the freedom of the parties to choose the arbitrator or arbitral tribunal. He saw no objection to emphasizing that principle more forcibly.

29. The CHAIRMAN suggested that the consideration mentioned by Mr. Hsu should be referred to the Standing Drafting Committee to be set up.

It was so agreed.

30. The CHAIRMAN put to the vote Mr. Yepes' text for article 5, amended by the insertion of the words "chosen or" before the words "constituted as they think fit".

Mr. Yepes' text, as amended, was adopted by 8 votes to none, with 2 abstentions.

ARTICLE 6³

31. Mr. FRANÇOIS said that article 6 should make clear whether nationals of the parties to a dispute could be chosen to sit on the arbitral tribunal. He was personally in favour of that being possible, and could then agree that the tribunal should consist of five judges. If that were not to be the case, however, the tribunal should be reduced to three. He would accordingly suggest that a fourth recommendation be added to article 6 specifying that the tribunal should include one arbitrator from each State party to the dispute.

32. Mr. el-KHOURI considered that article 6 was redundant, since it was unnecessary to make stipulations concerning the choice of arbitrators if the composition of the tribunal had to be decided by mutual agreement between the parties.

33. Mr. SCELLE said, in reply to Mr. François, that it was most unlikely, desirable though it would be, that parties would refrain from selecting arbitrators from among their own nationals. As Judge Loder, the First President of the Permanent Court of International

³ Article 6 read as follows :

"Nevertheless, generally speaking, and having due regard to the circumstances of the case, it is recommended in the light of experience : (a) that the persons chosen as arbitrators should possess the qualifications set forth in Article 2 of the Statute of the ICJ ; (b) that the sole arbitrator or the majority of the arbitrators should be chosen from among the nationals of States having no special interest in the case ; and (c) that the tribunal should have an odd number of judges, preferably five, and that it should be presided over by one of the neutral judges."

Justice, had declared in another connexion, the presence of judges who were nationals of a party to a dispute was a concession to human frailty. Great progress would indeed have been made if parties could be persuaded not to insist on the appointment of their own nationals. He would therefore deplore the addition of a provision such as that suggested by Mr. François. It might, for example, prevent States from requesting the International Law Commission itself to act as arbitrator.

34. Mr. LAUTERPACHT said that the remarks of Mr. Scelle and Mr. el-Khoury encouraged him to express his doubts concerning article 6, which was clearly not intended to impose legal obligations, but merely constituted a series of recommendations. He doubted whether it was advisable to include optional recommendations, which might or might not be accepted, in international instruments intended to impose binding obligations. He was aware that precedents for doing so existed, for example, Article 6 of the Statute of the International Court of Justice, but, as was well known, that article had remained a dead letter. He feared that the insertion of such recommendations in instruments having the character of a treaty would do nothing to enhance the authority of international law or the integrity of international conventions.

35. He had no objection in principle to the recommendations contained in article 6 of the special rapporteur's draft, but believed that such matters might be left to the good will of the parties concerned. If, however, Mr. Scelle insisted on the retention of that article, it might be better to cast it in a slightly different form. For example, the words "it is recommended" might be replaced by the words "it is desirable", and the phrase "in the light of experience" might be omitted altogether, since it was inappropriate to include in an international convention reasons for its provisions. All were obviously the result of experience.

36. Mr. FRANÇOIS said that unless article 6 was made more explicit, he too would be in favour of its being deleted in its entirety.

37. Mr. SCELLE pointed out that article 22 of the Revised General Act was much more imperative, and went a great deal further than his own text, which he had been careful to phrase more liberally.

38. Mr. LIANG (Secretary to the Commission) said that the introductory sentence to article 6 was perhaps somewhat unorthodox, but pointed out that it had not yet been decided whether the Commission's text was to take the form of a draft convention.

39. If, however, it was found desirable to retain article 6, its recommendations could be included in the commentary which would accompany the draft articles adopted by the Commission.

40. As to the substance, the article might perhaps be re drafted to conform with the provisions of Article 9 of the Statute of the International Court of Justice, namely, that the main forms of civilization and the

principal legal systems of the world should be represented in the Court.

41. Mr. LAUTERPACHT said that he was anxious that he should not be misunderstood. He fully supported the intention of article 6, and warmly endorsed Mr. Scelle's desire to contribute towards the development of international law by encouraging parties to a dispute to select as arbitrators persons from other States, but was uncertain whether that purpose would in fact be served by article 6 as at present conceived. For instance, recommendations (a) and (b) were optional in the special rapporteur's draft, whereas the parallel provisions in the Statute of the International Court of Justice and in the Revised General Act respectively were legally binding. He would ask, with all respect, whether article 6 really represented an advance. Accordingly, he would only be prepared to vote for it if it were cast in the form of a definite legal obligation in conformity with the afore-mentioned instruments.

42. Mr. SCELLE thanked Mr. Lauterpacht for his very pertinent observations, which he was quite prepared to act upon.

43. He could not agree with the Secretary, however, that Article 9 of the Statute of the International Court of Justice should be taken as a model for the recasting of article 6, since Article 9 referred to the representation of the main forms of civilization and of the principal legal systems of the world, considerations which had nothing whatever to do with the constitution of arbitral tribunals. Article 2 of the Statute of the International Court would be a far more suitable model and, if it were the Commission's wish, he would be prepared to redraft article 6 in similar form.

44. Mr. HSU agreed that the provisions of article 6 should be made obligatory. Mr. Lauterpacht's argument that, where possible, optional recommendations should not be included in international instruments was perfectly sound.

45. Mr. AMADO was categorically opposed to article 6. He did not propose to elaborate his views on the development of international law, but would confine himself to saying that such recommendations as were embodied in that article would not contribute to it. Nor did he see the utility of raising such, to his mind, superfluous recommendations to the status of legal obligations. He was strongly opposed to affirmations of high-flown principles which bore very little relation to reality, a fault which was very much in evidence in the Revised General Act, the adoption of which by the General Assembly had been deferred for one year as a result of his intervention. He deplored the idealistic academic approach from which that instrument suffered.

46. Arbitration was quite distinct from judicial settlement, and the two must be kept separate; that was the only way in which progress could be made.

47. Mr. YEPES was in favour of recasting article 6 of the special rapporteur's draft, which he considered

should be maintained in the form proposed by Mr. Lauterpacht. He was particularly in favour of that being done because of the paramount importance he attached to recommendation (a), which would ensure that arbitration was lifted out of the political plane and protected from political influences. He welcomed the fact that the special rapporteur had not fallen into the error of the American Treaty on Pacific Settlement of 1948 (Pact of Bogotá) which, in article XLI, empowered the parties to select as a single arbiter a Head of State, a trend that he deplored, since it placed arbitral procedure at the mercy of political considerations.

48. The CHAIRMAN said he would first put to the vote the amendment farthest removed from the original text, namely, the proposal by Mr. el-Khoury that article 6 should be deleted in its entirety.

The proposal that article 6 be deleted in its entirety was carried by 6 votes to 4.

49. Mr. SCELLE expressed his regret at the rejection of article 6, which meant that the Commission had reversed its earlier decision on that issue. The result of the vote might perhaps have been different had all members of the Commission been present. If the Commission persisted in reversing its own decisions, it would be very difficult for rapporteurs to divine its intentions.

50. Mr. HSU pointed out that the Commission had only voted against retention of the text of article 6 as set forth in document A/CN.4/46. There was nothing in that decision to prevent it from adopting a text of an obligatory nature if it so wished.

51. Mr. KERNO (Assistant Secretary-General) said that in his view the important point in article 6 was that contained in recommendation (a). If a new proposal were made, therefore, he suggested that it be limited to the substance of that recommendation : such a proposal might replace article 6, or, alternatively, form part of the commentary on the Commission's draft.

52. Mr. ZOUREK noted that the Commission had already decided, in article 5, that when the tribunal was set up by agreement between the parties they would be free to choose or constitute it as they thought fit. It would appear to be contrary to that provision to make it binding on them to conform with the criteria proposed in article 6. The Commission should therefore respect the decision it had just taken, and pass on to consideration of article 7.

53. Mr. el-KHOURI, agreeing, pointed out that the two parties might disagree on whether a person nominated as arbitrator did in fact possess the qualifications set forth in Article 2 of the Statute of the International Court of Justice. What body was to resolve that disagreement ? And what body was to enforce such a provision if it were made obligatory ? In the case of the judges of the International Court of Justice, it was envisaged that the General Assembly should play that

role, but in the case of arbitral tribunals there would be no higher authority suitable for the purpose.

54. Mr. SCELLE could not agree with Mr. el-Khoury's reasoning. Nine-tenths of the rules of international law relied for their implementation only on the good faith of the parties, and were unsupported either by any separate higher authority or by the threat of sanctions.

55. The CHAIRMAN accepted the procedural point made by Mr. Hsu, and said that if any proposal were submitted incorporating part or the whole of the provisions of article 6 in obligatory form, he would accept it for submission to the Commission.

56. Mr. YEPES said that he would submit such a proposal in due course.

ARTICLE 7⁴

57. Mr. KOZHEVNIKOV proposed the deletion of the words "or by the subsidiary procedures indicated above".

58. Mr. YEPES proposed that in that event the words "by agreement between the parties" should be deleted also.

59. Mr. FRANÇOIS pointed out that article 7 should be read in conjunction with article 9, which provided that "An arbitrator may not withdraw or be withdrawn by the government which has appointed him...." He could agree that the arbitrators who really were chosen by common agreement, that was to say, those chosen from among nationals of States which had no special interest in the case, should not be allowed to withdraw or to be replaced once the proceedings had started. The "national arbitrators" would, however, be in a different position. They would be appointed by their respective governments, and not by common agreement between the parties, although he had noted that in his report, Mr. Scelle had referred to all the arbitrators as being appointed by common agreement. "National arbitrators" were, however, as he had just said, in a different position from the other arbitrators, and he saw no reason why it should not be possible for them to withdraw or to be replaced.

60. Mr. SCELLE said that when the *compromis* was being concluded, one party could object to the "national arbitrator" chosen by the other, so that it was perfectly permissible to say, as he had, that all the arbitrators were chosen by common agreement, although admittedly in the case of some of them, such agreement might be tacit. It was of the very essence of his proposals that the tribunal should be an *independent* and truly

⁴ Article 7 read as follows :

"Once the arbitral tribunal has been set up by agreement between the parties or by the subsidiary procedure indicated above, it shall not be open to any of the contending Governments to alter its composition."

"If a vacancy occurs, for reasons beyond the control of those Governments, the arbitrator shall be replaced by the method laid down for appointments."

international body, jointly constituted and immutable in all its parts. The unfortunate outcome of failure to respect that principle in the past could be clearly seen, for example, in the case of the Hungarian Optants.⁵ He realized that Mr. François had behind him the weight of tradition and of confirmed habits of thought, but in his (Mr. Scelle's) view, it was essential to break with tradition in the present issue.

61. The whole question was connected with the law of treaties. He considered that each individual treaty brought into being an international system which constituted a legal entity and did not require any further sanction or support other than what was inherent in itself. He therefore attached great importance to the principle that the so-called "national arbitrators", once appointed, became members of an independent "international" tribunal, and could not be replaced or withdrawn until the task of that tribunal had been completed.

62. Mr. LAUTERPACHT said that, generally speaking, he was in full agreement with Mr. Scelle, although he thought the latter was unnecessarily complicating his case by maintaining that all arbitrators were in effect appointed by common agreement. He understood Mr. Scelle's reasoning, but such a logical refinement hardly corresponded with prevailing practice. The fact that one party could object to the national arbitrator chosen by the other was not equivalent to the tribunal's being chosen by common agreement.

63. He thought that it was essential to the very nature of arbitration, and in accordance with present practice, that a contending government should not be able to withdraw the arbitrator it had appointed, either because it did not favour the particular line he was pursuing or for some other reason, once the proceedings had begun. Otherwise, to mention only a few practical disadvantages, national arbitrators would have to remain in constant contact with the governments which had appointed them, and would enjoy no security of tenure of their offices.

64. Mr. el-KHOURI said that from his experience both of international arbitration and of arbitration within a State, he could say that one of the most frequent causes of its breaking down was that one party dismissed the arbitrator it had appointed, or caused him to withdraw, if the case appeared to be going against it. He therefore considered it essential to stipulate that, once the tribunal had been constituted, none of the arbitrators could withdraw or be withdrawn until the case had been completed. He therefore supported article 7 in its present form.

65. Mr. KOZHEVNIKOV proposed that the words "it shall not be open to any of the contending governments to alter its composition" be amended to read "it is recommended that none of the contending governments alter its composition", so as to avoid

conflict with the principle of national sovereignty as a fundamental principle of international law.

66. Mr. ZOUREK felt that the text proposed by the special rapporteur was too categorical, for in practice it was possible for the parties to a dispute before the International Court of Justice to change the judges appointed by them under Article 31, paragraphs 2 and 3, of the Court's Statute. He did not believe that that right could be denied absolutely in arbitration procedure.

67. The case of the Hungarian Optants had been mentioned, but detailed analysis of that case showed that there had been an excess of jurisdiction on the part of the Mixed Arbitral Tribunal. That Tribunal had in fact pronounced that, in virtue of article 250 of the Treaty of Trianon, it was competent in respect of agrarian reform laws, which in no wise constituted an act of seizure or liquidation falling within the Tribunal's jurisdiction as had been asserted by the Hungarian Optants. Subsequently, it had been generally recognized that there had been an excess of jurisdiction. Now, if the tribunal set up by the parties to the dispute to decide what was the law — to settle the dispute — began by violating a standard which was the sole source of its jurisdiction, or, in other words, by exceeding the limits of its jurisdiction as set forth in the *compromis* or, as in the case at present under discussion, in another legal text, the withdrawal of the arbitrator became a legitimate defensive measure by which the State victim of a manifest excess of jurisdiction attempted to repel the injustice with which it was threatened. It must not be forgotten that, by its very definition, arbitration was based on the will of the parties. Hence, the possibility of an excess of jurisdiction occurring should be provided for in the rules of arbitration procedure. Even if the Commission were to adopt the rigid text under consideration, a government which found itself confronted by a manifest excess of jurisdiction would not hesitate to have recourse to the defensive measures he had mentioned.

68. Mr. FRANÇOIS pointed out that in some cases a tribunal was set up to deal not with one particular case, but with any cases which might arise out of what might be a comprehensive treaty. Under the special rapporteur's proposal, it would be impossible to change an arbitrator, even though his competence might extend to only one of the fields covered by that treaty.

69. Mr. SCELLE agreed that the text proposed by him referred only to tribunals set up to arbitrate in one particular case, and that some amendment might be necessary to meet the point raised by Mr. François.

70. Mr. LAUTERPACHT suggested that, in order to cover that point and the contingency, arising out of Mr. Zourek's statement, that if both parties for any reason agreed that the composition of the tribunal should be altered it would be in accordance with the principles of arbitration to permit them to alter it, the text proposed by Mr. Scelle might be amended to read as follows :

⁵ See Francis Deák, *The Hungarian-Rumanian Land Dispute* (New York, Columbia University Press, 1928).

"Except by common agreement it shall not be open to the parties to alter the composition of the tribunal subsequent to the commencement of the proceedings in any particular case."

71. The CHAIRMAN stated that as Mr. Kozhevnikov's proposal to turn the first sentence of article 7 into a recommendation was the most far-reaching, he would put it to the vote first.

Mr. Kozhevnikov's proposal to replace the words "it shall not be open to any of the contending governments to alter" by the words "it is recommended that none of the contending governments alter" was rejected by 6 votes to 2, with 1 abstention.

72. The CHAIRMAN then put to the vote Mr. Kozhevnikov's proposal that the words "or by the subsidiary procedures indicated above" be deleted.

That proposal was adopted by 5 votes to 3.

73. Mr. AMADO, explaining his vote, said that the words "or by the subsidiary procedures indicated above" were not sufficiently clear. There seemed good reason why that phrase and the one preceding it should both be deleted.

74. Mr. SCELLE pointed out that, now that Mr. Kozhevnikov's proposal had been adopted, article 7 would contradict the preceding articles unless Mr. YEPES' proposal that the words "by agreement between the parties" be deleted was also adopted.

75. Mr. el-KHOURI said that his vote in favour of Mr. Kozhevnikov's proposal to delete the words "or by the subsidiary procedures indicated above" was conditional on Mr. YEPES' proposal being adopted.

Mr. YEPES' proposal that the words "by agreement between the parties" be deleted was adopted by 8 votes to none, with 2 abstentions.

76. Mr. FRANÇOIS expressed support for the text proposed by Mr. Lauterpacht.

77. Mr. SCELLE pointed out that under Mr. Lauterpacht's proposal the parties, if in agreement, would be free to change not only the arbitrators appointed by them, but also those appointed by a third party, for example, by the International Court of Justice. In his view, they should not be able to do that.

78. Mr. LAUTERPACHT did not agree with Mr. Scelle. The only ground on which a third party could intervene in the constitution of the tribunal was that the parties had been unable to agree on its constitution. If they could subsequently reach agreement on its composition being changed, he did not see that it would be derogatory to the International Court of Justice or any other third party to permit them to do so.

79. Mr. SCELLE felt that Mr. Lauterpacht's arguments were debatable, in that they envisaged the objectivity and good faith of the parties. But both parties might regard it as more likely to be to their interest if a dispute was not judged on purely legal grounds. For that reason, they might well agree on an arbitrator

whom each thought would be more amenable to political influence than would the impartial and highly authoritative arbitrator appointed by a third party. If the arbitral tribunal were to stand above the parties as an independent authority, it must not be open to the parties to change its neutral members, even by mutual agreement.

80. He did not attach the same importance to the principle that the parties should not be able to replace their "national arbitrators", and understood the difficulties indicated by Mr. François in that respect. He would, however, regret any departure from the principle of the immutability of the tribunal as a whole.

81. Mr. AMADO stated that, as was made clear in article 37 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, what distinguished arbitration from conciliation and other means of peaceful settlement was that it was based on respect for the law. Therein lay its historical significance. In resorting to arbitration, governments agreed to submit their differences to the rule of law. It was therefore not correct to proceed from the standpoint that governments which resorted to arbitration would indulge in all kinds of trickery and bad faith.

82. Mr. SCELLE said that he was not attacking governments, but merely wished to point out that if they suspected that the strict application of the law might not be favourable to them, they would, by their very functions, be bound to attempt to interfere with it, resting as they did on the support of political parties whose policy was dictated by national interests. It was therefore impossible for governments to be really objective in a dispute to which they were a party. As had been pointed out, the whole aim of his report was to remove arbitration from the sphere of politics. Mr. Lauterpacht's proposal would work in exactly the opposite direction.

83. Mr. YEPES was regrettably compelled to disagree with Mr. Scelle on the point under discussion. As Mr. Lauterpacht had pointed out, agreement between the parties was one of the basic principles underlying arbitration procedure.

84. Mr. el-KHOURI said that in his view any effort to alter the composition of the tribunal set up by a third party would be very little different from an attempt to circumvent the arbitral award: in both cases the assistance of a third party would have been requested; if its decision was set aside, the procedure would have to be begun anew.

85. He pointed out, however, that article 9 provided that an arbitrator might not withdraw or be withdrawn by the government which had appointed him, *save in exceptional cases*. He suggested, therefore, that further consideration of Mr. Lauterpacht's proposal be deferred until article 9 was taken up.

It was so agreed.

The meeting rose at 1 p.m.

141st MEETING*Thursday, 12 June 1952, at 9.45 a.m.***CONTENTS**

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*Chairman : Mr. Ricardo J. ALFARO.**Present :*

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCHELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) (*continued*)

1-5. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46).

ARTICLE 6 (*resumed from the 140th meeting*)

6. Mr. YEPES said that, in accordance with the Chairman's ruling¹ at the preceding meeting, he wished to submit the following new text to replace article 6 of the special rapporteur's text, which the Commission had not accepted :

" Nevertheless, the following rules shall be applicable to the constitution of the Arbitral Tribunal :

" (a) The parties shall choose as arbitrators persons possessing the qualifications set forth in Article 2 of the Statute of the International Court of Justice ;

" (b) The sole arbitrator or a majority of the arbitrators shall be chosen from among nationals of States having no special interest in the case."

7. It would be noted that his proposal contained no clause corresponding to recommendation (c) of the original article 6, since that recommendation had been criticized. Otherwise, the only changes he had made to Mr. Scelle's draft were those required to make the qualification for arbitrators mandatory rather than recommendatory, although he personally would have preferred to see recommendation (b) deleted as well.

8. Mr. LAUTERPACHT pointed out that in the text proposed by Mr. YEPES, sub-paragraph (a) only covered cases where the arbitrators were chosen by the parties. In order to extend its application to cases where they were chosen by the International Court of Justice or a third Power, he suggested that it be amended to read " the arbitrators shall be chosen from among persons possessing the qualifications . . . "

9. Mr. YEPES accepted Mr. Lauterpacht's suggestion.

10. Mr. LAUTERPACHT said that, apart from the drafting point he had just made, he wished to point out that the conditions laid down in Article 2 of the Statute of the International Court of Justice were extremely stringent from the point of view of their application to the selection of arbitrators. According to that article, the judges of the Court were to be elected from among persons " who possess the qualifications required in their respective countries for appointment to the highest judicial offices . . . " Such a qualification was obviously necessary for members of the highest judicial organ of the United Nations, an organ, moreover, which had been set up to deal not with one particular dispute or set of disputes, but with any dispute which might be referred to it under its Statute. An arbitral tribunal, on the other hand, might well have to pronounce judgement on some dispute of relatively minor importance. He wondered whether, in those circumstances, the special rapporteur and other members of the Commission really thought it essential that the tribunal should be composed of persons possessing the high qualifications required of judges of the International Court of Justice.

11. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Lauterpacht's pertinent observation would have been covered by Mr. Scelle's original draft of article 6, which had included the words " generally speaking, and having due regard to the circumstances of the case, it is recommended . . . "

12. Mr. SCHELLE did not think it was possible to make it obligatory that arbitrators should have all the qualifications set forth in article 2 of the Statute of the International Court of Justice. For example, it was unnecessary for them to possess the qualifications required for appointment to the highest judicial offices. Nor was it, perhaps, necessary to stipulate that they should *always* have competence in international law. He did not think it would be going too far, however, to say that they must be of high moral character and possess the qualifications required for appointment to judicial office.

13. Mr. ZOUREK said that he must again remind the Commission that in article 5 it had provided that in appointing the arbitrator or members of the arbitral tribunal the parties were free to act in whatever manner they deemed most appropriate. In view of that article he did not see how the Commission could now bind the parties by a mandatory provision in article 6. A

¹ See summary records of the 140th meeting, para. 55.

recommendation was the most that it could make. He did not, in fact, believe that, in rejecting the special rapporteur's draft of article 6, the Commission had been in agreement that that article should be replaced by one containing a mandatory provision regarding the qualifications of arbitrators.

14. Mr. KOZHEVNIKOV said that he could agree to the wording proposed by Mr. Yepes for sub-paragraph (a), provided it were made in the form of a recommendation.

15. Mr. SCELLE and Mr. YEPES said that they would have no objection to a text couched in terms of a recommendation if the Commission so desired, but recalled that the reason why the text originally proposed by the special rapporteur had been rejected was precisely that it had been couched in that form.

16. Mr. FRANÇOIS pointed out that by omitting the words "generally speaking, and having due regard to the circumstances of the case", and by making the qualification obligatory, Mr. Yepes excluded the possibility of Heads of States being chosen as arbitrators.

17. Mr. el-KHOURI agreed with Mr. Yepes that recommendation (c) of Mr. Scelle's original text was unnecessary, since it merely repeated article 22 of the Revised General Act, but said that his proposal was still far too rigid. As Mr. Lauterpacht had pointed out, the qualifications set forth in Article 2 of the Statute of the International Court of Justice might not be essential, or even the best, for arbitration in each and every case. It would be preferable not to refer to Article 2 of the Court's Statute, but merely to extract from it those qualifications which it would, generally speaking, be desirable for arbitrators to possess. As Mr. Scelle had already observed, they might not always need to have competence in international law; in commercial disputes, or disputes concerning frontiers or extradition, for example, knowledge of commercial law, of strategic matters or of domestic regulations respectively might be of more use to them. He also agreed that Heads of States might frequently make good arbitrators, even when they possessed no special competence in international law.

18. He therefore proposed that the introductory paragraph and sub-paragraph (a) of Mr. Yepes' text be amended to read as follows, sub-paragraph (b) being left unchanged:

"Nevertheless, generally speaking and having due regard to the circumstances of the case, the following rules shall be applicable to the constitution of the arbitral tribunal:

"(a) The arbitrators shall be chosen from among persons of high moral character who possess the qualifications and knowledge required for the matter;"

19. Mr. LIANG (Secretary to the Commission) suggested that, if narrowly interpreted, the phrase "the

qualifications and knowledge required for the matter" might prove too restrictive.

20. Mr. LAUTERPACHT suggested that further consideration of Mr. Yepes' proposal be deferred, seeing that the discussion had revealed difficulties which had not been apparent at the preceding meeting. It was still his view that the article under consideration should be in mandatory terms, and at the preceding meeting it had appeared that the majority of the Commission accepted that. The trend, however, was now towards the other view.

21. Although it was couched in mandatory terms, Mr. el-Khoury's amendment, by providing for unspecified exceptions, was in effect only a recommendation. The qualifications provided in his amendment appeared to say little. It was surely unlikely that persons who were not of high moral character would be appointed, and the Secretary had pointed out that it might not always be necessary for them to possess special knowledge of the matter under dispute; persons were in fact often called upon to arbitrate in matters with which they were not conversant before the case opened.

22. Further consideration also appeared to be required in the case of sub-paragraph (b). In several cases, such as the "I'm Alone" case² and the Alaska Boundary Commission dispute,³ the parties had felt that it would further settle by arbitration to limit the arbitral tribunal to their own nationals. That might or might not be a good principle, but the Commission must recognize that the practice existed.

23. Mr. SCELLE said that if Mr. Lauterpacht had wished to cite an even better case to illustrate his point, he might have cited that of the Casablanca deserters.⁴ That case had been of great importance to the world at large, since on its settlement had hung the issue of peace or war. The arbitration had been successful, and its success had been mainly due to the fact that the two most active arbitrators had been nationals of the contending States. That case had been settled by arbitration of an essentially political nature, aimed at arriving by one means or another at an award which would not affront the national susceptibilities of the parties to the dispute. Yet it was the main purpose of his draft to remove arbitration from the sphere of politics, and it was therefore legitimate for him to ask whether the case of the Casablanca deserters had really constituted a case of arbitration. Important though it had been from one point of view, it had certainly made no contribution to the progress of arbitration law, and

² Case between Canada and the United States of America. Final report of 5 January 1935. See references in A. M. Stuyt, *Survey of international arbitrations* (The Hague, Martinus Nijhoff, 1939), p. 357.

³ Boundary question between Great Britain and the United States of America. Award of 20 October 1903. See A. M. Stuyt, *op. cit.*, p. 263.

⁴ Award dated 22 May 1909 of The Permanent Court of Arbitration. Case between France and Germany. See A. M. Stuyt, *op. cit.*, p. 301.

if the essence of international arbitration was regarded as the settlement of disputes by an international, or rather supra-national, tribunal working on the basis of respect for the law, it would be seen that the case of the Casablanca deserters was really not one of arbitration at all, but one of a purely political arrangement between the contending States, helped to a greater or lesser degree by the good offices of third Powers.

24. He had made no secret of the fact that the very essence of his reports was the principle that the supra-national arbitral tribunal should conform as closely as possible to the procedure of a domestic judicial tribunal, the competence of which, once seized of a case, would not end until it had made its award. That concept derived directly from the views of Nicholas Politis, and the first step towards its realization had been taken in 1907 ; he recalled in that connexion that it had at first been proposed that the Permanent Court of Arbitration should be called the *International* Court of Arbitration. The Commission at present appeared to be moving in the contrary direction, namely, that dictated by the view that the main aim of arbitration was the political one of preventing disputes deteriorating into war. A choice must be made between those two concepts.

25. Mr. AMADO pointed out that law and politics necessarily interacted on each other. What was meant by arbitration, however, was perfectly clear, and he fully supported the definition given in article 37 of the 1907 Hague Convention on the Pacific Settlement of International Disputes, from which it emerged that its essence was to bring the parties together on the basis of respect for the law. He was, however, opposed to extraneous elements being introduced into the structure of arbitration as it grew up over the years. Naturally, progress made must be taken into account, but what were, after all, the very foundations of the system must certainly not be cast aside.

26. He had objected to article 6 of Mr. Scelle's draft, which he had thought was out of place in a convention, but had agreed to its being couched in mandatory terms. Now, however, it appeared that there was no agreement on what should be made mandatory. Certainly, too rigid a formula could not be used. It appeared that Mr. Scelle wished to preclude the possibility of Heads of States being chosen as arbitrators. It was true that there was a danger, to mention only one, that Heads of States might appoint persons who lacked the necessary qualifications to deputize for them. But it was impossible to generalize. In one case which had been of very great importance to Brazil, the President of the United States of America had been chosen as arbitrator ; his intervention had led to a peaceful and in every way satisfactory settlement of the dispute.⁵

27. Mr. SCELLE pointed out that what Mr. Amado had said amounted to criticism of article 22 of the

Revised General Act, which provided that three out of five arbitrators should be nationals of third Powers. The Revised General Act had recently been endorsed by the General Assembly. It was surprising to find that the International Law Commission apparently lagged behind the General Assembly in that respect.

28. Mr. HSU said that, to revert to the specific proposals before the Commission, he would suggest that the words "who possess the qualifications and knowledge required for the matter", in sub-paragraph (a) of Mr. el-Khoury's amendment, be replaced by the words "and of recognized competence in international law".

29. Mr. LAUTERPACHT said that, unlike Mr. Scelle, who appeared to think that there were two schools of thought within the Commission on the nature of arbitration, he believed that the Commission was virtually unanimous in considering that arbitration was and ought to remain a procedure based upon law, and that it should be as far removed from political influence as was possible. Members might legitimately differ on questions of detail. For example, Mr. Scelle considered that the choice of the Head of a State as arbitrator necessarily introduced a political element ; he (Mr. Lauterpacht) and Mr. Amado disagreed, and he would point out that the award made by Victor Emmanuel III, the King of Italy, in the Guiana dispute had been a contribution to international law.⁶ Similarly, the fact that some members of the Commission might consider that experience had shown certain provisions of the General Act to be unsatisfactory did not mean that they did not all support Mr. Scelle's fundamental thesis. He even doubted whether it would be contrary to that thesis to delete article 6 altogether.

30. Mr. KOZHEVNIKOV said that, as the interesting discussion which had just taken place had gone to the very roots of the matter, he would take the opportunity of again stating his general views on it. There was agreement that the essence of arbitration was that it should be based on respect for the law, but such a statement by itself was too vague to be of much value ; it depended on what was meant by the law. As he had already stressed, the Commission should rather proceed from the basic principles of international law, and ensure that its recommendations did not conflict with those principles. One of the underlying principles of international law was that of national sovereignty. He would therefore firmly resist any tendency to set up a supra-national organ with powers that would conflict with the principle of national sovereignty.

31. The CHAIRMAN invited the Commission to vote on Mr. el-Khoury's amendment.

32. Mr. KOZHEVNIKOV considered that the question of principle, namely, whether the provisions were to be made optional or obligatory, should be decided first.

⁵ Award of Grover Cleveland dated February 1895. Boundary question between Argentina and Brazil. See A. M. Stuyt, *op. cit.*, p. 165.

⁶ Award of 6 June 1904. Boundary question between Brazil and the United Kingdom. See A. M. Stuyt, *op. cit.*, p. 251.

33. The CHAIRMAN pointed out that that issue had already been disposed of at the preceding meeting by the rejection of the special rapporteur's text for article 6.

The introductory paragraph of Mr. el-Khoury's amendment was adopted by 4 votes to 1, with 5 abstentions.

34. Mr. AMADO said the result of the vote on an issue of cardinal importance demonstrated only too clearly the disadvantages of the voting procedure being followed by the Commission. A vital provision had been carried by virtue of abstentions rather than by the weight of majority opinion. Such a method of working could not contribute to the solution of the problems before the Commission, and he doubted whether, if the Commission were again criticized in the General Assembly, as it had been at the sixth session, it would be able to put up a convincing defence.

35. The CHAIRMAN observed that the Commission had not pronounced itself on a question of principle, but on an amendment to a proposal which was itself the direct result of a decision on principle taken at the preceding meeting, namely, that the provisions of article 6 should be made mandatory.

36. Mr. SCELLE said that the Commission's work would be rendered impossible if it persisted in reconsidering its own decisions and in taking provisional votes.

37. The CHAIRMAN put to the vote Mr. el-Khoury's amendment to sub-paragraph (a) of Mr. Yépes' text as it was the farthest removed from it.

Three votes were cast in favour of the amendment and 3 against, with 4 abstentions. The amendment was accordingly rejected.

Mr. Hsu's amendment to sub-paragraph (a) was adopted by 4 votes to 1, with 4 abstentions.

38. Mr. KOZHEVNIKOV said that he had not been present at the preceding meeting when the amendment in question had been discussed.

Mr. Yépes' text for sub-paragraph (b) was adopted by 5 votes to none, with 4 abstentions.

The text to replace the special rapporteur's draft of article 6 was adopted as a whole, as amended, by 5 votes to 2, with 3 abstentions.⁷

39. Mr. KERNO (Assistant Secretary-General) said that the Commission could not profitably examine article 8 until it had taken a final decision on article 7,

⁷ Article 6, as tentatively adopted, read as follows:

"Nevertheless, generally speaking and having due regard to the circumstances of the case, the following rules shall be applicable to the constitution of the arbitral tribunal:

"(a) The arbitrators shall be chosen from among persons of high moral character and of recognized competence in international law;

"(b) The sole arbitrator or the majority of the arbitrators shall be chosen from among nationals of States having no special interest in the case."

consideration of which had been deferred. He therefore suggested that article 9 be considered next.

It was so agreed.

ARTICLE 9⁸ and ARTICLE 7 (resumed from the 140th meeting)

40. Mr. SCELLE said that article 9 contained provisions which were part and parcel of the principle of the immutability of the tribunal. Clearly an arbitrator could not withdraw or be withdrawn without infringing that principle and destroying the balance of the tribunal as constituted. Withdrawal could only take place with the consent of the other members of the tribunal in very exceptional cases, such as prolonged illness.

41. Mr. ZOUREK said that some provision must be devised to protect States from becoming victims of a tribunal which exceeded its powers. He was accordingly unable to accept the words "and with the consent of the other members of the tribunal" in the first paragraph of article 9.

42. Mr. SCELLE was unable to understand clearly what Mr. Zourek had in mind. No appeal could be lodged on the grounds that a tribunal had exceeded its powers until the award had been made. It was surely unthinkable that a party to the dispute could be left free to interrupt the proceedings in such manner, since that would destroy the very essence of arbitration.

43. Mr. ZOUREK reaffirmed his conviction that States must be provided with some means of defence.

44. Mr. FRANÇOIS said that if, by the phrase "means of defence" Mr. Zourek meant the withdrawal of an arbitrator, or the suspension of proceedings, he disagreed with him. The draft contained provisions relating to revision and remedies; if they were inadequate, they must be strengthened, but unilateral withdrawal must be excluded.

45. Taking up another point, he said that he had gained the impression during the discussion of article 5 that the special rapporteur would be prepared to recognize the right of the parties to replace an arbitrator by another in cases submitted to arbitration by virtue of a general agreement. The way in which article 9 had been drafted seemed to indicate that that idea had not been taken into account.

⁸ Article 9 read as follows:

"9. An arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the other members of the tribunal.

"Should the withdrawal take place without the consent of the constituted tribunal, the latter shall be authorized to continue the proceedings and to render its award.

"If the withdrawal prevents the continuation of the proceedings, the tribunal may require 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."

46. Mr. SCELLE said Mr. François was correct in his first supposition. Although a general treaty providing for obligatory arbitration might contain provisions establishing a tribunal in advance, as it were, the members of that tribunal were not necessarily nominated at that stage. If they were, the parties must be free to appoint other arbitrators if necessary, when a particular case came up for arbitration under the treaty. What he would categorically oppose was any change in the composition of a tribunal *specially* constituted to deal with a *particular* case.

47. Mr. AMADO said that the discussion had illustrated the importance of the Commission's first pronouncing itself on the principle of immutability, with which the provisions of article 9 were clearly intimately linked.

48. The CHAIRMAN reminded Mr. Amado that the Commission had decided not to take up Mr. Lauterpacht's amendment to article 7 until it had considered article 9.

49. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Amado. He felt also that the Commission must decide whether a member of a tribunal could be replaced before the proceedings started. He suggested that the words "of the other members" should be deleted from the first paragraph of article 9.

50. Mr. SCELLE accepted the amendment suggested by the Assistant Secretary-General, and pointed out that article 9 did not envisage the replacement of members of the tribunal, for which provision was made in article 7. Should an arbitrator withdraw or be withdrawn — and either contingency usually arose through the intervention of the arbitrator's government — the tribunal could either continue to function or, if it decided that it was unable to do so, the provisions of the third paragraph of article 9 would come into play. The purpose of article 9 was to prevent a recalcitrant party from frustrating the proper functioning of the tribunal.

51. Mr. el-KHOURI, referring to Mr. Lauterpacht's text for the first paragraph of article 7, said that he could not accept it since it did not stipulate the procedure to be followed once the parties had agreed to alter the composition of the tribunal.⁹ Furthermore, it did not make clear that the parties were not free, even if they reached common agreement, to alter the composition of a tribunal not constituted by themselves, for example, one designated by the International Court of Justice. A decision by an organ independent of the parties must be regarded as one which they could not modify.

52. His principal objection to the special rapporteur's draft of article 9 was the vagueness of the expression "save in exceptional cases"; he feared that unless a paragraph were added defining that expression it would be open to serious abuse.

53. Mr. SCELLE said he would not be prepared to include a definition of those words, since they concerned a matter which should be left for decision by the tribunal itself.

54. Mr. LAUTERPACHT said that what he had had in mind in framing his amendment to article 7 was that the common agreement of the parties to alter the composition of the tribunal pre-supposed that it would continue to function.

55. He was anxious to learn from the special rapporteur whether he had rightly understood him to mean that according to the provisions of article 9 an arbitrator who withdrew, or was withdrawn, would not be replaced.

56. Mr. SCELLE said that the provisions of article 9 prohibited a party from replacing its arbitrator by unilateral action.

57. He had cited examples in his first report (A/CN.4/18) of tribunals continuing their work despite the withdrawal of one of their members.

58. Mr. LAUTERPACHT, referring to the third paragraph of article 9, asked whether in cases of a State withdrawing its arbitrator, that arbitrator would be considered as "absent".

59. Mr. SCELLE replied in the negative, and said that such an arbitrator would be considered as not discharging his functions.

60. Mr. KERNO (Assistant Secretary-General) observed that Mr. Lauterpacht's question probably arose from a defective English translation of the word "défaillant".

61. Mr. LAUTERPACHT asked whether an arbitrator might continue to serve on a tribunal, despite his government's wish that he should withdraw.

62. Mr. SCELLE answered in the affirmative. Once a person had been designated to serve on an arbitral tribunal he no longer came under the orders of his government. Surely no government of any civilized country had ever prohibited a judge from sitting in a case. If a government declared its intention of withdrawing an arbitrator, he had every right, and in fact it would be his *duty*, to continue in his functions regardless.

63. Mr. HSU said that he could not accept the final words of Mr. Lauterpacht's amendment, reading "subsequent to the commencement of the proceedings in any particular case", which, he believed, would be open to abuse by parties who wished to prevent the proceedings from being opened.

64. Mr. SCELLE said that he could not accept the words "subsequent to the commencement of the proceedings" in Mr. Lauterpacht's amendment, but suggested that they might be replaced by the words "subsequent to the constitution of the tribunal."

65. A distinction should be drawn in article 7 between arbitrators appointed by the parties and those appointed

⁹ See summary record of the 140th meeting, para. 70.

by a third Power or by the International Court of Justice, as in the two latter cases arbitrators could not be replaced even by mutual consent of the parties.

66. The CHAIRMAN put to the vote Mr. Lauterpacht's amendment to the first paragraph of article 7.

The amendment was rejected by 5 votes to 3, with 2 abstentions.

67. The CHAIRMAN reminded the Commission that at the preceding meeting it had agreed to the deletion of the words "by agreement between the parties or by the subsidiary procedures indicated above" from the special rapporteur's text of article 7, first paragraph.¹⁰ He would accordingly put the text as amended to the vote.

Five votes were cast in favour of the special rapporteur's text for article 7, and 5 against with no abstentions. The text was accordingly rejected.

The meeting rose at 1.10 p.m.

¹⁰ See summary record of the 140th meeting, paras. 72 and 75.

142nd MEETING

Friday, 13 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitration Procedure contained in the special rapporteur's second report (annex to document A/CN.

4/46). He understood that Mr. Scelle, in consultation with those members of the Commission who had made proposals at the previous meeting with regard to article 7, had prepared a new text, not only for that article but also for articles 8, 9 and 10. Pending distribution of that text, he suggested that the Commission consider article 11, dealing with disqualification of an arbitrator.

It was so agreed.

ARTICLE 11¹

2. The CHAIRMAN invited comments on the first paragraph of article 11.

3. Mr. HUDSON asked how a party could be aware, at the time of constitution of the tribunal, of a fact which did not arise until after constitution of the tribunal. In his view, the words "unless it can reasonably be supposed to have been unaware of the fact" did not make sense.

4. Mr. SCELLE said that his intention could be clearly seen from paragraph 41 of his first report (A/CN.4/18), where it was pointed out that "the governments parties to the dispute may be presumed to have known what they were about when they invested the judges". It seemed reasonable, therefore, to provide that they should not be able to propose disqualification of any of the arbitrators except on account of a fact arising subsequent to the constitution of the tribunal, or on account of a fact arising before constitution of the tribunal but which it was reasonable to suppose they might have been unaware of, or which had been concealed from them by fraud.

5. Mr. KERNO (Assistant Secretary-General) said that if that was the intention, neither the English nor the French text expressed it clearly. He suggested that a semi-colon be placed after the words "subsequent to the constitution of the tribunal" and that the remainder of the sentence be amended to read as follows :

"it may not so propose on account of a fact arising prior to the constitution of the tribunal unless it can reasonably be supposed to have been unaware of that fact or has been the victim of a fraud".

6. Mr. HUDSON asked whether there was not some international practice with regard to disqualification of arbitrators to which the Commission might refer.

7. Mr. SCELLE said that the Commission's task was to seek the best solution, not to conform to existing practice where that was defective.

¹ Article 11 read as follows :

"A party may not propose the disqualification of one of the arbitrators except on account of a fact arising subsequent to the constitution of the tribunal, unless it can reasonably be supposed to have been unaware of the fact or has been the victim of fraud. The matter shall be decided by the tribunal.

"In the case of a single arbitrator, the decision shall rest with the International Court of Justice through summary procedure."

The amendment suggested by the Assistant Secretary-General was adopted.

8. Mr. KOZHEVNIKOV proposed that the words "with the consent of that party" be added at the end of the sentence reading "The matter shall be decided by the tribunal".

9. Mr. el-KHOURI said that if he understood Mr. Kozhevnikov's proposal correctly, it would have the result of making it impossible for the tribunal to reject a proposal for disqualification unless the party which had made the proposal agreed. If that was the case, he could not support it.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 2.

10. The CHAIRMAN pointed out that in the sentence to which Mr. Kozhevnikov had referred, the words "la Cour" in the French text should be replaced by the words "le Tribunal".

11. Mr. KERNO (Assistant Secretary-General) pointed out that there was another discrepancy between the English and French texts of that sentence. The French text could be interpreted as meaning that it was only the question of whether the party which proposed disqualification could reasonably be supposed to have been unaware of a fact arising prior to the constitution of the tribunal or to have been the victim of a fraud which was to be decided by the tribunal; from the English text, it was clearer that the tribunal should decide any question covered by the foregoing sentence.

12. Mr. SCELLE confirmed that it was his intention that the tribunal should decide all questions relating to disqualification of the arbitrators.

13. Mr. AMADO suggested that the French text be amended to read: "Le Tribunal décidera".

Mr. Amado's suggestion was adopted in respect of both the French and the English texts.

The first paragraph of article 11 was adopted as amended by 8 votes to none, with 3 abstentions.

14. The CHAIRMAN invited comments on the second paragraph of article 11.

15. Mr. FRANÇOIS recalled that the Commission had already decided to delete mention of the Chamber of Summary Procedure of the International Court of Justice from article 2.² The question therefore arose whether the words "through summary procedure" should be deleted from the paragraph under discussion, though he would agree to their being retained, as the question of disqualification was not so important as the question dealt with in article 2.

16. After some discussion, Mr. HUDSON pointed out that Article 29 of the Statute of the International Court of Justice provided that the Court should form annually a Chamber composed of five judges which, at the

request of the parties, might hear and determine cases by summary procedure. The words "through summary procedure" were therefore unnecessary, since even if they were deleted it would still be open to the parties to request the Court to decide the question by that expeditious procedure; but what was more, those words might also be considered improper, since the procedure in question could not be resorted to unless the parties so requested. He therefore proposed that the words in question be deleted.

17. Mr. YEPES and Mr. SCELLE supported Mr. Hudson's proposal.

Mr. Hudson's proposal that the words "through summary procedure" be deleted was adopted by 7 votes to none, with 3 abstentions.

18. Mr. el-KHOURI pointed out that article 11 did not specify whether the arbitrator had a right of appeal against the Court's decision, or what would happen if continuation of the proceedings were threatened by withdrawal of an arbitrator. In those and many other ways it needed to be clarified.

19. Mr. SCELLE suggested that the second question raised by Mr. el-Khouri would be dealt with under article 9.

20. Mr. ZOUREK recalled that the Commission had decided, in accordance with the essential nature of arbitration, that the tribunal should be constituted by the parties if that was possible, and that only if they failed should an alternative procedure be used. It therefore seemed illogical for the Commission to provide, as was done in the second paragraph of article 11, that the matter of disqualification should be referred to the International Court of Justice direct, without the parties being given a chance to attempt to resolve it themselves. It might well happen that both parties would agree that, since his appointment, the arbitrator had acquired a special interest in the case which made him unsuitable for his arbitral duties.

21. Mr. SCELLE could not envisage a case where the disqualification of an arbitrator, as distinct from his replacement, could be the subject of valid agreement between the parties.

22. Mr. KOZHEVNIKOV proposed that the words "subject to the consent of the parties" be inserted before the words "the decision shall rest".

23. Mr. SCELLE said that such a proposal ran counter to the whole purpose of his draft, which was to make the parties continue along the path of arbitration, even if they did not wish to, once they had entered on it.

24. Mr. HUDSON understood that Mr. Scelle's intention was that if the draft convention were accepted by a State, that State would thereby automatically agree in advance to the jurisdiction of the Court in the cases provided for in the convention. The object of Mr. Kozhevnikov's amendment appeared to be to make the specific agreement of the contending States necessary, in each case where disqualification of a

² See summary record of the 138th meeting, para. 41.

single arbitrator was proposed, before the matter could be submitted to the International Court of Justice.

25. Mr. ZOUREK said that he would content himself with pointing out that the addition of the words proposed would make the draft convention acceptable to many more States.

Mr. Kozhevnikov's proposal was rejected by 8 votes to 2, with 1 abstention.

26. Mr. HUDSON said that, despite the decision which had just been taken, the Commission would doubtless agree that cases might arise where the parties would be in agreement on the disqualification of a single arbitrator. In such cases it would surely be unnecessary to refer the matter to the International Court of Justice.

27. Mr. SCELLE said that Mr. Hudson's view derived from the contractual concept of arbitration. The concept from which his own draft was derived in its entirety was a different one, namely, that the arbitral tribunal, once constituted, had supra-national powers. As he had already stated, he could not conceive of the parties being in agreement on a proposal to disqualify an arbitrator, whether he was the sole arbitrator or not, unless both were acting in bad faith.

28. Mr. HUDSON said that acceptance of Mr. Scelle's theory in the present instance would have serious practical disadvantages. Proceedings before the International Court of Justice necessarily lasted months, and if a proposal to disqualify a single arbitrator had necessarily to go before the Court even if the parties were agreed upon it, the course of the arbitration would be greatly retarded. Mr. Scelle had said that he could not envisage a case of a *bona fide* agreement between the parties on such a matter. But to take only one instance, one party might be unaware, before constitution of the tribunal, that the proposed arbitrator was related by marriage to the President of the other party, but might become aware of that fact subsequently, and propose disqualification on those grounds; the latter party might well agree to the proposal if it had believed that that fact had been known to the first party but had been deemed immaterial. He saw no reason why the decision in such a case should necessarily rest with the International Court of Justice.

29. Mr. KERNO (Assistant Secretary-General) thought that the whole discussion was somewhat academic. In the unlikely event of the parties agreeing on the disqualification of the arbitrator chosen they could have recourse to the procedure proposed for replacement.

30. Mr. SCELLE pointed out that articles 15-18 of his draft procedure provided for discontinuance of the case in accordance with a procedure which would ensure the good faith and validity of the settlement arrived at. It was not, therefore, true to suggest that he wished the whole lengthy process of arbitration to be carried through regardless of whether the parties reached agreement. But what he wished to avoid in the present case was that the parties should be free to change the

composition of the tribunal once it had been set up, merely because it did not suit either of them, and thus to cast unjust reflections on the honour or impartiality of a judge whom they themselves or a third Power had chosen. Leaving such cases of collusion aside, however, a party proposed disqualification of an arbitrator because it suspected that he would not judge the case objectively; and it was surely impossible for such a matter to be decided by the parties themselves.

31. Mr. LAUTERPACHT thought that Mr. Scelle was possibly going too far in the conclusions he drew from his concept of a supra-national tribunal, but said that he would be prepared to follow him as special rapporteur, as he (Mr. Lauterpacht) thought the Commission should always do in any matter on which there was doubt. He did not believe that the delay caused by referring such cases to the International Court of Justice would be so great as Mr. Hudson feared, since the Court's procedure would certainly be expedited if the parties happened to be in agreement.

32. Mr. ZOUREK felt that it might well happen that one party would put forward a valid case for disqualification of the arbitrator after his appointment, and that the other party would accept it, since a sole arbitrator would usually be the national of a third country, and all the particulars concerning him might not emerge beforehand. The Commission should respect the principle that the parties should have the right to settle such questions between themselves if they were able to do so.

33. Mr. el-KHOURI said that he could agree that it was unnecessary for the matter to be referred to the International Court of Justice if the parties were in agreement, provided, first, that the disqualified arbitrator did not object, and secondly, that the parties at the same time agreed on his replacement, a question on which the intervention of the International Court of Justice would otherwise be necessary in any event.

34. Mr. SCELLE urged the Commission to keep disqualification and replacement completely separate. It had already been conceded that the parties should be free to change the composition of the tribunal before the proceedings began. On the other hand, an arbitrator could only be disqualified after the proceedings had opened.

35. He recalled that the Commission had already rejected the proposal that an arbitrator could be disqualified by agreement of the parties in cases where there was more than one arbitrator. It would therefore surely be illogical to give them the power to disqualify a sole arbitrator by mutual arrangement.

36. The CHAIRMAN put to the vote the second paragraph of article 11, as amended by the deletion of the words "through summary procedure".

The paragraph was adopted by 6 votes to 4.

37. Mr. el-KHOURI said that he had voted against that paragraph since it was incomplete. In the same way, he would be unable to vote for article 11 as a

whole until he saw whether all the points he had referred to previously were covered by article 9.

Article 11, as amended, was adopted by 6 votes to 2, with 2 abstentions, subject to any further amendments made by the Standing Drafting Committee to be set up.³

ARTICLE 7 (resumed from the 141st meeting)

38. The CHAIRMAN invited the Commission to take up the new text of articles 7, 8 and 9 prepared by Mr. Scelle in consultation with some other members of the Commission, which was now available in both languages.

39. The text for article 7 read as follows :

"Once the arbitral tribunal has been set up its composition shall remain unchanged until after the decision has been rendered.

"The parties may, however, replace one or other of the arbitrators appointed by them, provided that the tribunal has not yet sat or begun its proceedings. An arbitrator may not be replaced during the hearing except by agreement between the parties."

40. Mr. HUDSON proposed the deletion of the first paragraph, which was entirely vitiated by the second.

41. Mr. SCELLE said that the first paragraph of article 7 was of paramount importance, as it enunciated the principle of the immutability of the tribunal. He agreed that the second paragraph provided for an important exception, but the principle laid down in the first paragraph stood.

42. The second paragraph had been included to meet the point raised by Mr. François at the preceding meeting, namely, that when a case came up as the result of a general arbitration agreement under which a tribunal had already been nominated, the parties must be free to change the composition of the tribunal if for some particular reason it was unsuited to the specific case at issue.

43. Mr. LAUTERPACHT agreed that the first paragraph stated a principle and the second an exception to it. It was only to that extent that the two were mutually contradictory.

44. Mr. YEPES supported both paragraphs, since exceptions must obviously derogate from the general rule. He hoped, however, that both the English and the French texts would be referred to the drafting committee, as neither seemed to him quite satisfactory as they stood.

³ Article 11, as tentatively adopted, read as follows :

"1. A party may not propose the disqualification of one of the arbitrators except on account of a fact arising subsequent to the constitution of the tribunal; it may not so propose on account of a fact arising prior to the constitution of the tribunal, unless it can reasonably be supposed to have been unaware of that fact or has been the victim of a fraud. The tribunal shall decide.

"2. In the case of a single arbitrator the decision shall rest with the International Court of Justice."

45. Mr. KERNO (Assistant Secretary-General) was uncertain whether the word "hearing" was an exact translation of the words "*lorsque l'instance est en cours*".

46. Mr. LIANG (Secretary to the Commission) suggested that a possible contradiction between the first and second sentences in the second paragraph would be removed by the substitution of the words "Each party" for the words "The parties", and by the substitution of the word "it" for the word "them" after the words "appointed by".

47. Mr. HSU supported the Secretary's suggestion.

48. Mr. KOZHEVNIKOV proposed the insertion of the words "by agreement between the parties, it is recommended that" after the words "has been set up" in the first paragraph.

49. Mr. YEPES asked Mr. Kozhevnikov whether, in his view, article 7 would still be applicable if a tribunal had not been set up by agreement between the parties.

50. Mr. KOZHEVNIKOV believed that a tribunal could only be set up by agreement between the parties.

51. Mr. el-KHOURI said he could vote in favour of the first paragraph, provided the word "shall" was replaced by the word "should". He believed that such a provision was essential in order to strengthen arbitral procedures. On the other hand, he believed the second paragraph to be unnecessary, since its provisions were repeated in articles 8, 9 and 11. He accordingly proposed that it be deleted.

52. Mr. LAUTERPACHT did not quite understand the purpose of Mr. el-Khoury's amendment to the first paragraph. Surely the use of the word "should" would weaken it.

53. Mr. el-KHOURI said that in that case he would withdraw his amendment to the first paragraph.

Mr. Hudson's proposal that the first paragraph of article 7 be deleted was rejected by 8 votes to 1, with 2 abstentions.

Mr. Kozhevnikov's amendment to the first paragraph was rejected by 8 votes to 2, with 1 abstention.

Mr. el-Khoury's proposal that the second paragraph be deleted was rejected by 7 votes to 2, with 2 abstentions.

The Secretary's suggestion concerning the second paragraph was adopted by 8 votes to none, with 3 abstentions.

54. Mr. HUDSON asked what was meant by the phrase "provided that the tribunal has not yet sat or begun its proceedings". He failed to understand the purpose of such a distinction, and he would also ask the special rapporteur to define the precise moment at which a tribunal might be regarded as constituted.

55. Mr. SCELLE replied that a tribunal could not be considered as constituted until its members had met and taken some procedural action, such as deciding on

the date of the first public meeting or discussing the rules of procedure.

56. Mr. AMADO said that surely the problem was not so complicated as it seemed. A tribunal was constituted as soon as its members came together to deliberate.

57. Mr. KERNO (Assistant Secretary-General) said that the precise significance of the phrases "*n'ait pas encore siégé ni entamé la procédure*" and "*lorsque l'instance est en cours*" escaped him. Surely a tribunal could sit without having begun its proceedings; the possible invocation of pre-established tribunals must also be taken into account. He presumed that the intention was not to allow replacement of arbitrators once the proceedings had actually begun.

58. Mr. SCELLE pointed out that consideration of its rules of procedure by a tribunal was already part of its proceedings.

59. The CHAIRMAN suggested that the text of article 7, as amended, be referred to the standing drafting committee to be set up, for consideration in the light of the foregoing discussion.⁴

It was so agreed.

ARTICLE 8⁵

60. The CHAIRMAN drew the attention of the Commission to the new text of article 8, which read as follows:

"Should one or more vacancies occur, for reasons beyond the control of the parties, the absent arbitrator or arbitrators shall be replaced by the method laid down for appointments."

61. Mr. LAUTERPACHT proposed that, in the interests of clarity, the words "the original" be inserted before the word "appointments".

It was so agreed.

62. Mr. HUDSON said that the English text was somewhat faulty. If a vacancy occurred, it would be inappropriate to speak of an absent arbitrator.

63. Mr. LAUTERPACHT suggested that Mr. Hudson's point would be met by the substitution of the words

⁴ Article 7, as tentatively adopted, read as follows:

"1. Once the arbitral tribunal has been set up, its composition shall remain unchanged until the decision has been rendered.

"2. Each party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet sat or begun its proceedings. An arbitrator may not be replaced during the hearing except by agreement between the parties."

⁵ Article 8 read as follows:

"If it is necessary to replace a single arbitrator, the appointment of the new arbitrator shall, in the absence of agreement between the parties, be entrusted to the third Power which would have been competent to appoint the first arbitrator, or to the President of the International Court of Justice."

"the vacancies shall be filled" for the words "the absent arbitrator or arbitrators shall be replaced".

It was so agreed.

64. Mr. HUDSON asked what kind of contingency was envisaged in article 8. Was it, for example, the death or illness of an arbitrator? He was bound to express his surprise at the first paragraph of article 7, which stipulated that there should be no change in the composition of a tribunal, being immediately followed by a series of exceptions to that principle.

65. Mr. KOZHEVNIKOV proposed the substitution of the words "by agreement between the parties" for the words "by the method laid down for appointments".

Mr. Kozhevnikov's amendment was rejected by 6 votes to 2, with 2 abstentions.

66. The CHAIRMAN put to the vote article 8, as amended by the two proposals made by Mr. Lauterpacht and already adopted.

Article 8, as amended, was adopted by 8 votes to none, with 3 abstentions.⁶

ARTICLE 9 (resumed from the 141st meeting)

67. The CHAIRMAN read out the new text of article 9, as follows:

"Once the hearing has begun, an arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the tribunal.

"If, for any reason such as previous cognizance of the case, a member of the tribunal considers that he cannot take part in the hearing, or if any doubt arises in this connexion within the tribunal, it may decide to require his replacement.

"Should the withdrawal take place without the consent of the constituted tribunal, the latter shall be authorized to continue the proceedings and render the award.

"If the withdrawal should make it impossible to continue the proceedings, the tribunal may require 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."

First paragraph

68. Mr. HUDSON, referring to the first paragraph, asked whether the consent of a sole arbitrator would have to be obtained for his own withdrawal.

69. Mr. SCELLE failed to understand the purport of the question, which seemed to him somewhat frivolous.

⁶ Article 8, as tentatively adopted, read as follows:

"Should one or more vacancies occur, for reasons beyond the control of the parties, the vacancies shall be filled by the method laid down for the original appointments."

70. Mr. YEPES wondered whether it might not be advisable to cite a few examples of the kind of exceptional cases in which an arbitrator might be withdrawn. He had in mind, for example, continued illness or inadequate means.

71. Mr. SCELLE could not agree to the inclusion of such examples. It would be for the tribunal itself to decide whether or not the circumstances attending any given case were exceptional.

72. Mr. KERNO (Assistant Secretary-General) said that he had understood the clause relating to exceptional cases to be in the nature of a directive to the tribunal, as it was impossible to legislate in advance for such contingencies. What was exceptional in one case might not be so in another.

The first paragraph of article 9 was adopted without change by 7 votes to none, with 4 abstentions.

73. Mr. HUDSON asked whether a tribunal composed of three persons could ever act unless all were present. If it could, then that should be clearly stated. He knew of very few instances in which that had occurred, although some did exist, such as the Lena Goldfields case.⁷ The decisions of the French-Mexican Claims Commission in 1927 had been taken in the absence of the Mexican member, and it would be recalled that the decisions had been impugned by the Mexican Government. Later, the Governments of France and Mexico had reached a compromise without, however, solving the question of principle.⁸ The International Court of Justice in its second advisory opinion on the interpretation of the peace treaties with Bulgaria, Hungary and Romania had laid stress on the importance of the presence of both the national members in a three-member tribunal.⁹

74. Mr. SCELLE said that Mr. Hudson had raised a very delicate issue which he personally hoped he had provided for in his original text. Surely it was for the tribunal itself to decide whether or not it could continue its work in the absence of one of its members.

75. Mr. HUDSON said that it was essential to devise a provision which would hold water. In his view, two members of a tribunal of three could not comply with the provisions even of the first and second paragraphs of article 9. Were they, in fact, competent to decide such issues?

76. Mr. SCELLE said that it would be helpful if Mr. Hudson gave expression to his very definite opinions in a formal amendment.

77. Mr. ZOUREK said that one of the essential conditions of arbitration was that the tribunal should be legally constituted, and that would not be the case

if one or more members were absent. Should a vacancy occur, the tribunal must request the parties to fill it.

78. Mr. SCELLE considered that what Mr. Zourek was proposing was tantamount to leaving the proceedings to the caprice of the parties. Once a tribunal had been constituted, it became transmuted into an international and supra-national organ which could not be changed. Arbitrators, once appointed, became the servants of the international community, and ceased to owe national allegiance. He was utterly opposed to the parties being given the possibility of preventing the proceedings from taking their course and the award being made. If they were to be free to do so, the tribunal would cease to be an arbitral organ, since, as soon as the case took a turn which seemed unfavourable to one of the parties, that party would clearly make every effort to bring about the suspension of the proceedings.

79. Mr. el-KHOURI observed that article 9 did not stipulate what a quorum of the tribunal should be. It was not a matter that could be left to chance, particularly in the case of a tribunal of three persons, of whom two might be nationals of the parties to the dispute. He considered that only the full tribunal could be considered as constituting a quorum.

80. Mr. KERNO (Assistant Secretary-General) asked whether a solution might not be found by leaving it to the tribunal to decide what would constitute a quorum.

81. Mr. SCELLE felt that the Assistant Secretary-General's ideas were very similar to his own. What he was anxious to prevent was the tribunal being left to the mercy of the will of the parties. It was surely for the tribunal itself to decide whether it was in a position to continue the proceedings in the absence of one or more of its members. He realized that particular difficulties might arise for tribunals composed of three persons, and it was for that reason that it was laid down in the "Revised General Act for the Pacific Settlement of International Disputes" that the arbitral tribunal should consist of five members. He was not personally in favour of stipulating that there would be a quorum only if all members were present. He saw no reason, for example, why two members of a tribunal of three might not be able to reach unanimous agreement and make an award in the absence of their colleague.

82. In his opinion, the function of the judge was not so much to protect the interests of the individual, as to settle disputes. If the whole process of arbitration, once instituted, were to be made contingent on the will of the parties it would cease to be arbitration, the purpose of which was to settle disputes in accordance with the rules of law. It was accordingly essential that the tribunal be independent. Such, in general terms, was his concept of arbitration, although, of course, he realized that the Commission might wish to adopt another.

83. Mr. AMADO said that, despite a strenuous effort to understand Mr. Scelle's point of view, he remained

⁷ See A. M. Stuyt, *Survey of International Arbitrations* (The Hague, Martinus Nijhoff, 1939) p. 392.

⁸ See United Nations, *Reports of International Awards*, Vol. V, p. 309.

⁹ Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950, p. 221.

unconvinced, since he doubted whether an outside body was capable of judging the interests of two States.

84. Mr. SCELLE asked whether the purpose of arbitration was to defend the interests of the parties or to determine on the basis of the rules of law whether or not a case was well founded. Once a State had given its consent to resort to arbitration that decision should be irrevocable. He confessed that he was unable to understand very clearly Mr. Amado's conception of arbitration, which seemed to him to come perilously close to mediation.

The meeting rose at 1.10 p.m.

143rd MEETING

Monday, 16 June 1952, at 2.45 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) (continued)

1. The CHAIRMAN invited members to continue their consideration of the Second Preliminary Draft on Arbitration Procedure submitted by the special rapporteur (Annex to document A/CN.4/46).
2. He recalled that at the end of the preceding meeting the Commission had been considering the new text proposed by the special rapporteur for article 9.¹ The Commission had adopted the first paragraph of that text. He called for comments on the second.

ARTICLE 9 (continued)

Second paragraph

3. Mr. HUDSON said that the second paragraph seemed to envisage the very improbable contingency of an arbitrator accepting appointment and then finding that he was unable to participate in the work of the tribunal because he had previous cognizance of the case. He wondered whether such a provision, which was appropriate for a standing organ with a fixed membership, such as the International Court of Justice, was really necessary for an *ad hoc* tribunal constituted to deal with a specific case.

4. Furthermore, certain other points needed elucidation. For example, would the member in question take part in the decision whether he must be replaced? He also suggested that the word "hearing" should be replaced by the word "case".

5. Mr. LAUTERPACHT pointed out that an arbitral tribunal might be appointed in advance to deal with a series of cases. When the appointments were made it would not be known what cases it would have to deal with.

6. Mr. KOZHEVNIKOV said that the latter part of the second paragraph seemed to him obscure. What, for example, was the doubt likely to arise, and what was the procedure to be followed if a tribunal decided that a certain member had to be replaced? He thought that the last phrase, "it may decide to require his replacement", might be improved by making it read "it may decide on his replacement".

7. Mr. KERNO (Assistant Secretary-General) suggested that most of the comments so far made were more or less of a drafting character and might well be referred to the Standing Drafting Committee when it was set up. The Commission had only to decide in principle whether or not a provision should be included in the draft, dealing with cases where a member of a tribunal ceased to fulfil the required conditions.

8. Mr. SCELLE agreed with the Assistant Secretary-General.

9. Mr. YEPES proposed that the words "on the unanimous vote of the other members" be inserted after the words "it may decide", so as to make it perfectly clear how the decision on replacement was to be reached.

10. Mr. FRANÇOIS asked whether it was necessary to stipulate unanimity.

11. Mr. YEPES replied that disqualification of an arbitrator on the grounds that he had previous cognizance of the case was a very serious matter on which a decision could not be reached by a simple majority. His amendment was modelled on paragraph 1 of Article 18 of the Statute of the International Court of Justice.

Mr. Yepes' amendment was adopted by 5 votes to none, with 4 abstentions.

¹ See summary record of the 142nd meeting, para. 67.

12. The CHAIRMAN put to the vote the substance of article 9, second paragraph, subject to review by the Standing Drafting Committee to be set up.

The substance of the second paragraph was adopted by 7 votes to none, with 3 abstentions.

Third paragraph

13. Mr. HUDSON considered that the provisions of the third paragraph conflicted with those of the first paragraph, which stipulated that once a hearing had begun an arbitrator could not withdraw, save in exceptional cases and with the consent of the tribunal. If the intention of the third paragraph was that if an arbitrator withdrew the other members could continue the proceedings, it should be so stated. As it stood, the text appeared to him to be far too laconic, and it might well be improved if drafted on the lines of a parallel provision in the *compromis* in the Lena Goldfields case. He would also like to suggest the deletion of the word "constituted" from before the word "tribunal".

14. Mr. SCELLE agreed with Mr. Hudson that the word "constituted" served no useful purpose, and might accordingly be deleted.

15. The intention of the third paragraph was clear — namely, that even if one member of a tribunal were withdrawn or died, the remaining members could proceed with the case if they felt able to do so. For example, even with a tribunal of three, two members might be able to complete a case and make an award.

It was agreed that the word "constituted" should be deleted from the third paragraph.

16. The CHAIRMAN asked whether Mr. Scelle would agree to the substitution of the words "the remaining members" for the words "the latter".

17. Mr. SCELLE replied in the affirmative.

18. Mr. HUDSON suggested that, in the interests of clarity, and in order to eliminate the impression that some future authorization would be necessary, the words "the remaining members shall be authorized" should be replaced by the words "the remaining members at the request of one of the parties shall have power".

19. Mr. LAUTERPACHT asked whether that amendment implied that the remaining members would be bound to continue proceedings, or might continue them.

20. Mr. KERNO (Assistant Secretary-General) thought that the second alternative was the correct interpretation.

21. Mr. SCELLE said that he could accept the words "shall have power", but not the words "at the request of one of the parties", since he firmly held the view that the tribunal should be master of its own procedure and that it should be able to continue its conduct of a case, even if neither party was in favour of its so doing.

22. Mr. HUDSON asked what would happen if both parties refused to plead their case before the tribunal.

23. Mr. SCELLE said that if that happened before the proceedings started the case would, of course, have to be dropped, but the provisions of the third paragraph came into play once the proceedings had begun, and he was firmly convinced that nothing should be allowed to interfere with them. He was in favour of making international tribunals as similar as possible to tribunals in municipal law. As Mr. Hudson would have noticed, the question of default was dealt with in article 28.

24. Mr. HUDSON said that, pushed to its logical conclusion, Mr. Scelle's view would deprive the parties of any control over the situation; he doubted whether States would accept that.

25. Mr. el-KHOURI said that, as he had indicated at the preceding meeting, nothing short of all members of the tribunal as appointed by the parties or by the subsidiary procedure could be considered as a quorum. If one or more members withdrew, the tribunal could not continue the proceedings without the consent of the parties. He could not therefore agree that the tribunal should be master of its own procedure to the extent contemplated by Mr. Scelle, since it was the very essence of arbitration that a dispute should be settled by judges of the parties' own choice.

26. Mr. LAUTERPACHT said that he would vote in favour of the amendment for the insertion in the third paragraph of the words "at the request of one of the parties".

27. He doubted whether it was necessary for the Commission to devote any time to the consideration of hypothetical situations, such as that in which neither party wished to plead before the tribunal. Article 53 of the Statute of the International Court of Justice, rightly in his opinion, made no provision for such a contingency.

28. Mr. KOZHEVNIKOV considered that Mr. el-Khouri's views merited full consideration, since arbitral proceedings must be based on the consent of the parties. He therefore proposed that the words "by agreement of the parties" be inserted after the words "shall have power", in Mr. Hudson's amendment.

29. Mr. ZOUREK observed that Mr. Kozhevnikov's amendment was intended to bring out the essential fact that arbitration must proceed on the basis of agreement between the parties.

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

30. Mr. FRANÇOIS proposed the deletion of the words "without the consent of the constituted tribunal".

Mr. François' amendment was adopted by 7 votes to 2, with 2 abstentions.

31. Mr. HUDSON said that if the provisions of the third paragraph were governed by the opening words of the first paragraph, namely: "Once the hearing has begun", that should be made explicit. It should also be made clear whether the word "withdrawal" was intended to cover the additional contingencies of the

death of a member of a tribunal, or refusal to attend proceedings without withdrawal.

32. Mr. KERNO (Assistant Secretary-General) pointed out that the case of the death of an arbitrator was covered by the provisions of article 8. He therefore suggested that those of article 9 should be confined to withdrawal.

33. Mr. AMADO said that he had abstained from voting on the amendment to the third paragraph because he considered that an arbitral tribunal reduced to two members ceased to be a tribunal. To allow it to pursue the case would be to undermine the whole principle of arbitration.

The third paragraph was adopted as amended.

Fourth paragraph

34. Mr. SCELLE proposed the deletion of the fourth paragraph, which had become redundant in view of the amendments adopted to the preceding paragraph. It was now implicit in that text that if the tribunal could not continue to function after the withdrawal of a member it could request that he be replaced.

Mr. Scelle's proposal was adopted.²

ARTICLE 12³

35. The CHAIRMAN suggested that as article 12 enumerated the constituent elements of the *compromis*, those elements should be taken up one by one.

It was so agreed.

36. Mr. SCELLE said that, as he had already had occasion to state, one of the principles underlying his

² Article 9, as tentatively adopted, read as follows :

" 1. Once the hearing has begun, an arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the tribunal.

" 2. If, for any reason such as previous cognizance of the case, a member of the tribunal considers that he cannot take part in the proceedings, or if any doubt arises in this connexion within the tribunal, it may decide, on the unanimous vote of the other members, to require his replacement.

" 3. Should the withdrawal take place, the remaining members, upon the request of one of the parties, shall have power to continue the proceedings and render the award."

³ Article 12 read as follows :

" The parties having recourse to arbitration shall sign a *compromis* in which they shall determine : the subject of the dispute ; the choice of judges and the constitution of the tribunal, if they have not previously done so, or if the tribunal has not already been constituted in accordance with the foregoing provisions ; the rules of procedure they may think fit to agree upon ; such powers as may be conferred on the tribunal concerning the rules of law applicable ; the power to adjudicate *ex aequo et bono*, and, if necessary, the power to act as *amiable compositeur*. Failing express provisions on these points, the arbitral tribunal may adjudicate *ex aequo et bono* if the positive law is silent or obscure, but may not act as *amiable compositeur*, except with the express consent of the parties.

" The *compromis* shall also decide where the tribunal shall meet and the languages to be used."

thesis was that the obligation to arbitrate did not always have its source in the *compromis*. That obligation was accordingly binding upon the parties even though what he might describe as the procedural *compromis* did not yet exist. He had accordingly drawn a sharp distinction between the obligation to arbitrate and the *compromis* itself.

37. He realized that the latter part of the first paragraph of article 12 raised a doctrinal difficulty, and that his view might not command general acceptance in the Commission. He therefore appealed to members for assistance in re-drafting the article if it were found unsatisfactory. The difficulty originated in a divergence of view on the two concepts, that of adjudicating *ex aequo et bono* and that of acting as *amiable compositeur*. Some authorities regarded them as one and the same thing, others — including himself — considered that the former gave the judge more latitude in interpreting the rules of law, and enabled him to act *praeter legem*. He thought that any judicial settlement might on occasion involve departure to some extent from the original intent of the law on which it was based. It could not but be in some respect interpretive. For example, the provisions on liability in the French civil code were now having to be interpreted in quite a different sense from that originally intended, in order to make them applicable to modern developments which had not been envisaged when the code had first been drafted. In most cases, jurisprudence represented an accumulation of judgments, and it was true to say that a judge was almost always something of a legislator. A judgment was therefore not invariably made on the strict interpretation of rules of law, but in accordance with equity.

38. Mr. YEPES said that Mr. Scelle's statement had confirmed him in his view that the clauses relating to the *compromis* should have been considered before those relating to the composition and immutability of the tribunal, since the former were essential to the whole draft. The *compromis* was the keystone of arbitral procedure, and was in the nature of an international treaty which must be negotiated by plenipotentiaries with all the attendant formalities. In his view, the *compromis* was the most important source of the obligation to arbitrate, and, indeed, was the way in which that obligation was given concrete form. It was vital therefore to surround it with all the necessary safeguards.

39. He was unable to understand why the special rapporteur should have divided the provisions of the *compromis* into two parts, the obligatory and the optional. He had accordingly prepared an alternative text for articles 12 and 13, making all the provisions obligatory. He attached particular importance to paragraph (b) in his text, according to which the subject of the dispute must be defined precisely and as clearly as clearly as possible ; to paragraph (e) concerning the quorum ; and to paragraph (g), stipulating how the tribunal was to adjudicate.

40. Mr. LAUTERPACHT said that, as he had not

had time to study Mr. Yepes' proposal, he would confine himself to commenting on Mr. Scelle's draft and the statement he had just made. He was relieved to hear that Mr. Scelle did not regard himself as irrevocably committed to article 12 of his draft, since he (Mr. Lauterpacht) was in fundamental disagreement with it, first, because it ran counter to the main trend of that draft, which was to remove arbitration from the influence of polities and make it as far as possible a purely legal process ; and secondly, because it also ran counter to the general trend regarding arbitration over the past 150 years, during which time arbitration had tended from political to legal settlement, distinguished from the judicial process provided for in the Statute of the International Court of Justice only in that an *ad hoc* tribunal was substituted for a permanently established forum.

41. Mr. Scelle did not appear to have made up his mind whether decisions *ex aequo et bono* were juridical decisions. He had stated that judges were entitled to adjudicate, and did in fact adjudicate, *ex aequo et bono*. If that were so, it was surely unnecessary to include in the *compromis* a special provision giving the tribunal powers it would already possess under ordinary rules of law. In his opinion, however, it was axiomatic that an arbitral tribunal, whose task it was to settle the dispute on the basis of the law, should not normally be able to adjudicate except on that basis. For the arbitral tribunal, therefore, the question of the law being silent did not arise ; in other words, there was no *non liquet*. It was true that the General Act of 1928 had provided for adjudication *ex aequo et bono* by an arbitral tribunal in cases where there was no rule of law applicable. However, it was fundamental that there was always a rule — or principle — of law enabling the judge to settle a dispute. The General Act was no unimpeachable authority. The unsatisfactory and self-contradictory nature of that instrument was shown by the fact that it stated that disputes which could not be settled on the basis of the law should be referred to conciliation, and then proceeded to provide that cases where conciliation had failed, in other words, cases which *ex hypothesi* could not be settled on the basis of the law, should be dealt with by arbitration, in other words, again on the basis of the law.

42. Mr. Scelle's draft also gave the parties power to consent to the arbitral tribunal acting as *amiable compositeur*. If the parties agreed that the dispute should be settled in that way, on the basis of political considerations, they had better refer it to a conciliation commission ; but a settlement on that basis would be alien to the whole character of international arbitration. It would certainly be inconsistent with the Statute of the International Court of Justice to request it to act in that way.

43. In his view, therefore, it would be sufficient to state, but to state explicitly, that, failing express provisions in the *compromis* on the law applicable, the provisions of Article 38 of the Statute of the International Court of Justice should apply.

44. The CHAIRMAN suggested that further consideration of both article 12 and article 13 should be deferred until members of the Commission had had an opportunity of studying the amendment proposed by Mr. Yepes.

It was so agreed.

ARTICLE 14⁴

45. The CHAIRMAN pointed out that article 14, dealing with the so-called obligatory *compromis*, would not be affected by the decision taken on articles 12 and 13.

46. Mr. HUDSON said that in practice an arbitral tribunal, properly speaking, was never constituted before the *compromis* was drawn up. The draft convention should not include provisions covering a situation that would never arise, and he consequently proposed that the second, third and fourth sentences of article 14 be deleted.

47. Mr. LAUTERPACHT suggested that in the first sentence the words "a suitable person, a Commission or one of its courts of justice" be replaced by the words "a person or body of persons". He hoped that the second sentence would be retained, in case such person or persons should fail to draft the *compromis*, but he thought that the words "the breakdown of proceedings" should be clarified.

48. Mr. SCELLE said that the whole basis of his draft was again being called into question. As had been correctly stated, that draft was based on a break with existing practice. If the parties were not in agreement on the contents of the *compromis*, it was essential to the purpose of his draft that the tribunal should itself draw up the *compromis* whenever the obligation to have recourse to arbitration resulted, not from the *compromis* but from a prior undertaking. The *compromis* itself, which was the subject of articles 12-14 of his draft, was only of secondary, procedural importance. At present, cases occurred where the contents of the *compromis* actually prevented the tribunal from rendering an award. It would surely be ridiculous if, in an ordinary court of law, the parties, and not the court, were the masters of procedure. For that reason he had

⁴ Article 14 read as follows :

"If the parties cannot agree on the contents of the *compromis* or on one of its stipulations, they may request the good offices of a third Power which shall appoint a suitable person, a commission, or one of its courts of justice to draw up the *compromis*. In the event of disagreement between the parties as to the choice of this third Power or of the breakdown of proceedings, the arbitral tribunal shall itself draw up the *compromis*, if possible in agreement with the agents of the parties, but in any case within a reasonable time-limit which it shall itself determine. Should the tribunal be constituted before the *compromis* has been drawn up, the parties may entrust the preparation of that instrument to the tribunal.

"At the expiry of the time-limit, fixed by the tribunal for the drawing up of the *compromis*, either party may refer the matter to the tribunal by an application."

proposed that the tribunal should be bound by the procedural provisions of the *compromis* only in so far as they proved compatible with the proper exercise of the arbitral function. Only too often the *compromis* was drafted in such a way that only one aspect of the dispute, and not the whole dispute, was referred to the arbitral tribunal, thereby rendering its task impossible. He did not, therefore, understand why Mr. Lauterpacht should maintain that his (Mr. Scelle's) proposals regarding the *compromis* ran counter to the whole purpose of the draft, which was to remove arbitration as far as possible from the influence of politics.

49. In view of what he had already said, it would be obvious that he did not agree with Mr. Yepes' proposal for a would-be exhaustive list of provisions which had necessarily to be included in the *compromis*. In his view, the tendency should be in the other direction; the ideal would be that no *compromis* was necessary in international arbitration, just as it was not required in cases referred to a domestic tribunal. The greater the importance attaching to the *compromis*, the easier it would become for one of the parties to claim that the tribunal had exceeded the powers laid down in it.

50. Mr. LAUTERPACHT said that the information given on pages 83-84 of a publication of the Legal Department of the United Nations entitled "Systematic Survey of Treaties for the Pacific Settlement of International Disputes"⁵ made it clear that it was the generally accepted practice, and not merely that of those States which were parties to the General Act, to constitute the tribunal before drawing up the *compromis*, and to provide that, if they were unable to reach agreement on the *compromis*, it should be drawn up by the Tribunal.

51. Mr. YEPES reaffirmed that he was in agreement with Mr. Scelle in principle, and that he agreed that an article on the so-called obligatory *compromis* should be included. The text proposed by Mr. Scelle was, however, excessively complicated, and he proposed that it be replaced by a provision similar to that found in article 53 of the Pact of Bogotá, reading simply:

"If the parties cannot agree on the contents of the *compromis* or on one of its stipulations, the International Court of Justice shall, at the request of one of the parties, be invited to draw up a *compromis*, which shall be binding on the parties."

52. It was possible that such a task might not be in accordance with the letter of the Court's Statute, but it would be in accordance with its spirit. And, given the qualifications of its members, a *compromis* drawn up by the Court should be acceptable to both parties.

53. Mr. SCELLE found the simplicity of Mr. Yepes' proposal attractive. If he himself had chosen more complicated wording, that was because he had wished to leave the parties as free as possible. He did not think it would be feasible to make the International Court responsible for drawing up the *compromis* whenever the parties failed to do so, but would have no objection

to article 14 being replaced by the following text, if a proposal were made to that effect:

"If the parties cannot agree on the contents of the *compromis* or on one of its stipulations within a period of ____ months, the arbitral tribunal previously constituted shall itself draw up the *compromis* without further delay."

54. Mr. YEPES preferred his own wording.

55. The CHAIRMAN stated that as Mr. Yepes' proposal was the farthest removed from the original text, he would put it to the vote first.

Mr. Yepes' proposal was rejected by 6 votes to 2, with 2 abstentions.

56. The CHAIRMAN then put to the vote Mr. Lauterpacht's proposal that the words "a suitable person, a commission or one of its courts of justice" should be replaced by the words "a person or body of persons".

Mr. Lauterpacht's proposal was adopted by 6 votes to none, with 5 abstentions.

57. The CHAIRMAN said that Mr. Hudson's proposal, that the second, third and fourth sentences of article 14 be deleted, would be put to the vote in three parts.

The proposal that the second sentence be deleted was rejected by 7 votes to 3, with one abstention.

58. Mr. SCELLE suggested, however, that the words "In the event of disagreement between the parties as to the choice of this third Power or of the breakdown of proceedings" might be replaced by the words "In the event of the failure of this procedure".

It was agreed that that suggestion should be referred to the Standing Drafting Committee which was to be set up.

59. Mr. LAUTERPACHT and Mr. KERNO (Assistant Secretary-General) pointed out that although the second sentence had been retained, the third and fourth sentences added nothing to the sense of the article, and could therefore be deleted, as Mr. Hudson had proposed.

It was so agreed.

Article 14 was adopted, as amended, by 7 votes to 2, with 2 abstentions.

60. Mr. YEPES said that he had voted for article 14 because he felt that the draft convention must contain some provision relating to the obligatory *compromis*.

61. Mr. AMADO said that he would merely ask the Commission to ponder whether the expression "obligatory *compromis*" was not a contradiction in terms.⁶

⁶ Article 14, as tentatively adopted, read as follows:

"If the parties cannot agree on the contents of the *compromis* or on one of its stipulations, they may request the good offices of a third Power which shall appoint a person, or body of persons, to draw up the *compromis*. In the event of the failure of this procedure, the arbitral tribunal shall itself draw up the *compromis*, if possible in agreement with the agents of the parties, but in any case within a reasonable time-limit which it shall itself determine."

Appointment of Standing Drafting Committee

62. The CHAIRMAN suggested that a Standing Drafting Committee should be set up, composed of Mr. Hudson, Mr. Lauterpacht and Mr. Yepes, together with the special rapporteur on any subject, *ex officio*, when that subject was being discussed. The general rapporteur would also be free to attend meetings of the Standing Drafting Committee whenever he so wished.

The Chairman's suggestion was adopted.

Date and place of the fifth session (item 7 of the agenda)

63. Mr. LIANG (Secretary to the Commission) pointed out that it was necessary for the Commission to take a preliminary decision at once with regard to the date and place of the next session, so that consultation with the Secretary-General might be undertaken in time, if necessary.

64. Mr. HUDSON proposed that the Commission should hold its next session in Geneva, beginning about 1 June 1953, and that the Secretary be requested to consult with the Secretary-General in accordance with article 12 of the Commission's Statute.

65. Mr. YEPES, Mr. SCHELLE, Mr. ZOUREK, Mr. KOZHEVNIKOV, Mr. LAUTERPACHT and Mr. FRANÇOIS supported Mr. Hudson's proposal.

66. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission's Statute laid down (article 12) that the Commission should sit at the headquarters of the United Nations, but that it had the right to hold meetings at other places after consultation with the Secretary-General. In other words, it had obviously been the intention that the Commission should normally meet in New York. Members knew the administrative and financial implications of meeting elsewhere.

After some further discussion, Mr. Hudson's proposal was unanimously adopted.

The meeting rose at 6 p.m.

144th MEETING

Tuesday, 17 June 1952, at 9.45 a.m.

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Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33, A/CN.4/L.33/Add.1) (continued)

Articles 12 (resumed from the 143rd meeting) and 13 41

Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H.

LAUTERPACHT, Mr. Georges SCHELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33, A/CN.4/L.33/Add.1) (continued)

ARTICLES 12 (resumed from the 143rd meeting)
AND 13¹

1. The CHAIRMAN invited the Commission to consider a text proposed by Mr. Yepes to replace articles 12 and 13 in the special rapporteur's Second Preliminary Draft on Arbitration Procedure. Paragraphs (b), (c), (d), (g) and (j) in Mr. Yepes' text amplified or amended the provisions proposed by Mr. Scelle. Paragraphs (e), (f), (h) and (i) were new.

Introductory clause of text proposed by Mr. Yepes :

"The parties having recourse to arbitration shall sign a *compromis* in which they shall determine :"

The introductory clause to Mr. Yepes' text was accepted.

Paragraph (a) of text proposed by Mr. Yepes :

"(a) Their common desire to submit the dispute between them to arbitration ;"

2. Mr. YEPES said that it was a *sine qua non* of arbitral procedure for the parties to embody in the *compromis* an affirmation of their common desire to submit the dispute between them to arbitration. Paragraph (a) should therefore not give rise to objection.

3. Mr. el-KHOURI said that such a provision was necessary when there was no previous general undertaking to resort to arbitration. It would not be redundant even if such an agreement existed. He would accordingly support paragraph (a).

4. Mr. SCHELLE said that such a provision might sometimes be unnecessary, but it would never be harmful. He would therefore be able to accept it. He wished, however, to propose that paragraph (a) be amended by the substitution of the words "the whole subject-matter" for the words "the dispute between them", in conformity with Article 13 of the Covenant

¹ Article 13 reads as follows :

"The *compromis* may contain any other conventional provisions that the parties deem it necessary to introduce, such as the order and time-limits for the communication of documents and procedural acts, the time-limit for delivery of judgment, the manner in which evidence is to be taken, the allocation of costs and fees, the appointment of agents, advocates and counsel.

"The arbitrator or the tribunal shall be bound by the procedural provisions only in so far as they prove compatible with the proper exercise of his or its function. The arbitrator or the tribunal shall be sole judge of such compatibility."

of the League of Nations. He attached great importance to that amendment.

5. Mr. YEPES accepted Mr. Scelle's amendment.

6. Mr. ZOUREK asked whether the provisions proposed by Mr. Yepes would be applicable if there was no prior obligation to resort to arbitration, in which case, in his (Mr. Zourek's view), the parties would be free to determine what elements in a dispute should be submitted for arbitration.

7. Mr. SCELLE said that if there was a prior obligation to resort to arbitration, freedom of the parties to reduce the scope of that obligation in any way must be opposed. Even when such obligation did not exist, he considered that the whole case should be submitted to arbitration, so that it might be settled in its entirety.

8. Mr. LAUTERPACHT was in favour of the provision in paragraph (a) being maintained, but only on condition that it was embodied in the preamble to article 12. That article was concerned with the special *compromis* to be concluded for a definite case arising from an earlier obligation to resort to arbitration. In view of the general and solemn nature of that commitment it would be both unnecessary and dangerous to repeat it, unless in the form of a clause in the preamble. Otherwise the implication might be that, in order to be valid in a definite case, the undertaking to resort to arbitration would have to be repeated in the special *compromis*. Furthermore, article 12 must be framed in such a way as to make its provisions applicable to an obligatory *compromis* imposed by an outside body on the parties.

9. Mr. el-KHOURI, speaking to a point of order, asked whether the Commission was in process of deciding in principle the kind of provisions to be inserted in article 12 for detailed formulation by the Standing Drafting Committee, or whether it was considering Mr. Yepes text as an alternative to articles 12 and 13 in the special rapporteur's draft.

10. Mr. KERNO (Assistant Secretary-General) pointed out that according to rule 90 of the rules of procedure of the General Assembly a motion was only considered as an amendment if it merely added to, deleted from or revised part of a proposal. If it envisaged the replacement of a proposal in its entirety, it was considered as a new proposal, to be discussed in order of submission unless decided otherwise.

11. Turning to the substance of paragraph (a), he expressed his agreement with Mr. Lauterpacht that it should be embodied in the preamble.

12. The purpose of Mr. Yepes' proposal was to make all the provisions relating to the conclusion of a *compromis* obligatory, and to enumerate them exhaustively. He submitted, however, that that could not be done, and that the enumeration should accordingly be prefaced by some form of words, such as those used in article 13 of the special rapporteur's draft, so as to make clear that it was not complete.

13. Mr. YEPES had hoped that his text would not give rise to a lengthy procedural debate. His intention had been simply to facilitate discussion and simplify the problem. His proposal did merely add to some parts of Mr. Scelle's draft and delete or revise others. Under rule 90 of the rules of procedure of the General Assembly, therefore, it was an amendment.

14. Mr. LIANG (Secretary to the Commission) said that it was imperative that the Commission should decide whether the substance of paragraph (a) should form part of the preamble or was a matter for confirmation by the parties or for negotiation when the special *compromis* was being drawn up.

15. Mr. LAUTERPACHT said that his views would be met if the introductory clause were re-drafted to read:

"The parties shall sign a *compromis* which, after affirming their obligation to submit their dispute to arbitration, shall specify:"

16. The CHAIRMAN ruled that, in view of the submission of Mr. Lauterpacht's amendment, discussion on the introductory clause to Mr. Yepes text was re-opened.

17. Mr. YEPES accepted Mr. Lauterpacht's amendment.

18. Mr. SCELLE said that the intent of the provision in paragraph (a) would not be entirely the same in all cases. If an earlier obligation to resort to arbitration existed, paragraph (a) would merely be a re-affirmation of an existing undertaking. That might perhaps be brought out in Mr. Lauterpacht's amendment.

19. Mr. LAUTERPACHT said that the form in which his amendment had been cast reflected the pre-occupation of the Commission with the case of a special *compromis* following a general undertaking to arbitrate. There would still have to be considered the case in which no special *compromis* was necessary, for the reason that its substance was embodied in the arbitration treaty itself.

20. Mr. AMADO said that Mr. Scelle's system of arbitration pre-supposed that the parties would no longer remain masters of the procedure. Partisans of that theory must define how the *compromis* was to be drawn up and what procedure was to be followed.

21. He supported Mr. Lauterpacht's amendment.

22. Mr. SCELLE pointed out that there was no such thing as "the Scelle system". In preparing his draft he had borrowed from a whole series of international instruments which had been in existence for years. He was merely trying to introduce some kind of order into the procedure to be followed.

23. He would wish to repeat at the present stage that a *compromis* might result from a prior general obligation to resort to arbitration, which might not even specify in any great detail the kind of dispute to which it would apply, or from a decision to submit an actual, specific dispute to arbitration. An example of the former was to be found in the recent treaty

concluded with the Government of the Federal Republic of Germany to replace the Occupation Statute.² That treaty contained a clause by which disputes arising from its interpretation or implementation were to be submitted to arbitration. At present no one could foresee what the nature of those disputes would be. The obligation was therefore assumed purely *in abstracto*. Should a dispute arise, the special *compromis* to be drawn up would determine the subject of the dispute and would contain a re-affirmation by the parties of their previous obligation to submit such a dispute to arbitration.

24. On the other hand, it was self-evident that where no previous obligation existed, it could not be reaffirmed, since in that event the obligation would derive from the *compromis* itself.

25. He recognized that one difficulty would arise later in the discussion, namely, whether parties should or should not be free to reduce the scope of an obligation previously entered into, and to submit only certain elements in a dispute to arbitration. As the Commission already knew, he strongly advocated that the parties should be bound to submit the whole subject-matter of the dispute to arbitration once they had entered into a general obligation to do so.

26. Mr. AMADO recalled that Mr. Scelle had stated at the previous meeting that his draft entailed a clean break with traditional procedure. Yet he now asserted that it contained nothing new.

27. Mr. SCELLE declined to retract either of his statements. The theories on which his draft were based had all been formulated by recognized authorities on international law and incorporated in treaties for many years past. In practice, however, the parties had often found ways of evading the implementation of the provisions in which those theories had found expression. To make it impossible for them to do so henceforward, a break with traditional practice had to be made.

28. Mr. KERNO (Assistant Secretary-General) suggested that, in order to meet all points made, Mr. Lauterpacht's amendment might be expanded to read :

“The parties having recourse to arbitration shall sign a *compromis* in which, after having re-affirmed their previous undertaking or affirmed their common desire to submit the whole subject-matter of the dispute between them to arbitration, they shall specify, *inter alia* :”

29. Mr. HUDSON felt that the suggested wording was unnecessarily cumbersome, and proposed that the preamble should read as follows :

“The parties having recourse to arbitration, either in pursuance of the previous agreement or otherwise, shall sign a *compromis* in which they shall specify, *inter alia* :”

² Convention on relation between the three Western Powers and the Federal Republic of Germany, 26 May 1952. Cmd. 8571, p. 4.

30. Mr. LAUTERPACHT asked whether the special rapporteur regarded it as necessary for the parties to sign a separate *compromis* in every case, for example, even in cases where they concluded an arbitration treaty in which they undertook to submit all disputes of a particular kind to arbitration and to set up an arbitral tribunal for the settlement of such disputes, and specified the various matters referred to in Mr. Yepes' draft.

31. Mr. SCELLE pointed out that no treaty of the type referred to by Mr. Lauterpacht could define the subject-matter of disputes which had not yet arisen ; it could only define what category of disputes were to be submitted to arbitration.

32. The CHAIRMAN pointed out that in a number of cases — for example, that of the boundary dispute between Colombia and Costa Rica and that of the boundary dispute between Panama and Costa Rica which had arisen out of it — no separate *compromis* had been drawn up other than what had been included in the arbitration treaty.³ He did not, however, understand Mr. Lauterpacht's difficulty with regard to such cases, since the wording proposed did not state that the parties should sign a separate *compromis*, but merely that they should sign a *compromis*. That *compromis* might take the form of part of the arbitration treaty, or it might be a separate instrument.

33. Replying to a question by Mr. LAUTERPACHT, Mr. SCELLE said that he preferred the wording suggested by the Assistant Secretary-General to that proposed by Mr. Hudson, because the words “or otherwise” in the latter were too vague. In view of the objections which had been raised to the phrase “the whole subject-matter”, he would, however, agree to those words being deleted from the wording suggested by the Assistant Secretary-General, since the point he was anxious to establish was covered in a subsequent article.

Subject to those words being deleted, the wording suggested by the Assistant Secretary-General was adopted by 8 votes to 2 with 1 abstention.

34. Mr. AMADO said that, although he had voted for the wording just adopted, since it had been Mr. Scelle's preference, he would have preferred that proposed by Mr. Hudson.

35. Mr. LAUTERPACHT said that he reserved the right to propose in the Standing Drafting Committee the insertion of the words “unless already contained in the treaty of arbitration”.

36. Mr. HUDSON said that by adopting the wording suggested by the Assistant Secretary-General the Commission had seriously weakened article 1. If the parties were required to reaffirm an undertaking, that would necessarily cast doubts on the obligatory nature of the undertaking in the first place.

³ See A. M. Stuyt, *Survey of International Arbitration* (The Hague, Martinus Nijhoff, 1939), pp. 125 and 311.

37. The CHAIRMAN said that it might be possible for the Standing Drafting Committee to resolve satisfactorily the points raised by Mr. Lauterpacht and Mr. Hudson.

Paragraph (b) of text proposed by Mr. YEPES :

"The subject of the dispute, defined precisely and as clearly as possible."

Paragraph (b) was adopted by 5 votes to 1, with 4 abstentions.

Paragraph (c) of text proposed by Mr. YEPES :

"The choice of judges and the constitution of the Tribunal, if they have not previously done so, or if the Tribunal has not already been constituted in accordance with the foregoing provisions ;".

38. Mr. YEPES pointed out that paragraph (c) of his proposals repeated Mr. Scelle's draft word for word.

39. Mr. ZOUREK suggested that the word "judges" be replaced by the word "arbitrators", as used elsewhere in the text.

Mr. Zourek's suggestion was adopted by 8 votes to none, with 1 abstention.

40. Mr. ZOUREK also proposed that the words "in accordance with the foregoing provisions" be deleted.

41. Mr. KOZHEVNIKOV supported that proposal, and himself proposed that the words "by them" be inserted after the words "or if the tribunal has not already been constituted".

42. Mr. SCELLE could not agree to those proposals, which would preclude constitution of the tribunal by the International Court of Justice or a third Power.

43. Mr. KERNO (Assistant Secretary-General) asked whether that objection did not apply only to Mr. Kozhevnikov's proposal.

44. Mr. SCELLE said that Mr. Zourek's proposal introduced at any rate an element of doubt on that point. For that reason, he could not support it.

Mr. Kozhevnikov's proposal was rejected by 6 votes to 2, with 2 abstentions.

Mr. Zourek's proposal that the words "in accordance with the foregoing provisions" be deleted was adopted by 7 votes to none, with 2 abstentions.

45. Mr. HUDSON proposed that the words "if they have not previously done so, or" be deleted, since that contingency was covered by the words "if the tribunal has not already been constituted".

Mr. Hudson's proposal was adopted by 5 votes to none, with 2 abstentions.

46. Mr. HUDSON also proposed the deletion of the words "and the constitution of the tribunal".

Mr. Hudson's proposal was adopted by 6 votes to 1 with 2 abstentions.

47. Replying to a question by Mr. el-KHOURI, the CHAIRMAN stated that the phrase "the tribunal"

was to be understood *passim* as including the case of a single arbitrator.

The meeting rose at 11.40 a.m.

145th MEETING

Wednesday, 18 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhs Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33, A/CN.4/L.33/Add.1) (continued)

1-3. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46) contained in the special rapporteur's Second Report.

ARTICLES 12 AND 13 (continued)

Amendments submitted by Mr. YEPES (continued)

Paragraph (d)

4. The CHAIRMAN recalled that the Commission had been discussing Mr. YEPES' amendment to articles 12 and 13 paragraph by paragraph, and invited comments on paragraph (d), reading :

"The procedure to be followed or the authority conferred on the tribunal to establish its own procedure."

5. That paragraph corresponded to the words "the rules of procedure they may think fit to agree upon" in Mr. Scelle's draft.

6. Mr. YEPES explained that he had thought it preferable to indicate clearly that the parties could confer authority on the tribunal to establish its own procedure, if they so wished.

Paragraph (d) of Mr. Yepes' amendment was adopted by 9 votes to none, with 1 abstention.

Paragraphs (e) and (f)

7. The CHAIRMAN invited comments on paragraph (e) of Mr. Yepes' amendment, reading :

"Where the tribunal has several members, the number of judges constituting the quorum required for the tribunal to deliberate and take a valid decision ;"

8. There was nothing corresponding to that paragraph in Mr. Scelle's draft.

9. Mr. YEPES recalled that Mr. el-Khoury had drawn attention, in connexion with article 9, to the question of what was to happen if one member of a tribunal of three was absent.¹ In his view, a question which could have such important consequences ought to be determined in the *compromis* itself. As had been pointed out, the whole process of arbitration frequently foundered on what might appear to be minor points of procedure.

10. Mr. LAUTERPACHT asked what was the connexion between paragraph (e) of Mr. Yepes' amendment and paragraph (f), which read :

"Whether the tribunal may hold a valid session in the absence of one or more of its members or in the absence of one of the parties ;"

11. Mr. YEPES said that, as paragraph (f) covered the question he had wished to settle under paragraph (e), the latter could be deleted.

12. Mr. SCELLE agreed that it might be difficult, in certain cases, such as when it was composed of only three arbitrators, to decide whether the tribunal should continue to sit in the absence of one of them. However, since the tribunal was being entrusted with responsibility for adjudicating on the substance of the dispute, confidence could surely be placed in it to decide the procedural questions referred to in paragraph (e) and (f) of Mr. Yepes' amendment.

13. Moreover, the Commission had already decided, in article 9, that in the event of the withdrawal of one arbitrator the remaining members of the tribunal should, at the request of one of the parties, be empowered to continue the proceedings and render the award. It would be contradictory to that provision to give the parties power to impose a different procedure in the *compromis*.

14. He therefore felt that both paragraph (e) and paragraph (f) should be deleted.

15. Mr. KOZHEVNIKOV said that, whatever might be their relation to articles already adopted by the Commission, paragraphs (e) and (f) of Mr. Yepes' amendment were perfectly in accordance with the basic principles of international law.

16. Mr. ZOUREK recalled that it had been made clear

that the draft articles were intended to apply to cases where the obligation to have recourse to arbitration referred to a particular dispute (*arbitrage occasionnel*), as well as to cases where it resulted from a general agreement. In cases of the first kind, he could not imagine its being left to the tribunal to determine the important questions referred to in paragraphs (e) and (f) of Mr. Yepes' amendment. Those questions should be determined in the *compromis*.

17. Mr. LAUTERPACHT saw no connexion, and hence no possibility of conflict, between article 9 already adopted and paragraph (e) of Mr. Yepes' amendment, which dealt with the simple question of the quorum for the conduct of proceedings. A rule governing that question was a necessity for every formally constituted body. The only point at issue was whether such a rule should be included in the *compromis* or left to the tribunal itself to lay down.

18. After further discussion, Mr. HUDSON suggested that in any case paragraph (e) and (f) needed rearranging, since the question of a quorum for the ordinary day-to-day conduct of proceedings was quite distinct from that of the number of votes required for the rendering of an award by the tribunal. He therefore proposed that paragraphs (e) and (f) of Mr. Yepes' amendment be themselves amended to read as follows :

"(e) If the tribunal has several members, the number of members constituting a quorum for the conduct of the proceedings ;

"(f) The number of members constituting the majority required for a judgment of the tribunal ;"

19. Mr. LAUTERPACHT said that he could vote in favour of paragraph (e) as proposed by Mr. Hudson, but that he personally understood the words "conduct of the proceedings" to cover all stages of the proceedings, including the making of the award.

20. Mr. SCELLE agreed with Mr. Lauterpacht that the words "conduct of the proceedings" covered the making of the award. He would point out to the Commission, however, that if it adopted either of the paragraphs proposed by Mr. Hudson it would make it possible for one party to the dispute to bring about a breakdown of the arbitration procedure, notwithstanding all the elaborate precautions which had been taken in the previous articles to preclude that possibility. In other words, it would be giving legal sanction to the second advisory opinion — which he regarded as indefensible — of the International Court of Justice in the case of the interpretation of the peace treaties with Bulgaria, Hungary and Romania.²

21. Mr. LAUTERPACHT said that Mr. Scelle had drawn attention to an important and valid objection to the proposed clauses. On the other hand, the question of the quorum should, in his (Mr. Lauterpacht's) view, be settled in the *compromis*.

¹ See summary record of the 142nd meeting, para. 79.

² Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950, p. 221.

22. Mr. FRANÇOIS proposed that the words "without prejudice to the provisions of article 9, paragraph 3," be inserted at the beginning both of paragraph (e) and of paragraph (f) as proposed by Mr. Hudson.

Mr. François' proposal was adopted by 6 votes to 5.

Paragraph (e) of Mr. Yepes' amendment, in the form proposed by Mr. Hudson, was adopted, as amended, by 7 votes to 3, with 1 abstention.

Paragraph (f) of Mr. Yepes' amendment, in the form proposed by Mr. Hudson, was adopted, as amended, by 6 votes to 2, with 1 abstention.

Paragraph (g)

23. The CHAIRMAN invited comments on paragraph (g) of Mr. YEPES' amendment, which read:

"The law and principles by which the decisions of the tribunal must be guided: whether it is strictly bound by existing law or whether, on the contrary, it may adjudicate *ex aequo et bono* or as an *amiable compositeur*;".

24. Mr. Hudson had submitted to the Chair an alternative proposal to the effect that paragraph (g) should simply read:

"The principles of law to be applied by the tribunal;".

25. Mr. SCELLE withdrew the wording he had used in his original draft in favour of that proposed by Mr. YEPES.

26. Mr. LAUTERPACHT recalled that at the 143rd meeting he had explained in some detail his objections to the text proposed by Mr. Scelle.³ Much the same objections applied to the wording proposed by Mr. YEPES. His main objection was to providing that the parties could ask the tribunal to act as an *amiable compositeur*, which was a purely political way of settling a dispute. On the other hand, it seemed reasonable to permit them to ask the tribunal to adjudicate *ex aequo et bono*: that would be in accordance with prevailing practice; moreover, there seemed no reason why the tribunal should in that respect be placed in a position different from that of the International Court of Justice. The parties should, however, also be permitted, if they so wished, to request the tribunal to make recommendations, in addition to the binding award based on law, for settlement of the dispute. Recommendations by the arbitral tribunal had greatly contributed, for example, to the satisfactory and statesmanlike settlement of the Behring Sea Fisheries dispute and to that of the North Atlantic Fisheries Case between Great Britain and the United States.⁴

27. He therefore proposed that paragraph (g) be amended to read:

"The law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono* and to make recommendations;".

³ See summary record of the 143rd meeting, paras. 40 to 44.

⁴ Award of 17 December 1897; award of 7 September 1910.

28. Mr. HUDSON said that he would have no objection to mentioning the power to adjudicate *ex aequo et bono*, if that was thought necessary, although it seemed to him that it was covered by the wording he himself had proposed. He agreed with Mr. Lauterpacht that it should not be possible for the parties to request the tribunal to act as an *amiable compositeur*, but felt that the question of recommendations should preferably be dealt with in paragraph (i).

29. Mr. LAUTERPACHT agreed that the question of recommendations should be dealt with in paragraph (i), and therefore withdrew the last four words of the text he had proposed.

30. Mr. KOZHEVNIKOV pointed out that paragraph (i) dealt with the form of the judgment; the question of recommendations would be better dealt with in paragraph (g). Unlike Mr. Lauterpacht, he considered that the parties should be able to request the tribunal to act as an *amiable compositeur*.

31. The CHAIRMAN pointed out that Mr. Lauterpacht had already agreed to delete any reference to recommendations from his proposed text.

32. Mr. HUDSON said that he could accept Mr. Lauterpacht's proposal provided the words "the principles of law" were substituted for the words "the law". In the "Alabama" Claims case, for example, the principles of law to be applied by the tribunal had been specified in the *compromis*.⁵

33. Mr. SCELLE pointed out that article 20 of his draft provided that if the *compromis* contained no relevant provision, the tribunal, in its decision, should apply the substantive rules set forth in Article 38 of the Statute of the International Court of Justice. On further consideration, and in the light of private discussion with other members of the Commission, especially Mr. Lauterpacht, he now felt that those rules should be applied in every case. It was not the rôle of the tribunal or of the parties to make the law. The "Alabama" Claims case had been quite exceptional and in his opinion did not constitute a precedent.

34. Mr. LAUTERPACHT said that the question under consideration was fundamental. He would therefore deplore its being disposed of hastily. He did not understand how Mr. Hudson could argue from the *compromis* in the "Alabama" Claims case that the expression "the principles of law" should be used in preference to "the law". The provisions in the *compromis* to which Mr. Hudson had referred were usually known as the Three Rules of Washington; they were not principles, but rules of law.

35. Mr. YEPES said that, in referring to "principles" in the text which he had himself proposed, he too had had in mind the Three Rules of Washington. He was convinced that it was necessary to state in the

⁵ "Alabama" claims between Great Britain and the United States; award of 8 May 1871.

compromis the principles of law by which the tribunal was to be guided. The aim of arbitration was the settlement of disputes on the basis of respect for law. But the question arose, which law? In his view, the law which was to be applied could be law not yet existing. For that reason it was essential that the *compromis* should state the principles of law which were to apply.

36. Mr. SCELLE said that the practice followed in the "Alabama" Claims case had been absolutely extra-juridical. For, had the dispute been between two other States, the Three Rules of Washington would have been quite different. He could not agree that international law should vary with the nationality of the parties; in his view, it must be supra-national in character. If it were to be restricted merely to what the parties to each dispute could accept, the Commission's work would have no meaning.

37. The CHAIRMAN said that he would put Mr. Hudson's proposal to the vote first.

Mr. Hudson's proposal was rejected by 6 votes to 2, with 3 abstentions.

Mr. Lauterpacht's proposal, as amended by himself, was adopted by 9 votes to 1, with 1 abstention.

Paragraph (h)

38. The CHAIRMAN invited the Commission to consider paragraph (h) of Mr. Yepes' amendment, which read:

"whether the tribunal may impose such provisional or conservatory measures as are required by the circumstances".

39. Mr. HUDSON proposed an alternative text, to read:

"whether the tribunal may indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the parties".

40. The Commission would note that he had borrowed the operative part of that wording from Article 41, paragraph 1, of the Statute of the International Court of Justice, but had substituted the words: "the parties" for the words "either party".

41. Mr. SCELLE explained that he had not inserted such a provision at that point in his draft, but had related it to the procedure of the tribunal, as he considered it to be self-evident that it was the inherent right of a tribunal to indicate provisional measures. That was something that was entirely independent of the will of the parties, and therefore had no place whatsoever in the *compromis*.

42. Mr. LAUTERPACHT agreed with Mr. Scelle and proposed that paragraph (h) be deleted. The imposition of interim measures was solely within the competence of the tribunal, and was dealt with in article 26 of the special rapporteur's draft. By using the word "prescribe", and not the word "indicate", in Article 2, paragraph 2, already adopted, the Commission had

already endorsed Mr. Hudson's view expressed in the second edition of his book "The Permanent Court of International Justice" that, when the Permanent Court indicated interim measures, those measures imposed a legal obligation on the parties.

43. Mr. YEPES suggested that Mr. Scelle's argument was equally applicable to article 26 in the draft arbitration procedure, the only difference being that he (Mr. Yepes) wished the provision to be included in the article on the *compromis*, since if that were not done the parties might contest the right of the tribunal to impose such measures.

44. Mr. AMADO pointed out that if the tribunal's power to indicate interim measures was as self-evident as Mr. Scelle thought, Article 41 of the Statute of the Court must be redundant.

45. Mr. SCELLE said that it was sometimes necessary to state the obvious, but that must be done in the right place. To make the power of the tribunal to indicate interim measures dependent on the parties would be tantamount to allowing them to withdraw the case during the proceedings, which was, of course, unthinkable.

46. Mr. AMADO could not subscribe to Mr. Scelle's general tendency to regard the parties as suspect, and the arbitrators as paragons of virtue and honesty.

47. Mr. SCELLE said that it was a natural tendency for parties to a dispute to be more concerned with protecting their interests than with maintaining the law.

48. Mr. AMADO pointed out that arbitration had a very honourable history.

49. Mr. SCELLE said that he would only be prepared to meet Mr. Yepes' view if a provision was inserted in article 12 stating that the parties must always recognize in the *compromis* the right of an arbitral tribunal to impose interim measures.

50. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that paragraph (h) be deleted.

Mr. Lauterpacht's proposal was adopted by 6 votes to 5.

51. Mr. el-KHOURI explained that he had voted for the deletion of paragraph (h) because he favoured the subject-matter being dealt with in article 26 of the special rapporteur's draft.

Paragraph (i)

52. The CHAIRMAN invited the Commission to consider paragraph (i) of Mr. Yepes text, which read:

"the form and time-limits in which the judgment must be delivered, provisions regarding the enforcement of the judgment and possible appeals against it".

53. Mr. HUDSON proposed an alternative text for paragraph (i), to read:

"the form of the judgment to be given by the tribunal and any recommendations which it may present to the parties".

54. Mr. LAUTERPACHT did not clearly understand what Mr. Hudson meant by "the form of the judgment" or what Mr. Yepes meant by "the enforcement of the judgment".

55. He attached importance to the *compromis* stipulating time-limits within which the judgment was to be delivered, and also to the inclusion of provisions in article 12 relating to appeal and revision. The latter two questions had been troubling international legal opinion for the last twenty years, ever since the case of the Hungarian Optants.

56. Mr. YEPES explained that he had included the clause on the enforcement of the judgment to ensure that the tribunal indicated how the award was to be carried out.

57. Mr. SCELLE observed that the last two chapters of his draft procedure dealt with revision and remedies. He queried whether such provisions should rightly find their place in an article on the *compromis*, since they were not matter for the parties to decide. As to the question of enforcement, he would point out to Mr. Yepes that an international arbitral award was never executory in nature.

58. Paragraph (i) seemed to confer upon the parties rights which properly belonged to the tribunal. He could not therefore support it.

59. Mr. LAUTERPACHT said that it was not entirely clear whether the special rapporteur was in favour of retaining certain elements from paragraph (i).

60. It was the problems of appeal and revision which, in the light of experience, gave the entire question of arbitral procedure its topical and urgent character, and the Commission must take the greatest care when considering paragraph (i) to avoid any decision which might obstruct development in that respect.

61. Mr. SCELLE agreed with Mr. Lauterpacht about the importance of appeal and revision, but re-affirmed his conviction that provisions relating to either could not be made contingent on the will of the parties. He accordingly proposed the deletion of the whole of paragraph (i).

62. Mr. Hudson's amendment was interesting, but would find its true place farther on in the draft, as it had no relation whatsoever to the *compromis*.

63. Mr. LAUTERPACHT then proposed an alternative text for paragraph (i) to read :

"the time limits within which the award must be rendered, the form of the award and any power given to the tribunal to make recommendations and, subject to articles 38 to 41, any special provisions in the matter of appeal and revision".

64. Mr. LIANG (Secretary to the Commission) also found difficulty in comprehending what exactly was meant by "the form of the judgment".

65. Mr. YEPES referred the Secretary to paragraph 16, section (8) of the memorandum on arbitral procedure prepared by the Secretariat (A/CN.4/35).⁶

66. Mr. LIANG (Secretary to the Commission) pointed out that, as a draft convention would not contain the explanations given in the paragraph mentioned by Mr. YEPES, something more precise was needed.

67. Mr. HUDSON observed that in two recent cases submitted to arbitration, one judgment had been couched in the form of a conclusion and the other had been accompanied by carefully reasoned arguments. That was the sort of thing he had in mind when he spoke of the form of a judgment.

68. As to time-limits, they had in the past been more often disregarded than observed and had given rise to great difficulties.

69. Mr. SCELLE, referring to the second paragraph of article 13 in his draft, which stipulated that the arbitrator or the tribunal should be bound by the procedural provisions of the *compromis* only in so far as they proved compatible with the proper exercise of his or its function, pointed to the danger of including in the *compromis* provisions with which the tribunal might find it impossible to comply. It would be appropriate for certain conditions concerning the form of the judgment to be imposed on the tribunal in a general instrument such as that contemplated by the Commission, but it would be quite inappropriate for the parties to prescribe that imposition.

70. Referring to Mr. Lauterpacht's amendment, he asked whether there was any need to empower a tribunal to make recommendations. A tribunal was always free to do so.

71. Mr. LAUTERPACHT pointed out that it was not the normal function of an arbitral tribunal to make recommendations.

72. Mr. SCELLE observed that if a tribunal could not make an award it would be bound to put forward recommendations.

73. The CHAIRMAN put to the vote Mr. Scelle's proposal that paragraph (i) be deleted in its entirety.

Mr. Scelle's proposal was rejected by 7 votes to 2, with 2 abstentions.

74. Mr. KOZHEVNIKOV said that as Mr. Lauterpacht's text was of some complexity, he would like to have an opportunity of studying it carefully before pronouncing upon it. He accordingly requested that the text be translated into Russian for him and that in the meantime the vote thereon be deferred.

75. The CHAIRMAN acceded to Mr. Kozhevnikov's request.

⁶ It read as follows: "16. A *compromis* should include certain items: ... (8) The form in which the award should be presented, the method by which it is determined, and the extent of its obligation (e.g. as to revision, if any) should be stated, and provision, if any, as to its execution;".

Paragraph (j)

76. The CHAIRMAN invited the Commission to consider paragraph (j) of Mr. Yepes' amendment, which read :

" finally, the place where the tribunal shall meet, the date of its installation and the language to be used ".

77. Mr. HUDSON proposed two alternative clauses to replace paragraph (j), to read :

" (j) the place where the tribunal shall meet and the date of its first meeting.

" (k) the languages to be employed in the proceedings before the tribunal."

Mr. Hudson's texts were adopted unanimously.

78. Mr. ZOUREK asked whether article 12 should not include a provision relating to costs.

79. Mr. SCELLE said that he would have no objection, since it was clearly a matter for the decision of the parties.

80. Mr. HUDSON considered that a provision on the functions of the umpire might also be included in the article relating to the *compromis*. The question was how far an umpire could participate in the proceedings, and how far he could go in establishing whether there was a difference of view between two national arbitrators.

81. The CHAIRMAN invited the preceding speakers to consult together and prepare texts on those two points for possible inclusion in article 12.

The meeting rose at 1.5 p.m.

146th MEETING

Thursday, 19 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsy Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary

General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L. 33 and Add. 1 and 2) (continued)

ARTICLE 12 (continued)

Mr. Zourek's proposal for an additional paragraph

1. The CHAIRMAN announced that, in accordance with his suggestion at the preceding meeting,¹ Mr. Zourek had submitted a proposal for an additional paragraph to article 12, to read :

" the way in which costs and expenses shall be divided ".

2. Mr. SCELLE supported Mr. Zourek's proposal.

Mr. Zourek's proposal was adopted unanimously.

Amendment to paragraph (i) of Mr. Yepes' text for article 12 (resumed from the previous meeting)

3. The CHAIRMAN invited the Commission to resume its consideration of Mr. Lauterpacht's amendment to paragraph (i) of Mr. Yepes' text, a decision on which had been deferred at the request of Mr. Kozhevnikov to enable a Russian translation to be prepared.²

4. Mr. KOZHEVNIKOV said that the words " subject to articles 38 to 41 " seemed to suggest that those articles had already been adopted, whereas in fact they had not yet been discussed. He would therefore propose that they be deleted pending the decision on the articles in question.

5. Mr. HSU said that the adoption of Mr. Lauterpacht's text as it stood would not give rise to any difficulty, since there was nothing to prevent the Commission from making a consequential amendment to it should articles 38 to 41 not be adopted.

6. Mr. SCELLE said that, as he had already explained, he was not greatly in favour of Mr. Lauterpacht's amendment, since it would require the parties to take decisions on matters which were not within their discretion. For example, a tribunal should not be compelled to observe the time-limits laid down in the *compromis*, as there might be very good reasons for its being unable to do so. He would accordingly suggest that the word " must " be replaced by the words " ought to ", after the word " award ".

7. Again, appeal and revision did not depend solely on the will of the two parties, and it would be impossible to argue that it was open to them to prohibit both of the two processes in the *compromis*. The possibility of revision was inherent in any judicial settlement.

¹ See summary record of 145th meeting, para. 78.

² *Ibid.* paras. 52—75. For Mr. Lauterpacht's text, see para. 63.

8. Mr. LAUTERPACHT did not consider that there was any fundamental disagreement between Mr. Scelle and himself. He too was convinced that the parties must not be given the power to make appeal or revision impossible, and he assumed that articles 38 to 41 would establish the absolute right of a party to demand revision. Nevertheless, he saw no reason why the parties should not have some latitude in laying down certain procedural details, such as the time-limit within which a new fact might be brought to light.

9. The only reason why he had inserted a provision on time-limits was that the parties might not find lengthy procedures acceptable. It was customary to make such stipulations in the *compromis*.

10. Mr. SCELLE said that, in the light of Mr. Lauterpacht's explanations, he would accept the text, provided his amendment were adopted, and on condition that the words "procedure for" were inserted after the words "in the matter of".

11. Mr. LAUTERPACHT accepted Mr. Scelle's amendments.

12. The CHAIRMAN said that the word "appeal" which had been translated into French by the word "*recours*", might give rise to difficulties, since the latter expression and its Spanish equivalent "*recurso*" denoted a whole range of legal remedies, and was not so restrictive as the term "appeal".

13. Mr. KERNO (Assistant Secretary-General) suggested that the difficulty be referred to the Standing Drafting Committee.

14. In answer to a question by Mr. YEPES, Mr. LAUTERPACHT said that he was using the word "revision" in its widest sense.

15. Mr. YEPES said that there was a variety of remedies which the parties might seek to obtain. For example, they might wish to stipulate in the *compromis* that a challenge of the validity of the award might be submitted to the International Court of Justice.

16. The CHAIRMAN suggested that Mr. YEPES' doubts might be allayed by the addition of the words "and other legal remedies" at the end of Mr. Lauterpacht's text.

17. Mr. KOZHEVNIKOV said that appeal and revision raised fundamental problems of principle. How, for example, was an appeal to be lodged and before what instance? Would it require the additional consent of the other parties? He did not think that a provision on such matters could be voted upon without mature consideration.

18. Mr. YEPES maintained that some provision must be inserted in article 12 that would enable one party to refer its challenge of an arbitral award to the International Court of Justice.

19. Mr. LAUTERPACHT pointed out that such an eventuality would be covered by the Chairman's

proposed wording "and other legal remedies". The present moment did not seem to him the appropriate time for detailed consideration of the distinction to be made between appeal and revision, a question which probably belonged properly to articles 38 to 41 of the special rapporteur's draft.

20. The CHAIRMAN said that he would put to the vote Mr. Lauterpacht's text with the amendments accepted by the author, the words "subject to articles 38 to 41" being deleted pending the Commission's decision on those articles. The text would accordingly read:

"the time limits within which the award ought to be rendered, the form of the award and any power given to the Tribunal to make recommendations, and any special provisions in the matter of procedure for revision and other legal remedies;"

That wording was adopted by 7 votes to 1, with 1 abstention.

Mr. Lauterpacht's proposal for an additional paragraph

21. The CHAIRMAN invited the Commission to consider Mr. Lauterpacht's proposal for the addition of a new paragraph to article 12, to read:

"the time limits and the order of the pleadings and of the communication of documents and other evidence; provisions, in such detail as the parties may determine, of the nature and the manner of evidence submitted to the tribunal; the allocation of costs and fees; and the appointment of agents and counsel;"

22. Mr. LAUTERPACHT deleted the words "the allocation of costs and fees" from his amendment, in view of the adoption of Mr. Zourek's proposal for an additional paragraph to article 12.³

23. Mr. YEPES proposed the deletion of the words "the time limits . . . and other evidence".

24. Mr. LAUTERPACHT accepted Mr. YEPES' proposal.

Mr. Lauterpacht's text, as amended, was adopted by 8 votes to 2, with 1 abstention.

Mr. Lauterpacht's amendment to the introductory paragraph to article 12

25. The CHAIRMAN drew the attention of the Commission to Mr. Lauterpacht's amendment to the introductory paragraph to article 12, which amendment read:

"The treaty of arbitration or a special *compromis* to be concluded in pursuance thereof shall specify:"

26. Mr. LAUTERPACHT apologized for re-opening the discussion on the introductory paragraph to article 12, which had already been adopted.⁴ He did so because it seemed to him that the Commission had

³ See above, paras. 1 and 2.

⁴ See summary record of the 144th meeting, paras. 1—33.

become entangled in a terminological confusion, which might render the whole draft incomprehensible, by speaking of the conclusion of a special *compromis* as if that were the only means of acceptance by the parties of the provisions enumerated in article 12. He wished to point out that, in the majority of cases, such provisions were included in the treaty of arbitration itself. To require the parties to sign an additional *compromis* in such cases would be wholly unnecessary and confusing. In his amendment, he had also tried to meet Mr. Scelle's view that, if there were no prior *compromis* , there was an obligation on the parties to conclude one.

27. Mr. HUDSON failed to see the purpose of Mr. Lauterpacht's amendment. How could a general treaty of arbitration specify the subject of a future dispute?

28. Mr. LAUTERPACHT pointed out that treaties of arbitration fell into two categories, those concerning possible future disputes, which were therefore indeterminate, and those concluded for the settlement of a particular dispute.

29. Mr. AMADO said that, in the case of the first type, a special *compromis* was essential in order to safeguard what, in his view, was crucial to arbitration, namely, the freedom of the parties to choose their judges. Unless Mr. Lauterpacht could give a more convincing explanation of the necessity for his amendment, he would be compelled to abstain when it was put to the vote.

30. Mr. el-KHOURI also saw no necessity for Mr. Lauterpacht's amendment. Both kinds of treat to which he (Mr. Lauterpacht) had referred were covered in the introductory paragraph to article 12 already adopted by the Commission.

31. Mr. YEPES regretted that he could not support Mr. Lauterpacht's amendment, but he was unable to see what purpose it would serve. The text already adopted was clear, and faithfully reflected the intention of the Commission.

32. Mr. KOZHEVNIKOV remained unconvinced of the necessity for re-affirming a prior obligation, as was stipulated in the introductory paragraph already adopted.

33. Mr. HSU supported Mr. Lauterpacht's amendment, which had the advantage of eliminating certain unsatisfactory elements which occurred in the text already adopted, such as the words "shall sign a *compromis* ", and the weakening proviso concerning the re-affirmation of a prior obligation.

34. Mr. SCELLE suggested that the Commission was wasting its time unnecessarily. As it had reached fundamental agreement on the introductory paragraph to article 12, it might refer the two texts before it to the Standing Drafting Committee.

35. Mr. FRANÇOIS supported Mr. Scelle.

36. The CHAIRMAN, speaking in his personal

capacity, said that he fully understood the reason why Mr. Lauterpacht was anxious to draw attention to the fact that, where a special treaty had been concluded for the submission of a dispute to arbitration, no special *compromis* would be necessary. He agreed that the text already adopted might give rise to doubts by giving the *impression* that a special *compromis* would always be necessary.

37. Mr. HUDSON proposed the following alternative wording for the text already adopted:

"Unless there is a treaty of arbitration which suffices for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify :".

38. Mr. LAUTERPACHT said that that wording would fully meet his point. He hoped that Mr. Hudson would now admit that his (Mr. Lauterpacht's) objections had not been purely of a drafting order, and that he had had valid grounds for attempting to eliminate the inherent contradiction in the wording of the preamble to article 12 as already adopted by the Commission.

39. Mr. SCELLE asked whether Mr. Hudson could agree to the substitution of the words "an obligation to arbitrate" for the words "a treaty of arbitration" since that obligation could result from an instrument other than a treaty of arbitration.

40. The CHAIRMAN suggested that Mr. Hudson's amendment be referred to the Standing Drafting Committee for consideration in the light of Mr. Scelle's remarks.

The Chairman's proposal was adopted by 8 votes to none.

Article 12, as a whole, and as amended, was adopted by 7 votes to none, with 4 abstentions.⁵

⁵ Article 12, as tentatively adopted, read as follows :

"The parties having recourse to arbitration shall sign a *compromis* in which, after having reaffirmed their obligation previously undertaken, or affirmed their common desire to submit the dispute between them to arbitration, they shall specify in particular :

- (a) the subject of the dispute, defined precisely and as clearly as possible ;
- (b) the choice of arbitrators, if the tribunal has not already been constituted ;
- (c) the procedure to be followed or the authority conferred on the tribunal to establish its own procedure ;
- (d) without prejudice to the provisions of Article 9, paragraph 3, if the tribunal has several members, the number of members constituting a quorum for the conduct of the proceedings ;
- (e) without prejudice to the provisions of article 9, paragraph 3, the number of members constituting the majority required for a judgment of the tribunal ;
- (f) the law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono* ;
- (g) the time limits within which the award ought to be rendered, the form of the award and any power given to the Tribunal to make recommendations, and any special provisions in the matter of procedure for revision and other legal remedies ;
- (h) the place where the tribunal shall meet and the date of its first meeting ;

ARTICLE 15⁸

41. The CHAIRMAN invited the Commission to consider article 15 in the special rapporteur's draft (Annex to document A/CN.4/46).

42. Mr. SCELLE said that the purpose of the article was self-evident.

43. Mr. FRANÇOIS proposed the deletion of article 15, which seemed to him entirely superfluous.

44. Mr. AMADO and Mr. LAUTERPACHT supported Mr. François' proposal.

45. Mr. SCELLE said that he would have no objection to the deletion of article 15.

Mr. François' proposal that article 15 be deleted was adopted by 7 votes to none, with 1 abstention.

ARTICLE 16⁹

46. Mr. HUDSON pointed out that the terms "claimant" and "respondent" had not been used before in the draft, and would need clarification. He also had doubts about the substance of article 16. The rule in the International Court of Justice was that discontinuance of proceedings by one party could be accepted by the tribunal without the other party's consent, provided the latter had up to that time taken no step in the proceedings; once it had taken some step, its — at least tacit — consent was required. In his view, that distinction should be preserved.

47. Mr. el-KHOURY felt that the parallel with the International Court of Justice was not valid. In the case of arbitration both parties had agreed to have recourse to a certain procedure, and it was logical that the consent of both should be required before that procedure could be discontinued. On the other hand, he agreed with Mr. Hudson that the use of the terms "claimant" and "respondent" was inappropriate in referring to arbitration.

48. Mr. AMADO fully agreed with the substance of article 16.

(i) the languages to be employed in the proceedings before the tribunal;

(j) the way in which the costs and expenses shall be derived;

(k) provisions, in such detail as the parties may determine, of the nature and the manner of evidence submitted to the tribunal, and the appointment of agents and counsel."

Alternative text of preamble referred to Standing Drafting Committee:

"Unless there is a treaty of arbitration which suffices for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify:"

⁸ Article 15 read as follows:

"Once the tribunal has received the submissions of the parties, it must continue the proceedings until an award is made."

⁹ Article 16 read as follows:

"Discontinuance of proceedings by the claimant may not be accepted by the tribunal without the respondent's consent."

49. The CHAIRMAN suggested that it be left to the Standing Drafting Committee to find appropriate substitutes for the terms "claimant" and "respondent".

On that understanding, article 16 was adopted by 8 votes to 2, with one abstention.

ARTICLE 17⁸

50. Mr. LAUTERPACHT proposed the deletion of the second sentence from article 17.

51. Mr. SCELLE said that he could accept that proposal, since the sentence in question did not essentially affect the arbitration procedure he was trying to crystallize.

52. Mr. KERNO (Assistant Secretary-General) pointed out that Article 103 of the Charter already provided that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail.

Mr. Lauterpacht's proposal was unanimously adopted.

Article 17 was adopted, as amended, by 9 votes to none.

ARTICLE 18⁹

53. Mr. LAUTERPACHT proposed that the words "after verifying its good faith and validity" be deleted, and that a new sentence be added reading:

"At the request of the parties it shall embody the settlement in an agreed award."

54. There was no need for him to comment on the deletion he proposed, but the sentence which he proposed be added was in accordance with normal practice in several countries, where the agreement reached by the parties was given added authority by being embodied by the tribunal in what was known as an "agreed award".

55. Mr. SCELLE said that he could agree to the sentence which Mr. Lauterpacht proposed be added to article 18, but that the tribunal could not be asked to confer its authority on a settlement which it had not been given an opportunity of scrutinizing, at least to the extent of ensuring that it did constitute a real settlement of the dispute and did not conflict with the rights of third parties affected by it.

56. It must be borne in mind that the settlement referred to in article 18 was of a special kind; it was

⁸ Article 17 read as follows:

"If the case is withdrawn from the tribunal by agreement between the two parties, the tribunal shall take note of the fact. Such withdrawal shall be without prejudice to the provisions of Chapter VI of the United Nations Charter, and in particular of Articles 33 and 36."

⁹ Article 18 read as follows:

"The tribunal shall take note of the conclusion of a settlement between the parties, after verifying its good faith and validity."

a final settlement, binding on the parties. The tribunal was not merely the servant of the parties ; it also represented the common interest of the international community.

57. Mr. AMADO felt that Mr. Scelle was attempting to be too perfectionist. He would ask the English-speaking members of the Commission, however, whether the phrase "settlement between the parties" was an accurate translation of "*transaction d'expédition*".

58. Mr. SCELLE felt that Mr. Amado's question was extremely pertinent. He wondered, in fact, whether Anglo-Saxon law provided for a "*transaction d'expédition*", meaning an agreement between the parties which was given the force of law by the tribunal's approving it.

59. Mr. LAUTERPACHT said that "settlement between the parties" was a term which had a clear and definite meaning. Whether that meaning was exactly the same as what was meant in French by "*transaction d'expédition*", he could not say.

60. Mr. KOZHEVNIKOV said that article 18 again raised the general question of the nature of the arbitral award, and that he therefore felt obliged to restate his general views on the subject.

61. Article 18 clearly reflected the general trend of Mr. Scelle's draft, which appeared to be based on the curious assumption that one, at least, of the parties would be acting in bad faith. If that assumption were accepted, it followed that a certain procedure would have to be imposed on the parties, but to do so would be contrary to their sovereign rights and would make the tribunal a supra-national body whose powers might well extend to interference in the domestic affairs of sovereign States. Such a trend ran counter to the basic principles of international law.

62. It was surely a fundamental axiom of arbitration that the tribunal was made for the parties, and not the parties for the tribunal.

63. Article 18 clearly reflected the excessively dogmatic nature of Mr. Scelle's draft as a whole. The bad faith of the parties could not be taken as a basis for drawing up arbitration procedure. He therefore supported Mr. Lauterpacht's proposal that the words "after verifying its good faith and validity" be deleted.

64. Mr. AMADO pointed out that the English words "its good faith" were a mistranslation of the French words "*le caractère certain*".

65. Mr. FRANÇOIS pointed out that the English text of article 18 contained another error in translation, in that the words "*le cas échéant*" had not been translated ; they might be rendered in English by replacing "shall" by "may". Those words surely made the last clause of article 18 superfluous.

66. Mr. SCELLE feared that there was a basic difference of opinion on the substance of article 18. He had agreed to the deletion of article 15 because he

had thought it went without saying. If the idea was that, in the event of the parties concluding a settlement, the tribunal need have nothing further to do, he must resolutely oppose that idea, which was quite contrary to the basic purpose of his draft.

Further discussion of article 18 was deferred.

The meeting rose at 11.45 a.m.

147th MEETING

Friday, 20 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33, A/CN.4/L.33/Add.1) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46) contained in the special rapporteur's Second Report.

ARTICLE 18 (*continued*)

2. Mr. ZOUREK supported the first part of the amendment¹ proposed by Mr. Lauterpacht and seconded by Mr. Kozhevnikov at the previous meeting, which envisaged the deletion of the words "after verifying its good faith and validity". It appeared that that phrase was somewhat in contradiction with the substance of article 17. If a case could be withdrawn from the tribunal by agreement between the parties, why should a different procedure be provided for in the case of the

¹ See summary record of the 146th meeting, para. 53.

parties reaching agreement on the substance of the dispute?

3. However, he could see no convincing reason why the tribunal should be obliged to embody in an agreed award a settlement agreed upon by the parties. It had been suggested that greater authority needed to be given to any settlement concluded between the parties; but the competence itself of an arbitral tribunal depended wholly on the wishes of the parties to the dispute. The procedure proposed by Mr. Lauterpacht was comprehensible for domestic arbitration, where a "*jugement d'expédition*" transformed a private agreement between the parties into an authentic legal instrument with executive force, and also perhaps in the field of international commercial arbitration, provided the two parties agreed to it, since in many countries arbitral awards in that field had executive force by virtue of the 1927 Convention on the Execution of Foreign Arbitral Awards.² But in the field of international arbitration, which rested solely on the agreement of the parties, he did not see how a "*jugement d'expédition*" could add anything to a direct agreement between the parties. In such a case the whole aim of the arbitration, which was the settlement of a dispute between the parties, would have been achieved.

4. Mr. HSU said that in his view it was necessary to ensure that the settlement between the parties was a real one, but that he could understand why the words "good faith and validity" appeared objectionable. He suggested that article 18 be amended to read:

"If the terms of a settlement between the parties prove acceptable to the tribunal, it shall take note of them and, at the request of the parties, shall embody them in an agreed award."

5. Mr. SCELLE had not been convinced by Mr. Zourek's arguments, able as they were. He saw no contradiction between the clause in dispute and article 17. The parties could do one of two things: they could withdraw the case from the tribunal; alternatively, they could ask it to transform the settlement they had concluded into a "*jugement d'expédition*". But the tribunal could not be obliged to bestow the authority of a *res judicata* on a settlement which it had not been given an opportunity of scrutinizing.

6. Mr. KERNO (Assistant Secretary-General) said that the Commission appeared to be faced with two difficulties. One was that, if a settlement was concluded between the parties, it seemed unreasonable that the tribunal should be able to ignore that settlement and render its award notwithstanding; the other was that it seemed illogical for the tribunal to be compelled to give its sanction to a settlement which it did not approve. He felt that both those difficulties would be met if the words "after verifying its good faith and validity" were deleted, and the sentence "At the request of the parties it shall embody the settlement in an agreed award", proposed by Mr. Lauterpacht, added, both parts of the

sentence being at the same time made optional by the substitution of the word "may" for the word "shall".

7. Mr. LAUTERPACHT associated himself with the suggestion of the Assistant Secretary-General, which should, in his opinion, give full satisfaction to Mr. Hsu and Mr. Scelle.

8. Mr. HSU withdrew his amendment.

Mr. Lauterpacht's proposal that the words "after verifying its good faith and validity" be deleted was adopted by 8 votes to 2, with 1 abstention.

Mr. Lauterpacht's proposal for the addition of the sentence quoted above was adopted, as amended, by 7 votes to 1, with 3 abstentions.

Article 18 was adopted as a whole, as amended, by 8 votes to 1, with 2 abstentions.³

ARTICLE 19⁴

9. Mr. LAUTERPACHT proposed that article 19 be replaced by the following text:

"In the event of a dispute as to whether the tribunal has jurisdiction, the matter shall be settled by the decision of the tribunal."

10. Mr. AMADO had been particularly struck by the masterly way in which article 19 was drafted in Mr. Scelle's text. The article clearly established the principle that the tribunal possessed power to interpret the *compromis*. That principle was not clearly established in Mr. Lauterpacht's amendment, and for that reason he much preferred Mr. Scelle's original version.

11. Mr. YEPES agreed that Mr. Lauterpacht's draft of article 19 corresponded to only a part of Mr. Scelle's. The question of interpretation of the *compromis* was dealt with by Mr. Lauterpacht in a proposal which he had circulated as an amendment to article 21, and which read:

"The tribunal shall interpret the procedural provisions of the arbitration treaty or the *compromis*, in a manner most conducive to the expeditious and final settlement of the dispute through a binding award."

12. In his (Mr. Yepes) view, that way of dealing with the question was not so satisfactory as Mr. Scelle's.

13. Mr. LAUTERPACHT said that disputes concerning interpretation of the *compromis* could relate to many

³ Article 18, as tentatively adopted, read as follows:

"The tribunal may take note of the conclusion of a settlement between the parties. At the request of the parties, it may embody the settlement in an agreed award."

⁴ Article 19 read as follows:

"The arbitral tribunal as the judge of its own competence possesses the widest powers to interpret the *compromis*."

² Text in League of Nations *Treaty Series*, vol. 92, p. 301.

questions other than that of the competence of the tribunal, but that disputes relating to the latter issue had, particularly during the past fifty years, been so much more important than any other disputes arising out of interpretation of the *compromis* that it seemed to him that they should be dealt with separately. That had been done in the Statute of the International Court of Justice, on paragraph 6 of Article 36 of which his proposal for article 19 was modelled.

14. He had other objections, of a drafting nature, to Mr. Scelle's text for article 19. In the first place, he did not think that provisions intended for ultimate inclusion in a draft convention should contain parenthetical explanations, as the words "as the judge of its own competence" appeared to be. Secondly, the words "or the arbitration treaty" would have to be added after the words "to interpret the *compromis* ", unless the Chairman ruled, once and for all, that whenever the word " *compromis* " was used it was to be understood as referring to an arbitration treaty as well in cases where no special *compromis* was concluded.

15. The CHAIRMAN said that when the arbitration treaty did not specify all the points referred to in article 12 as adopted, "the *compromis* " should be understood to mean the special *compromis* drawn up.

16. Mr. el-KHOURI considered that article 19 should be split into two paragraphs, the first dealing with the question of competence, the second with that of interpretation of the *compromis* . The wording proposed by Mr. Scelle would give the arbitral tribunal powers to interpret the *compromis* even when the parties who had drawn it up agreed on its interpretation. If the parties agreed on the interpretation of the *compromis* , their interpretation should be accepted. He therefore proposed the following text to form the second paragraph of article 19:

"In case of disagreement between the parties as to the interpretation of the *compromis* , the tribunal's interpretation shall prevail."

17. Mr. KOZHEVNIKOV felt that article 19 dealt with two distinct questions of such importance that they should be discussed separately.

18. The CHAIRMAN agreed, and invited comments on the question of the competence of the tribunal.

19. Mr. HUDSON cited article 73 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, which merely stipulated that "the tribunal is authorized to declare its competence in interpreting the *compromis* ..." He thought that the question of the competence of the arbitral tribunal, in the sense of jurisdiction, should be omitted altogether from the text of article 19, which should merely affirm the power of the tribunal to interpret the *compromis* .

20. He accordingly proposed the following text:

"The tribunal possesses the power to interpret the *compromis* ."

21. Mr. KERNO (Assistant Secretary-General) felt that Mr. Lauterpacht's objections to the text proposed by

Mr. Scelle, which had been drafted in French, arose partly from the difficulty of translating into English what was, in French, an extremely elegant turn of phrase, and one that expressed the meaning precisely.

22. Mr. HSU suggested that Mr. Scelle's text be amended to read:

"The arbitral tribunal is the judge of its own competence and..."

23. Mr. ZOUREK agreed with Mr. Kozhevnikov that the two questions — namely, the competence of the tribunal and the interpretation of the *compromis* — should be dealt with in separate articles. For the former he proposed the following text:

"The competence of the arbitral tribunal is determined by the arbitration treaty, or by the *compromis* ."

24. The CHAIRMAN said that a fundamental question of principle must first be resolved, namely, whether the two elements in the special rapporteur's text for article 19, that of the competence of the tribunal and that of its power to interpret the *compromis* , should both be retained.

25. He put that question to the vote.

The Commission decided the question of principle in the affirmative by 9 votes to 2.

26. Mr. KOZHEVNIKOV proposed that the text relating to the competence of the tribunal read as follows:

"The arbitral tribunal constituted by agreement of the parties itself defines its competence".

27. The CHAIRMAN said that he would put to the vote the several proposals before the Commission except that submitted by Mr. Hudson, which sought to provide for only one of the two elements.

Mr. Zourek's proposal was rejected by 6 votes to 3, with 2 abstentions.

Mr. Kozhevnikov's proposal was rejected by 7 votes to 2, with 2 abstentions.

Mr. Lauterpacht's proposal was rejected by 5 votes to 3, with 3 abstentions.

28. Mr. AMADO said that the advantage of Mr. Scelle's text over Mr. Hsu's was that it merely noted a well-known and obvious fact, instead of purporting to establish it as a rule.

29. Mr. LAUTERPACHT expressed the hope that the special rapporteur would support Mr. Hsu's amendment. It was not the purpose of a convention to note facts, but to lay down legal rules.

30. The CHAIRMAN put Mr. Hsu's amendment to the vote.

Four votes were cast in favour of the amendment and 4 against, with 1 abstention. The amendment was accordingly rejected.

31. Mr. SCELLE said that he had abstained from the vote on Mr. Hsu's amendment since, as Mr. Amado had pointed out, it made for a slightly different meaning

from that which he himself had intended. It was because the tribunal was the judge of its own competence that it possessed the widest powers to interpret the *compromis*.

The original wording proposed by Mr. Scelle, down to the words "of its own competence", was adopted by 8 votes to 3.

32. The CHAIRMAN invited comments on the question of interpretation of the *compromis*. He recalled Mr. el-Khoury's proposal in that connexion.

33. Mr. KOZHEVNIKOV felt that the wording proposed by Mr. Scelle, which gave the tribunal the widest powers to interpret the *compromis*, went much too far. The tribunal would be an organ set up by agreement between the parties, and the right to interpret the *compromis* which they themselves had concluded ought to rest with them. He therefore proposed that the reference to the interpretation of the *compromis* be omitted altogether.

Mr. Kozhevnikov's proposal was rejected by 6 votes to 2, with 2 abstentions.

34. Mr. HUDSON proposed that the words "the widest powers" in Mr. Scelle's draft be replaced by the words "the general power".

35. The CHAIRMAN said that he would first put Mr. el-Khoury's proposal⁵ to the vote.

Mr. el-Khoury's proposal was rejected by 6 votes to 2, with 2 abstentions.

36. Mr. YEPES said that he had voted against Mr. el-Khoury's proposal, not because he disagreed with the principle underlying it, but because he preferred the simpler wording proposed by Mr. Scelle.

37. Mr. AMADO said that he had voted against Mr. el-Khoury's proposal because he considered that it should be the function of the tribunal constituted by the parties to interpret the *compromis*, and because the wording proposed by Mr. Scelle expressed that principle in the clearest way.

38. The CHAIRMAN then put Hr. Hudson's proposal to the vote.

Four votes were cast in favour of the proposal, and 4 against, with 2 abstentions. The proposal was accordingly rejected.

39. The CHAIRMAN said that as all the amendments proposed had been rejected he would put to the vote as a whole article 19 as proposed by Mr. Scelle.

Article 19, as proposed by Mr. Scelle,⁶ was adopted by 7 votes to 4.

40. Mr. el-KHOURI said that he had voted against the wording proposed by Mr. Scelle for article 19 because he could not support a text which would give the tribunal power to place a different interpretation on

the *compromis* drawn up by the parties from that upon which they themselves had agreed.

ARTICLES 20, 21 and 22⁷

41. Mr. LAUTERPACHT proposed that, as articles 20, 21 and 22 all dealt with the interpretation of the *compromis*, they should be taken together.

It was so agreed.

42. Mr. SCELLE said that he was not irrevocably wedded to his own text, in which he took no particular pride of authorship. He had sought to find a formula which would be generally acceptable on the very important issue of *non liquet*, about which legal opinion appeared to be divided. He was partisan to the view that in no circumstances could a tribunal bring in a finding of *non liquet* on grounds of the silence or obscurity of the law. If it did not give judgment it would be failing in its duty. As the Commission was aware, he also believed that a tribunal had the inherent right to judge in equity, on the basis of the general rules of law, and that it might, if necessary, assume to some extent the function of a legislator. Of course, his view might not be shared by all members, and it was for the Commission to pronounce upon what he considered to be one of the most important issues in the whole draft procedure.

43. One possibility must also be taken into consideration, that of a tribunal being unable to give judgment because one of the parties withheld some essential piece of evidence. If that occurred, the tribunal must be empowered to discontinue the proceedings and absolve itself from further responsibility.

44. In view of the adoption by the Commission of the provision which now formed paragraph (f) of article 12, and which read: "the law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono*", he withdrew the words "being in all cases empowered to judge in equity" from the second paragraph of article 20 of his draft.

⁷ Articles 20, 21 and 22 read as follows:

Article 20. "If the *compromis* contains no relevant provision, or in the absence of a *compromis* concluded by mutual agreement, the tribunal, in its decision, shall apply the substantive rules set forth in Article 38 of the Statute of the International Court of Justice.

'The tribunal, being in all cases empowered to judge in equity, may not bring in a finding of *non liquet* on the grounds of the silence or obscurity of international law or of the *compromis*.'

Article 21. "If the tribunal finds itself confronted with express and unequivocal provisions of the *compromis* likely to hinder it in its work, either with regard to the integrality of the dispute or to the conduct of the proceedings, it may overrule them, in particular, if an undertaking prior to, and more comprehensive than, the *compromis* is adduced by one of the parties and that party proves that it was its intention to refer to it."

Article 22. "If the *compromis* cannot be interpreted in this sense, or if failure to comply with procedural orders would prevent the tribunal from performing its functions, the tribunal should, before bringing a finding of *non liquet*, call upon the parties to modify the *compromis*, to obey the orders of the tribunal or explicitly to discontinue the proceedings."

⁵ See para. 16 above.

⁶ See text in footnote 4 above.

45. The CHAIRMAN drew the attention of the Commission to the alternative texts submitted by Mr. Lauterpacht for articles 20, 21 and 22, which read as follows:

"Article 20"

"If the treaty of arbitration or the *compromis* contain no relevant provisions in the matter of procedure these shall be framed by the tribunal in accordance with the exigencies of the case, any applicable provisions of the Statute and the Rules of the International Court of Justice, and general principles of law recognized by civilized States in the matter of procedure.

"Article 21"

"The tribunal shall interpret the procedural provisions of the arbitration treaty or the *compromis* in a manner most conducive to the expeditious and final settlement of the dispute through a binding award.

"Article 22"

"The Law to be applied by the Tribunal"

"Subject to any particular rules of law expressly agreed by the parties, the tribunal shall apply the rules of law laid down in Article 38 of the Statute of the International Court of Justice."

46. Mr. HUDSON proposed the following alternative text for article 20, first paragraph:

"Subject to any agreement between the parties on the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice."

47. There was hardly any need for him to point out that Article 38, paragraph 1, of the Statute of the International Court of Justice did not lay down any rules of law, but merely listed the sources of the law to be applied.

48. Mr. AMADO supported Mr. Hudson's proposal. Unfortunately, there were certain elements in Mr. Lauterpacht's text with which he could not agree. His wording for article 20 implied that the rules of the International Court of Justice would be subsidiary to the rules of procedure of the tribunal as laid down in the *compromis*. Nor did he see why the provisions relating to procedure in Chapter III of the Statute of the International Court should be applied to an arbitral tribunal, since rules intended for a judicial organ could hardly be satisfactorily applied in an arbitral tribunal, the structure and purpose of which were more restricted. Furthermore, the Commission had already decided, by adopting paragraph (c) of article 12, that the procedure to be followed or the authority conferred on the tribunal to establish its own procedure should be specified in the *compromis*. He therefore failed to understand why there was any need to refer to the rules of the International Court of Justice at all.

49. Mr. SCELLE had no objection to Mr. Hudson's text.

50. Mr. AMADO welcomed Mr. Scelle's readiness to accept Mr. Hudson's text, which would make it unnecessary for the Commission to discuss the problem of *non liquet*.

51. Mr. LAUTERPACHT said Mr. Hudson's wording was substantially the same as that suggested by himself for article 22. He accordingly withdrew his own amendment to that article.

52. He wished to point out, however, that articles 19 to 22 of the special rapporteur's draft and Mr. Hudson's text should be treated separately, since the former dealt with the *compromis* and the latter with the law to be applied by the tribunal, which was a general matter not restricted to the interpretation of the *compromis*.

53. In reply to Mr. Amado, he pointed out that his text for article 22, and not that for article 20, was at present under discussion.

54. Mr. KOZHEVNIKOV said he would be able to accept Mr. Hudson's text if the words "shall apply, by agreement of the parties" were substituted for the words "shall be guided by".

55. The CHAIRMAN suggested that Mr. Kozhevnikov's point was already covered by the words "Subject to any agreement between the parties".

56. Mr. LAUTERPACHT said that Mr. Kozhevnikov's point was also covered by the reference to Article 38, paragraph 1, clause *a*, of the Statute of the International Court, which spoke of international conventions "establishing rules expressly recognized by the contesting States".

57. He added that although he had withdrawn his own amendment in favour of Mr. Hudson's, he did not think it wise to restrict the provision to paragraph 1 of Article 38 of the Statute of the International Court, since it had been recognized in article 12, already adopted by the Commission, that the parties might empower the tribunal to adjudicate *ex aequo et bono*.

58. Mr. YEPES agreed with Mr. Lauterpacht and regretted that the latter should have withdrawn his amendment, which was preferable to Mr. Hudson's. He thought that Mr. Hudson's text might be interpreted as being contradictory to article 12, paragraph (f), already adopted by the Commission. He proposed the deletion of the words "paragraph 1" from Mr. Hudson's text, so as to make paragraph 2 of Article 38 of the Statute of the International Court of Justice, which provided for adjudication *ex aequo et bono*, equally applicable.

59. Mr. AMADO pointed out that Mr. Hudson's text related to the "law to be applied". Reference to adjudication *ex aequo et bono* would therefore be inappropriate.

60. Mr. LAUTERPACHT asked whether Mr. Hudson attached importance to the retention of the words "shall be guided by", which seemed to imply an element of discretion, in preference to the expression "shall

apply", which was mandatory and was used in Article 38 of the Statute of the International Court.

61. Mr. SCELLE thought that that was a question of drafting that could be referred to the Standing Drafting Committee.

62. Mr. HUDSON suggested that Mr. Lauterpacht's preoccupation was unnecessary, since the provision expressly referred to Article 38, paragraph 1, which was couched in mandatory terms.

63. He considered Mr. YEPES' amendment to be wholly unnecessary, since the power of the tribunal to adjudicate *ex aequo et bono* was doubly safeguarded in article 12, paragraph (f), and in the opening words of his (Mr. Hudson's text) "Subject to any agreement between the parties".

64. The CHAIRMAN put to the vote Mr. YEPES' amendment to Mr. Hudson's text.

Mr. YEPES' amendment was rejected by 5 votes to 4 with 2 abstentions.

65. The CHAIRMAN put to the vote Mr. Hudson's text to replace the first paragraph of article 20 in the special rapporteur's draft.

Mr. Hudson's text was adopted by 8 votes to none, with 2 abstentions.

66. Mr. HUDSON, referring to Mr. Scelle's withdrawal of the words "being in all cases empowered to judge in equity" from article 20, second paragraph, hoped that that had not been done on the grounds that the Commission had adopted article 12, paragraph (f), the import of which was by no means the same.

67. Mr. AMADO considered article 20, second paragraph, to be indispensable, in order to lay the ghost of the possibility of a finding of *non liquet*.

68. Mr. LAUTERPACHT observed that it was so generally assumed that that particular ghost had been well and truly laid that no provision of the rudimentary and self-evident kind that was embodied in article 20, second paragraph, had been inserted in the Statute of the International Court of Justice. He accordingly proposed the deletion of that paragraph.

69. Mr. HUDSON said that, if the second paragraph were not deleted, he would propose the deletion from it of the words "or of the *compromis*", since it was clear that it was a finding of *non liquet* on the grounds of the silence or obscurity of the law, and not of the *compromis*, that the article was intended to render impossible.

70. Mr. ZOUREK asked what would be the position of a tribunal if it were to find that it could not judge according to the strict rules of law laid down in the *compromis*.

71. Mr. YEPES supported article 20, second paragraph, subject to the deletion of the words "being in all cases empowered to judge in equity", which had already been withdrawn by the special rapporteur.

72. Mr. SCELLE observed that the Commission had already decided to delete article 15, and if Mr. Lauterpacht's proposal for the deletion of article 20, second paragraph, were adopted, the important issue of *non liquet* would be set aside altogether, despite the fact that it was an issue which was under constant discussion in all authoritative works on arbitral procedure. A provision prohibiting a judge from refusing to give judgment existed in all civil codes, and he was convinced that the point could not be passed over in silence in the draft under consideration. Either article 15 must be reinstated, or article 20, second paragraph, must be retained.

73. Mr. LIANG (Secretary to the Commission) considered that the self-evident could not always be assumed. The deletion of article 20, second paragraph, might accordingly give the impression that an arbitral tribunal could bring in a finding of *non liquet*. He added that from his studies of arbitration cases and procedure he had found that the possibility of a finding of *non liquet* was very seldom due to obscurity of international law. It was far more likely to arise from the complete absence of a specific rule on the subject under consideration. Where the law was obscure, it would clearly be the duty of the tribunal to interpret it.

74. He agreed with Mr. Hudson's amendment to article 20, second paragraph, as it was unnecessary to provide for the contingency of a *compromis* being silent or obscure. If it should be silent on the law to be applied, the tribunal would apply international law, being, according to the first paragraph (just adopted) of article 20, guided by paragraph 1 of Article 38 of the Statute of the International Court of Justice. On the other hand, if the *compromis* should be obscure, it would be for the tribunal to interpret it.

75. Mr. SCELLE explained that by the words "or of the *compromis*" he had meant to envisage the situation where the *compromis* provided for the application of certain law, and the tribunal found such law to be silent or obscure on the issue.

76. Mr. LIANG (Secretary to the Commission) said that if that was the case he should think that the meaning of the paragraph would be made clearer by the insertion of the words "the rules agreed upon in" before the words "international law or of".

77. The CHAIRMAN put to the vote the several proposals before the Commission.

Mr. Lauterpacht's proposal that article 20, second paragraph, be deleted was rejected by 6 votes to 4, with 1 abstention.

*Mr. Hudson's amendment concerning the deletion of the words "or of the *compromis*" was rejected by 6 votes to 4.*

Mr. Kozhevnikov's amendment was rejected by 8 votes to 2, with 1 abstention.

78. The CHAIRMAN put to the vote the text of article 20, second paragraph, as amended by Mr. Scelle:

"The tribunal may not bring in a finding of *non*

liquet on the grounds of the silence or obscurity of international law or of the *compromis*."

That paragraph was adopted by 8 votes to none, with 3 abstentions.⁸

79. Mr. SCELLE said that, as a result of the foregoing decisions, he felt that articles 21 and 22 would require re-drafting. He would accordingly ask that their consideration be deferred until the next meeting to give him time to do so in consultation with Mr. Lauterpacht, who had submitted alternative texts.

It was so agreed.

The meeting rose at 1.5 p.m.

⁸ Article 20, as tentatively adopted, read as follows:

"1. Subject to any agreement between the parties on the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

"2. The tribunal may not bring in a finding of *non liquet* on the grounds of the silence or obscurity of international law or of the *compromis*."

148th MEETING

Monday, 23 June 1952, at 3 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Date and place of the fifth session (item 7 of the agenda) (*resumed from the 143rd meeting*)

1. Mr. KERNO (Assistant Secretary-General), after recalling that the Commission had decided at its 143rd

meeting¹ that the Secretariat should be requested to consult with the Secretary-General with a view to the Commission's fifth session being held in Geneva, beginning about 1 June 1953, said that he had been instructed by the Secretary-General to draw the serious attention of the Commission to the fact that the cost of holding its 1953 session in Geneva would be considerably higher than that of holding it in New York. The additional cost would amount to approximately 8,000 dollars for travel and per diem allowances, and a further 3,000 dollars for engaging the necessary additional interpreters from and into Russian.

2. The CHAIRMAN suggested that the Commission take note of the statement made by the Assistant Secretary-General and defer further consideration of the question until a subsequent meeting.

It was so agreed.

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 3) (*continued*)

3. The CHAIRMAN requested the Commission to resume its discussion of the Second Preliminary Draft on Arbitration Procedure annexed to the special rapporteur's second report on that subject (A/CN.4/46).

ARTICLES 21 AND 22 (*continued*)

4. Mr. SCELLE said that, quite apart from the question whether they constituted unwarranted reflections on the good faith of the parties, he felt that articles 21 and 22 might be deleted, since they were perhaps too detailed and complicated.

5. Mr. YEPES said that it was quite possible that the *compromis* would be drafted in such a way as to defeat the whole arbitration procedure. The cases referred to in articles 21 and 22 of Mr. Scelle's draft should therefore be covered, and he had prepared a text which would be circulated in due course.

6. The CHAIRMAN recalled that Mr. Lauterpacht had also proposed amendments to articles 21 and 22.²

7. Mr. LAUTERPACHT withdrew his amendments to articles 21 and 22, but agreed with Mr. Yepes that there might be good reasons for retaining the substance of those articles. The Commission had already adopted an article concerning gaps in the substantive law to be applied by the tribunal. A code on arbitration procedure should also contain provisions concerning possible gaps in the procedural sphere.

8. The CHAIRMAN suggested that further discussion of articles 21 and 22 be deferred until Mr. Yepes' amendment had been circulated.

It was so agreed.

¹ See summary record of the 143rd meeting, paras. 63—66.

² See summary record of the 147th meeting, para. 45.

ARTICLE 23³

9. Mr. SCELLE said that it went almost without saying that the principle of the equality of the parties before the rules of procedure should be broadly observed. It seemed reasonable, however, to leave the tribunal free to assess the importance of irregularities of form.

10. Mr. YEPES felt that the wording proposed by Mr. Scelle would be inappropriate in a draft convention, and proposed that article 23 be amended to read :

"Any serious violation of the principle of equality of the parties before the rules of procedure may be invoked by the injured party as a reason for voiding the award. Purely formal irregularities of procedure shall not be considered as serious under this article."

11. Mr. SANDSTRÖM proposed that article 23 be deleted, not because he was opposed to the ideas contained in it, but because the first sentence was axiomatic and the second would more properly be included among the provisions relating to the right of appeal.

12. Mr. el-KHOURI associated himself with Mr. Sandström's proposal.

13. Mr. LAUTERPACHT also supported Mr. Sandström's proposal, for the reasons the latter had given, and also because the question of the admissibility of evidence was dealt with in article 24, which gave the tribunal entire discretion in the matter.

14. Mr. YEPES pointed out that article 23 also provided for a penalty in the event of non-observance of the principle of equality of the parties before the rules of procedure.

15. Mr. SCELLE said that he would only point out that the word used in the French text of the second sentence, namely "*productions*", covered more than evidence. He agreed that the first sentence was axiomatic, but did not agree that it would be inappropriate to include in a convention such statements of generally accepted principles which had, he would remind members of the Commission, been included in earlier instruments laying down arbitration procedure, such as the General Act of Arbitration.

16. Mr. KOZHEVNIKOV emphasized that the whole convention should proceed from the fundamental principles of international law. Accordingly, so important a principle of international law as the equality of the parties should be thoroughly discussed, and mention of it could not be deleted.

17. As to the second sentence of article 23, that could well be deleted in its entirety.

³ Article 23 read as follows :

"The equality of the parties before the rules of procedure is the underlying principle of any arbitral jurisdiction ; failure to observe this principle may void the award. The tribunal is, however, free to assess the importance of irregularities of form only and is not bound in all cases to rule the preclusion or inadmissibility of the evidence submitted."

18. Mr. SCELLE pointed out that the main point of article 23 lay in the second sentence. The principle of equality of the parties before the rules of procedure was indeed so generally accepted that he knew of no case where it had been expressly laid down. The purpose of the article was therefore not so much to lay down the equality of the parties, as to give the tribunal a certain freedom of appreciation in that respect.

19. Mr. HUDSON felt that inclusion of a statement to the effect that failure to observe the principle of the equality of the parties before the rules of procedure might void the award would only encourage a party against whom an award was made to challenge the principle. He felt that the second part of the first sentence in Mr. Scelle's draft should be omitted, as should also the second sentence which, as Mr. Sandström had pointed out, was out of place.

20. He proposed, therefore, that article 23 be amended to read as follows :

"The equality of the parties before an arbitral tribunal is an underlying principle of the law of arbitration."

21. The CHAIRMAN said that he would first put to the vote the proposal that article 23 be deleted.

The proposal was rejected by 6 votes to 3, with 3 abstentions.

Mr. Hudson's proposal was adopted by 8 votes to 1, with 3 abstentions.

ARTICLE 24⁴

22. Mr. LAUTERPACHT felt that it was generally undesirable that the tribunal should be able to overrule the provisions of the *compromis*; in some cases the parties might find it useful to rule out certain kinds of evidence in advance. He therefore felt that the words "regardless of the provisions of the *compromis*" should be deleted.

23. The words "or other methods of proof" should be added at the end of the first paragraph proposed by Mr. Scelle, since the various types of evidence he had listed were not comprehensive.

24. With regard to the second paragraph, he felt that

⁴ Article 24 read as follows :

"Any party adducing a fact likely to be relevant to the decision of the case shall furnish at least the first elements of proof thereof. The tribunal shall be the judge of the admissibility and weight of evidence, regardless of the provisions of the *compromis* and regardless of whether the evidence consists of written papers or documents, depositions, affidavits, inquiries, expert opinions or inquiries *in situ*.

"The parties shall co-operate with one another and with the tribunal in the production of evidence and shall obey the measures ordered for this purpose. Refusal to co-operate shall constitute an unfavourable presumption against the party so refusing.

"The burden of proving the applicable rules of law, including rules of municipal law, does not rest exclusively on the parties; the tribunal may co-operate with them with a view to furnishing such proof."

refusal to co-operate with the other party and with the tribunal in the production of evidence should not necessarily constitute an unfavourable presumption against the party so refusing.

25. He therefore proposed that the second sentence of the first paragraph of article 24 be amended to read as follows :

"The tribunal shall be the judge of the admissibility and weight of evidence regardless of whether it consists of written documents, depositions, affidavits, testimony of witnesses, inquiries by and opinions of experts, visits to the place (*descentes sur les lieux*) or other methods of proof."

and that the second sentence of the second paragraph be amended to read as follows :

"The tribunal shall duly take note of the failure of any party to comply with the obligations of this article."

26. The third paragraph of Mr. Scelle's draft was also unsatisfactory. The first part appeared to lay down the principle that the tribunal should be partly responsible for proving the applicable rules of law ; the second part appeared to make that an optional task for the tribunal. He therefore proposed that the third paragraph be deleted. A paragraph should, however, be added, stating :

"The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary."

27. Mr. SANDSTRÖM agreed with the amendments proposed by Mr. Lauterpacht, but also felt that the first sentence of the first paragraph should be deleted, first, because it was unnecessary, and secondly, because the first elements of proof could sometimes be dispensed with.

28. Mr. FRANÇOIS agreed with Mr. Sandström concerning the first sentence of article 24 ; no proof was required, for example, of well-known facts which might be adduced as evidence.

29. He also agreed in general with Mr. Lauterpacht's amendments, although he thought that the phrase "regardless of... other methods of proof" could be deleted. Nor did he understand what was meant by stating that the parties should "co-operate with one another" in the production of evidence. Finally, he suggested that the wording proposed by the special rapporteur for the second sentence of the second paragraph was unnecessarily cumbersome, and that the wording used in Article 49 of the Statute of the International Court of Justice should be used instead.

30. Mr. HUDSON agreed with the criticisms levelled against the third paragraph of article 24, and suggested that the article as a whole be replaced by the following text :

"1. The tribunal shall be the judge of the admissibility and weight of any evidence presented to it.

"2. The parties shall co-operate with one another and with the tribunal in the production of evidence.

"3. The tribunal shall have power at any stage of the proceedings to call for the production of evidence deemed to be required."

31. Mr. LIANG (Secretary to the Commission) wondered whether it was really necessary to provide that the tribunal shall be the judge of the admissibility and weight of the evidence presented to it. Surely that went without saying. No such provision was to be found in the Statute of the International Court of Justice.

32. Mr. SCELLE said that the whole point of the second sentence of the first paragraph was contained in the words "regardless of the provisions of the *compromis* ". If those words were deleted, he agreed that the whole sentence could be deleted. In his view, however, the tribunal should be able to set aside the provisions of the *compromis* if they made it impossible for it to render an award which would constitute a true settlement of the dispute in its integrality.

33. He agreed with Mr. François that the words "with one another and" could be deleted from the second paragraph. What he had had in mind was that the parties and the tribunal should jointly discuss the admissibility of evidence furnished.

34. With regard to the third paragraph, he pointed out that it had been stated in a number of cases that rules of municipal law did not have to be proved ; in his view, that was not so, but the tribunal should co-operate with a view to furnishing such proof.

35. Mr. LAUTERPACHT agreed that the enumeration of the various types of evidence should be deleted from the first paragraph. On the other hand, he greatly hoped that the Commission would retain the words "The tribunal shall be the judge of the admissibility and weight of evidence", since the tribunal's right in that respect had been questioned in some cases. The Statute of the International Court of Justice also contained a similar provision, namely, Article 52, which left it to the Court's discretion whether to accept evidence submitted after the time-limit specified for the submission of evidence had expired.

36. He also hoped that the words "with one another and" would be retained. In the United Kingdom and the United States of America, at any rate, the parties were obliged to co-operate with one another in preparing the evidence, and also, in some cases, to produce certain kinds of evidence which was in their possession even if it was damaging to their case.

37. With regard to the third paragraph, it was open to question whether the tribunal should be presumed to be cognizant of rules of municipal law. The International Court of Justice had ruled that it was under no obligation to be cognizant of such rules or to take official notice of them, but that it could do so if it so desired. The questions which the paragraph raised were so controversial that he felt that it should be deleted, and replaced by the paragraph which he himself had proposed.

38. The CHAIRMAN pointed out that Mr. Hudson's proposal entailed the deletion of the first sentence of

the first paragraph from Mr. Scelle's draft. He would, therefore, put that sentence to the vote first.

The first sentence of Mr. Scelle's draft was rejected by 5 votes to 4, with 2 abstentions.

Paragraph 1 of Mr. Hudson's proposal was adopted by 10 votes to none, with 2 abstentions.

39. The CHAIRMAN pointed out that the proposal that the words "with one another and" be deleted, would apply equally to paragraph 2 of Mr. Hudson's proposal.

40. Mr. SCELLE and Mr. el-KHOURI felt that to meet the point made by Mr. Lauterpacht in that respect all that was necessary was to provide that the parties should co-operate with the tribunal.

41. Mr. AMADO pointed out that Article 52 of the Statute of the International Court of Justice provided that, after expiry of the time-limit laid down, the Court could refuse to accept any further evidence that one party might desire to present, unless the other party consented. If more than such consent, was meant by the reference to the parties co-operating with one another he must oppose its inclusion.

42. Mr. SANDSTRÖM felt that the words "with one another and" should be retained, since, in the case of recognition of a known fact, for example, it would be preferable to have recognition by both parties.

43. Mr. FRANÇOIS pointed out that, as worded, the paragraph imposed a quite unqualified obligation on the parties to co-operate with one another in the production of evidence. Such a provision might have some meaning in the particular case referred to by Mr. Sandström, but in general he could see no justification for it.

44. Mr. YEPES felt that the words in question should be retained. As Mr. Lauterpacht had pointed out, one party might be in possession of a piece of evidence which was vital to the other's case.

The proposal to delete the words "with one another and" was rejected by 5 votes to 4, with 3 abstentions.

45. Mr. SCELLE, opposing paragraph 2 of Mr. Hudson's proposal, said that, if the Commission were to retain article 26, which provided that the parties were bound to comply with interim measures of protection indicated by the tribunal, it should *a fortiori* retain the words "and shall obey the measures ordered for this purpose" in article 24.

Paragraph 2 of Mr. Hudson's proposal was rejected by 6 votes to 3, with 3 abstentions.

46. Mr. AMADO asked whether Mr. Lauterpacht could agree to delete the word "duly" from his amendment to the second sentence of the second paragraph of Mr. Scelle's draft of article 24.

47. Mr. LAUTERPACHT agreed to do so, but pointed out that Article 49 of the Statute of the International Court of Justice provided that "*Formal* note shall be taken of any refusal" to produce any document or supply any explanations.

48. Mr. el-KHOURI said that he would prefer the second sentence of the second paragraph to be deleted altogether. The question should be left to the discretion of the tribunal, which might well accept the reasons advanced by a party for refusing to produce any particular piece of evidence.

Subject to deletion of the word "duly", and the substitution of the word "paragraph" for the word "article", Mr. Lauterpacht's amendment to the second sentence of the second paragraph of article 24 was adopted by 7 votes to 1, with 4 abstentions.

The second paragraph of article 24 was adopted, as amended and as a whole, by 6 votes to 1, with 5 abstentions.

49. The CHAIRMAN then put to the vote Mr. Lauterpacht's amendment to paragraph 3 of article 24, which amendment was substantially included in paragraph 3 of Mr. Hudson's proposal.

50. Mr. SCELLE expressed his support for Mr. Lauterpacht's amendment.

Mr. Lauterpacht's amendment to the third paragraph of article 24 was adopted by 8 votes to none, with 4 abstentions.

51. Mr. HUDSON stated that his experience at the International Court of Justice had shown him that it was sometimes useful for the tribunal to visit the scene involved in a case before it. Such visits must, however, be made at the request of the parties, since they involved additional expenditure. He therefore proposed the addition of the following paragraph to article 24:

"The tribunal may visit the scene involved in a case before it, at the request of the parties."

52. Mr. SCELLE and Mr. el-KHOURI felt that the tribunal should be able to visit the scene involved even if the parties did not so request.

53. Mr. KERNO (Assistant Secretary-General) wondered whether it was necessary to include such a provision at all, if visits were to be made subject to the request of both parties.

54. Mr. SANDSTRÖM supported Mr. Hudson's proposal, and felt that the cost of such visits made it necessary to stipulate that they should be carried out only at the request of the parties.

55. Mr. ZOUREK agreed that such visits should be made only at the request of the parties, both for the reason adduced by Mr. Hudson and Mr. Sandström and also because the Commission had already provided in paragraph (h) of article 12 that the meeting-place of the tribunal should be specified by the parties in the *compromis*.

56. Mr. KOZHEVNIKOV also supported the wording proposed by Mr. Hudson, which was in accordance with the principles of international law.

57. Mr. LAUTERPACHT, supported by Mr. YEPES, proposed the deletion of the words "at the request of the parties".

58. The CHAIRMAN put Mr. Lauterpacht's proposal to the vote.

Six votes were cast in favour of the proposal and 6 against. The proposal was accordingly rejected.

Mr. Hudson's proposal was adopted by 8 votes to 3.

59. Mr. LAUTERPACHT said that he had voted in favour of Mr. Hudson's proposal because he thought it was better to have such a provision, even with the clause to which he had taken exception, than to have no such provision at all.

60. Mr. HUDSON proposed a further additional paragraph to article 24 to read :

"Subject to any agreement between the parties on the procedure to be followed by the tribunal, the tribunal shall be competent to formulate the rules of procedure to be applied."

61. Mr. SANDSTRÖM suggested that, if Mr. Hudson's proposed additional provision was of a general character, its place was elsewhere in the draft.

62. Mr. HUDSON agreed, but thought that that was a matter which might be left to the Standing Drafting Committee.

63. Mr. SCELLE said that he could support Mr. Hudson's proposal provided it meant that, if there were disagreement between the parties, the tribunal could itself formulate its rules of procedure. If that were the case, the purpose of the proposal would correspond to what he had had in mind in drafting his text for articles 21 and 22.

64. Mr. HUDSON said the purpose of his proposal was to provide for the contingency of the parties either failing to stipulate in the *compromis* the rules of procedure to be applied, or making inadequate provision in that respect.

65. Mr. YEPES suggested that the matter was already covered by paragraph (c) of article 12, all provisions of which were obligatory.

66. Mr. SCELLE asked whether the words "Subject to any agreement" in Mr. Hudson's proposal meant in the absence of any agreement.

67. Mr. HUDSON replied in the affirmative.

68. Mr. LAUTERPACHT maintained that the opening words of Mr. Hudson's proposal were slightly ambiguous. The meaning would be clearer if the words "In the absence of agreement between the parties" were substituted.

69. Mr. YEPES proposed that the opening words of Mr. Hudson's proposal be amended to read :

"If contrary to the provisions of article 12 (c) above the parties fail to establish the procedure to be followed by the tribunal, the tribunal shall be competent..."

70. Mr. HUDSON considered Mr. YEPES' amendment to be unnecessary, as his point was already met in the

wording as it stood. It was important, on the other hand, to enable the tribunal to formulate rules of procedure additional to those laid down in the *compromis*.

71. Furthermore, he would point out that Mr. YEPES had not suggested any mention of article 12 in the provisions relating to the law to be applied.

72. The CHAIRMAN pointed out to Mr. YEPES that it would be one of the duties of the Standing Drafting Committee to ensure that there was no contradiction between any of the articles.

Mr. Hudson's proposal was adopted by 10 votes to none, with 2 abstentions.

Article 24, as amended, was adopted as a whole by 9 votes to none, with 2 abstentions.⁵

ARTICLE 25⁶

73. Mr. LAUTERPACHT proposed alternative wording for article 25 to read :

"Presumptions shall be left to the appreciation of the tribunal."

74. Mr. HUDSON proposed the deletion of article 25. As it stood, he was unable to divine its meaning.

75. Mr. LAUTERPACHT said that, in so far as a presumption was an assertion which did not require proof, it was already covered by article 24, which laid down that the tribunal should be the judge of the admissibility and weight of evidence.

76. Mr. SCELLE observed that presumption and proof were not the same. Presumption was not always a question of evidence. Furthermore, presumption in international law was not parallel to presumption in municipal law, as there were no absolute presumptions in international law. Presumptions must therefore be left to the discretion of the tribunal.

77. Mr. LIANG (Secretary to the Commission) said that the definitions of presumption in French and Anglo-Saxon law respectively were clearly quite different. To the best of his knowledge, according to

⁵ Article 24, as tentatively adopted, read as follows :

"1. The tribunal shall be the judge of the admissibility and weight of any evidence presented to it.

"2. The parties shall co-operate with one another and with the tribunal in the production of evidence and shall obey the measures ordered for this purpose. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

"3. The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary.

"4. The tribunal may visit the scene involved in a case before it at the request of the parties.

"5. Subject to any agreement between the parties on the procedure to be followed by the tribunal, the tribunal shall be competent to formulate the rules of procedure to be applied."

⁶ Article 25 read as follows :

"Generally speaking, presumptions shall be left to the learning and discretion of the tribunal."

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

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

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

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

Mr. Scelle withdrew article 25.

The meeting rose at 5.50 p.m.

149th MEETING

Tuesday, 24 June 1952 at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 3) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/

46) contained in the special rapporteur's Second Report.

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

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

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

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

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

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

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

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

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

¹ See summary record of the 148th meeting, para. 8.

ARTICLE 26²

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

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

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

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

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

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

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

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

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

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

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

² Article 26 read as follows :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 27⁴

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

34. He proposed an alternative text, which read:

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

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

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

⁴ Article 27 read as follows:

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

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

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

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

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

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

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

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

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

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

tribunal, to reject an additional claim, an example of which was a claim for damages.

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

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

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

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

ARTICLE 28⁵

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

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

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

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

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

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

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

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

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

⁵ Article 28 read as follows:

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

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

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

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

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

It was so agreed.

ARTICLE 29⁶

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

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

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

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

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

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

⁶ Article 29 read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 30⁹

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

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

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

⁹ Article 30 read as follows:

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

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

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

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

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

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

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

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

83. Mr. SCELLE agreed.

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

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

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

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

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

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

ARTICLE 31¹¹

86. Mr. SCELLE declared that he would withdraw

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

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

¹¹ Article 31 read as follows:

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

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

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

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

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

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

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

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

92. Mr. SCELLE agreed that the Commission had left a gap by deleting article 21.¹³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ See above, para. 7.

an obligation on the parties to stipulate time-limits in the *compromis*.

It was so agreed.

The meeting rose at 1.05 p.m.

150th MEETING

Wednesday, 25 June 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 4) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (annex to document (A/CN.4/46) contained in the special rapporteur's second report.

ARTICLE 31 (*continued*)

2. Mr. LAUTERPACHT said that, following the discussion at the preceding meeting, he had given further consideration to article 31 and had come to the conclusion that he must maintain the alternative wording he had himself proposed.¹

3. His researches had enabled him to establish not only that the stipulation of time-limits within which the award must be made was an almost constant feature of arbitration agreements, but that tribunals observed those

limits strictly. In certain cases, of course, the parties had provided by agreement for an extension, as, for example, in the case of the French-Mexican Claims Commission. On that occasion the tribunal had attached so much importance to continuing its proceedings within the time-limits fixed by the parties that it had done so despite the absence of one of its members.

4. He was also convinced that the Commission must adhere to the principle that the *compromis* was the source of the authority of the tribunal and that the latter should not have the power to extend its own existence without the consent of the parties. He appreciated that consent might not be forthcoming and that the tribunal might in consequence be hurried into making its award. Such a contingency was, however, unlikely to occur, and if one party withheld its consent to an extension of time-limits without good reason, the tribunal would take that fact into account as a factor in assessing the evidence submitted.

5. Mr. SCELLE observed that Mr. Lauterpacht had based his argument upon precedent, and not on the essential principle, namely, that the tribunal must make an award. Though he admitted that Mr. Lauterpacht's provision would be adequate in a number of cases, he could not support it, because its effect would be to render the tribunal dependent on the will of the parties. It was quite inadmissible that one party—and it was likely to be the one which expected the award to go against it—should be free to refuse extensions of the time-limits and thereby prevent the tribunal from making an award in a manner consonant with its high responsibilities.

6. Mr. el-KHOURI thanked Mr. Scelle for having focused attention on the fact that it would be the losing party which was likely to withhold its consent to an extension of the time-limits, a view which substantiated the argument he himself had put forward at the preceding meeting, namely, that extension should be made possible at the request of one of the parties. He accordingly proposed the insertion in Mr. Lauterpacht's text of the words "one of", after the words "consent of".

7. Mr. YEPES supported Mr. el-KHOURI's amendment.

8. Mr. HSU preferred the special rapporteur's text to that proposed by Mr. Lauterpacht, since the former was more in harmony with the spirit of the draft as a whole.

9. Mr. YEPES said that it would be most dangerous to stipulate that the consent of the parties must be obtained before the time-limits could be extended. Such a provision would run counter to the whole spirit of arbitration by making the award contingent upon the will of one of the parties. Was an arbitral tribunal composed of persons of the highest moral standing to be prevented from prolonging its proceedings if it felt itself in need of more time?

10. Mr. SANDSTRÖM said that he would vote in favour of Mr. Lauterpacht's text because a certain

¹ See summary record of the 149th meeting, paras. 87—88.

degree of freedom must be left to the parties. In the present instance they could not be deprived of their right to regulate the procedure of the tribunal. It was conceivable, after all, that a tribunal might not conduct the case with all the diligence necessary in order to reach a decision.

11. Mr. KOZHEVNIKOV said that, although the question of the extension of time-limits was not of prime importance, it did involve certain issues of principle. Mr. Lauterpacht's text was nearer to his (Mr. Kozhevnikov's) conception of arbitration, namely, that the will of the parties must be respected throughout. He accordingly supported the reservation that the time-limits could only be extended with their consent. He could not agree to the tribunal being given powers as wide as those envisaged by the special rapporteur.

12. Mr. HUDSON considered that the words "or the arbitral tribunal" should be deleted from the special rapporteur's text, since if time-limits were fixed by the tribunal itself it would always be open to it to reconsider its own decision. He also advocated the deletion from Mr. Lauterpacht's text of the words "or the arbitration treaty", which were unnecessary, since they were already covered by the phrase "the *compromis*" in the sense in which it was being used throughout the draft.

13. Mr. LAUTERPACHT said that he could agree to Mr. Hudson's amendment to his own proposal provided that an article were inserted in the draft explaining that the term "the *compromis*" embraced a compromissory clause in a general treaty, a general treaty of arbitration, a special treaty of arbitration or a special *compromis*.

14. Mr. ZOUREK supported Mr. Lauterpacht's text, as he considered that time-limits should not be extended without the consent of both parties.

15. Mr. SCELLE said that, rather than see the adoption of a provision such as that proposed by Mr. Lauterpacht, which was entirely contrary to the spirit of his draft, he would withdraw article 31 altogether.

16. Mr. KOZHEVNIKOV observed that the Commission could not without mature deliberation delete articles dealing with grave issues of principle.

17. Mr. FRANÇOIS re-introduced the special rapporteur's text for article 31, but with the words "or the arbitration treaty" substituted for the words "or the arbitral tribunal" and the word "retains" for the word "reserves".

18. Mr. HUDSON proposed an alternative wording for the last sentence in Mr. Lauterpacht's proposal; the entire text as amended by himself would then read:

"The arbitral award shall be made within the period fixed by the *compromis*, unless the parties consent to an extension of that period."

19. Mr. LAUTERPACHT accepted Mr. Hudson's amendment, the wording of which was more precise than his own.

20. Mr. SCELLE said that Mr. Hudson's wording made the provision even stronger, and would enable the parties to force the tribunal to conclude its work even when it felt itself unable to do so. Such a provision would contradict that of article 29, which stipulated that it was the tribunal itself that must officially declare closed the hearing of a case.

21. Mr. KOZHEVNIKOV asked whether the effect of Mr. Hudson's wording would be that if the parties failed to give their consent to the extension of time-limits, the tribunal could act counter to their wishes.

22. Mr. HUDSON replied in the negative. If the parties withheld their consent to an extension, the tribunal would be bound to give its award within the period fixed.

23. Mr. YEPES said that none of the opponents of Mr. Scelle's text had yet explained what would happen if a tribunal considered that, when the time-limit expired, it had not received all the explanations necessary to enable it to reach a decision.

24. Mr. AMADO suggested that it was a mistake to start from the premise that the tribunal and the parties would necessarily always be at loggerheads.

25. The CHAIRMAN put to the vote Mr. Hudson's amendment concerning the deletion of the words "or the arbitration treaty" from Mr. Lauterpacht's text.

Mr. Hudson's amendment was adopted by 6 votes to none, with 2 abstentions.

26. The CHAIRMAN put to the vote Mr. el-Khoury's amendment concerning the insertion of the words "one of" after the words "consent of" in Mr. Lauterpacht's text.

Mr. el-Khoury's amendment was rejected by 6 votes to 2, with 3 abstentions.

27. The CHAIRMAN put to the vote Mr. Hudson's proposal that the second sentence of Mr. Lauterpacht's text be replaced by the words "unless the parties consent to an extension of that period".

Mr. Hudson's amendment was adopted by 6 votes to 5, with 1 abstention.

28. Mr. SCELLE said that, in the light of the foregoing decisions and in order to eliminate the consequent contradiction between articles 29 and 31, he would propose the addition of a second paragraph to Mr. Lauterpacht's text to read:

"In case of disagreement between the parties on such an extension of the period, the tribunal shall refrain from rendering its award."

29. Mr. KERNO (Assistant Secretary-General) suggested that Mr. Scelle's wording was, perhaps, too strong, as it would make it obligatory on the tribunal to refrain from rendering its award in such cases. He would suggest that the word "shall" be replaced by the word "may".

30. Mr. SCELLE agreed that it must be left to the

tribunal to decide whether it would or could not make an award, and accepted the Assistant Secretary-General's suggestion.

31. He wished to take the present opportunity of warning the Commission that, as the draft took shape, it was to be observed that the tribunal was approximating more and more closely to a conciliation commission. He could not too strongly emphasize the fact that arbitration constituted a judgment; that the arbitral tribunal was a servant, not of the parties but of the law; and that its functions were to settle disputes on the basis of the law and not in accordance with the interests of the parties.

32. Mr. SANDSTRÖM observed that the need for extension of time-limits would clearly be considered long before they ran out. The tribunal would therefore have time to adjust the pace of the proceedings once it had ascertained that the parties would not agree to prolong them.

33. Mr. LAUTERPACHT suggested that the situation was not so tragic as Mr. Scelle seemed to think. By the time the proceedings terminated, a tribunal would inevitably have a considerable amount of evidence before it. If one party refused without good reason to extend time-limits to enable the tribunal to find more evidence, that contingency would be covered by the provisions of article 24. His proposal did not run counter to the entire system of arbitration as conceived by the special rapporteur, since an extension of time-limits would be possible even if the necessary provisions had not been made in the *compromis*. He hoped in the light of the foregoing considerations that Mr. Scelle would be able to see his way to withdrawing his proposal.

34. Mr. el-KHOURI supported Mr. Scelle's proposal together with the amendment thereto suggested by the Assitant Secretary-General.

35. He regretted that the Commission should have decided to enable one party to a dispute to frustrate the arbitral proceedings.

36. Mr. KOZHEVNIKOV suggested that Mr. Scelle had misunderstood the views held by those who considered that the consent of the parties was fundamental to arbitration. Surely conflict and antagonism between the parties and the tribunal were not inevitable. If the parties agreed to resort to arbitration it would mean that they were willing to submit their case to settlement on the basis of law.

Mr. Scelle's proposal, as amended, was adopted by 6 votes to 4, with 2 abstentions.

Article 31, as amended, was adopted by 9 votes to none, with 3 abstentions.²

² Article 31, as tentatively adopted, read as follows:

"1. The arbitral award shall be made within the period fixed by the *compromis*, unless the parties consent to an extension of that period.

"2. In case of disagreement between the parties on such an extension of the period, the tribunal may refrain from rendering its award."

ARTICLE 32³

37. Mr. YEPES submitted two texts to replace article 32. They read:

"Article 32"

"The arbitral award shall be drawn up in writing. It shall be read in open court, the representatives and counsel of the parties being present or duly summoned to appear.

"Article 32 bis"

"The arbitral award shall duly state the grounds on which it is based. In doing so it shall retrace the successive stages of the proceedings and give an objective historical account of the facts that gave rise to the dispute; state the juridical rules or principles of equity on which the award is based; mention the evidence produced by the parties and the statements made on their behalf; and cite any decisions taken on points of fact or law in the form of procedural orders, incidental judgments and, possibly, protective measures."

38. He considered that a separate provision, enumerating the contents of the award, was necessary. That was why he had divided his proposal into two articles.

39. Mr. LAUTERPACHT proposed alternative wording for article 32, to read:

"The arbitral award shall be drawn up in writing and read in open court. It shall include a full statement of reasons."

40. Mr. HUDSON suggested that for the time being the Commission should confine itself to the opening words of the special rapporteur's text, namely, the words: "The arbitral award shall be drawn up in writing and read in open court." He found that formula acceptable, but wondered whether it covered the possibility of the parties not wishing to make an award public. He referred in that connexion to the *Chevreau case* between France and the United Kingdom, when the parties, for considerations of public policy, had not wished the award to be made public.⁴

He had had grave doubts at that time as to the propriety of that proceeding, and had approached the President of the Permanent Court of Arbitration to secure the permission of the parties to allow qualified persons to consult the text of the award at the Peace

³ Article 32 read as follows:

"The arbitral award shall be drawn up in writing and read in open court, the grounds being carefully stated. The operative part should retrace the successive stages of the proceedings, state the juridical rules or principles of equity on which it is based, and any decisions taken on points of fact or law in the form of procedural orders, incidental judgments and protective measures."

See summary record of the 154th meeting, paras. 64—65.

⁴ See English text of the award in *American Journal of International Law*, vol. 27 (1933), pp. 153—182. Award of 9 June 1931.

Palace at The Hague. It would be remembered, of course, that the award had been published twelve months later.

41. He supported Mr. Yepes' view that the form and content of the award should be dealt with in separate provisions, and agreed with the additional provision, contained in Mr. Yepes' text for article 32, concerning the presence of representatives and counsel for the parties when the award was being read.

42. Mr. SANDSTRÖM pointed out that the special rapporteur's text had omitted mention of the signature of the award, a matter which was covered by article 79 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. He believed that that gap should be made good.

43. The CHAIRMAN put to the vote Mr. Yepes' text for article 32.

That text was adopted by 10 votes to none.

44. Mr. LAUTERPACHT, referring to the content of the award, suggested that the Commission might confine itself to deciding whether the provision should be general and brief, as suggested in his own text, or whether it should enumerate the different constituent elements, as was done in the special rapporteur's draft and the text proposed by Mr. Yepes for article 32 bis. Should the Commission decide in favour of the latter method it would not be necessary to discuss the article in detail, since it was unlikely to give rise to differences of opinion on substance, and its drafting might be well left to the Standing Drafting Committee.

45. Mr. FRANÇOIS expressed a preference for Mr. Lauterpacht's text, namely:

"It shall include a full statement of reasons".

46. It should be left to the tribunal itself to decide whether there was any need to include the elements enumerated in Mr. Yepes' text.

47. Mr. LAUTERPACHT observed that a statement of reasons would normally comprise an objective historical account of the facts which gave rise to a dispute, since it would otherwise hardly be intelligible.

48. Mr. AMADO agreed with Mr. Lauterpacht. Any award must give a clear and full statement of reasons, and it would normally do so. He made a plea for a sober and concise provision such as that proposed by Mr. Lauterpacht, which was very similar to article 79 of the Hague Convention of 1907.

49. Mr. SCELLE had no objection to Mr. Lauterpacht's formula.

50. Mr. HUDSON supported Mr. Lauterpacht's text.

51. The CHAIRMAN put to the vote the issue whether the provision on the content of the award should be brief, and more or less in the form suggested by Mr. Lauterpacht, or whether the constituent elements should be enumerated in detail, as in Mr. Yepes' text.

It was agreed by 9 votes to 1, with 1 abstention, that

the provision should be modelled on Mr. Lauterpacht's proposal.

52. Mr. YEPES said that, notwithstanding the decision of the Commission, he would request that the attention of the Standing Drafting Committee be drawn to his text.

53. Mr. HUDSON agreed with Mr. Sandström that some provision should be inserted relating to signature, but was not in favour of following the 1907 Hague Convention on that point, as he considered that the award should normally be signed by all members of the tribunal. Even a dissenting member should add his signature, since that act would not imply approval of the award itself. Of course, where an umpire had been called in his sole signature would be enough.

54. He accordingly suggested that the provision might be worded as follows:

"The award shall be signed by all the members of the tribunal or by the umpire."

55. Mr. SCELLE remained to be convinced whether a dissenting member of the tribunal could sign the award.

56. Mr. HUDSON suggested that the difficulty would be overcome if it were laid down that the award must stipulate the number of votes by which it had been adopted.

57. Mr. SANDSTRÖM accepted the wording proposed by Mr. Hudson.

58. Mr. LAUTERPACHT said that he too could accept Mr. Hudson's wording; but a stipulation that every member of the tribunal should sign the award might give rise to difficulties. It would be remembered that there had been cases in the past of arbitrators refusing to attend the proceedings at which the award had been made.

59. Mr. HUDSON replied that signature by all members of the tribunal should not be a *sine qua non*, but should be the regular procedure. He was therefore prepared to amend his wording to read: "The award ought to be signed etc."

60. Mr. AMADO considered that the provision should be modelled on article 79 of the 1907 Hague Convention. He therefore proposed the following wording:

"The arbitral award shall contain the names of the arbitrators and shall be signed by the president and by the registrar or the secretary."

61. Mr. FRANÇOIS said that he could support Mr. Amado's text provided it was amplified by stating that the award should indicate the number of votes by which it had been adopted.

62. Mr. el-KHOURI said that the provision in the Hague Convention was in accordance with the procedure followed in all courts of justice. He therefore supported Mr. Amado's proposal.

63. Mr. HUDSON had no particular preference for his own wording.

*Mr. Amado's proposal was adopted by 6 votes to none, with 4 abstentions, subject to any drafting changes that might be made by the Standing Drafting Committee.*⁵

ARTICLE 33⁶

64. Mr. HUDSON proposed that article 33 be amended to read:

"The arbitral award shall provide for the allocation between the parties of the expenses of the tribunal."

65. Mr. LAUTERPACHT agreed that the references to measures of reparation or award of damages should be deleted as unnecessary, since reparation or damages were usually the most important part of the claims of the party which considered itself injured. He noted, however, that Mr. Hudson's amendment failed to mention the costs of the litigation, which might be considerable. Article 64 of the Statute of the International Court of Justice read: "Unless otherwise decided by the Court each party shall bear its own costs", and thus provided that the Court could award costs.

66. Mr. SANDSTRÖM pointed out that article 85 of the 1907 Hague Convention did not give the tribunal that power.

67. Mr. YEPES wondered whether Mr. Lauterpacht's point was not covered by the text of paragraph (j) of article 12, already adopted by the Commission.

68. Mr. SCELLE felt that that paragraph dealt with a slightly different question. To solve the difficulty, however, he proposed that article 33 be deleted.

69. Mr. ZOUREK pointed out that the purpose of article 12 as a whole was merely to enumerate what questions should be specified in the *compromis*. The actual award of costs was an entirely separate process, and must be provided for separately.

Mr. Scelle's proposal that article 33 be deleted was rejected by 7 votes to 2, with 1 abstention.

70. Mr. LAUTERPACHT said that it was true that the Hague Convention provided that the parties should bear their own costs. However, such a provision was obviously unsatisfactory. The reason why it had been included in the Hague Convention was doubtless that it had at that time been regarded as a great achievement

⁵ Article 32, as tentatively adopted, read as follows:

"1. The arbitral award shall be drawn up in writing. It shall be read in open court, the representatives and counsel of the parties being present or duly summoned to appear.

"2. The arbitral award shall include a full statement of reasons.

"3. The arbitral award shall contain the names of the arbitrators and shall be signed by the president and by the registrar or the secretary."

⁶ Article 33 read as follows:

"Any measures of reparation or award of damages shall be carefully specified, as shall the allocation of costs and expenses."

if two States could be persuaded to have recourse to arbitration, and that the authors of the Convention had not wished to include any provision which might increase the reluctance of governments to have recourse to that, at that time, rather novel process. It was only just, however, that the tribunal should be allowed to award costs in certain cases; cases had occurred, and still occurred, for example, where litigation was quite unnecessary, where one party had resolutely opposed from the very outset an obviously just claim by the other party. For that reason he proposed that the following words be added at the end of Mr. Hudson's proposal:

"and of the costs of the litigation"

Mr. Lauterpacht's proposal was adopted by 9 votes to none, with 2 abstentions.

71. Mr. HUDSON suggested that it would be preferable in that case to retain the wording used in Article 64 of the Statute of the International Court of Justice, "Unless otherwise decided by the Court, each party shall bear its own costs".

72. Mr. SANDSTRÖM suggested that that question might be referred to the Standing Drafting Committee.

On that understanding, Mr. Hudson's proposal was adopted as amended.

ARTICLE 34⁷

73. Mr. HUDSON proposed that article 34 be amended to read:

"Subject to any contrary provision in the *compromis*, any member of the tribunal may attach his separate opinion to the award."

74. Mr. YEPES said that although, in theory, he did not favour separate or dissenting opinions, which weakened the authority of an arbitral award, he realized that the practice of including them was so firmly established that it would not be possible to eliminate them.

75. He proposed, however, that the following sentence be added to article 34, either in its original form or in that proposed by Mr. Hudson:

"Separate or dissenting opinions shall be limited to a brief statement of the considerations advanced by their authors."

76. Mr. LAUTERPACHT disagreed emphatically with Mr. YEPES' proposal, the intention of which was to restrict the arbitrators' right to present separate or dissenting opinions. It must be assumed that in submitting such opinions arbitrators would take care not to detract from the authority of the tribunal; apart from that, their right should be subject to no limitation. It was essential to the healthy development of international

⁷ Article 34 read as follows:

"The arbitrators are authorized to attach their separate or dissenting opinions to the award, unless they are explicitly debarred from doing so by the *compromis*."

law that any separate or dissenting opinions should be made known in as much detail as possible.

77. He could agree to the wording proposed by Mr. Scelle or to that proposed by Mr. Hudson, although he did not understand why Mr. Hudson spoke only of "separate opinions".

78. Mr. HUDSON pointed out that Article 57 of the Statute of the International Court of Justice also referred only to separate opinions. Separate opinions included dissenting opinions.

79. Mr. AMADO could find no fault with the admirably clear text proposed by Mr. Scelle. He could see no reason for the amendment submitted to it, unless its translation into English had given rise to difficulties.

80. Mr. KOZHEVNIKOV said that he was not convinced by Mr. Yépes' argument, and would vote against his proposal, which would have the effect of restricting the undoubtedly right of members of the tribunal to submit separate or dissenting opinions. In Soviet Union law, those two terms related to two distinct matters, and if Mr. Hudson's proposal was to be voted on, he would propose the insertion in it, after the words "may attach his separate", of the words "or dissenting".

81. He would be prepared to vote for the wording proposed by Mr. Scelle as it stood.

After further discussion, *Mr. Yépes' proposal was put to the vote and was rejected by 7 votes to 1, with 2 abstentions.*

Mr. Kozhevnikov's proposal, that the words "or dissenting" be inserted after the words "may attach his separate" in Mr. Hudson's amendment, was adopted by 7 votes to 2, with 1 abstention.

Mr. Hudson's proposal was adopted, as amended, by 8 votes to none with 1 abstention, subject to any further amendments that might be made by the Standing Drafting Committee.

82. Mr. el-KHOURI hoped that the Standing Drafting Committee would take into account the possibility that members of the tribunal who dissented from an award might use their right to attach to it their separate or dissenting opinions in such a way as to delay the issue of the award beyond the time-limit, thus invalidating it.

83. Mr. SANDSTRÖM pointed out that the draft prepared by Mr. Scelle did not specify what majority was required to enable the tribunal to make its award. He therefore proposed that the following sentence, taken from article 78 of the 1907 Hague Convention on the Pacific Settlement of International Disputes, be inserted in the draft text before the Commission, either as a second paragraph to article 34 or in any other place where the Standing Drafting Committee thought fit:

"All questions are decided by a majority of the members of the tribunal."

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

ARTICLE 35⁸

84. Mr. HUDSON proposed that article 35 in its entirety be replaced by the following text:

"The award is obligatory for the parties, and it must be carried out in good faith."

85. Mr. SCELLE pointed out that Mr. Hudson's proposal ignored the question of what was usually known as the "*effet utile*" of an award. If an award was carried out with respect only to its actual content, and not with respect to its logical implications as well, it could become meaningless. A recent judgment by the International Court of Justice, for example, had stated that the action taken by one of the parties was illegal. That party had pointed out that the Court had not said that it should revoke that action, and had declined to do so. What he wished to ensure was that, if the tribunal failed to dot the I's and cross the T's, its clear intention should nevertheless be carried out.

86. Mr. LAUTERPACHT associated himself with Mr. Hudson's proposal, although he felt that the text proposed should replace article 36 as well as article 35. In so far as the States parties to the dispute were concerned, article 36 merely repeated article 35; the further proposal that the award should be binding on the nationals of States parties to the dispute introduced a controversial element upon which he thought the Commission would have difficulty in agreeing. Finally, the provision that the award should be binding only on the parties to the dispute and in respect of the case which had been decided, which was based on Article 59 of the Statute of the International Court of Justice, where it had been included with the intention of somewhat weakening the impact of Article 38, was unnecessary in the draft convention, which contained no counterpart to Article 38 of the Court's Statute.

87. With regard to the question of "*effet utile*", his understanding of the statement that "the award... must be carried out *in good faith*" was precisely that the parties were bound to carry out everything which was logically implied in it as well as what was stated explicitly.

88. Mr. SCELLE said that he could accept Mr. Hudson's proposal if the majority of the Commission supported it. He would only point out that in his view Mr. Lauterpacht was too optimistic; the parties to a dispute could not be expected to be judges of good faith and justice; all that they could be expected to know was what was to their interest.

89. Mr. KOZHEVNIKOV felt obliged to protest against the statement that the parties could be judges

⁸ Article 35 read as follows:

"The award is strictly binding and shall be carried out in good faith with respect not only to its actual content but also to its logical implications."

"The tribunal has no power to issue regulations regarding either the execution of the award or the adjustment of future relations between the parties in the matter which has been the subject of the dispute, unless expressly invested with such power by agreement between the parties."

only of their own interests, not of good faith and justice. He requested, however, that the vote on Mr. Hudson's proposal be deferred until it had been distributed in writing.

It was so agreed.

Data and place of the fifth session (item 7 of the agenda)
(resumed from the 148th meeting)

90. The CHAIRMAN recalled that the Commission had already provisionally decided that its fifth session should be held in Geneva, beginning about 1 June 1953, and that the Assistant Secretary-General in charge of the Legal Department had subsequently transmitted to it certain comments by the Secretary-General on the additional financial implications of such a decision. The time had now come when the Commission should take its final decision on the matter.

After a brief discussion, the Commission decided by 9 votes to none, with 3 abstentions, to confirm its previous provisional decision, taken in the interests of the efficient conduct of its work, to hold its fifth session in Geneva, beginning about 1 June 1953. The voting was as follows:

In favour: Mr. Alfaro, Mr. Amado, Mr. François, Mr. Hsu, Mr. Hudson, Mr. Lauterpacht, Mr. Sandström, Mr. Scelle, Mr. Yepes.

Against: None.

Abstaining: Mr. el-Khoury, Mr. Kozhevnikov, Mr. Zourek.

The meeting rose at 1.10 p.m.

151st MEETING

Thursday, 26 June 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURY, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr.

Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 4) (continued)

1. The CHAIRMAN invited the Commission to resume its discussion of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46) contained in the special rapporteur's second report.

ARTICLES 35 (continued) AND 36¹

2. The CHAIRMAN recalled that, at the previous meeting, Mr. Hudson had proposed that articles 35 and 36 be replaced by the following article:

"The award is obligatory for the parties, and it must be carried out in good faith."

3. Mr. KOZHEVNIKOV said that although the French text was clear, the Russian translation with which he had been provided was not. It would be preferable to insert the words "by them" in the Russian text, after the words "carried out".

4. The CHAIRMAN pointed out that only English and French were working languages. The Russian translation should therefore not be regarded as authentic.

5. Mr. SCHELLE asked whether Mr. Hudson would agree to the insertion of the word "immediately" after the words "carried out".

6. Mr. YEPES felt that that addition was absolutely necessary. He formally moved the insertion of the word "immediately".

7. Mr. SANDSTRÖM and Mr. LAUTERPACHT pointed out that an award did not always have to be carried out immediately. The words "in good faith" covered the point which Mr. Scelle had in mind.

8. Mr. KOZHEVNIKOV agreed, and pointed out that the word "immediately" was itself open to varying interpretations. Its inclusion would not make for clarity in the way desired by Mr. Scelle.

9. Mr. SCHELLE said that he would not press his suggestion.

10. Mr. YEPES withdrew his proposal.

The text proposed by Mr. Hudson to replace articles 35 and 36 was adopted by 10 votes to none, with 1 abstention.

¹ Article 36 read as follows:

"The arbitral award, which shall be binding forthwith on the States parties to the dispute and on the nationals and organs of those States, is binding only on the parties to the dispute and in respect of the case which has been decided."

ARTICLE 37²

11. Mr. YEPES proposed that article 37 be amended to read:

"Any dispute which may arise between the parties with regard to the interpretation or execution of the award shall be submitted to the tribunal which made the award. If it proves materially impossible to reconstitute the tribunal, the dispute with regard to interpretation or execution shall be referred to the International Court of Justice."

12. Mr. LAUTERPACHT pointed out that the only difference of substance between the text proposed by Mr. Yepes and that of the special rapporteur was that the former omitted the reference to the Permanent Court of Arbitration. He could not himself understand that reference in Mr. Scelle's draft. There was no such body in existence as the Permanent Court of Arbitration; tribunals had been constituted at various times under the aegis and in pursuance of the Hague Conventions, but that was all.

13. He noted, however, that both Mr. Yepes and Mr. Scelle used the words "If it proves materially impossible to reconstitute the tribunal". If those words were intended to refer to cases where one or more members of the tribunal which had made the award had subsequently died, or were no longer available for any other reason, they raised an important issue, which affected the provisions relating to revision of the award as well as those relating to its interpretation and execution. In his view, it was extremely important that the tribunal which revised or interpreted the award should be the same as that which had rendered it, save in very exceptional cases. All that was necessary, therefore, was to extend the scope of the provisions relating to the replacement and withdrawal of arbitrators to cases of replacement or withdrawal arising after as well as before the award had been made.

14. Mr. el-KHOURI pointed out that article 82 of the 1907 Hague Convention for the Pacific Settlement of International Disputes had contained no provisions corresponding to the second sentence of Mr. Yepes' text or to the second paragraph of article 37 in Mr. Scelle's draft. That was obviously because it had been considered that the tribunal continued to exist until the dispute had finally been disposed of, and because the Hague Convention had contained provisions for the replacement and withdrawal of arbitrators. Article 4 already adopted by the Commission contained provisions dealing with the same matters. Those were all that was required, and he would suggest that

² Article 37 read as follows:

"Any dispute which may arise between the parties with regard to the interpretation and execution of the award shall be submitted to the tribunal which made the award.

"If it proves materially impossible to reconstitute the tribunal, the dispute with regard to interpretation or execution shall be referred, at the choice of the parties, either to the ICJ or to the PCA. In the event of disagreement between the parties, the ICJ shall have compulsory jurisdiction."

article 82 of the Hague Convention be substituted, with the necessary consequential changes, for the whole of article 37 in Mr. Scelle's draft.

15. Mr. SCELLE said that on the main point at issue he was entirely in agreement with Mr. Lauterpacht. What remained was only a matter of drafting. Disputes with regard to the interpretation of an award might arise months, or even years, after the award had been made, and situations might occur in which it would indeed be "materially impossible to reconstitute the tribunal". Provision should be made for such cases, although his basic idea had been that such disputes should be dealt with by the tribunal that rendered the original award.

16. He agreed that the Permanent Court of Arbitration at present existed only on paper. In his view, however, it was extremely regrettable that it had been allowed to fall into desuetude, and that disputes which apparently lent themselves to arbitration were now referred to the International Court of Justice instead.

17. Mr. SANDSTRÖM pointed out that the first paragraph of Mr. Scelle's draft of article 37 appeared to correspond to article 82 of the 1907 Hague Convention, but that the words "in the absence of an agreement to the contrary", which appeared in the latter, had been omitted. He wondered whether that omission was intentional.

18. Mr. SCELLE said that he had omitted those words purposely, because the award was binding on the parties, and he could not agree that the parties should be able, with the object of maintaining the *status quo*, to exploit a dispute, real or otherwise, as to the interpretation of the award. If such a dispute arose, it should be settled, whenever possible, by the tribunal which rendered the award.

19. Mr. KOZHEVNIKOV said that he could accept either Mr. Yepes' proposal or that of Mr. Scelle, subject to two amendments. In the event of Mr. Yepes' proposal being taken as the basis for discussion, he would propose that the words "established by agreement between the parties and" be inserted after the words "be submitted to the tribunal" in the first sentence, and that the words "upon agreement between the parties" be added after the words "to the International Court of Justice" in the second sentence. In the event of Mr. Scelle's proposal being taken as the basis for discussion, he would propose corresponding amendments to it.

20. Mr. LIANG (Secretary to the Commission) asked whether it was the Commission's intention to include in the draft articles a provision concerning what might be called the life of an *ad hoc* arbitral tribunal. He felt that it would be reasonable to provide that an *ad hoc* tribunal should cease to exist when all questions arising out of the dispute which had been referred to it, including questions of interpretation and revision of the award, had been settled. If that was agreed, the question of reconstituting the tribunal for the purpose of the interpretation or revision of the award would not arise,

because the tribunal would then be still in existence, and the provisions already adopted by the Commission relating to the withdrawal and replacement of arbitrators would apply.

21. On the other hand, it was possible, as Mr. Scelle had pointed out, that disputes concerning interpretation and revision might arise years after the award had been made, when members of the tribunal would no longer be available. In such cases, one solution would be to regard such disputes as new disputes and to consider the functions of the original tribunal as having ceased with the rendering of its award.

22. Mr. SCELLE could not agree with the last point made by the Secretary. In his view, all questions arising out of the interpretation, execution and revision of an award should be settled, if at all possible, by the tribunal which had made the award. One solution of the difficulty to which attention had been drawn by some members would be to provide for a time-limit, as had been done in Article 61, paragraph 5, of the Statute of the International Court of Justice, within which applications must be made for that purpose. Six months might be a suitable limit. After the time-limit prescribed had expired, such application would have to be made to the International Court of Justice or to the Permanent Court of Arbitration.

23. Mr. HUDSON had grave doubts whether article 37 should deal with the execution of awards. Some awards, such as that in the *Trail Smelter Case*, entailed execution over a very long period.³ Moreover, disputes with regard to execution could arise years after the award had been made. In *The Pious Fund of the Californian Case*, for example, a dispute had arisen with regard to the interpretation of a treaty concluded in 1848. The dispute had been submitted to arbitration by an umpire, and an award had been made in 1875 and slightly revised the following year. A dispute concerning execution of that award had arisen only in 1898, and had been submitted to a tribunal and an award rendered in 1902.⁴

24. If mention of execution was retained in article 37, some such words as those used in article 82 of the 1907 Hague Convention, namely, "in the absence of an agreement to the contrary", should be added, in order to give the parties some measure of control over the proceedings. It would also be necessary to provide for a time-limit, as suggested by Mr. Scelle.

25. Mr. ZOUREK said that the Secretary had raised a very important question, namely, that of the life of the tribunal. In his (Mr. Zourek's) view, an *ad hoc* arbitral tribunal ceased to exist as soon as the time-limit laid down in the arbitral undertaking or the *compromis* for the rendering of its award had expired, since it

³ Dispute between Canada and the United States of America. Award of 16 April 1938. See text in *American Journal of International Law*, vol. 33 (1939), pp. 182—212.

⁴ Dispute between Mexico and the United States of America. Award of 14 October 1902. See text in *American Journal of International Law*, vol. 2 (1908), pp. 898—902.

owed its very existence to the arbitral undertaking or the *compromis*. So long as the tribunal remained in existence, the parties should be free to refer to it questions of the interpretation of its award, if they so chose; if they did not so choose, or if the tribunal had ceased to exist, such questions should be dealt with as separate disputes, in accordance with the international instruments in force between the parties for the international settlement of disputes; if there were no such instruments in force between the parties, the dispute would have to be settled in any other manner agreed by them.

26. Mr. SANDSTRÖM did not consider it logical to assert that the tribunal ceased to exist on the expiry of the time-limit set for the rendering of its award.

27. After some drafting discussion, Mr. HUDSON suggested that the first paragraph of article 37 in Mr. Scelle's draft be replaced by the following text, adapted from Article 60 of the Statute of the International Court of Justice:

"Unless the parties agree upon another solution, any dispute which may arise between the parties as to the meaning and scope of the award may, at the request of any party, be submitted to the tribunal which rendered the award".

28. Mr. SCELLE and Mr. YEPES accepted Mr. Hudson's suggestion.

Mr. Hudson's suggestion was adopted by 9 votes to none, with 2 abstentions.

29. Mr. HUDSON felt that the words "unless the parties agree to another solution" in the first paragraph as just adopted made the second paragraph of Mr. Scelle's draft unnecessary.

30. Mr. LAUTERPACHT said that if the second paragraph were deleted, and if a situation arose where it became impossible to reconstitute the tribunal and the parties did not agree on another solution, deadlock would result. For that reason, the second paragraph ought to be retained.

31. Mr. YEPES and Mr. SCELLE agreed with the point of view expressed by Mr. Lauterpacht.

32. Mr. HUDSON suggested that if the second paragraph were to be retained it should be worded as follows, although he did not favour its substance;

"If for any reason it is impossible to submit the dispute to the tribunal which rendered the award, and if the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of any party."

33. Mr. SCELLE and Mr. YEPES accepted the text suggested by Mr. Hudson, and Mr. YEPES withdrew his own amendment.

The text suggested by Mr. Hudson was adopted by 8 votes to none, with 4 abstentions.

Article 37 as a whole and as amended was adopted by 9 votes to none, with 3 abstentions.⁵

ARTICLES 38 AND 41⁶

34. Mr. LAUTERPACHT proposed alternative wording for article 38, to read as follows :

"An application for the revision of the award may be made only on the ground of the discovery of some new fact of such a nature as to be of a decisive character, provided that, when the award was rendered, that fact was unknown to the tribunal and to the party claiming revision and that such ignorance was not due to the negligence of the party claiming revision.

"The application for revision must be made at the latest within six months of the discovery of the new fact."

35. He had incorporated in his text article 41 from the special rapporteur's draft, where that article conflicted with article 38, which stated that the application for an award might be made at any time.

36. Mr. HUDSON supported Mr. Lauterpacht's text, which departed from that drafted by the special rapporteur by stipulating that the application for revision must be made within six months of the discovery of the new fact, and by omitting the words "notwithstanding any clauses to the contrary in the *compromis*".

37. He himself had drafted an alternative text for article 38, modelled on article 61, paragraph 1, of the Statute of the International Court of Justice. His text read as follows :

"An application for revision of an award may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the award was rendered, unknown to the tribunal and also to the party claiming revision, provided that such ignorance was not due to that party's negligence."

⁵ Article 37, as tentatively adopted, read as follows :

"1. Unless the parties agree upon another solution, any dispute which may arise between the parties as to the meaning and scope of the award may, at the request of any party, be submitted to the tribunal which rendered the award.

"2. If for any reason it is impossible to submit the dispute to the tribunal which rendered the award, particularly if the tribunal cannot be reconstituted in accordance with Article 4, and if the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of any party."

See paras. 81—85 below.

⁶ Article 38 read as follows :

"An application for revision of an award may be made at any time, notwithstanding any clauses to the contrary in the *compromis*, if it is based upon the discovery of some new fact of such a nature as to be a decisive factor, which fact was, when the award was given, unknown to the arbitrator and also to the party claiming revision."

Article 41 read as follows :

"The application for revision must be made at the latest within six months of the discovery of the new fact."

38. Mr. SCELLE asked whether Mr. Lauterpacht and Mr. Hudson considered that the parties had a right to stipulate in the *compromis* that there should be no revision. If that were the intention of the two alternative texts proposed he would be unable to accept either of them, since it seemed to him contrary to the interests of the international community to allow the parties to prohibit revision of an award which was manifestly mistaken.

39. Mr. HUDSON replied in the negative.

40. Mr. LAUTERPACHT was not absolutely certain that Mr. Hudson's wording did not mean that the parties were masters of the procedure, and that accordingly they were not deprived of the right of providing against revision in the *compromis*. Such a contingency could be envisaged, but was unlikely to occur.

41. Mr. SANDSTRÖM considered that the Commission might have to insert in the draft procedure the provision contained in article 83, first paragraph, of the 1907 Hague Convention for the Pacific Settlement of International Disputes, whereby, if the parties did not reserve their right to demand revision in the *compromis*, revision would be excluded. In the interests of public order, disputes must be finally settled and litigation should not be allowed to continue indefinitely. He would accordingly propose that article 38 be amended in that sense.

42. The CHAIRMAN observed that, according to article 12, paragraph (g), already adopted by the Commission,⁷ the *compromis* was to contain special provisions in the matter of procedure for revision.

43. Mr. KERNO (Assistant Secretary-General) observed that if it was agreed that the parties did not have the right to exclude the possibility of revision, then some provision would have to be made to enable the tribunal to re-open a case *ex officio*.

44. Mr. SCELLE expressed surprise at the thesis developed by Mr. Sandström, which seemed to him retrograde, and with which he was in profound disagreement. According to an axiom in Anglo-Saxon law, "nothing was settled until it was settled right"; an arbitral award which was contrary to public order should not be allowed to stand, even though it be in accord with the will of the parties. For him, it was absolutely axiomatic that the possibility of revision should be allowed in any judicial process, whatever its nature.

45. Mr. HUDSON did not think that the issue whether the parties had a right to exclude revision arose in any of the texts before the Commission.

46. Mr. LAUTERPACHT said that, even though that might be true, it was nevertheless an issue which the Commission ought to face, and he was inclined to support Mr. Scelle's views. A new fact, for instance,

⁷ See summary record of the 146th meeting, para. 40.

might be the discovery after an award had been made that it had been procured by fraud, collusion or false testimony. Could it be maintained that in such cases the parties should be in a position to prevent the tribunal from re-opening the matter?

47. Mr. SANDSTRÖM replied that fraud or false testimony discovered subsequent to the award did not, in his view, constitute the discovery of a new fact, but was a case of irregular procedure, which was dealt with elsewhere in Mr. Scelle's draft articles.

48. Mr. LAUTERPACHT said that in order to meet Mr. Scelle's point he would amend his own text by adding the words "by either party" after the words "revision of the award may be made". The word "only" might also be dropped from his text.

The first paragraph of Mr. Lauterpacht's amendment, as amended, was adopted by 8 votes to none, with 3 abstentions.

49. Mr. HUDSON said that both Mr. Lauterpacht's text and his own should be prefaced by the words "Subject to any relevant provisions in the *compromis*".

50. Mr. SCELLE pointed out that the addition suggested by Mr. Hudson could not be put to the vote, since it conflicted with the text already adopted.

51. Mr. LAUTERPACHT agreed that Mr. Hudson's proposal ran counter to the spirit of the text just adopted and to the sense of the special rapporteur's draft as a whole. He added that there was no contradiction between his text and that of article 12, paragraph (g), according to which the parties had full latitude to lay down provisions in the *compromis* relating to the procedure of revision. Their right to exclude it did not of course arise.

52. The CHAIRMAN ruled out of order Mr. Hudson's amendment to Mr. Lauterpacht's text which had already been adopted.

53. He then put to the vote the whole of Mr. Lauterpacht's text.

Mr. Lauterpacht's text, as amended, to replace articles 38 and 41 in the special rapporteur's draft was adopted as a whole by 7 votes to 1, with 4 abstentions.⁸

54. Mr. AMADO, explaining his vote, said that he had abstained because he shared Mr. Sandström's views.

55. Mr. LAUTERPACHT raised the question whether the Commission should not make some provision similar to that contained in Article 61, paragraph 5, of

the Statute of the International Court of Justice, imposing a time-limit of ten years on applications for revision.

56. Mr. SCELLE was not in favour of such a provision, although he had no objection of principle to the issue.

57. Mr. LIANG (Secretary to the Commission) expressed his doubts on the wisdom of transposing to the draft before the Commission the provision of Article 61, paragraph 5, of the Statute, since that provision was appropriate only to a permanent judicial organ.

58. Mr. HUDSON considered that if such a provision were inserted, the period should be reduced to three or five years.

59. Mr. el-KHOURI thought that such a provision would be unwise. If it was impossible to re-convene the original tribunal for the purpose of entertaining an application for revision, the matter could be referred to the International Court of Justice.

60. Mr. SANDSTRÖM proposed the adoption of a provision couched in the same terms as Article 61, paragraph 5, of the Statute of the International Court, namely:

"No application for revision may be made after the lapse of ten years from the date of the award."

61. Mr. LAUTERPACHT supported Mr. Sandström's proposal.

62. Mr. SCELLE considered that if article 39 of his own draft were adopted that would suffice to meet the purpose of the text proposed by Mr. Sandström, since it would make the tribunal responsible for deciding whether revision should take place.

63. Mr. ZOUREK pointed out that an arbitral tribunal was quite different in nature and composition from the International Court of Justice. He did not believe that provisions applicable to the latter were always appropriate to the former. He therefore opposed Mr. Sandström's proposal.

64. Mr. AMADO also opposed Mr. Sandström's proposal.

Mr. Sandström's proposal was rejected by 6 votes to 5, with 1 abstention.

ARTICLE 39⁹

65. Mr. HUDSON proposed that article 39 be replaced by the following text:

"The proceedings for revision shall be opened by an interlocutory award by the tribunal expressly recording the existence of the new fact, and declaring the application admissible on this ground."

⁸ Article 38, as tentatively adopted, read as follows :

"1. An application for the revision of the award may be made by either party on the ground of the discovery of some new fact of such a nature as to be of a decisive character, provided that, when the award was rendered, that fact was unknown to the tribunal and to the party claiming revision and that such ignorance was not due to the negligence of the party claiming revision.

"2. The application for revision must be made at the latest within six months of the discovery of the new fact."

⁹ Article 39 read as follows :

"The proceedings for revision shall be opened by a judgment of the tribunal recording the existence of the new fact and ruling upon admissibility. The tribunal shall then rule upon the merits of the case."

66. Mr. LAUTERPACHT supported Mr. Hudson's proposal, but asked whether the word "expressly" might not be deleted, as it appeared to him redundant.

67. Mr. LIANG (Secretary to the Commission) suggested that there was no need to follow the wording of Article 61 of the Statute of the International Court of Justice too closely. He had misgiving about the words "The proceedings for revision shall be opened...", as any hearing upon the admissibility of an application for revision in itself constituted part of the proceedings.

68. Mr. HUDSON observed that the point raised by the Secretary might be met by amending the opening words of his text to read: "The decision on revision shall be preceded by", etc.

69. Mr. KERNO (Assistant Secretary-General) suggested that it was important to make clear that the tribunal had first to pronounce on whether it was in the presence of a new fact. After which it could examine the merits of the case and decide whether to revise its award.

70. Mr. SCELLE agreed that the procedure of revision entailed two stages: first, the decision on admissibility, and secondly, examination of the substance of the new fact.

71. Mr. LAUTERPACHT suggested that, as there was no disagreement on the substance of article 39, suggestions regarding its drafting should be left to the Standing Drafting Committee.

It was so agreed.

Mr. Hudson's text for article 39 was adopted, subject to review by the Standing Drafting Committee, by 9 votes to none, with 1 abstention.

ARTICLE 40¹⁰

72. Mr. HUDSON proposed an alternative text for article 40, to read:

"The application for revision shall be made to the tribunal which rendered the award. If for any reason it is not possible to address the application to that tribunal, the application may, unless the parties agree upon another solution, be made to the International Court of Justice."

73. Mr. SCELLE accepted Mr. Hudson's proposal.

74. Mr. KOZHEVNIKOV said that Mr. Hudson's proposal largely accorded with his own views. He would, however, propose an amendment to the second part, namely, the insertion of the words "by consent of the parties" after the words "be made".

¹⁰ Article 40 read as follows :

"The application for revision shall be made to the tribunal which gave the original award. If it is impossible to reconstitute that tribunal, the application shall be made to the ICJ or the PCA, as provided in the above article on interpretation."

75. Mr. LAUTERPACHT, referring to Mr. Hudson's proposal, asked what were the reasons for which it would not be possible to address an application for revision to the original tribunal. If one of the members of the tribunal had died after the award had been rendered, would the situation then be one envisaged by Mr. Hudson's text? He thought it a fundamental principle that revision should be made by the original tribunal. That was a characteristic feature which distinguished revision from other remedies. Some means should therefore be found to prevent a party from discarding the tribunal which had rendered the award.

76. Mr. SCELLE said that he had intentionally referred in articles 37 and 40 to the reconstitution of the tribunal, since that would mean that if one of the members had died in the meantime, the provisions relating to replacement would apply.

77. Mr. HUDSON said that his text would cover reconstitution of the tribunal.

78. Mr. LAUTERPACHT suggested that that was open to question. The possibility of reconstitution did not seem to him to be implicit either in Mr. Hudson's text or in the second paragraph of article 37 as already adopted by the Commission. Indeed, he had had the intention of submitting an amendment to the latter concerning the insertion of the words "if necessary the tribunal shall be reconstituted in accordance with the provisions of article 4".

79. Mr. AMADO agreed with Mr. Lauterpacht.

80. Mr. SANDSTRÖM had understood the words "the tribunal which rendered the award", in the second paragraph of article 37, to mean a tribunal consisting of at least a majority of the original arbitrators.

81. Mr. SCELLE said that it was becoming evident that the second paragraph of article 37 was not quite clear. He therefore proposed that a reference to the reconstitution of the tribunal be inserted in it, and in Mr. Hudson's draft of article 40, by adding, at the appropriate place, the following words, "particularly if the tribunal cannot be reconstituted in accordance with article 4".

82. Mr. HUDSON accepted Mr. Scelle's proposal.

83. Mr. LAUTERPACHT suggested that it should be laid down that the tribunal should be reconstituted in accordance with the provisions of article 4.

84. Mr. SCELLE agreed.

85. The CHAIRMAN put to the vote Mr. Hudson's text for article 40, as amended by Mr. Scelle. He declared that, if adopted, the addition proposed by Mr. Scelle would apply equally to the second paragraph of article 37, already tentatively adopted.

Mr. Hudson's wording, as amended, was adopted by 9 votes to none, with 3 abstentions.

The meeting rose at 1.15 p.m.

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Chairman : Mr. Ricardo J. ALFARO.***Present :***

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

**Arbitral procedure (item 2 of the agenda) (A/CN.4/18,
A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add.
1 to 6) (*continued*)****ARTICLES 42 TO 44¹**

1. The CHAIRMAN, inviting the Commission to continue its consideration of the Second Preliminary Draft

¹ Article 42 read as follows :

“ Any challenge of the validity of the award, whatever the defect alleged, must be submitted to further judicial proceedings by the party alleging invalidity. ”

“ Such appeal must be lodged within a very short time after the making of the award (one month or six weeks, at the most) and shall not stay execution unless the new tribunal or the new arbitrator to whom the case is referred decides otherwise by ordering the necessary provisional measures. ”

Article 43 read as follows :

“ Any party challenging the validity of an arbitral award must propose to its adversary the appointment of a new arbitrator or the constitution of a new tribunal, which shall take place in the manner provided in the present regulations. ”

“ The parties may also refer the matter directly to the ICJ or the PCA. In the event of disagreement between the parties, the matter may be referred to the ICJ by the appellant by direct application. ”

Article 44 read as follows :

“ The tribunal to which the objection is referred shall first decide whether there are grounds for a fresh hearing, and if so shall decide : either to review the judgment (appeal) or to pronounce it null and void (cassation). In the latter case, the parties shall by order of the tribunal revert to the legal and, where possible, material *status quo ante*. ”

“ In either case, they must agree either to constitute a new arbitral tribunal or to empower the court to which the question of admissibility is referred to re-examine the case. If agreement between them is not reached within the period assigned to them for this purpose in the decision on admissibility, the ICJ shall be competent to give final judgment on the merits of the dispute. ”

on Arbitration Procedure (annex to document A/CN.4/46) contained in the special rapporteur's second report, said that he wished to make some preliminary remarks before the Commission took up the last chapter of the special rapporteur's draft relating to remedies.

2. That chapter, and the doubts that Mr. Scelle himself had expressed on the question of legal remedies and the nature of appeal and *cassation* against arbitral awards, prompted him to make a few observations on the advisability of including such remedies in the draft procedure.

3. Eminent authorities on international law had expressed concern at the evil caused by arbitral decisions rendered *ultra vires*, or involving gross errors of law or fact, as a result of which one party suffered injustice. That concern had earlier inspired jurists to consider the possibility of conferring on the Permanent Court of International Justice the power to review arbitral judgments as a court of second instance. He himself believed such concern to be justified, but also felt that it was neither feasible nor desirable to adopt such a remedy.

4. No litigant, whether an individual or a State, admitted that the judgment rendered against his or its claims was right and just. The losing party might abide by the adverse decision, but would continue to believe that a mistake or an injustice had been committed. That feeling would not be removed by the existence of a jurisdiction of second instance.

5. He could not reconcile the concepts of appeal and *cassation* with international arbitration, since appeal presupposed the simultaneous and permanent existence of courts of first and second instance. The latter were considered to afford a certain guarantee, in that they were capable of remedying any error of the inferior courts by modification of their judgments or by a decision *a contrario imperio*. *Cassation* constituted in fact a third instance, but was concerned only with substantive or procedural errors of law, the judgment of the court of appeal being declared null and void if it were found that such errors had been committed by that court.

6. It seemed self-evident that those two remedies generally offered under municipal law were extraneous to international arbitration. It was hard to envisage the latter process as jurisdiction of first instance, because such a conception was contrary to the nature of things. International jurisdiction and arbitration were recognized as two different methods of achieving the peaceful settlement of disputes between States. One or the other might be preferred in particular cases, but the possibility of having recourse to either would be destroyed if arbitration were subordinated to international jurisdiction by means of a system of appeals against arbitral awards. Such a procedure would be tantamount to making arbitral tribunals part of the machinery of the International Court of Justice. They would thus become courts of first instance subject to appeal or *cassation* before the International Court acting as a court of second instance. That would be to disregard the nature of arbitration itself.

7. The essence of arbitration was that the litigants submitted their dispute to judges of their own choice. It would be manifestly inconsistent for the parties to place their confidence not in the judges they chose themselves, but in the possibility of an appeal from the decision of those judges. It was imperative, therefore, as a matter of principle, to treat arbitral tribunals as courts of single instance whose decisions were final. The only possible remedy would be revision by the same tribunal. The Commission had already adopted provisions relating to revision and its task might well stop there.

8. He did not fail to recognize the gravity of the problem created by awards rendered *ultra vires*, or involving error or injustice, for any reason. But the problem created by the reverse situation, namely, that of the losing party alleging nullity of the award without legal grounds, must also be taken into consideration. In international disputes, exacerbated national sentiment might impel a government to resort to any allegations and any means of invalidating, evading or rendering inoperative the adverse decision of an arbitral tribunal. Who then was to judge whether it was the tribunal and the winning party, or the party which alleged *ultra petita*, corruption, prejudice or errors of any other kind, that was in the right?

9. Once again the nature of things might be used as a safe guide. If a nation which had pledged its national honour to carrying out an arbitral award failed to do so, alleging, with or without reason, in good or in bad faith, that the award was legally invalid, a new conflict came into being. The remedy was to resort to a new arbitration if the matter could not be settled between the parties direct.

10. For those reasons, he felt that, before embarking on its substantive discussion on articles 42 to 44, the Commission might wish to discuss in principle the question whether it was desirable to include a special chapter on legal remedies other than revision.

11. Mr. SCELLE was in agreement with many of the points made by the Chairman. Remedies was a subject concerning which he (Mr. Scelle) felt some hesitation. He agreed that to establish a system of courts of second instance would be a distortion of arbitration, since appeal to such a court would be equivalent to opening a new case. Revision was, of course, in an entirely different category.

12. However, one matter connected with jurisdiction of second instance must be considered, namely, the possibility of the parties not agreeing to submit a dispute to arbitration for the second time.

13. He entirely agreed with the Chairman that it was for the Commission first to decide whether or not to deal with the question of remedies at the present stage.

14. Mr. LAUTERPACHT expressed disagreement with the proposal put forward by the Chairman. It was essential to consider the question of nullity. Arbitral procedure, as an item on the Commission's agenda, was, on the face of it, a somewhat theoretical subject, since no major dispute had been submitted to arbitration for forty years. In his view, therefore, the main

justification for considering the matter at all was in order to deal with an issue which had done so much to bring discredit upon international law, namely, that of excess of jurisdiction and nullity of awards. It was precisely that subject which the Chairman was now suggesting the Commission might leave on one side. Perhaps some of the difficulties arising from the Chairman's remarks were due to the fact that he had failed to distinguish clearly enough between nullity because of excess of jurisdiction and appeal on the ground of a wrong application of international law.

15. Excess of jurisdiction was constantly occurring, and was a problem which must be faced. There was no reason why the parties should be deprived of an adequate remedy against it. The matter was particularly crucial, in so far as excess of jurisdiction, if proved, meant that there was no legal obligation on the parties to comply with the award. The subject had been considered in great detail during the time of the League of Nations, and there was much accumulated literature and experience on the matter of which the Commission should make use.

16. Appeal from an award on grounds of a wrong application of the law was another matter, and many of the Chairman's remarks were very pertinent to it. He agreed that there were persuasive reasons why there should be no appeal on that ground, and why the award should be final unless specific provisions to the contrary were embodied in the *compromis*.

17. In conclusion, he urged the Commission to maintain a clear distinction between challenge on grounds of excess of jurisdiction and appeal on the ground of a wrong application of the law, and to consider the whole matter in detail with a view to formulating the necessary provisions.

18. Mr. SCELLE said that if the Commission decided to include in the draft a chapter on remedies, the relevant discussions might take several weeks. It would be remembered that the subject had been examined in great detail by the First Committee of the League of Nations Assembly, and by a number of eminent authorities, whose works he had mentioned in paragraph 100 of his first report on arbitration procedure (A/CN.4/18).²

19. Mr. KERNO (Assistant Secretary-General) said that in his view a characteristic feature of arbitration was the finality of the arbitral award. He accordingly considered that in principle appeal was contrary to the whole spirit of arbitration, though he recognized that an appeal on grounds of nullity was in a different category, and must be allowed.

20. On the other hand, it might perhaps be argued that, in considering the special rapporteur's draft, the Commission was not attempting to regulate arbitral procedure in all its aspects, but merely trying to deal with its most essential elements. If it were decided not to include a chapter on remedies that would not mean

² See printed French text in *Yearbook of the International Law Commission, 1950*, vol. II, p. 145.

that appeal would be impossible, since provision could be made for it in the *compromis* under the provisions of article 12, paragraph (g). If no such provision were inserted in the *compromis*, it would mean that the parties had full confidence in the tribunal and would regard its decision as final.

21. Mr. SANDSTRÖM considered that an appeal on the ground of a wrong application of law should not be allowed, but agreed with Mr. Lauterpacht that a challenge on the ground of excess of jurisdiction must be admissible. It could be dealt with either as an appeal, or as a subject for a new arbitration conducted in the usual manner. He had no particular preference for either method. He did not consider, however, that the Commission could leave the whole question in the air.

22. Mr. AMADO paid tribute to the moral and intellectual integrity of the special rapporteur, whose whole draft was permeated with the conviction that arbitration was a legal and not a political process. On the other hand, those who believed that arbitration provided States with an outstanding method of settling disputes felt that arbitral awards must be final. Little purpose would be served by sacrificing the feasible on the altar of legal perfectionism. He agreed with those who felt that a system of remedies would undermine the confidence of the international community in arbitration.

23. Mr. HSU observed that the process of appeal could be set about with a whole series of guarantees to prevent abuse.

24. The Commission had in fact to make a choice between two evils; the possible prolongation of litigation, and a bad settlement. Surely the former was the lesser of the two?

25. Mr. FRANÇOIS considered that there should in principle be no appeal against an arbitral award, and that it should be accepted by the parties for better or for worse. But, as Mr. Lauterpacht had argued, there were certain cases in which resort to a court of second instance must be allowed. Some provision must clearly be made to protect the parties from excess of jurisdiction, since that was one of the greatest dangers to the proper development of arbitration. If no remedy against that evil were provided, the consequences would indeed be serious, since many governments held the view that when excess of jurisdiction occurred it was their sovereign right to decline to recognize the award: a matter of which they evidently regarded themselves as the sole judge. That to him was totally unacceptable. If no provision was made in the *compromis* to the contrary, some remedy must be devised to allow for appeal on those grounds. He accordingly subscribed to the views put forward by Mr. Lauterpacht.

26. Mr. SCELLE appealed to members of the Commission first to decide the issue whether or not a chapter on remedies was to be included in the draft. If the Commission decided against inclusion, he would have to devote a section in his final report explaining the reasons for that decision.

27. Mr. KOZHEVNIKOV agreed with Mr. Scelle's earlier remark that so complex and delicate a problem as remedies could not be dealt with in haste. In view of the Commission's responsibilities, such matters must be given mature consideration.

28. He did not believe, however, that the problem of remedies was of prime importance, or as vital and topical as some of the other problems with which the Commission had already dealt—to his mind unsatisfactorily. There was clearly a very profound difference of opinion within the Commission based on two diametrically opposed conceptions of arbitration. In his view, one of the cornerstones of international law was the principle of sovereignty and of non-interference in the domestic affairs of States. Others seemed to believe that progress could only be made by creating international organs in the face of the opposition of States. He could not but regard such a view as retrograde, and was convinced that those provisions so far adopted which were designed directly or indirectly to impose certain obligations on the parties against their will were contrary to the fundamental principles of international law. Accordingly, he would be able to accept only those provisions on remedies that were based on respect for the will of the parties.

29. Mr. SANDSTRÖM formally moved that the Chairman put to the vote the question whether or not a chapter on remedies be included in the draft.

30. Mr. el-KHOURI considered that if the draft contained no chapter on remedies the chance of States adhering to the final instrument would be greatly diminished.

31. Under Islamic law States were forbidden to submit issues affecting their vital national interests to the decision of irresponsible parties, and he would apply that term to an arbitral tribunal in the sense that it was not answerable to any other body.

32. He recognized, of course, that the question of remedies was extremely complex and would require detailed discussion. That discussion might accordingly be deferred until the next session to allow the special rapporteur to prepare more material on it.

33. Mr. YEPES did not believe that, after four years work, the Commission could report to the General Assembly that it had decided not to discuss the vital problem of remedies. Surely the time had now come to do so, and for the Commission to face up to its responsibilities. A draft without a chapter on remedies would be incomplete and virtually void of meaning, since it would consecrate the theory of the infallibility of arbitral awards, which would not be accepted by world public opinion and would be harmful to the development of arbitration as a whole. It was impossible to ignore the fact that numerous cases of excess of jurisdiction had occurred and some protection against it must therefore be provided.

34. He could not agree with the thesis put forward by the Chairman that no nation would ever recognize itself to be in the wrong.

35. An arbitral award tainted with the fault of excess of jurisdiction was not strictly speaking an award, and the parties could not be obliged to execute it. He therefore strongly urged that the Commission consider the problem of remedies and insert the necessary provisions in the draft. If it failed to do so, it would lay itself open to justifiable criticism.

36. Mr. ZOUREK said that the system of remedies envisaged in the special rapporteur's draft was contrary to the essence of arbitration, namely, the voluntary choice of arbitrators by the parties. Furthermore, it would transform arbitral tribunals into courts of first instances whose decisions would be subject to the jurisdiction of the International Court of Justice.

37. In his view, if an award gave rise to dispute that dispute should be settled either by normal diplomatic processes or by a new arbitration.

38. Mr. LIANG (Secretary to the Commission) suggested that the Commission might find it difficult in its report to justify the leaving-aside of the important and persistent problem of legal remedies in arbitration. The argument that that problem lay outside the field of arbitral procedure was open to question. Certainly the general public and legal experts would expect the Commission at least to discuss the problem and to give expression of its views thereon. The task of codifying procedure in that respect might prove impossible in the course of one or two meetings. But there was no particular urgency about finishing the Commission's work on arbitral procedure within a definite time-limit. What was important was that all essential problems should be examined. He did not believe, however, that the discussion of legal remedies would take so long as Mr. Scelle feared; after all, the history of the subject was well known to all members of the Commission.

39. Mr. SCELLE said that it had been his wish to limit the Commission's discussion of legal remedies to the purely procedural aspect of the question. He persisted in the belief that if it embarked on a discussion of the substantive aspect the discussion would be very protracted. Moreover, the question of what constituted grounds for nullifying an arbitral award was immaterial to a draft on arbitration procedure. On the other hand, it was essential to include provisions governing the procedure for nullification, for example, the time-limit for the submission of challenges of the validity of the award, the tribunal by which the matter was to be decided and so on.

40. Mr. YEPES wished to point out that the Institute of International Law had prepared a draft on arbitration procedure which contained a provision that the award might be rescinded in certain specified cases.³ What he proposed was that a similar provision should be included in the draft the Commission was now preparing.

41. He also recalled that in article 23 of his draft the special rapporteur had provided that failure to observe

³ See text in *Annuaire de l'Institut de droit international*, vol. 33 (1927), t. II, pp. 634—641.

the principle of equality of the parties before the rules of procedure could void the award. It had been agreed that that provision should be deleted from article 23, but that it should be re-inserted at some later point in the draft.⁴

42. The CHAIRMAN said that he would put to the vote the issue whether the question of legal remedies should be discussed by the Commission, and whether proposed texts relating to that question should be discussed and put to the vote.

That issue was decided in the affirmative by 10 votes to 2.

43. Mr. SCELLE explained that he had voted in the affirmative because he had already stated that he would support the views of the majority, and it was obvious that the majority was in favour of including provisions on legal remedies in the draft.

44. Mr. el-KHOURI said that he had voted in the affirmative against his belief that it would be impossible to bring the discussion of the question of legal remedies in all its aspects to a conclusion at the present stage.

45. The CHAIRMAN said that now that that question of principle had been settled, he would open discussion on the various proposals which had been submitted to the Chair. Mr. Lauterpacht had proposed that article 42 be replaced by the following text:

“The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on the ground of excess of jurisdiction or of a fundamental fault of procedure. The application must be made within sixty days of the rendering of the award.”

46. Mr. Sandström had proposed that article 42 be replaced by the following text:

“Unless otherwise agreed by the parties, there shall be no right of appeal against the award except in the following cases :

“1. If the arbitrators gave the award without the dispute having been referred to them by the parties ;

“2. If the award was obtained by fraud or corruption ;

“3. If, through no fault of the party, a procedural irregularity occurred calculated to influence the decision, provided that the party did not take part in the proceedings without pointing out such irregularity or otherwise making it clear that it did not intend to plead it.”

47. Mr. Hudson had proposed that articles 42 to 44 be replaced by the following single article :

“If a party challenges the validity of the award of a tribunal on the ground of *excès de pouvoir* or on the ground of bad faith on the part of a member of the tribunal, and if the parties fail to reach an agreement on the matter, the dispute may be submitted to the International Court of Justice by either party,

⁴ See summary record of the 148th meeting, paras. 9—12.

and the International Court of Justice may pronounce the nullity of the award."

48. Mr. YEPES' proposal, on the other hand, was that the following text should be inserted under the heading "Remedies", before article 42:

"The award may be rescinded at the request of the injured party in the following cases:

"(a) If the tribunal has exceeded its powers;

"(b) If corruption is proved against an arbitrator;

"(c) If there has been any serious departure from the rule of equality of the parties in arbitration proceedings. A technical irregularity may not be invoked for the purposes of this article;

"(d) If the *compromis* is null and void;

"(e) If there has been fraud or collusion in the production of evidence."

49. Mr. SANDSTRÖM felt that the Commission should confine itself to deciding three further questions of principle, namely: first, whether the cases in which an appeal could be made should be enumerated, and if so, what those cases should be; secondly, to what jurisdiction the appeal should be addressed; and thirdly, within what time-limit it should be made. It could then be left to the Standing Drafting Committee to prepare a text.

50. Mr. LAUTERPACHT felt that the Commission should first resolve a question of terminology. Mr. Sandström had referred to "appeals", but what the Commission was really considering, in his (Mr. Lauterpacht's) opinion, was claims for nullification of the award.

51. Mr. HUDSON said that he was opposed to any mention of appeals; what was meant was challenges to the validity of an award.

52. Mr. SCELLE said that he did not agree, but that the question was one for the Commission to decide.

53. After some discussion, the CHAIRMAN noted that a majority of the Commission was in favour of the cases in which nullification of the award could be claimed being enumerated in the draft convention, and therefore invited comment, first on the introduction proposed by Mr. YEPES to the chapter on remedies.

54. Mr. ZOUREK proposed that the introduction read as follows:

"The award shall be null in the following cases";

55. Mr. HUDSON suggested that if the question of grounds for nullity were to be dealt with in a separate article, the introduction thereto should be worded as follows:

"The validity of an award may be challenged by either party on one or more of the following grounds:"

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

Mr. Hudson's suggestion was adopted by 11 votes to none, with 1 abstention.

56. The CHAIRMAN then invited discussion on paragraphs (a) to (e) of Mr. YEPES' proposal.

Paragraph (a) was adopted by 10 votes to none, with 1 abstention.

57. Mr. el-KHOURI proposed that in paragraph (b) the word "corruption" be replaced by the word "partiality". Partiality, by which he meant a flagrant departure from the principles of international law and justice in favour of one of the parties, was more far-reaching and easier to prove than corruption.

58. Mr. YEPES disagreed. Partiality was a subjective question and exceedingly difficult to prove. Corruption was an objective question and comparatively easy to prove.

Mr. el-Khouri's proposal was rejected by 10 votes to 1, with 1 abstention.

59. Mr. HUDSON suggested that paragraph (b) of Mr. YEPES' proposal be amended to read:

"The corruption of a member of the tribunal".

60. Mr. YEPES accepted that proposal.

Paragraph (b) was unanimously adopted as amended.

61. After some drafting discussion, Mr. YEPES agreed that paragraph (c) should be amended to read:

"If there has been a serious departure from a fundamental rule of procedure".

Paragraph (c) was unanimously adopted in that form.

62. Mr. HUDSON, supported by Mr. SANDSTRÖM, proposed that paragraph (d) be omitted. It was not clear how the question of nullity of the *compromis* could arise.

63. Mr. YEPES explained that it could happen that the parties could conclude a *compromis* which was null, but that the nullity was not discovered until the award had been made; alternatively, they might conclude a *compromis* which was not ratified by their legislatures.

64. Mr. LAUTERPACHT agreed that cases could exceptionally arise where nullity of the *compromis* would entail nullification of the award, but hoped that Mr. YEPES would withdraw paragraph (d) in order not to detract attention from paragraph (a), which was by far the most important.

65. Mr. YEPES agreed to withdraw paragraph (d).

66. Mr. LAUTERPACHT hoped that Mr. YEPES would also withdraw paragraph (e), for the reasons which he (Mr. Lauterpacht) had already advanced in connexion with paragraph (d), and also because the cases referred to in paragraph (e) were covered by article 38, which provided for revision in the event of the discovery of some new fact.

67. Mr. YEPES said that he would agree to withdraw paragraph (e), provided it was understood that the cases referred to therein were covered by the provision referred to by Mr. Lauterpacht.

The article proposed by Mr. YEPES was adopted, as

amended, by 8 votes to none, with 3 abstentions. The text read as follows:

"The validity of an award may be challenged by either party on one or more of the following grounds;

- "(a) If the tribunal has exceeded its powers;
- "(b) The corruption of a member of the tribunal;
- "(c) If there has been a serious departure from a fundamental rule of procedure".

The meeting rose at 1 p.m.

153rd MEETING

Monday, 30 June 1952, at 2.45 p.m.

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Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 7) (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitral Procedure (annex to document A/CN.4/46) contained in the special rapporteur's second report.

ARTICLE 43

2. Mr. LAUTERPACHT said that, in view of the Commission's decision to enumerate in article 42 the grounds on which an award might be challenged he wished to amend the text he had proposed at the previous meeting¹ to read:

"The International Court of Justice shall be competent, on the application of either party, to declare

the nullity of the award on any of the grounds set out in the preceding article.

"The application must be made within sixty days of the rendering of the award."

3. The CHAIRMAN reminded the Commission that it also had before it the text² proposed by Mr. Hudson at the previous meeting to replace articles 42-44 in the special rapporteur's draft, which read:

"If a party challenges the validity of the award of a tribunal on the ground of *excès de pouvoir* or on the ground of bad faith on the part of a member of the tribunal, and if the parties fail to reach an agreement on the matter, the dispute may be submitted to the International Court of Justice by either party, and the International Court of Justice may pronounce the nullity of the award."

4. Mr. SCELLE asked whether the implication of Mr. Hudson's text was that the parties were free to agree that an award was null and void. If so, he could not accept it.

5. Mr. HUDSON said that Mr. Scelle's interpretation of his text was correct.

6. Mr. SANDSTRÖM supported Mr. Hudson's text. In his view, in as much as the parties were free to agree to submit a dispute to arbitration, they should be equally free to nullify an award.

7. Mr. CÓRDOVA pointed out that when the parties agreed to nullify an award that was a new agreement and not a part of the original arbitral proceedings.

8. Mr. LAUTERPACHT agreed with Mr. CÓrdovala.

9. Mr. SCELLE said that it was inadmissible that parties which undertook to resort to arbitration should reserve the right to act subsequently as a superior tribunal and declare an award null. That seemed to him so contrary to common sense that he had not even envisaged the issue being raised. Annulment could only be pronounced by a superior tribunal set up by the parties or by the International Court of Justice. There was no legal system in the world which allowed the parties themselves to annul a judicial decision.

10. Mr. el-KHOURI considered Mr. Scelle's arguments to be pertinent to criminal jurisdiction under municipal law, but felt that in international arbitration the parties must have full freedom to nullify an award.

11. Mr. KOZHEVNIKOV considered that there was nothing to prevent the parties from agreeing to nullify an award, provided they did so by common consent. It was unthinkable that a tribunal should enforce an award in the face of the opposition of both parties to the original dispute. He would have no objection, provided that both parties were agreed, to a challenge of the validity of an award being submitted to the International Court of Justice. He would accordingly propose that in Mr. Lauterpacht's amendment the words "on the

¹ See summary record of the 152nd meeting.

² *Ibid.*, para. 47.

application of either party" be replaced by the words "by the agreement of both parties".

12. Mr. HUDSON, replying to Mr. Scelle, said that there was nothing to prevent a party from waiving its rights under the award if it recognized a challenge by the other party of the validity of the award to be well founded.

13. Mr. SCELLE observed that that would not constitute annulment of the award. A party might waive its rights, but it might not nullify an award.

14. Mr. LIANG (Secretary to the Commission) agreed that annulment could not be identified with non-compliance.

15. Mr. SANDSTRÖM proposed the substitution of the words "unless otherwise agreed between the parties" for the words "and if the parties fail to reach an agreement on the matter", in Mr. Hudson's text.

16. The CHAIRMAN said that, notwithstanding Mr. Scelle's arguments, the Commission must consider the contingency of one party claiming that an award was invalid, and the other party recognizing that claim. The case he had in mind was that of a boundary dispute between Costa Rica and Panama, which had been submitted to the Chief Justice of the United States Supreme Court.³ The award had been contested by Panama on grounds of excess of jurisdiction. Costa Rica had not supported the challenge, but after some years the two governments had come together and had concluded a boundary treaty which delimited the boundary along a line other than that contained in the arbitral award, the nullity of which had thus been implicitly recognized by Costa Rica.

17. It seemed to him impossible to prevent parties from agreeing to set aside an award in that manner.

18. Mr. LAUTERPACHT drew attention to the words "on the application of either party" in his proposal. If there was agreement between the parties on the nullity of an award, the matter would go no further.

19. Mr. CÓRDOVA agreed with Mr. Lauterpacht that there would be nothing to prevent the parties from entering into an entirely new agreement not to carry out the award. Nevertheless, he felt that a very bad precedent would be created if the Commission were to include a provision in the draft stating that the parties were free to do so. Clearly they could not decide on the issue of nullity, which could only be settled by due judicial process.

20. Mr. SCELLE agreed with Mr. Córdova. Any two parties could, by common agreement, decide not to carry out a decision of a tribunal, but annulment of that decision could only be pronounced by a judicial organ.

21. The CHAIRMAN put to the vote the first paragraph of Mr. Lauterpacht's text, which read:

"The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article".

That wording was adopted by 7 votes to 4, with 2 abstentions.

22. Mr. KOZHEVNIKOV requested that his amendment be put to the vote.

23. Mr. LAUTERPACHT observed that Mr. Kozhevnikov's amendment had been rendered inoperative by the adoption of the words "on the application of either party".

24. The CHAIRMAN said that he would nevertheless accede to Mr. Kozhevnikov's request.

Mr. Kozhevnikov's amendment to Mr. Lauterpacht's text was rejected by 7 votes to 2, with 2 abstentions.

25. The CHAIRMAN invited the Commission to consider the second paragraph of Mr. Lauterpacht's text, which read:

"The application must be made within sixty days of the rendering of the award."

26. Mr. HUDSON said that the time-limit of sixty days was far too short. The possibility of negotiating an agreement must be left to the parties.

27. Mr. SCELLE disagreed, as he considered that a challenge of the validity of an award should be made as quickly as possible. Even sixty days was too long.

28. Mr. LAUTERPACHT pointed out that those who wished to eliminate the possibility of further delay in the execution of an award considered that a challenge must be made as swiftly as possible.

29. Mr. el-KHOURI did not consider that there was any need at all to stipulate a time-limit.

30. Mr. KERNO (Assistant Secretary-General) said that there was a fundamental difference of view on the whole question. Those members of the Commission who were of the opinion that arbitral awards must be final wished to restrict the possibility of an award being challenged.

31. Mr. YEPES said that sixty days was too little. He therefore proposed that the provision be amended to conform to that concerning the application for revision in Article 61, paragraph 4, of the Statute of the International Court of Justice, in which a time-limit of six months was laid down.

32. Mr. LAUTERPACHT said that he had not invented the time-limit of sixty days, which was one that had been proposed by the Institute of International Law and used in several arbitration treaties.

33. Mr. ZOUREK proposed that the second paragraph of Mr. Lauterpacht's text be deleted.

34. Mr. CÓRDOVA strongly opposed Mr. Zourek's proposal, as he felt there must be some restriction on

³ Award of 12 September 1914. See text in *American Journal of International Law*, vol. 8 (1914), pp. 913—941.

the right to challenge an award. Otherwise awards need never be complied with unless the parties agreed to do so.

35. Mr. LIANG (Secretary to the Commission) doubted whether the provision of the Statute of the International Court relating to revision should be extended to apply to annulment of an arbitral award. Whereas an application for revision of a judgment depended on the discovery of a new fact, for which sufficient time must be allowed, grounds on which the validity of an award could be challenged, especially those of excess of jurisdiction or of a fundamental fault in procedure, would not take so long to discover. There was therefore a strong case in favour of a short time-limit for application for annulment.

36. Mr. AMADO was in favour of the special rapporteur's draft for articles 42 to 44, and would have voted more readily for it than for the alternative texts submitted subsequently.

37. He considered that the time-limit within which the challenge of an award must be lodged should be short.

38. Mr. HUDSON observed that the text adopted at the previous meeting by the Commission and enumerating the grounds for challenging an award made no stipulation as to the time-limit within which the challenge should be made. He opposed Mr. Lauterpacht's provision, which might make agreement between the parties impossible.

39. Mr. LAUTERPACHT said that it was extremely important to prescribe a time-limit in order to avert complications.

40. Mr. ZOUREK said that he had proposed the suppression of the whole of the second paragraph of Mr. Lauterpacht's text because he considered that a dispute on the validity of an award was a new dispute which should be dealt with as a new subject for arbitration. He realized that Mr. Lauterpacht's provision was supported by those who were in favour of second-instance arbitration, but he was not among them.

Mr. Zourek's proposal was rejected by 9 votes to 4.

Mr. Yepes' proposal was rejected by 7 votes to 4, with 2 abstentions.

The second paragraph of Mr. Lauterpacht's text was adopted by 8 votes to 4, with 1 abstention.

41. Mr. SCELLE considered that the challenge of the validity of an award should not stay execution. He accordingly proposed that a third paragraph be added to Mr. Lauterpacht's text, conceived in the same terms as in Mr. Sandström's proposed text for article 44. It would read :

"The application shall not stay execution unless otherwise decided by the court with which it is lodged."

42. Mr. YEPES said that he would vote in favour of Mr. Scelle's proposal, which accorded with Article 61, paragraph 3, of the Statute of the International Court of Justice, which paragraph read :

"The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision."

43. Mr. CÓRDOVA drew attention to the difference between Article 61, paragraph 3, of the Statute and the paragraph proposed by Mr. Scelle. Under the former, until the Court required compliance with the judgment its execution was to be stayed. He emphasized that an award, once executed, could hardly be undone.

44. Mr. LAUTERPACHT observed that Article 61, paragraph 3, of the International Court's Statute in effect meant that there could be no execution unless the Court directed otherwise.

45. Mr. SANDSTRÖM did not consider that there was a wide difference between the two methods. That laid down in the Statute merely meant that the International Court could demand execution of an award as a precondition for its taking up proceedings. He doubted whether such a provision was appropriate to the case of arbitration.

46. Mr. SCELLE observed that revision, to which Article 61, paragraph 3, of the Statute of the International Court referred, was not entirely parallel to annulment. The latter involved very grave issues, such as excess of jurisdiction, or corruption.

47. In principle, an award should be carried out at once, and a stay of execution should be allowed only in exceptional circumstances.

48. He did not think the difficulty mentioned by Mr. Córdova, namely, that execution would be impossible to revoke, would arise very often, since clearly a party which intended to secure annulment of an award would do so without delay.

49. Mr. KERNO (Assistant Secretary-General) suggested that it was perhaps more important to safeguard the definite character of arbitral awards than to provide for the contingency mentioned by Mr. Córdova.

50. Mr. LAUTERPACHT expressed the hope that Mr. Scelle would see his way to recasting his proposal so as to make it conform to the relevant provision of the Statute of the International Court of Justice. There was a far stronger case to stay execution, unless otherwise decided, of an award than of a judgment.

51. Mr. HUDSON asked whether the International Court had in fact any power to stay the execution of an award. The provision in the second paragraph of Mr. Lauterpacht's text seemed to him out of place.

52. Mr. LAUTERPACHT replied that the Court would derive its powers to declare the nullity of the award, or to stay execution, from the agreement of the parties.

53. Mr. FRANÇOIS suggested that the purpose which Mr. Lauterpacht had in mind would be better fulfilled if Mr. Scelle's proposed text were to read :

"The application shall stay execution unless otherwise decided by the Court".

54. Mr. SANDSTRÖM and Mr. LAUTERPACHT supported Mr. François' amendment.

55. Mr. AMADO said that he would vote in favour of Mr. François' amendment though he would have preferred the wording of article 42, second paragraph, in the special rapporteur's draft.

Mr. François' amendment was adopted by 9 votes to 2, with 2 abstentions.

56. Mr. el-KHOURI explained that he had abstained from voting on Mr. François' amendment because as it stood the text did not make clear whether an award could be carried out within sixty days of its having been rendered. He hoped that obscurity would be elucidated by the Standing Drafting Committee.

Mr. Lauterpacht's text for Article 43, as amended and as a whole, was adopted by 8 votes to 3, with 2 abstentions.⁴

ARTICLE 44

57. Mr. SANDSTRÖM said that it had been his intention to propose that article 43, as drafted by the special rapporteur, be amended to read:

"Unless otherwise agreed by the parties, an appeal must be lodged with the International Court of Justice within two months of the award being made". However, in view of the article which had just been adopted, that text would no longer apply.

58. Mr. LAUTERPACHT said that in his view it was essential to include a provision that would ensure that the parties to an obligatory arbitration treaty would be obliged, in the event of the award being declared null, to submit the dispute to a new tribunal. He therefore proposed the following text, to be included as article 44:

"If the award is declared null by the Court, the case shall be submitted to a new tribunal to be constituted by agreement of the parties or, failing such agreement, in accordance with article 4".

59. Mr. SCELLE agreed with Mr. Lauterpacht's arguments, but pointed out that the wording the latter had proposed would cover all cases of arbitration, and not only those resulting from an obligatory arbitration treaty.

60. Mr. LAUTERPACHT said that in his view the procedure should apply in all cases.

61. Mr. SCELLE agreed that that was logical and defensible. In all such cases the undertaking to settle

the dispute by arbitration would not have been discharged.

62. Mr. SANDSTRÖM disagreed. The parties would have had recourse to arbitration; it would have failed, and the arbitration procedure would therefore be terminated.

63. Mr. CÓRDOVA said that it would be contrary to the whole conception of arbitration to state that the parties' obligation would lapse if a challenge to the validity of the award was allowed. The fact that the tribunal had exceeded its powers or that there had been corruption on the part of one of its members was no reason why the parties' obligation should cease.

After further discussion, *Mr. Lauterpacht's proposal was put to the vote and adopted by 8 votes to 5.*

PROPOSED ARTICLE ON APPEAL

64. Mr. LAUTERPACHT said that, although he had hesitated about introducing a further amendment at the present stage of the proceedings, he felt it his duty to propose an amendment providing for the possibility, but no more than the possibility, of appeal. He therefore proposed the following text, to be inserted in the draft convention after article 44, just adopted.

"The *compromis* may lay down that either party shall be entitled to appeal to the International Court of Justice or to any other tribunal provided by the *compromis*, on the ground of erroneous application of international law. If the appeal is successful, the case shall be submitted to a new tribunal constituted by agreement of the parties or, failing such agreement, in accordance with article 4".

65. That there should be the possibility of appeal from the decisions of the tribunal of first instance was fully in accordance with the legal character of arbitration, which had been so much stressed. All members of the Commission could cite cases of arbitral awards which it would have been in the interests of justice to reverse. It was true that no appeal was allowed from decisions of the International Court of Justice, but there was no higher organ to which appeal from that Court's decisions was possible.

66. It was, of course, important that arbitration procedure should be kept as expeditious as possible, but he did not think there was any justification for preventing the parties from providing for appeals if they wished to do so. It would be noted that his proposal had only optional force.

67. It might be argued that if the provision was to be optional there was no need to include it. In his view, however, there were three reasons for doing so. First, it should be made clear that the right of appeal on a point of law was not a self-evident right of the parties, like the right to demand revision or nullity, but must be provided for in the *compromis*. Secondly, the question of appeals had been a highly controversial one, and the Commission's silence on it might be misinterpreted. Thirdly, paragraph (g) of article 12 previously adopted by the Commission stated that the

⁴ Article 43 as tentatively adopted, read as follows :

" 1. The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article.

" 2. The application must be made within sixty days of the rendering of the award.

" 3. The application shall stay execution unless otherwise decided by the Court."

compromis should specify "...any special provisions in the matter of procedure for revision and other legal remedies"; it therefore left the door open to appeals, but, if they were to be allowed, it was necessary to lay down the procedure which was to be followed in respect of them.

68. Mr. SCELLE accepted the wording proposed by Mr. Lauterpacht, although it did not go quite so far as the text (article 44) he himself had proposed.

69. Mr. YEPES warmly supported Mr. Lauterpacht's proposal for the reasons which the latter had adduced, and also because it was desirable that it should be made clear to the arbitrators that if they did not apply international law correctly their award could be revised upon appeal.

70. He considered, however, that appeals should be allowed on the grounds of erroneous application not only of general international law, but also of regional international law, respect for which, it followed from Article 52 of the United Nations Charter, was binding both on arbitral tribunals and on the International Court of Justice.

71. Mr. SANDSTRÖM said that ideally an arbitral award should be final. The Commission had already provided for revision and nullification, and in view of the provisions of paragraph (g) of article 12 he saw no reason why it should provide specifically for appeal as well.

72. If such provision were to be made, however, he did not see why the grounds for appeal should be limited to erroneous application of international law; appeals should also be possible on the grounds of erroneous application of domestic law or erroneous finding of fact.

73. Mr. KOZHEVNIKOV asked whether it was Mr. Lauterpacht's intention that the *compromis* would have to state whether appeals would be permitted to the International Court of Justice or to some other specified tribunal. He also asked whether Mr. Lauterpacht would agree to delete the words "or, failing such agreement, in accordance with article 4".

74. Mr. LAUTERPACHT replied to Mr. Kozhevnikov's first question in the affirmative. He could not, however, agree to the deletion of the words to which Mr. Kozhevnikov objected, since that would make it possible for the purpose of arbitration procedure to be frustrated.

75. Mr. CÓRDOVA said that, if the provision was to be made optional, he did not see the need for its inclusion, which would, moreover, greatly weaken arbitration procedure. The wording proposed by Mr. Lauterpacht would also rule out any arbitration *ex aequo et bono*.

76. Mr. el-KHOURI warmly supported Mr. Lauterpacht's proposal, adoption of which would encourage the smaller States, who were at present somewhat doubtful of arbitration procedure, to subscribe to the draft which the Commission was preparing.

77. Mr. FRANÇOIS doubted the need for such a provision as that proposed by Mr. Lauterpacht. In any case the procedure envisaged in it seemed unnecessarily complicated. Why should the dispute necessarily be submitted to a new tribunal if the appeal was successful?

78. Mr. AMADO said that, while he appreciated the motives which had inspired Mr. Lauterpacht's proposal, he felt that it went too far, and would accordingly be obliged to vote against it. The parties normally had recourse to arbitration after having failed to settle the dispute by political means; the arbitral award should therefore be as final as it was possible to make it.

79. Mr. HSU said that, although he would have preferred the position taken by Mr. Scelle in his report, he was prepared to support that proposed by Mr. Lauterpacht, since the majority of the Commission appeared not to be ready to go the full length with the special rapporteur.

80. Mr. LAUTERPACHT could not agree that inclusion of the provision he had proposed would weaken arbitration procedure. On the contrary, it would strengthen it by encouraging States to have recourse to arbitration. It would surely add to the authority of arbitration to bring it as closely as possible into line with judicial procedure.

81. Nor could he agree that any difficulty arose concerning adjudication *ex aequo et bono*, since that process was not governed by any provisions of international law, and the question of their erroneous application did not therefore arise.

82. On the other hand, he agreed with Mr. François that it would be desirable, where possible, for the dispute to be settled by an appellate court rather than by a third tribunal. His proposal would need some amendment in that respect. He also agreed with Mr. Sandström that the grounds for appeal should not be restricted to erroneous application of international law, and suggested that those words be replaced by "erroneous application of the law", under which an error in the finding of fact would be included, as was clear from Article 36 of the Statute of the International Court of Justice.

83. Replying to an intervention by Mr. HUDSON, he explained that Article 36 of the Statute of the International Court of Justice stated that disputes concerning the existence of any fact which, if established, would constitute a breach of an international obligation, were legal disputes. The question was one of drafting, however, and he suggested that the Commission should first decide whether it wished to include in the draft convention a separate article dealing with appeals. If so, he would submit an amended proposal in the light of the foregoing discussion.

The Commission decided by 7 votes to 6 that a separate article dealing with appeals should be included in the draft convention.

84. Mr. ZOUREK explained that he had voted in favour of the inclusion of such an article, on the understanding that it would be of an optional nature.

The meeting rose at 6.15 p.m.

154th MEETING

Tuesday, 1 July 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 8) (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of the Second Preliminary Draft on Arbitral Procedure (annex to document A/CN.4/46) contained in the special rapporteur's second report.

PROPOSED ARTICLE ON APPEAL (*continued*)

2. Mr. LAUTERPACHT said that in accordance with the wishes expressed by some members of the Commission at the preceding meeting he had redrafted his text to read:

"The *compromis* may provide that on the application of either party an appeal shall lie against the award, on the ground of erroneous application of international law, to the International Court of Justice or to a tribunal constituted in accordance with articles 3 and 4."

3. He wished to state that, in view of the extremely narrow majority by which the Commission had decided at the previous meeting to include an article of that

kind in the draft, he did not wish himself formally to propose the text, since he believed that the authority of the Commission's decisions derived from the weight of opinion behind them. Seven members had considered that such an article, though declaratory, might be useful, whereas six had thought it would be positively harmful. Accordingly, unless there was a substantial change of view in the Commission he would not vote in favour of the text which he had prepared. The omission of such an article would be regrettable, but would not deprive the parties of any rights which they would otherwise possess.

4. Mr. SCELLE said that he would himself sponsor Mr. Lauterpacht's text.

5. Mr. YEPES considered that such an article was desirable, since it would make the draft more complete.

6. Mr. CÓRDOVA asked whether he was right in assuming that if an appeal were submitted to a tribunal constituted in accordance with articles 3 and 4 that body would be able to give a final judgment.

7. Mr. LAUTERPACHT replied in the affirmative.

8. Mr. HUDSON said that such an article would impose a restriction upon the parties which he could not accept, since he believed they should be free to choose whatever method of appeal they thought fit.

9. Mr. el-KHOURI asked whether the effect of the proposed article would be to limit the scope of paragraph (g) of article 12, which, and in his view correctly, imposed no limitation on the grounds of appeal.¹

10. Mr. SCELLE replied that in his opinion the new text would not be restrictive, but would merely make for greater precision. If no mention was made of appeal the impression might gain ground that the Commission was not in favour of it.

11. He could not agree with Mr. Hudson that the new text would in any way circumscribe the freedom of the parties.

12. Mr. KOZHEVNIKOV said that the new text before the Commission did not seem to him to differ substantially from that introduced by Mr. Lauterpacht at the preceding meeting. His previous objections therefore stood, and he would be unable to vote for the proposal.

13. Mr. SANDSTRÖM suggested, with all respect, that Mr. Scelle was incorrect in arguing that the new text did not imply a restriction on paragraph (g) of article 12, for it would not allow an appeal on the ground of incorrect appraisal of the facts.

14. Mr. KERNO (Assistant Secretary-General) said that, as there was general agreement that the parties were free to include in the *compromis* any kind of provision relating to appeal, the article under discussion

¹ For text of para. (g) of article 12 see summary record of the 146th meeting, para. 40.

was superfluous. Furthermore, it was becoming clear that it might entail some danger of conflict with paragraph (g) of article 12. He wondered, therefore, whether any useful purpose would be served by adopting it.

15. Mr. AMADO maintained the objections to such an article that he had expressed at the preceding meeting. He feared that it represented an attempt to achieve legal perfectionism and to ignore the realities of international life. The draft was becoming overburdened with unnecessary ornament. For his part, he envisaged arbitral procedure as more sober and practical.

16. Mr. HSU said that although paragraph (g) of article 12 did cover appeal, it would be unfortunate if the Commission were not to devote a special article to the subject in view of the fact that it had done so in the case of revision and nullity.

17. Mr. ZOUREK said that he would be unable to support the new text, which imposed a restriction on paragraph (g) of article 12.

18. The CHAIRMAN put to the vote the text sponsored by Mr. Scelle for article 44, on appeals.

The text was rejected by 9 votes to 3, with 1 abstention.

19. Mr. SCELLE asked whether the Commission would agree to his indicating in the final report that the text for article 44 had not been adopted because it was considered that it duplicated paragraph (g) of article 12.

20. Mr. el-KHOURI pointed out that the article had been rejected because it restricted the wide scope of paragraph (g) of article 12.

21. Mr. HUDSON expressed the hope that Mr. Scelle would confine his comments to the articles which had been adopted, and that he would not give a detailed analysis of texts which had been rejected.

22. Mr. CÓRDOVA said that the ground for rejection mentioned by Mr. Scelle was far from being the only one. He, for example, had had others in mind. He agreed with Mr. Hudson that if any explanation concerning the Commission's decision on article 44 was required it should be made in connexion with paragraph (g) of article 12.

23. Mr. SANDSTRÖM endorsed Mr. Córdova's remarks.

24. Mr. LAUTERPACHT considered that the Commission should not at the present stage prejudice the commentary which the special rapporteur would have to prepare to accompany the draft finally adopted by the Commission, in accordance with article 20 of the Commission's Statute. That commentary would be a scientific work of the highest value, and would, perhaps, in some respects be more important than the draft itself.

25. The CHAIRMAN pointed out that, in accordance with the plan of work for the present session drawn up by himself, the draft on arbitral procedure to be presented to the Commission by the Standing Drafting

Committee was to include a commentary prepared by the special rapporteur.

26. Mr. LAUTERPACHT could not envisage the special rapporteur being able to prepare a commentary of the kind demanded under article 20 of the Statute during the present session, and without a full commentary the draft would remain lifeless, and, to the casual reader, might seem to differ little from the Hague Convention for the Pacific Settlement of International Disputes of 1907. The draft convention on arbitral procedure would be the first text of that kind to be submitted to the General Assembly, and the Commission should not contemplate preparing the accompanying commentary under the exacting and busy conditions of its annual session.

27. Mr. KERNO (Assistant Secretary-General) said that Mr. Lauterpacht had raised a very important point, to which he himself had devoted a considerable amount of thought. He concluded that the Commission might follow the same procedure as it had done in the case of the draft articles on the régime of the continental shelf at the third session, that was, in accordance with article 16 of its Statute, to send the text to governments for their observations. He did not believe that the moment was ripe for the Commission to submit the draft on arbitral procedure to the General Assembly in conformity with article 20 of its Statute.

28. Mr. SCELLE said that he could support the suggestion made by the Assistant Secretary-General. At all events, he hoped that the Commission would not again take up the substance of the draft in connexion with the commentary to be attached to it.

29. Mr. FRANÇOIS did not think that any vital question was at stake, since, no matter whether the draft was submitted to governments or to the General Assembly, the form of the accompanying report would not differ very much. He personally would oppose its containing any detailed account of the discussions held on each article.

30. Mr. LAUTERPACHT said that the Commission must none the less face the question he had raised: a question which, in his opinion, touched on a most important aspect of the Commission's work, and one which affected the scientific value of that work and its influence on public opinion and governments.

31. As to the amount of space to be devoted to the discussions held on each article, that must be left to the discretion and wisdom of the special rapporteur.

32. The CHAIRMAN suggested that further consideration of the issue be deferred.

It was so agreed.

ADDITIONAL ARTICLE PROPOSED BY MR. ZOUREK

33. Mr. ZOUREK proposed that the following new article be inserted to follow article 35:

"1. The arbitral award shall be binding on the

parties from the date on which it is read in open court.

"2. Except in the case referred to in article 38 the arbitral award, once made, may not be revised. As long as the arbitral tribunal remains in office, however, it shall be entitled to rectify mere typographical errors or mistakes in calculation."

34. The purpose of paragraph 1 was merely to fill the gap left by article 35, which failed to specify the moment at which an award became binding.

35. The first sentence of paragraph 2 was a logical consequence of the generally accepted principle of the finality of arbitral awards, and the second sentence merely embodied a provision which existed in many legal codes, and which in his view was worth including in the draft. He had inserted the words "As long as the arbitral tribunal remains in office" in order to avoid the difficulties arising from the fact that most arbitral tribunals were temporary, *ad hoc* bodies.

36. In his view, a tribunal remained in office until the expiry of the time-limit, imposed upon it in the *compromis*, for rendering the award.

37. Mr. YEPES supported Mr. Zourek's proposal which would render the draft more complete.

38. Mr. FRANÇOIS felt some doubts about the expression "As long as the arbitral tribunal remains in office", and the interpretation placed on it by Mr. Zourek seemed to him quite novel. Surely once an award has been rendered the tribunal ceased to exist.

39. He wondered also whether the expression "mistakes in calculation" meant that a tribunal could, for example, make significant modifications to sums assessed for damages.

40. Mr. SANDSTRÖM considered that there was some justification for having a provision which would enable the arbitral tribunal to rectify typographical errors or mistakes in calculation, but wondered whether it would be expedient to refer to article 38 in paragraph 2 of Mr. Zourek's proposal, since that article related to the discovery of new facts and was accordingly quite a different matter.

41. Mr. SCELLE had no objection to paragraph 1 of Mr. Zourek's proposal, but asked whether the first sentence of paragraph 2 would exclude declaration of nullity and appeal. If that were the case, it would, of course, be unacceptable.

42. He agreed with Mr. François that once a tribunal had rendered its award it ceased to exist. The second sentence in paragraph 2 would have to be amended accordingly.

43. The CHAIRMAN suggested that Mr. Scelle's objection to the first sentence of paragraph 2 would be met if the words "by the tribunal which has rendered it" were added at the end.

44. Mr. ZOUREK accepted the Chairman's suggestion.

45. Mr. KERNO (Assistant Secretary-General) said that as a convinced upholder of the principle of the finality of arbitral awards, he had regretted the Commission's decision to adopt article 43, paragraph 3, and wondered whether paragraph 1 of Mr. Zourek's proposal did not conflict with it.

46. Mr. ZOUREK did not believe that there was any contradiction between paragraph 1 of his proposal and paragraph 3 of article 43, since the latter dealt with the execution of an award, which was a separate matter from its binding character.

47. Mr. SCELLE agreed with Mr. Zourek.

48. Mr. YEPES suggested that the objections raised to the words "As long as the arbitral tribunal remains in office" would be met if the words were replaced by a text borrowed from the draft on arbitral procedure prepared by the Institute of International Law in 1875.

49. He accordingly proposed that the opening words of the second sentence be amended to read:

"As long as the time-limit set in the *compromis* has not expired the tribunal shall be etc."

50. Mr. SCELLE could not support Mr. Yepes' amendment, since it took no account of the fact that once an award had been made it could not be modified.

51. Mr. ZOUREK accepted Mr. Yepes' amendment.

52. Mr. CÓRDOVA asked whether the provision in the second sentence of paragraph 2 of Mr. Zourek's proposal would be rendered inoperative if the tribunal made its award on the day on which the time-limit laid down in the *compromis* expired. Surely it was always open to any tribunal to rectify minor errors in an award?

53. Mr. KOZHEVNIKOV said that he could support the general principle laid down in paragraph 1 of Mr. Zourek's proposal, and believed that the provision contained in paragraph 2 would serve a useful purpose.

54. Mr. HUDSON believed that there were certain elements in Mr. Zourek's text which might usefully be included in the draft. The substance of paragraph 1 should be incorporated in the text of article 35 already adopted.²

55. The first sentence in paragraph 2 could be omitted, since the Commission had already adopted an article on revision. The provision in the second sentence enabling the tribunal to rectify mere typographical errors or mistakes in calculation was useful, but he believed that the words "As long as the arbitral tribunal remains in office" might be deleted, since their exact meaning was controversial. There was in fact no real need for a stipulation as to the period within which minor corrections could be made.

56. Mr. ZOUREK agreed to Mr. Hudson's suggestion concerning paragraph 1. Referring to Mr. François's point about damages, he explained that his intention

² See summary record of the 151st meeting, para. 2.

was that the tribunal should be free to correct only manifest mistakes in arithmetic.

57. He must, however, insist that the opening words of the second sentence of paragraph 2 as amended by Mr. YEPES be maintained, since the temporary character of arbitrary tribunals must be taken into account.

58. Mr. YEPES pointed out to members who had expressed doubts about the second sentence of paragraph 2 that it would not empower the tribunal to make substantive modifications to the award.

59. Mr. SANDSTRÖM said that under Swedish municipal law tribunals were empowered to rectify minor errors such as those mentioned in Mr. Zourek's text.

60. The CHAIRMAN put to the vote Mr. Hudson's suggestion that the Standing Drafting Committee be instructed to incorporate the substance of paragraph 1 of Mr. Zourek's proposal in article 35.

Mr. Hudson's suggestion was adopted unanimously.

61. The CHAIRMAN put to the vote the first sentence of paragraph 2, as amended, reading:

"Except in the case referred to in article 38, the arbitral award, once made, may not be revised by the tribunal which has rendered it."

That text was adopted by 10 votes to none, with 3 abstentions.

62. The CHAIRMAN put to the vote the second sentence in paragraph 2 of Mr. Zourek's text, as amended by Mr. YEPES to read:

"As long as the time-limit set in the *compromis* has not expired the tribunal shall be entitled to rectify mere typographical errors or mistakes in calculation".

That text was adopted by 12 votes to 1.

The text proposed by Mr. Zourek as a whole and as amended was adopted unanimously.

63. Mr. FRANÇOIS, explaining his vote, said that he could not support the second sentence of paragraph 2 because it would enable corrections to be made up to the expiry of the time-limit laid down in the *compromis* for rendering the award, even if the award had in fact been made much earlier.

ADDITIONAL PROPOSAL BY MR. EL-KHOURI

64. Mr. el-KHOURI pointed out that no provision had been made to ensure that the award should be communicated to the parties in writing. He therefore proposed that the Standing Drafting Committee be instructed to add suitable wording to that effect, either in article 32 or in article 35.

65. Mr. SCELLE supported Mr. el-Khoury's proposal.
Mr. el-Khoury's proposal was adopted unanimously.

ADDITIONAL ARTICLE PROPOSED BY MR. YEPES

66. Mr. YEPES said that in order to complete the draft convention it was necessary to add to it an article on the right of third parties to intervene. That right had been admitted in the 1907 Hague Convention for the Pacific Settlement of International Disputes and in the Statute of the International Court of Justice, and he felt that there need be no lengthy discussion on it. The wording which he proposed was as follows:

"Should a State consider that it has an interest of a legal nature which may be affected by the decision in a case submitted to an arbitral tribunal, it may submit a request to the tribunal to be permitted to intervene. The tribunal's decision in the matter shall not be open to appeal, and should permission to intervene be granted the award shall be binding on the State intervening."

67. The first sentence was taken—with the necessary consequential modifications—from paragraph 1 of Article 62 of the Statute of the International Court of Justice.

68. Mr. SCELLE said that he had left aside the question of the right of intervention because he had thought that it would be difficult to reach agreement on it; but if the Commission wished to include an appropriate article, he would have no objection.

69. Mr. LAUTERPACHT agreed that the draft convention would be incomplete if it contained no provisions on the right of intervention. He pointed out, however, that both the Hague Convention of 1907 and the Statute of the International Court of Justice distinguished between cases where the third State considered that it had an interest of a legal nature which might be affected by the decision, and cases where it had an interest in the interpretation of a multilateral convention. Cases of the former kind were not dealt with at all in the Hague Convention. In the Statute of the International Court of Justice they were dealt with in Article 62, whereas cases concerning the interpretation of a multilateral convention were dealt with in Article 63, which provided that the interpretation of the convention given by the International Court of Justice should be binding on the State intervening, although there was no corresponding provision in Article 62. He (Mr. Lauterpacht) did not understand how a decision in a dispute between two States could be made binding on a third, as Mr. YEPES proposed. In his view, it would be preferable to retain the wording used in Articles 62 and 63 of the Statute of the International Court of Justice.

70. Mr. FRANÇOIS understood the need for a provision dealing with the intervention of third States where the compulsory jurisdiction of the International Court of Justice was concerned, but saw no such need in the case of arbitration, which concerned only the States parties to the dispute. Moreover, inclusion of such a provision would raise a number of practical questions, for example, that of the allocation of the extra costs.

71. Mr. AMADO pointed out that article 84 of the 1907 Hague Convention for the Pacific Settlement of International Disputes read as follows :

"The award is not binding except on the parties in dispute.

"When it concerns the interpretation of a convention to which powers other than those in dispute are parties, they shall inform all the signatory powers in good time. Each of these powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them."

72. The wording proposed by Mr. Yepes was very different, and he could not support it.

73. Replying to a question by Mr. LAUTERPACHT, Mr. HUDSON said that one difference between the International Court of Justice and an arbitral tribunal in the matter of interventions by third parties was that the judgments of the former had far greater authority than the award of the latter.

74. Mr. SCELLE pointed out that another difference was that the International Court of Justice had been set up to serve the international community as a whole, whereas an arbitral tribunal was set up to reach a settlement between the parties to the dispute, by whom it was normally set up. If Mr. Yepes' proposal was adopted, the tribunal would be transformed into a body with potentially world-wide jurisdiction, and in that case it would be logical to take away from the parties the power to choose the arbitrators. In view of the complicated nature of the question and the disagreements to which it had given rise, he felt it would be preferable to omit it from the convention, just as he had omitted it from his second draft.

75. Mr. LIANG (Secretary to the Commission) pointed out that in addition to the differences with regard to the intervention of third parties between the International Court of Justice and arbitral tribunals to which Mr. Hudson and Mr. Scelle had drawn attention, those bodies also differed in their composition, in the law which they had to apply and in their practical resources for dealing with such interventions. Moreover, it had to be borne in mind that expediency was of the essence of arbitration. For all those reasons he felt that if interventions by third parties were to be allowed, they should be restricted to cases concerning the interpretation of multilateral conventions.

76. Mr. SANDSTRÖM supported the view expressed by the Secretary.

77. Mr. KOZHEVNIKOV said that he had carefully studied Mr. Yepes' proposal and had come to the conclusion that it dealt with an extremely important question ; so important, in fact, that he doubted whether it could be included in the convention without fuller reflection on its compatibility with the spirit of arbitration and the nature of the arbitral tribunal. Its inclusion would be a retrograde step if it were in fact merely based on an unjustifiable tendency to assimilate

the International Court of Justice and arbitral tribunals, which differed profoundly, not so much in point of authority, which might be open to question, but in point of competence and composition. An arbitral tribunal was set up by agreement between the parties, and on their initiative, for the settlement of a specific dispute or disputes. The intervention of a third State in the arbitration proceedings could only give rise to difficulties, and he therefore felt that it would be inadvisable to include in the draft convention the article proposed by Mr. Yepes.

78. Mr. HUDSON said that the only reason in favour of including in the draft convention an article on intervention by third Powers was that such an article had been included in the 1907 Hague Convention. Article 84 of that Convention had, however, remained a dead letter in practice, and he doubted whether the States parties to it had ever respected the provision that when the dispute concerned the interpretation of a multilateral convention, they should inform all the signatory powers in good time.

79. Mr. YEPES said that he would not insist on his amendment, as he recognized that the question was not yet ripe for codification. He would not therefore adduce the reasons of a purely legal nature, or those based on diplomatic history, for its being both feasible and desirable to include in the draft convention the question of intervention by interested third States. It would be easy for him to recall cases of arbitration which had affected the interests of States other than those parties to the dispute in question. However, he would not press his point, and proposed that the discussion be closed.

It was so agreed.

ACTION TO BE TAKEN IN RESPECT OF THE DRAFT ARTICLES

80. The CHAIRMAN said that, now that the Commission had completed its work on Mr. Scelle's draft, he had only to thank Mr. Scelle on behalf of the Commission for the great assistance he had given it in its work on arbitration procedure. In his view, the Commission had drawn up a code which preserved the essential elements of arbitration, which would prevent arbitration procedure from being frustrated by the unilateral action of one of the parties, and which provided a flexible but at the same time efficient procedure for arbitration as a means of peaceful settlement of disputes in the interests of peace and the reign of law.

81. Mr. Scelle said that he in turn had to thank the Commission, and especially its Chairman, for the patience and understanding they had displayed in considering his draft.

82. After a brief discussion on procedure, Mr. KERNO (Assistant Secretary-General) pointed out that it was desirable that the special rapporteur should know as soon as possible whether he was to attempt during the present session to draft a commentary to the draft convention.

83. Mr. HUDSON said that in his view each of the articles should be followed by a brief commentary, as had been done in the case of the draft articles on the régime of the continental shelf.

84. Mr. LAUTERPACHT said that in his opinion the Commission would not be doing justice either to the importance of the subject or to the labour it had devoted to it if it confined itself to short commentaries such as had been appended to the draft articles on the régime of the continental shelf. The commentaries should be of the nature laid down in article 20 of the Commission's Statute. He felt that it was extremely important that a further twelve months should be devoted to producing a commentary which would be of high scientific value, great persuasive force and the maximum usefulness as a source of information, somewhat along the lines of the commentaries appended to the Harvard Research drafts, but even fuller, in view of the greater resources which were supposed to be at the Commission's disposal.

85. The decision on the commentary on arbitration procedure would be of crucial importance, as it would determine the character of all the Commission's work on questions of a similar nature, and he hoped that it would not be taken hastily.

86. Mr. LIANG (Secretary to the Commission) said that he would again emphasize that mere legal texts, without a full commentary, lacked persuasive value. The Commission's work on the régime of the continental shelf had been one of development, not of codification; for that reason it had not been possible to make the commentary very extensive. In the field of arbitration procedure, on the other hand, there was a whole body of international precedent and doctrine, and there was no reason why the commentary should not be much fuller. A full commentary could not, however, be written in two or three weeks. But it might be considered desirable, as the Assistant Secretary-General had suggested earlier, to accompany the draft convention which had been tentatively adopted with a simple, precise commentary, pending the fuller commentary which would be prepared during the forthcoming year.

87. Mr. HUDSON said that in order to retain the interest of governments in the Commission's work, the articles adopted should be submitted to them with a brief commentary during the current year. Their comments could then be taken into account in preparing the final, full commentary in 1953.

88. Mr. FRANÇOIS said that Mr. Lauterpacht's proposal would only be practicable if the Commission sat permanently and was assisted by a large Secretariat. The plain fact was that the Commission had not the material resources of the Harvard Research, and had no choice but to limit the commentary on arbitral procedure to approximately the same proportions as the commentary on the régime of the continental shelf.

89. Mr. KOZHEVNIKOV said that it might be wise to defer the decision on so important a matter in order

to give members of the Commission an opportunity of pondering carefully Mr. Lauterpacht's remarks. In his view, if the Commission was to fulfil its role as an expert and authoritative body, it must supplement the draft convention with a full commentary which would enable governments to see what position the Commission had adopted, and to judge what position they themselves should adopt with regard to its proposals.

90. Mr. LAUTERPACHT thought that Mr. François was being unnecessarily pessimistic, and that it would be quite possible for the special rapporteur, with the help of the Division for the Development and Codification of International Law, to produce a volume of commentary, dealing with each article in the convention, within the space of twelve months.

91. With regard to what should be done at present, he would remind the Commission that it was first impressions which mattered. If governments received a draft with a short commentary, which could not be self-explanatory, on such a controversial question as arbitration procedure, their interest would be lukewarm and their comments necessarily perfunctory and sterile.

92. Mr. HSU heartily agreed with Mr. Lauterpacht that a full commentary was required. Such had obviously been the General Assembly's intention, and the Commission might forfeit that body's support if the commentary it produced on so important a question was inadequate. On the other hand, he agreed that the Commission should show something for its labours without waiting for a full commentary to be prepared. What could be done in the way of a commentary in the remaining few weeks at the Commission's disposal must be left to the discretion of the special rapporteur.

93. Mr. SCELLE agreed that a full commentary was necessary; but it could not be prepared by the end of the present session. In his view, the Commission should confine itself, in its report on the present session, to submitting the articles it had tentatively adopted.

94. Mr. AMADO was in complete agreement with Mr. Lauterpacht that the draft convention should be accompanied by a volume of commentary.

95. Mr. KOZHEVNIKOV proposed that further discussion be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.15 p.m.

155th MEETING

Wednesday, 2 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 9) (continued)

ACTION TO BE TAKEN IN RESPECT OF THE DRAFT ARTICLES (continued)

1. The CHAIRMAN invited the Commission to continue the discussion, begun at the preceding meeting, of the question of what action was to be taken in respect of the draft articles on arbitration procedure when they were eventually adopted by the Commission after the second reading during the current session. The great majority of the Commission had appeared to be in agreement that it was indispensable that those articles should eventually be accompanied by a commentary as prescribed in article 20 of the Commission's Statute, but it was evident that the preparation of such a work would be a time-consuming task. The Commission had therefore to decide what it wished to include in its report to the forthcoming session of the General Assembly. It was for the Commission to consider whether the draft articles lay in the domain of the progressive development or in that of the codification of international law, and to decide accordingly whether to apply article 16 or article 20 of the Commission's Statute.

2. In that connexion, Mr. Hudson had submitted a proposal to the effect that the draft articles on arbitral procedure be included, with a commentary on each article, in the Commission's report of that year as a tentative provisional draft.

3. Mr. KERNO (Assistant Secretary-General) expressed full agreement with what Mr. Lauterpacht had said at the preceding meeting concerning the importance of the decision that was to be taken in connexion with the commentary on the draft articles on arbitration procedure, inasmuch as that decision would establish a precedent for all the Commission's work on codification.

4. As reference had been made to article 20 of the Commission's Statute, he would like to point out that

the relation between that article and articles 21 and 22 was far from clear. Article 20 provided that the Commission should submit its drafts to the General Assembly together with a full commentary, the nature of which was specified. Article 21 provided that when the Commission considered a draft to be satisfactory it should request the Secretary-General to issue it as a Commission document and request governments to submit comments thereon within a reasonable time. Article 22 then went on to state that, taking such comments into consideration, the Commission should prepare a final draft and explanatory report for submission to the General Assembly. Having regard to the order of the articles, that might be held to mean that the Commission should submit its drafts to the General Assembly both before and after submitting them to governments for comment. In his view, however, that was not the case; the Commission had to submit its draft to the General Assembly once only, and the procedure laid down in article 21 preceded that laid down in article 20. But the point was not clear, and he had felt it his duty to draw the Commission's attention to the position.

5. Mr. LIANG (Secretary to the Commission) said that even if the Assistant Secretary-General's view that the Commission had to submit its drafts to the General Assembly once only was adopted, that would not mean that it could not include in its annual reports to the General Assembly progress reports with regard to its work on such drafts. Mr. Hudson's proposal, made at the previous meeting, was therefore perfectly in accordance with the Statute, as he (the Secretary) understood it, but he would suggest that it would be preferable to keep the word "commentary" for the full commentary provided for in article 20, and replace it in Mr. Hudson's proposal by the word "explanations".

6. Mr. HUDSON accepted the Secretary's suggestion.

7. Mr. LAUTERPACHT, after recalling the views he had expressed at the preceding meeting, agreed that it would be useful for the draft articles eventually adopted at the present session to be submitted to governments forthwith, provided, however, that they were accompanied by relatively full explanations — one or two pages for each article — in order to facilitate the consideration of the draft article by governments and to elicit fuller comments from them. The special rapporteur could obviously not be expected, without help, to produce such full explanations in the few weeks still available to him. On the other hand, he thought it perfectly feasible to ask the Standing Drafting Committee, or any individual members of the Commission who had shown particular interest in certain articles, to help the special rapporteur in his task. He (Mr. Lauterpacht) himself would be glad to prepare the explanation for the articles dealing with remedies. The special rapporteur would then circulate the draft explanations to members of the Commission for any further comment, and draw up, for inclusion in the Commission's report, his final explanations on each of the articles adopted. The explanations would, however, be regarded as the explanations of the special rap-

porteur, and there would accordingly be no need for the Commission to approve them.

8. With regard to the action to be taken at the fifth session in 1953, he proposed that the Commission should at that time consider the comments submitted by governments, and, at the close of the session, submit the draft articles to the General Assembly accompanied by a full commentary complying with the requirements laid down in article 20 of the Commission's Statute.

9. Mr. FRANÇOIS said that in his view the draft articles were much more a progressive development than a codification of international law; the provisions of article 16 of the Commission's Statute should therefore be followed. Governments did not need any detailed explanations of the draft articles at the present time, nor would they have time to study them; it was significant that only a few governments had so far replied to the Commission's request for comments on the draft articles relating to the régime of the continental shelf. For that reason it was also unrealistic to suppose that full comments on the draft articles on arbitration procedure would be received in time to be taken into account at the Commission's fifth session.

10. It would be a fundamental, and, he believed, unfortunate departure from the practice not only of the Commission but of other international bodies if the Commission was not itself to assume responsibility for all the matter included in its reports. On the other hand, approval of detailed explanations might well prove a lengthy process; that was not an argument, however, for making such explanations the responsibility of the special rapporteur, but rather a further argument in favour of making them brief.

11. Mr. KOZHEVNIKOV said that it was essential to lay before governments texts which were self-explanatory. On the other hand, he saw no reason why the Commission should consider itself bound at all costs to submit to the next session of the General Assembly some account of its work on arbitration procedure. In his view, it was only necessary to lay before that body the final fruits of its labours.

12. He proposed, therefore, that the special rapporteur should prepare a detailed commentary for consideration by the Commission at its fifth session, that the Commission should then submit the draft articles and the commentary to governments for comment, and that it should take their comments into account before submitting its final draft to the General Assembly.

13. Mr. SCELLE said that the Commission should clearly include in its report to the General Assembly the text of the draft articles it eventually adopted, stating at the same time that those articles were being submitted to governments for comment. It would be quite impossible for him, even with the help of other members of the Commission, to prepare before the close of the present session a commentary on the lines indicated in article 20 of the Commission's Statute. All that would be possible would be to append to each article a brief explanation of what it meant.

14. After further lengthy discussion, Mr. LAUTERPACHT, supported by Mr. KOZHEVNIKOV, proposed that further discussion be deferred and that the vote on the three proposals which had been submitted, namely, that of Mr. Hudson, that of Mr. Lauterpacht and that of Mr. Kozhevnikov, be taken at the following meeting.

It was so agreed.

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50)

GENERAL

15. The CHAIRMAN invited the Commission to take up the report on nationality, including statelessness (A/CN.4/50) prepared by Mr. Hudson, special rapporteur for that subject.

16. Mr. HUDSON said that those members of the Commission who attended the third session would remember that he had accepted the task of preparing a report on nationality, including statelessness, only with great reluctance.¹ He hoped that the report that he was now submitting to the Commission would at least furnish it with a basis for discussion. In its preparation he had had the valuable assistance of Mr. Paul Weiss, Legal Adviser to the High Commissioner for Refugees. Mr. Weiss, who had also worked for the International Refugee Organization, was closely concerned with questions of statelessness.

17. The substance of his report was contained in the three annexes to it. Annex I gave a general historical and analytical review of the major problems connected with nationality. Annex II dealt with the nationality of married persons and contained a draft convention on that question. Annex III constituted a working paper on statelessness, and contained nineteen points which he put forward for discussion by the Commission.

18. He proposed that Annex II be dealt with first, since it constituted a method of approach to a specific task entrusted to the Commission by the Economic and Social Council in the latter's resolutions 304(XI) and 385 F(XIII). That task was to draft a convention on the nationality of married women embodying the following principles recommended by the Commission on the Status of Women:

“(i) There shall be no distinction based on sex as regards nationality, in legislation or in practice;

“(ii) Neither marriage nor its dissolution shall affect the nationality of either spouse. Nothing in such a convention shall preclude the parties to it from making provision for the voluntary naturalization of aliens married to their nationals.”

19. He recalled that the Commission on the Status of Women had decided not to recommend that the draft convention should include a provision relating to distinction as between the father and mother in the transmission of nationality *jure sanguinis*.

¹ Mr. M. O. Hudson was appointed special rapporteur at the 133rd meeting.

20. He considered that it would be unnecessary for the Commission to express any views on the principles upon which the draft convention was to be based, or to analyse the consequences of their application. It could confine itself solely to the task of drafting the necessary text.

21. In preparing the draft he had concluded that it should be broadened to include married persons of both sexes in order to conform with the first of the two principles mentioned.

22. Mr. YEPES thanked Mr. Hudson for his valuable contribution to the study of the topic of nationality, including statelessness, but expressed disagreement with the special rapporteur's proposal as to how the Commission should deal with his report. Annex I should be regarded as an introduction to the other two annexes, as it contained certain general principles which must be examined first. For example, he could not agree with the view expressed in section II,4 of that annex that in principle the power of States to cancel or withhold nationality was not limited by international law. Clearly, fundamental issues of principle which must of necessity affect the draft convention contained in annex II should be fully discussed first.

23. He was in almost complete agreement with the draft convention prepared by Mr. Hudson, and wished to take the opportunity of pointing out that the principles laid down in it had already been accepted some twenty years ago by those Latin-American States which had signed the Convention on the Nationality of Married Women adopted at Montevideo in 1933.

24. Mr. HUDSON appealed to the Commission not to embark upon a substantive discussion of his report until it had decided the question of procedure, namely, whether it should first take up annex II and discharge the task entrusted to it by the Economic and Social Council.

25. Mr. LAUTERPACHT found himself in considerable difficulty concerning Mr. Hudson's report, and in particular concerning the suggestion that the draft convention on the nationality of married persons should be discussed at the present session.

26. The draft convention was not accompanied by any supporting documentation, although the Secretary-General's consolidated report on the problem of statelessness (E/2230-A/CN.4/56), which the Secretariat had made available to the Commission, contained an analysis of replies from certain governments. He believed that an important question of principle was involved, namely, whether the Commission should consider the text of a draft convention which was not accompanied by a report by the special rapporteur. It was true that those who were diligent enough to assemble information from other sources could benefit from the purely factual report of the Secretary-General on the nationality of married women. Nevertheless, that could not fill the vital gap left by the failure of the special rapporteur to present his considered views on a most complicated subject. The question of the

nationality of women had many legal, sociological and other ramifications, but the Commission was now being asked, at the insistence of the Commission on the Status of Women, to adopt a draft convention on the subject embodying certain principles laid down by that Commission.

27. Mr. HUDSON intervened to point out that the International Law Commission had merely been asked to draft a text.

28. Mr. LAUTERPACHT said that it would be a deplorable development if the Commission were to prepare for submission to the General Assembly texts, the underlying principles of which it had not itself approved. Any convention which it drafted must have its approval, both as to principle and as to phraseology.

29. It was true that at its second session the Commission had decided to deal with the matter in connexion with its consideration of nationality, including statelessness, but that decision was subject to the usual procedure, namely, that the Commission must give due consideration, not only to the legal merits of the subject, but also to its sociological and political implications. He could not agree that it was the function of the Commission to act as a drafting committee and, as such, to cast in the form of a draft convention principles laid down by another body.

30. Were it not for the great respect he felt for Mr. Hudson, he would suggest that the Commission should not take up the matter at the present session at all, but should only do so when it had all the necessary accompanying information and a statement of the special rapporteur's personal views.

31. Should the Commission decide to consider the draft convention he would loyally participate in the discussions, despite his gravest doubts as to the possibility of the Commission's doing useful work without adequate preparation.

32. Mr. FRANÇOIS said that he could understand Mr. Lauterpacht's reactions to what at first sight seemed a somewhat doubtful thesis, namely, that the Commission could adopt a draft convention without pronouncing itself either on the principles the convention embodied or on the consequences of their application. Nevertheless, he felt that the method proposed by Mr. Hudson was the only possible one, particularly as it was not for the Commission to touch upon questions relating to private international law, and as the adoption of such a draft convention by States would possibly have the most serious repercussions upon both public and private international law. For example, many countries would be reluctant to abandon the principle that nationality was transmitted by the father. A report prepared for the Institute of International Law at its last session by Messrs. Batiffol and Valladao indicated that in order to realize the principle of equality between spouses as to the effects of the marriage in international private law, it would be necessary to make applicable the law of the country

of residence, and not the law of the husband's country.² Such a change had not been applied even by the States which had adopted the Montevideo Convention, and would undoubtedly be resisted by many States. That was only one example of the kind of obstacles which might be met.

33. Mr. YEPES had contended that the principles enunciated in the draft prepared by Mr. Hudson had been accepted by the Latin-American countries some twenty years earlier, but it was quite clear that those principles were far from being applied in practice. It would take the Commission at least two or three sessions to examine the extent to which the principles in the draft convention could be applied. Consequently, the only possible solution seemed to him to follow Mr. Hudson's suggestion and to prepare a draft for the Economic and Social Council, making it absolutely clear that it was a draft upon the principles of which the Commission had not expressed any opinion.

34. Mr. HUDSON said that he had merely put forward a draft. He held no brief for it, or for attempting to follow the 1933 Montevideo Convention on the Nationality of Women, which had only been ratified by ten States, or the 1933 Montevideo Convention on Nationality, which was in force between only five States, three of which had entered reservations. He did not think that there was anything in the Statute of the Commission to preclude it from preparing a draft for the Economic and Social Council without assuming responsibility for its content.

35. Mr. HSU reminded the Commission that the request made by the Economic and Social Council in its resolution 304(XI) had given rise to a considerable amount of criticism at the Commission's second session, notably from those members who considered that the Commission was not a body which should concern itself with the mere drafting of conventions to embody principles laid down by another organ.³ The Commission's task was to develop and codify international law. Some members, and he was among them, had at the time expressed the view that the Commission should not undertake the task.

36. With all due respect, he felt that Mr. Hudson had ignored the spirit in which the Commission had decided to accede to the Council's request, which was to consider the problem of the nationality of married women as part of the topic of nationality, including statelessness. At that time the Commission had not decided merely to prepare a draft without going into the substance of the question. Had that been proposed, the motion would probably have been rejected.

37. Mr. LIANG (Secretary to the Commission) said that the crucial point at issue was whether the Commission should transform itself into a mere drafting

bureau. He quoted the remarks of various members made at the seventy-first meeting of the Commission during its second session to show the doubts then entertained on that point.

38. Mr. SANDSTRÖM said that several members, of whom he had been one, had at the second session expressed the view that investigation of the problem of the nationality of married women could only be undertaken as part of the whole subject of nationality, including statelessness.

39. If the Commission were to treat the Economic and Social Council's request as a mere matter of drafting, it would have to accompany the text with very strong and clear reservations explaining that it had not examined the question of how such a convention would affect the problem of nationality as a whole. Such reservations would clearly so attenuate the value of the draft as to render it almost meaningless, and he therefore had the gravest doubts whether any useful purpose would be served by proceeding in the manner proposed by Mr. Hudson.

40. Mr. KOZHEVNIKOV said that, as one of the new members of the Commission, he was not fully acquainted with the historical background of the problem, but Mr. Hudson's proposal clearly raised very important issues relating to the position and competence of the Commission. He personally thought that the General Assembly was the only body competent to entrust the Commission with a specific task.

41. The Commission's Statute left no doubt as to its great responsibilities. It was called upon to deal with grave and important problems, and he was very doubtful whether it could transform itself into a mere technical drafting committee. At all events, the question of competence must be settled first.

42. Should the Commission decide to act in accordance with Mr. Hudson's proposal it would then have to consider how it was to deal with the draft convention. It might find that it could not confine itself to mere drafting, but would have to pronounce on certain questions of principle.

43. Mr. SCELLE expressed his firm conviction that the Commission could not act as a drafting body on behalf of any other organ. He was fortified in that belief by the reasons adduced by Mr. François, with whose conclusion, however, he could not agree. It was unthinkable that the Commission should be given the task of casting the concepts of others in concrete form. He, for his part, was unable to endorse some of the articles which Mr. Hudson had prepared, the effect of which, in his view, would be to destroy the family, which was not putting it too strongly. If the Commission considered the draft convention before it, it must pronounce upon its substance.

44. Mr. CÓRDOVA said that he had already expressed his views on the matter at the second session. The Commission would never be able to fulfil its task if it were to turn itself into a pure drafting committee. It would be remembered, for example, that in preparing

² See *Annuaire de l'Institut de droit international*, vol. 44 (1952), t. II, pp. 1—9.

³ See *Yearbook of the International Law Commission*, 1950, summary record of the 71st meeting, pp. 247—255.

the draft code of offences against the peace and security of mankind, the Commission had not felt itself bound by the principles recognized by the Nürnberg Tribunal. The Commission's task was to codify international law as it understood it, and not in accordance with the concepts put forward by other organs. If it decided to prepare a draft convention, the Commission should examine the substance of the subject.

45. Mr. el-KHOURI said that to the best of his recollection the Commission had decided to take up the question of nationality of married women as part of the whole problem of nationality, including statelessness. It could not therefore confine itself to the mere drafting of a text for whose content it would be taking no responsibility.

46. Mr. HUDSON said that if the Commission refused to draft a convention it would be guilty of misleading the Economic and Social Council as to its intentions.

47. Mr. YEPES said that if the Commission followed the procedure proposed by Mr. Hudson it would do so in violation of article 1 of its Statute.

48. Mr. ZOUREK considered that the Commission had decided to accede to the Council's request in accordance with article 17, paragraph 2, of its Statute.

49. Mr. HUDSON suggested that the Chair take the sense of the Commission by putting to the vote the following proposal :

"The Commission decides, complying with the proposal of the Economic and Social Council, to draft a convention embodying the principles recommended by the Commission on the Status of Women."

"In doing so, it does not express any approval of those principles."

Mr. Hudson's proposal was rejected by 8 votes to 3, with 1 abstention.

50. Mr. LAUTERPACHT said that out of respect for the Commission's previous decision and the work done by Mr. Hudson, the Commission should hold a short general discussion on the problem of nationality of married women to enable it to decide whether it could draft a convention at a subsequent session.

The meeting rose at 1.15 p.m.

156th MEETING

Thursday, 3 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsy Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCHELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 9) (resumed from the 155th meeting)

ACTION TO BE TAKEN IN RESPECT OF THE DRAFT ARTICLES (resumed)

1. The CHAIRMAN invited the Commission to continue its discussion of the action which was to be taken with regard to the draft articles which had been tentatively adopted. He recalled that three proposals had been made. Mr. Hudson had proposed

"That the draft on arbitral procedure be included, with explanations to follow on each article, in the report of the Commission this year as a tentative provisional draft."

2. Mr. Lauterpacht had proposed

"1. That after the end of this session the draft articles shall be submitted to governments with explanations.

"The Special Rapporteur, with the assistance of the Standing Drafting Committee and any other member of the Commission, shall prepare a draft of explanations to every article adopted by the Commission and circulate that draft among members of the Commission for comment. After receiving that comment the Special Rapporteur shall finally prepare his explanations to be appended to the draft articles ;

"2. That after the end of the 1953 session the draft articles shall be submitted to the General Assembly accompanied by a full commentary in accordance with article 20 of the Statute of the Commission."

3. Finally Mr. Kozhevnikov had submitted a proposal worded as follows :

"To prepare a detailed commentary before transmitting it to governments. To submit the commentary to the Commission for consideration at its fifth session. After such consideration, to transmit all the material to governments for their observations. To

take account of the observations of governments with a view to transmitting the final text of the draft to the General Assembly."

4. Unless there was any proposal to the contrary, he would, in accordance with rule 130 of the rules of procedure of the General Assembly, put those proposals to the vote in that order, which was the order of their submission.

5. Mr. LIANG (Secretary to the Commission) suggested that, in order to bring the wording as far as possible into line with that used in the Statute of the Commission, Mr. Hudson's proposal might be amended to read as follows :

"That the draft on arbitral procedure, accompanied by explanations, be issued as a Commission document and submitted to governments for comment and included in the report of the Commission to the General Assembly this year as a provisional draft."

6. Mr. HUDSON accepted the Secretary's suggestion.

7. Mr. LAUTERPACHT said that, in view of the fact that certain features of his proposal had aroused the opposition of several members of the Commission during the discussion at the preceding meeting, he would withdraw section 1 thereof in favour of Mr. Hudson's proposal, as amended at the suggestion of the Secretary. He reserved the right, however, to propose, if necessary, rather fuller explanations in respect of certain articles in which he was particularly interested, to replace the explanations which would be submitted to the Commission by the special rapporteur.

8. Mr. YEPES felt that the whole difficulty had arisen from the Commission's failure to recognize that the draft on arbitration procedure was, for much the greater part, a matter of the development of international law, and from its consequent attempt to apply to it the provisions of article 20 of the Commission's Statute, provisions which were perfectly justifiable in the case of drafts dealing with the codification of international law, but which were quite inapplicable in the case of a draft which diverged from the existing law as much as did that submitted by Mr. Scelle.

9. He could, however, accept Mr. Hudson's proposal as amended, although he would suggest that the words "being largely a draft for the progressive development of international law" be inserted after the words "the draft on arbitral procedure".

10. Mr. LIANG (Secretary to the Commission) pointed out that Mr. Yepes' proposal would add an element of juridical appreciation to what was a purely formal, procedural resolution. Moreover, not all members of the Commission might be prepared to agree without discussion that the draft on arbitral procedure was largely one for the progressive development of international law.

11. Mr. YEPES said that he would not press his amendment, although he was personally convinced that the draft submitted by Mr. Scelle, even in the form in which

it had been tentatively adopted by the Commission, was far more concerned with the progressive development of international law than with its codification.

12. Mr. KERNO (Assistant Secretary-General) pointed out that it was immaterial whether the draft was mainly concerned with the progressive development or with the codification of international law, since the wording proposed by Mr. Hudson, as amended, was in accordance both with article 16 and with article 21 of the Commission's Statute. As he had pointed out at the preceding meeting, the procedure laid down in article 21 came before that proposed in article 20, chronologically speaking. If Mr. Hudson's proposal, as amended, was adopted, the draft articles would be submitted to the General Assembly at its forthcoming session, but for information only; on the other hand, governments would be required to submit their comments on those articles during the forthcoming year. Under Mr. Kozhevnikov's proposal they would not be required to do so until after the 1953 (fifth) session.

13. Mr. SCELLE said that the question under discussion had an important bearing on the way in which the Commission would organize all its future work. From what Mr. Lauterpacht had said at the preceding meeting concerning the uselessness of anything other than a full commentary, he would have expected him to favour Mr. Kozhevnikov's proposal rather than Mr. Hudson's. It was essential that all members of the Commission should appreciate the issues at stake.

14. Mr. LAUTERPACHT said that if he supported Mr. Hudson's proposal rather than Mr. Kozhevnikov's, he did so because he considered that it was absolutely vital that the Commission should succeed in completing its work on at least one or two topics of codification by the time the term of office of the present members came to an end. For that reason, it was necessary that the draft articles on arbitral procedure should be submitted to governments already in 1952.

15. The fullness of explanations was a matter of degree. He accepted the special rapporteur's assurance that it would be quite impossible to prepare a commentary that would meet all the requirements laid down in article 20 of the Commission's Statute, but he still hoped that the explanations would be full enough to show governments what the Commission had been attempting to do. As he had already suggested, individual members of the Commission could help the special rapporteur in that respect by submitting explanations or articles in which they were particularly interested.

16. Mr. KOZHEVNIKOV had thought that his proposal was in accordance with the general trend of discussion at the preceding meeting. The majority of members of the Commission had appeared to be opposed to the Commission's considering itself bound by any rigid time-table, and to have taken their stand on the principle that it was the Commission's task to produce authoritative work and on the practical consideration that governments should be given an

opportunity of apprehending clearly the significance of its drafts. His proposal was in accordance with that point of view, but some members of the Commission appeared to have changed their opinion, for some reason which he did not understand.

After further discussion, *Mr. Hudson's proposal was put to the vote, as amended, and was adopted by 8 votes to 1, with 3 abstentions.*

17. The CHAIRMAN pointed out that the Commission had still to take a decision on section 2 of Mr. Lauterpacht's proposal, as well as on those parts of the proposal made by Mr. Kozhevnikov which had not been disposed of by the vote just taken.

18. Mr. HUDSON felt that the wording proposed by Mr. Lauterpacht was somewhat peremptory, and suggested that it be replaced by the following text:

"That the Special Rapporteur be invited to prepare and to present to the Commission at its next session a full commentary on the draft on arbitral procedure, with a view to the submission of the final draft and commentary to the General Assembly in 1953".

19. After some discussion, Mr. LAUTERPACHT pointed out that the only urgent question had been that of the explanations which were to be appended to the draft articles in the Commission's report on its present session. There was no need at all to decide forthwith the question of the procedure to be followed in drawing up the full commentary. That question was of vital importance, and, as Mr. Scelle had rightly pointed out, the decision taken on it would affect the Commission's future methods of work as a whole. It was his intention to submit a working paper concerning that question, if the Commission so desired, and he therefore formally moved that the present discussion, as well as the votes on the remaining proposals before the Commission, be deferred until that working paper had been circulated.

20. The CHAIRMAN pointed out that under rule 115 of the rules of procedure of the General Assembly two members of the Commission could speak in favour of Mr. Lauterpacht's motion, and two against it, after which it would be put to the vote.

21. Mr. FRANÇOIS supported the motion for adjournment, since the Commission would not be in a position to decide until the end of the present session what items it wished to place on the agenda for its next session.

22. Mr. CÓRDOVA also supported Mr. Lauterpacht's motion, since the working paper which the latter intended to submit would relate, as he (Mr. Córdova) understood it, to the procedure in respect of all items on the Commission's agenda in the case of which it would be necessary to prepare full commentaries. There was therefore no point in taking a separate decision in respect of arbitration procedure.

23. Mr. YEPES said that he looked forward with interest to seeing the working paper submitted by Mr. Lauterpacht, but thought that it should be considered in connexion with the item relating to revision

of the Commission's Statute. He therefore opposed the motion.

24. Mr. el-KHOURI agreed with Mr. YEPES. If, as a result of Mr. Lauterpacht's working paper, some general procedure were agreed on which differed from that agreed on for arbitration procedure, the decision with regard to arbitration procedure could be modified accordingly.

Mr. Lauterpacht's motion was rejected by 5 votes to 3, with 5 abstentions.

25. Mr. SANDSTRÖM, explaining his vote, said that he feared that the present discussion would only be repeated when the Commission took up the question again.

26. Mr. HUDSON said that he had voted against the motion because he saw no need for any general rule, or for specifying the procedure by which the commentary was to be prepared. If the special rapporteur needed help in that respect, he had only to ask for it.

27. The CHAIRMAN said that as the motion for adjournment of the debate had been rejected, he would put to the vote the wording proposed by Mr. Hudson to replace section 2 of Mr. Lauterpacht's proposal.

28. Mr. ZOUŘEK asked whether Mr. Hudson would be prepared to delete the reference to the date by which the final draft and commentary had to be submitted to the General Assembly.

29. Mr. HUDSON pointed out that the wording he had proposed read: "...with a view to the submission...". It did not therefore bind the Commission in advance to submitting the final draft and commentary in 1953, if for some reason or another it was not satisfied with them.

Mr. Hudson's proposal was adopted by 7 votes to 3, with 3 abstentions.

30. The CHAIRMAN asked whether Mr. Kozhevnikov wished his proposal to be put to the vote, since several of the questions it raised had already been decided by the votes already taken.

31. Mr. KOZHEVNIKOV replied in the affirmative.

32. Mr. ZOUŘEK pointed out that Mr. Kozhevnikov's proposal referred to two points which were not covered by either of the two texts so far adopted by the Commission, namely: the question of a detailed commentary being transmitted to governments; and the question of observations of governments being taken into account in the preparation of the final text.

Mr. Kozhevnikov's proposal was rejected by 5 votes to 2, with 4 abstentions.

33. The CHAIRMAN indicated that the Commission had completed its work on arbitration procedure until such time as the Standing Drafting Committee reported back on the articles already tentatively adopted by the Commission.

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (resumed from the 155th meeting)

GENERAL (resumed)

34. The CHAIRMAN reminded the Commission that it had before it a proposal by Mr. Lauterpacht,¹ which was now available in writing. It read:

"The Commission will proceed with a general discussion of the *Draft Convention on Nationality of Married Women* with a view to enabling the Commission, at a subsequent session and after receiving a report in conformity with article 17 of its Statute, to determine whether it is in a position to draft a convention."

35. Mr. LAUTERPACHT said that on further reflection he had decided to withdraw his proposal.

36. Mr. el-KHOURI asked that the Chairman communicate the Commission's decision concerning the draft convention on the nationality of married persons to the President of the Economic and Social Council, together with the draft prepared by Mr. Hudson.

37. The CHAIRMAN said that Mr. el-Khouri's request would be complied with.

38. Mr. LIANG (Secretary to the Commission) observed that the Commission's decision to reject Mr. Hudson's proposal concerning the draft convention on the nationality of married persons did not conflict with the decision it had taken at its second session. He did not think it sufficient, however, that the Commission should transmit to the President of the Council the text of Mr. Hudson's draft alone, and suggested that it be accompanied by the summary record of the proceedings at the preceding meeting so that the Council might be informed of the views expressed by members of the Commission on the question as a whole.

It was so agreed.

39. The CHAIRMAN observed that the Commission must now discuss how it would deal with item 6 of the agenda.

40. Mr. HUDSON said that, if it were the Commission's pleasure, he would propose that it first take up Annex III to his report, since the urgent problem of elimination of statelessness could usefully be discussed.

41. Mr. YEPES said that, as Annex I embodied certain general principles on which Annex III itself was based, it was impossible to consider them separately.

Mr. Hudson's proposal was adopted by 8 votes to 1, with 4 abstentions.

42. Mr. AMADO said that, before the Commission began its discussion of Annex III to Mr. Hudson's report, he would like to clear up one point raised in Annex I, section II, 3(bb), where Mr. Hudson quoted "collective naturalization" practised under the Brazilian

Constitution of 1891 as an example of imposed nationality.

43. In fact, Article 69, paragraphs 4 and 5, of the Constitution of Brazil laid down, first, that all aliens in Brazilian territory on 15 November 1889 would be regarded as Brazilian citizens unless they declared their intention of retaining their own nationality within a period of six months, and secondly, that the same would apply to aliens possessing real estate in Brazil or who had Brazilian children.

44. That provision had never been interpreted as implying imposition of nationality, as was suggested by Mr. Hudson. The very opposite was true, and what was known in Brazil as "*grande naturalisation*" was designed to facilitate naturalization for the thousands of immigrants who arrived in Brazil. Furthermore, those who wished to retain their own nationality could do so under the provision he had cited.

45. He emphasized that rulings of the Supreme Court of Brazil had completely rejected the notion that Article 69 entailed imposition of nationality. Indeed, the decisions of the Court had even restricted the overgenerous scope of the provision, so that naturalization under the terms of that article only took place when the interested party obtained naturalization papers according to the normal procedure. Obviously, an alien applying for those papers would only do so voluntarily, and there could thus be no question of enforced naturalization.

46. He had wished to elucidate that point in order to show that the Brazilian Constitution of 1891 had always been regarded as enabling aliens who wished to acquire Brazilian nationality to do so without being subjected to the bureaucratic difficulties associated with the normal processes of naturalization.

SECTION VI OF ANNEX III : STATELESSNESS ; POINTS FOR DISCUSSION

47. The CHAIRMAN suggested that the Commission might take as the framework for its discussion the nineteen points listed in section VI of Annex III to Mr. Hudson's report (A/CN.4/50), starting with the two general rules laid down in paragraph 2 thereof, aimed at precluding future additions to the number of stateless persons. Those rules were:

"(i) If no other nationality is acquired at birth, every person shall acquire at birth the nationality of the State in whose territory he is born. This would extend *pro tanto* the application of the *jus soli* rule in many countries.

"(ii) No person shall lose his nationality unless such person acquires another nationality."

48. Mr. KOZHEVNIKOV suggested that, if the Commission were to have no general discussion, it might at least hold a preliminary exchange of views before passing to the consideration of Section VI of Annex III point by point.

49. Mr. YEPES agreed that a general discussion was necessary.

¹ See summary record of the 155th meeting, para. 50.

50. The CHAIRMAN said that from his long experience he had learnt that, however general a debate, it must be anchored to some specific point or points. Otherwise, it tended to become diffuse. He was somewhat at a loss to determine how the Commission should approach the problem of nationality, including statelessness, and had therefore suggested that it might focus its attention on the grave problem of how statelessness was to be eliminated. At the same time, of course, each member was entitled to draw attention to any general aspects of the matter.

51. Mr. YEPES said that, as he had indicated at the preceding meeting, there were certain principles contained in Annex I to Mr. Hudson's report with which he could not agree, notably that in section II, 4. He could not agree that the power of States to cancel or withhold nationality was, in the absence of treaty obligations, not limited by international law. Surely, according to Article 15 of the Universal Declaration of Human Rights, everyone had a right to a nationality, and should neither be arbitrarily deprived of his nationality nor denied the right to change it.² It was inadmissible that States should impose deprivation of nationality as a penalty. He therefore proposed that a rule in that sense be formulated.

52. Mr. AMADO pointed out that the practical application of Article 15 of the Universal Declaration of Human Rights would give rise to a great number of difficulties, since it conflicted with the municipal law of a number of countries. No purpose would be served by enunciating pious principles, the possibility of whose acceptance was very slender.

53. Mr. KOZHEVNIKOV wished to make certain general remarks on the whole subject of nationality and on Mr. Hudson's report.

54. Nationality could only be approached in the light of the democratic principles of international law. And in that field, as in any other, normal relations between States were impossible unless founded on the reciprocal recognition of the principle of sovereignty and of non-interference in domestic affairs, as laid down in the Charter of the United Nations. Despite that, certain States had been guilty of the grossest violations of those principles on the pretext that they were acting in defence of human rights. The problem of nationality was thus being exploited by reactionary and aggressive forces.

55. The task of the Commission was to find a solution to the problem in accordance with the democratic principles of international law.

56. As some members had referred to the domestic legislation of their countries, he intended to do the same and to point out that the Stalin Constitution of the Soviet Union was based on the equality of all citizens in every sphere. No direct or indirect limitation of rights was admitted, and any kind of discrimination based on race or nationality was condemned by law.

² *Universal Declaration of Human Rights*, United Nations publication, Sales No. : 1949.I.3.

57. Women enjoyed full equality of rights with men, and their position was guaranteed by their having the right to work, to equal pay, to holidays, to social security, to education, to special protective measures for mothers and children etc.

58. A special nationality law existed in the Soviet Union enabling aliens, whatever their nationality or race, to acquire Soviet Union citizenship. No special conditions had to be fulfilled for that purpose.

59. Despite the differences of legislation in various countries, he did not think that the situation was hopeless, since a way out might be found through bilateral or multilateral agreements freely entered into on a basis of equality.

60. Turning to Annex III, he said that he could not agree with the considerations put forward by Mr. Hudson since, in the light of the existing international situation and wide variations in the domestic laws of different countries, it would be quite unrealistic to base a draft convention on the two rules suggested in point 2 of Section VI of Annex III. Their acceptance would call for radical changes in the municipal law of a large number of States. Experience in the time of the League of Nations had shown that such proposals were unlikely to yield any practical results; and that outcome was not fortuitous, since the problems involved were for the most part of a purely domestic character which each State was free to regulate as it pleased within the general democratic framework of international law. Clearly, certain States, and notably Nazi Germany, had enacted regulations which violated those democratic principles and which could not be regarded as of internal significance alone. They impinged on the sovereignty of other States, and were therefore contrary to international law.

61. In conclusion, he stated that the considerations put forward by Mr. Hudson were inadequate, and therefore would not contribute to the solution of the problem.

62. Mr. HUDSON suggested that paragraph 3 of section VI in Annex III had escaped Mr. Kozhevnikov's notice. That paragraph stated :

“The universal or general adoption of the rules stated in paragraph 2 seems to be improbable, even if the rules were thought to be desirable.”

63. Mr. HSU agreed with the view put forward by Mr. Hudson in the paragraph just quoted, but wondered what the latter part of it meant. If Mr. Hudson thought that the general adoption of such rules was not desirable, he should surely give reasons for his belief. For his own part, he believed that, however impracticable, it was the Commission's duty to recommend what was desirable.

64. Mr. HUDSON said that he did not fly so high. If there was little possibility of a principle being adopted by States, there seemed little purpose in pursuing it.

65. Mr. FRANÇOIS said that, although from certain points of view it was very desirable to eliminate statelessness, there were grave objections to obliging States

to accept as nationals persons who had no ties of allegiance. In that respect, the Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague in 1930, had been more circumspect, since it had recognized certain rules with regard to nationality, together with certain limitations to those rules.³

66. Mr. KERNO (Assistant Secretary-General) said that the Commission must endeavour to find some way of reducing the numbers of stateless persons, even if it were not possible to eliminate statelessness altogether.

67. Mr. HSU observed that according to Mr. François there seemed to be a choice between two evils. On the one hand there was the suffering of countless people deprived of nationality, and on the other the reluctance of governments to adopt a liberal naturalization policy. Nevertheless, he believed that the Commission might put forward the two rules suggested by Mr. Hudson as one possible solution to the problem of statelessness. That proposed solution should not be set aside merely because its chances of acceptance were slight.

68. Mr. ZOUREK said that nothing would be achieved by the enunciation of vague philosophical abstractions. The Commission must take as its starting point the principle that nationality was a matter which lay exclusively within the internal jurisdiction of States, and one which they were free to regulate as they thought fit. That view was confirmed by the comments of governments on the draft of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, by article 1 of that Convention, and by the decisions of the Permanent Court of International Justice.

69. Mr. Hudson had very clearly shown that that was the existing doctrine on the subject. Unless that doctrine was recognized, no useful progress could be made. Indeed, the fate of existing international instruments on the subject was hardly encouraging. The Convention of 1930 had been ratified by very few States, and it was obvious that nationality was a subject concerning which States in general were reluctant to surrender their exclusive competence.

70. Mr. YEPES had mentioned the Universal Declaration of Human Rights, but that was in no sense a legal instrument, and its provisions could not be taken as a basis for discussion.

71. The CHAIRMAN called the attention of the Commission to the fact that at the present stage the Commission was not considering a draft convention, but the question of whether it was feasible to prepare such an instrument with a view to the eradication of a great human evil.

72. Mr. SANDSTRÖM said that obviously some preliminary discussion was necessary to enable the Commission to decide whether it should prepare a draft convention for the elimination of statelessness, or one

on nationality. At the present moment he could not say in which of the two the rules set forth by Mr. Hudson could be most appropriately embodied.

73. Mr. el-KHOURI agreed with Mr. Hudson's two rules, but suggested that the first required clarification. It was necessary to decide whether the nationality to be acquired in accordance with the first rule should be regulated by *jus soli* or by *jus sanguinis*.

74. He also believed that the second rule should be more forcibly stated, as in his view no State had the right to deprive a person of his nationality.

75. Mr. FRANÇOIS considered that Mr. Zourek had no grounds for attempting to substantiate his argument that nationality was a matter of purely internal competence by invoking article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, the second sentence of which read:

"This law shall be recognized by other States in so far as it is consistent with international conventions, international customs, and the principles of law generally recognized with regard to nationality."

The meeting rose at 1.5 p.m.

157th MEETING

Friday, 4 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (continued)

SECTION VI OF ANNEX III : STATELESSNESS ; POINTS FOR DISCUSSION (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of Annex III to the special

³ See text in League of Nations, *Treaty Series*, vol. 179, p. 89.

rapporteur's report on nationality, including statelessness (A/CN.4/50).

2. Mr. ZOUREK considered that the first of the two rules, designed to preclude future additions to the number of stateless persons, put forward by Mr. Hudson in point 2 of the points for discussion (Section VI of Annex III), was unacceptable, because it was unrealistic. That rule read:

“If no other nationality is acquired at birth, every person shall acquire at birth the nationality of the State in whose territory he is born...”

In the view of Mr. Zourek it failed to go to the core of the problem, which was the link between the individual and the State. If such a rule were adopted, nationality would henceforward be determined in a purely fortuitous manner. It would be preferable to recommend that countries whose legislation was based on *jus soli* should adopt the principle of *jus sanguinis* in respect of children born abroad. Legislation passed in 1949 in Czechoslovakia combined the two principles. A child born in Czechoslovakia acquired Czechoslovak nationality if one or both parents were Czechoslovaks; and there was no discrimination against illegitimate children. A child born abroad acquired Czechoslovak nationality at birth if both parents were Czechoslovak citizens; if only one of the parents was a Czechoslovak citizen and the other was a foreigner, the child acquired Czechoslovak nationality if it was applied for by the parent who was a Czechoslovak citizen and the application was approved by the regional National Committee.

3. Mr. HUDSON asked whether he had correctly understood Mr. Zourek to mean that, if no nationality was acquired at birth, the principle of *jus soli* would not apply.

4. Mr. AMADO said that the principle of *jus soli* could not be applied in too absolute a manner, since it would be quite unreasonable to expect a State not to withdraw nationality from persons born on its territory, but who left it at an early age and never returned.

5. He had very great difficulty in accepting the rules put forward by Mr. Hudson as a basis for discussion, since they seemed to him to be formulated in extremely vague terms and to be impossible of practical application. The Commission must proceed in the light of what could in fact be achieved. It was useless to enunciate high moral principles which had no chance of acceptance. The problem of statelessness was one of the foremost problems of the time and could not be dealt with in the manner envisaged in the nineteen points suggested for discussion by Mr. Hudson (Section VI of Annex III).

6. Mr. YEPES said that, in accordance with his statement at the previous meeting,¹ he wished to submit the following proposal for the consideration of the Commission:

“No State has the right to deprive its own nationals of their original nationality.”

“For the purposes of this article, ‘original nationality’ means the nationality acquired at birth.”

7. Mr. LAUTERPACHT said that, while he did not intend at the present stage to take part in the discussion on the individual points listed in Section VI of Annex III, he wished to enunciate certain general considerations.

8. He believed that the Commission had acted wisely in deciding to concentrate its attention for the time being on the problem of statelessness, since, if it were to deal with nationality as a whole, it would have to go into a number of extremely complex issues. As it would be impossible to put an end to existing statelessness without framing political recommendations, which would inevitably be controversial, it would be best for the Commission to confine itself to the examination of the five main sources of statelessness, which were: differences in national legislation, particularly in respect of *jus soli* and *jus sanguinis* with regard to acquisition of nationality by birth; marriage; deprivation of nationality; territorial changes; and certain minor matters, such as adoption legitimation, change of status of parents etc.

9. The Commission would have to decide whether the current objections against statelessness were well-founded, whether there was need for reform, and, if so, whether such reform could be achieved by means of an international convention. He believed the answer was in the affirmative to all three questions, because statelessness was inconsistent with the existing structure of international law, which considered nationality to be a link between the individual and the law of nations, with human dignity and with civilized standards. He felt, however, that that conclusion could not be taken for granted without careful study.

10. Again, the assumption that statelessness led to severe hardship and was inadmissible because, according to existing law, nationality was the only link between the individual and the protection offered by international law, must be examined in relation to the question of whether or not certain changes had occurred as a result of recent developments in international law which were calculated to ensure respect for fundamental human rights, irrespective of nationality.

11. Mr. Hudson had suggested that general adherence to the principle of *jus soli*, supplemented by recognition of nationality by descent, would go far towards eliminating statelessness. That view was acceptable, but the proviso that the method be qualified by some additional identification of the parent with the State would be fatal to the whole principle. Indeed, he believed that on close investigation the Commission would find that, in many countries, the difference between *jus soli* and *jus sanguinis* had in the last fifty years been obliterated and become largely theoretical. Furthermore, little substance remained in the argument that adherence to one or the other of the two principles was bound up with imperative national interests and

¹ See summary record of the 156th meeting, para. 51.

traditions which could not be abandoned. An example of the way in which traditional thinking could be reversed was to be found in the legislation concerning the nationality of married women enacted in the United Kingdom after The Hague Conference of 1930.

12. The principle that, provided no other nationality was acquired at birth, every person should acquire the nationality of the State in the territory of which he was born, might be found to offer the correct solution, and he could not agree that it would be useless to put such a recommendation forward to States simply, as Mr. Hudson maintained, because it was unlikely, for political reasons, that they would accept it. That was not a factor which the Commission should take into account, since its duty was to show up existing anomalies and suggest means for their removal.

13. He was convinced that the Commission would do well to devote equal attention to the second of the two rules (in point 2, Section VI) formulated by the special rapporteur as a point for discussion, namely: "No person shall lose his nationality unless such person acquires another nationality", and on Mr. Yepes' proposal, since that principle was suitable for incorporation in an international convention on the subject.

14. There was no persuasive reason why existing legislation which permitted States to deprive persons of their nationality should be regarded as so rational as to form an enduring part of the law of States. It was clear from point 18 in section VI of annex III that Mr. Hudson was fully alive to the importance of the issue. He (Mr. Lauterpacht) could not agree, however, to the qualification put forward that no person should be deprived of nationality "except on decision in each case by a competent authority acting in accordance with due process of law". Any substantial departure from principle could be cloaked with such a formula, and it would merely enshrine the existing right of States to deprive persons of nationality. He could not accept, however, as exhaustive, the three grounds put forward by Mr. Hudson under point 18 for deprivation of nationality, but welcomed the fact that he had not included among them the ground of disloyalty or other criminal acts for which other penalties existed.

15. In his view, the Commission should at its fifth session prepare a report on statelessness and a full commentary on the issues involved. The special rapporteur might also submit a paper giving his considered views.

16. The Commission would not be taking up a new subject, but would be continuing the work started at The Hague Conference in 1930. He could not agree with Mr. Kozhevnikov that the results achieved by that Conference in the field of nationality were disappointing. The Convention on Certain Questions Relating to the Conflict of Nationality Laws had given a definite impetus towards improvement, and had persuaded many governments to revise their legislation. Recognition of the dignity of the human person was becoming, in an incipient fashion, a part of international law. The special rapporteur should therefore be given every encourage-

ment to study further the question how statelessness could be not only reduced but eliminated altogether.

17. Mr. YEPES said that his proposal related neither to voluntary change of nationality, which was an inherent right possessed by every person, nor to the right of a State to deprive a person of nationality on the ground that he had obtained naturalization by fraud or had indulged in activities inimical to the security of the State.

18. Deprivation for political, social or religious reasons of nationality acquired at birth must be condemned, since it inevitably led to the loss of all civic rights. The appalling results of that practice on the part of certain States had become manifest during recent years, and the evil must be faced courageously and eradicated. States had other means of safeguarding national security, and if deprivation of nationality were tolerated a great element of instability would be fostered.

19. Since the adoption of the Universal Declaration of Human Rights, the concept that nationality was within the exclusive domestic jurisdiction of States had been set aside. Indeed, the Permanent Court of International Justice had, in the *Case of the Nationality Decrees issued in Tunis and Morocco* (Advisory opinion of 7 February 1923), recognized that concept as being relative.² Since that date further changes had occurred. Members of the United Nations had reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and the Universal Declaration of Human Rights enjoined upon States the duty of promoting those rights by progressive measures, both national and international. It was for the Commission to devise the appropriate instruments for achieving that purpose.

20. Mr. KERNO (Assistant Secretary-General) observed that the first paragraph of Mr. Yepes' proposal might be interpreted to mean that no one could be deprived of his original nationality, even when he had acquired another nationality. He assumed that that was not the author's intention.

21. Mr. YEPES agreed; he would be prepared to amend the first paragraph of his proposal by adding the words "unless they have acquired another nationality".

22. Mr. AMADO said that he could not but applaud the lofty principles which inspired Mr. Lauterpacht's and Mr. Yepes' statements, but, unfortunately, any international instrument must be based on recognized principles of international law and be drafted in such a way as to command some reasonable chance of acceptance by States.

23. Mr. KOZHEVNIKOV considered that the time was not yet ripe for the Commission to decide whether it was desirable to deal with the problem of statelessness by means of one or more international conventions. The

² Publications of the Permanent Court of International Justice, *Advisory Opinions Series B*, No. 4, pp. 7—32.

special rapporteur had only gone so far as to express the hope that his exposition and analysis of the problem would furnish a sound basis for the Commission's deliberations. He himself doubted even whether such a basis existed. Clearly, the reason why the special rapporteur did not wish to make specific proposals was that he felt that he must examine the matter further.

24. He had some sympathy with the motives which had prompted Mr. Yépes' arguments, but could not agree that the Universal Declaration of Human Rights imposed any legal obligation whatsoever upon States. Neither did it prescribe any procedure by which the general principles proclaimed in it could be enforced. The Commission could express its views on how such principles could be given effect, but it could not create law. That was a function which pertained to sovereign States alone.

25. The question of the deprivation of nationality must be examined further, since it involved a number of general philosophical considerations. There were some States where moral and political identity between the individual and the State had been achieved, and clearly sanctions must be brought to bear against individuals whose acts tended to destroy or undermine that identity. He did not, therefore, think that the issue could be stated in such categorical terms as in Mr. Yépes' proposal, which said: "No State has the right to deprive its own nationals of their original nationality". On that point Mr. Hudson had offered a more acceptable solution in his report.

26. Mr. FRANÇOIS said that the principle that everyone had the right to a nationality was undoubtedly a noble one, but did it mean that there should be a kind of automatic grant of nationality by States? Nationality constituted a link between the individual and the State, the nature of which differed in the various countries. He was not so optimistic as Mr. Lauterpacht in thinking that those differences were no longer significant just because the principle of *jus sanguinis* was now being applied less rigidly. The differences were deeply rooted in custom and tradition. He was therefore unable to support either the second rule formulated by Mr. Hudson or Mr. Yépes' proposal, neither of which took into account the need to make sure that the individual acquiring nationality felt the existence of a bond between himself and the State of which he became a national. The unconditional right to nationality was not recognized in The Hague Convention of 1930, which laid down certain residential requirements.

27. There were certain other difficulties that must be faced. A State was entitled to withdraw its nationality from a person who had severed all his connexions with the country, had resided for a long time abroad or had entered into the service of another State. In the last-mentioned case, a conflict of duties had to be removed.

28. With those considerations in mind, he agreed with Mr. Kozhevnikov that it was impossible to solve the problem by enunciating general rules of the kind proposed in Mr. Hudson's report and by Mr. Yépes. From the legal point of view, such rules would be almost worthless.

29. Mr. CÓRDOVA said that there appeared to be some confusion concerning the Commission's task. Some members appeared to think that its work on nationality including statelessness could not be regarded as one of codification, and that the subject was not therefore sufficiently ripe for the Commission to proceed to the drafting of a convention. In his view, Economic and Social Council resolution 319 B III(XI) was to be understood merely as meaning that the Commission should attempt to find the best solution to the problem of eliminating statelessness. It was to be noted that those members of the Commission who had objected to proceeding in the manner proposed by Mr. Hudson had put forward no alternatives.

30. Other members of the Commission had expressed the view that nationality lay outside the Commission's field of work, in that it was a question solely for national jurisdiction. All questions of international law had repercussions at national level. The Commission's aim should be to reconcile and harmonize the national laws of the various countries in such a way as to eliminate statelessness, which all were agreed was an evil. It had been suggested that that aim was too ambitious, and that all the Commission could hope to do was to reduce statelessness. That issue was surely immaterial to the Commission's work. If it agreed that the ideal was the complete elimination of statelessness, it should do all in its power to indicate the best means of attaining that ideal. More it could not do. It was in that light that Mr. Yépes' proposal should be viewed. If the principle it laid down was correct, the proposal should be adopted, whatever the difficulties its adoption might at present entail for certain States; his own country, for example, would have considerable difficulty about agreeing to that principle forthwith, since it conflicted with the legislation at present in force. Unless, however, it were laid down that no State had the right to deprive its own nationals of their original nationality unless they had acquired another nationality, it would be impossible to make any progress, and the door would be thrown open to the assertion of that right by those States which did not at present assert it. The outcome would be anarchy.

31. Mr. HUDSON said that he merely wished to record his emphatic agreement with everything that Mr. François had said. It was only natural that countries into which there was large-scale immigration should have different views on the question from countries from which there was much emigration, and the Commission should bear that fact in mind.

32. Mr. LIANG (Secretary to the Commission) observed that any attempt to consider statelessness independently of the whole subject of nationality was not likely to yield fruitful results. The discussion had so far brought out a number of questions which were really questions of nationality, and had also brought out the fact that on those questions there was a basic difference of opinion. He recalled that at The Hague Conference in 1930, in which he had taken part, it had been found impossible to bring the question of state-

lessness into focus until the basic concepts of nationality had been discussed.

33. In his view, the present discussion had also brought out the sharp distinction between the progressive development of international law and its codification. On the question of statelessness, the legislative policies of States had to be taken into account. The problem was largely to determine how far the right of States to deprive their nationals of its nationality could be limited. In that connexion, he had been gratified to hear what Mr. Lauterpacht had said concerning the impetus given in that direction by the 1930 Hague Convention.

34. If, as appeared to be the case, the Economic and Social Council, composed of government representatives, had really reached agreement on the political question that such adjustments as were necessary for the elimination of statelessness should be made to the nationality laws of the different countries, the task of the Commission, composed of legal experts, became a purely juridical one, and would be much easier. In present circumstances, he wondered whether it was useful to treat the problem of statelessness separately from the wider subject of nationality.

35. Mr. HSU acknowledged that there was a good deal of truth in what the Secretary had said, if the question was regarded from the angle of codification. On the other hand, the Commission had been requested by the Economic and Social Council to do a particular piece of work on a question with which the Council was profoundly concerned. If the Commission recognized that its contribution to the task of eliminating statelessness was restricted to only one aspect, the legal aspect, of the task as a whole, it would see more clearly what was required of it. It would see, for example, that what it had to do related not so much to the codification of the law of nationality as to the progressive development of such law as would ensure the elimination of statelessness. For that reason, he had regretted the Commission's decision to brush aside, as it were, the principles which had been commended to it on no mean authority, without first considering how far they were in conformity with the principles and practice of international law. Even if the Commission's recommendations could not be given world-wide implementation at once, they would become a standard of achievement, just as the 1930 Hague Convention had formed a standard towards which governments had striven over the years, with the result that cases of conflict between nationality laws were now considerably fewer than they had been before that Convention had been concluded.

36. With regard to practical procedure, he thought that the Commission should consider one by one the nineteen points for discussion contained in Section VI of Annex III to Mr. Hudson's report, and that in the light of those discussions the special rapporteur should prepare a draft convention for consideration at the next session.

37. Mr. SANDSTRÖM said that, in his view, points 1-9 of the points for discussion suggested by Mr. Hudson

were so obvious that discussion of them would not be very fruitful. It would be more useful to discuss forthwith points 10-19, which dealt with more concrete questions.

38. With regard to point 10(i), he felt that the problem was of such manifest importance, and the amount of human suffering involved so great, that the Commission should at any rate attempt to reach a solution; such an attempt would show whether the subject was in fact "sufficiently ripe for international legislation".

39. With regard to point 10(ii), he considered that it would be preferable for the Commission to carry on with its work and submit drafts to Governments for comment, rather than to ask the Governments for their general views before proceeding with the work.

40. Mr. el-KHOURI said that the Commission had a definite responsibility to proceed with the topic of nationality, including statelessness. It had much material available to it, including the 1930 Hague Convention. It was generally agreed that the problem of statelessness was an international issue which required international action. The Commission must not evade its responsibilities in respect to that problem, and in his view its first step in practice should be to consider the principles underlying The Hague Convention.

41. Mr. KOZHEVNIKOV pointed out that the special rapporteur himself had posed the question whether the subject was sufficiently ripe for the Commission to take action on it. In his (Mr. Kozhevnikov's) view, it was not sufficiently ripe, as was proved, indeed, by the fact that neither the special rapporteur nor any of those members who had expressed the view that it was sufficiently ripe, except for Mr. Yepes, had submitted any definite proposals for dealing with it.

42. Mr. SCELLE said that he was in favour of continuing the discussion and adopting a draft text, even though he recognized that such a text might have little chance of general acceptance by States, when national laws were so deeply rooted. That was no reason, however, why the Commission should not do its utmost to contribute to the solution of the problem.

43. The history of the question of nationality, including statelessness, was part of the story of man's progress from the level of an animal to that of a social being. In the animal kingdom those who suffered from some abnormality or deformity were destroyed. That practice had not been entirely abandoned by man; from Sparta to the present day, certain States had claimed and exercised, with greater or lesser ruthlessness, the right to liquidate elements which they regarded as anti-social. The revolutionary nature of Mr. Yepes' proposal should be clearly understood, for it would give the individual, and not the State, the last word in the matter. It would deprive States of a right which many of them still claimed, the right to reduce their own nationals to the level of basts, of inanimate objects, deprived of all civic rights; for that was what statelessness meant. To compensate such human beings as were thus denied all their rights the League of Nations had instituted the

system of Nansen passports. Those passports gave their holders a few useful but limited rights, but they were hardly fair compensation for what they had lost, nor did they confer world citizenship on those who had lost their country but remained members of the human race. Yet that must remain the ideal. In the last resort, progress could only be achieved if States were to abandon step by step the outmoded concepts of national sovereignty. Although in present circumstances their sovereignty could only be restricted in so far as they agreed to accede to a convention, it was the Commission's duty to submit such a convention for their approval. It was not the Commission's task to legislate, but it was its task to pave the way for the progressive development of international law. If it failed to do so in the field of statelessness, it would be contributing to the perpetuation of a grave injustice, and shirking an important task for which it had been set up.

44. The question of the practical steps to be taken raised yet once more the whole problem of the Commission's method of work and its status. It was obvious that the work on statelessness could not be completed within twelve months.

45. Mr. KOZHEVNIKOV said that he had listened with great interest to Mr. Scelle's statement, but that he was in profound disagreement with it. The path which Mr. Scelle had traced led not forwards but backwards, not towards the development of international law but towards international anarchy. The Commission's task was to codify the laws already adopted by governments, taking full account of the views and wishes of independent sovereign States. It should seek to enlist the co-operation of governments, and not attempt to dictate to them.

46. Mr. HUDSON said that he was gratified that Mr. Scelle had raised the question to which Mr. Kozhevnikov had referred. He recalled that an eminent American jurist, Professor Wigmore, had been a leading proponent of the thesis of what was called world citizenship. In recent months the Press had carried reports of individuals who had renounced their nationality to free themselves from national ties, and thus to become "citizens of the world". Certain very responsible circles were in general sympathy with those views. He personally, however, found it impossible to envisage any practical steps in that direction which would at the present stage be acceptable to governments in any part of the world. As he had already indicated, however, he was glad that Mr. Scelle had raised the question.

47. Mr. el-KHOURI said that, as the Commission had no specific proposals before it which it could discuss, he would suggest that the special rapporteur be requested to prepare a draft convention on nationality, including statelessness, with a view to its consideration at the next session.

48. Mr. HUDSON said that, in all humility, he would suggest that the points for discussion set forth in section VI of Annex III to his report could form a

useful basis for the Commission's debates at the present session. With regard to the elimination of statelessness, dealt with in points 1-3, he had had grave doubts about the desirability of rules that would preclude any further addition to the number of stateless persons, as well as about the possibility of their universal or general adoption. For example, it might seem reasonable for one State which was at war with another State to deprive of their nationality any of its nationals who joined the armed forces of the latter State against itself. It was for that reason that he had turned his attention to the problem of *reducing*, first, statelessness already existing and, secondly, statelessness arising in the future. With regard to the former, he did not think much could be achieved in the way of practical results, but it might be useful for the Commission at any rate to discuss the five points dealing with that question. With regard to statelessness arising in the future, he thought that the Commission could and should take useful steps. Although the discussions at the present session might result in little of immediate practical value, they would be a useful guide for the drafting of a convention at a later stage.

49. Mr. ZOUREK pointed out that several of the causes of statelessness were closely connected with the wider question of nationality. That proved that the two questions could not be treated separately, at least in the initial stages of the work.

50. In his view, the subject of statelessness was not sufficiently ripe for international legislation. It required much more thorough consideration and, as a first step, the Commission should discuss the various points in Mr. Hudson's report, distinguishing clearly between what was theoretically desirable and what was practicable, and discarding any proposals which ran counter to the fundamental principles of international law and national sovereignty. Mr. Scelle's proposal, for example, would in his view, mean the end of progress towards a community of independent sovereign States, and the decline of international law into international anarchy.

The meeting rose at 1.15 p.m.

158th MEETING

Monday, 7 July 1952, at 2.45 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (continued)

SECTION VI OF ANNEX III : STATELESSNESS ; POINTS FOR DISCUSSION (continued)

1. The CHAIRMAN said that it appeared from the discussion that the Commission was agreed that nationality was essentially a subject for codification, whereas statelessness was emphatically a subject for the progressive development of international law. The Commission also seemed to recognize that codification of the law of nationality would be a complicated and difficult task, for practical and psychological reasons, and that there was no great urgency about taking it up.

2. On the other hand, statelessness constituted a pressing, tragic and vital human problem with which the nations of the world had been deeply concerned since the days of The Hague Conference in 1930. The nations represented at that conference had unanimously declared that States "should make every effort to reduce as far as possible cases of statelessness", and the same sentiment had inspired the action of all United Nations bodies which had considered the question since the end of the Second World War. That action had culminated in the Economic and Social Council's resolution 319 B III (XI) of 11 August 1950, in which, after stressing the seriousness of the problem of statelessness for individuals and States, the Council had urged the International Law Commission to "prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness". Moreover, the Commission itself had, at its first session, selected the subject of nationality, including statelessness, for codification, and had noted at its third session that the action urged on it by the Council in the resolution to which he had just referred lay within the framework of that topic. The Commission had therefore given priority to the question of statelessness, both because of its manifest urgency and because of its own commitment in that field.

3. In the course of the discussion divergent opinions had been expressed on a number of questions which it was necessary to decide in order to set the course of the Commission's debates. As he saw them, those questions were: first, whether the Commission was ready to undertake at the present time the drafting of

one or more conventions on statelessness; secondly, if not, whether the Commission was of the opinion that it might at the present stage formulate certain principles with a view to their subsequent incorporation in an international convention as a possible means of imposing some check on statelessness; thirdly, and in either case, whether the Commission considered that statelessness, as it existed at present, could be eliminated; fourthly, again in either case, whether the Commission considered that statelessness, as it existed at present, could only be reduced; and lastly, again in either case, whether the Commission considered that it could only envisage the possibility of reducing statelessness arising in the future.

4. Whatever form the Commission's recommendations might take, they would have to be submitted to governments as the Commission's reply to the question put to it, as the juridical organ of the United Nations, whether a juridical remedy could be found for eliminating or reducing the evil of statelessness. It was for the Commission to say whether such a remedy existed or not, but it would be for States to decide whether to apply, reject or modify any remedy the Commission suggested.

5. Mr. AMADO said that, if the Commission wished to ensure any continuity in the development of international law, and if it wished to avoid working, as it were, *in vacuo*, it must base itself upon reality, in other words upon what had been achieved in the past. In dealing with the subject at present under consideration it must base itself above all on the principles and practice of particular international law. Its aim was not only to draft a convention, but to ensure that governments would approve that convention. It must therefore rule out any absolute solutions such as those proposed by Mr. Yepes or Mr. Scelle. The 1930 Hague Convention, and the protocols appended thereto, had been drawn up with an eye to their acceptance, and had dealt with precise questions. That was why they had enjoyed a certain measure of success. The general discussion which the Commission had so far held had been of great interest, but had not greatly advanced consideration of the specific task with which the Commission was faced.

6. As he had already pointed out, the question of statelessness was an exceedingly difficult one; but that was not to say that it was insoluble. In his view, the Commission could contribute to reducing the numbers of the stateless. But to do so it must approach its task methodically, and in his opinion the best, and indeed the sole, method was to discuss the only specific proposals which were before the Commission, namely, the points for discussion contained in Section VI of Annex III to the special rapporteur's report. Those points were eminently clear, and in his opinion their discussion would be useful, although, as the special rapporteur had himself acknowledged, the discussion of some would be of more value than the discussion of others. If the Commission did not define the field which it wished its recommendations to cover, the special rapporteur would be unable to submit any more helpful, definite proposals to the Commission at its next session, guided as he would be only by the conflicting views that had so far been expressed.

7. The CHAIRMAN agreed that the points for discussion at the end of the special rapporteur's report were the only possible bases for discussion at the present session. On the other hand, he felt that before discussing those points, the Commission should make up its mind on the five issues he had stated.

8. Mr. CÓRDOVA proposed that the Commission should first consider the points for discussion in section VI of Annex III, since only in the light of such consideration would it become evident whether or not a convention could be drafted at the present stage, and what its scope should be.

9. Mr. SANDSTRÖM supported Mr. Córdova's proposal.

10. Mr. YEPES felt that the Commission should first decide whether questions of nationality really fell exclusively within the province of domestic legislation.

11. Mr. KOZHEVNIKOV said that he had listened with great interest to the Chairman's remarks, and indeed to the whole discussion. He agreed with Mr. Amado that the Commission must be realistic, and must aim at producing work of practical value. His view that prevailing circumstances made the immediate conclusion of a convention on statelessness unrealistic appeared to have been borne out by the trend of the discussion. He therefore proposed that on the question of statelessness the Commission include the following passage in its report :

"Following an exchange of views on the proposals put forward by Mr. Hudson concerning the problem of statelessness, the International Law Commission came to the conclusion that, under prevailing conditions, the adoption of a convention based on Mr. Hudson's proposals would be unrealistic. The adoption of such a convention would postulate a radical change in the nationality laws in a number of States. Moreover, by their very nature such questions concern the domestic legislation of individual countries".

12. Mr. SANDSTRÖM thought the Commission was in agreement that it should not attempt to draft a convention at the present session, but that it would be sufficient for the points listed in the special rapporteur's report to form the subject of discussion, in the light of which the special rapporteur could prepare specific proposals for consideration by the Commission at its next session.

13. Mr. LAUTERPACHT said that it was becoming clear that the Commission was not in agreement, and was unlikely to reach agreement in the course of the present session on the essential questions before it. It could not be denied that the tendency of recent legislation in many countries was towards the elimination of statelessness. That tendency had been in evidence even before The Hague Conference of 1930. However, apart from statelessness resulting from other causes, some countries still claimed the right to deprive their nationals of nationality as a sanction. The question therefore was,

by which reality was the Commission to be governed, by the reality of conflicting laws on the matter, or by the reality of the trend towards something more consonant with the temper of the time, as expressed in the resolution of the Economic and Social Council which spoke of the elimination, and not merely the reduction, of statelessness ? Until that question had been resolved, until the Commission had made up its mind to lend its active support to the view that statelessness was an evil which ought to be eliminated, and that the only way of eliminating it was for those States which at present admitted it to recede from their position, no progress could be hoped for.

14. The Commission must therefore examine closely the legislation of those States which at present claimed the right to deprive their nationals of nationality, in order to enable it to form a conclusion whether their vital interests were involved, as Mr. François had suggested that they were. Nationality was not a favour which States could withhold or withdraw as they wished, but a function which they discharged under international law.

15. Mr. KERNO (Assistant Secretary-General) pointed out that part of the preamble to Economic and Social Council resolution 319 B III (XI) read :

"Considering that statelessness entails serious problems both for individuals and for States, and that it is necessary both to reduce the number of stateless persons and to eliminate the causes of statelessness,

"Considering that these different aims cannot be achieved except through the co-operation of each State and by the adoption of international conventions,".

16. Moreover, by selecting for codification the question of nationality, including statelessness, the Commission had already decided, at its first session, that the codification of laws concerning those questions was, in the words of article 18 of its Statute, "necessary or desirable". A number of the questions which had been discussed had therefore already been decided.

17. The CHAIRMAN explained in reply to Mr. Lauppach's remarks, that he was acting on the assumption that all members of the Commission agreed that the question of statelessness should be considered and a solution to it sought.

18. Mr. SCELLE said that he merely wished to ask the special rapporteur whether he had taken into account the legislation of federal States bearing on nationality and statelessness. He did so because he agreed that the Commission must be realistic. It was not realistic, however, to be guided by the past, as Mr. Amado had suggested. Only the present could provide the necessary guidance. It had long been recognized that restrictions should be placed on the right of States to deprive their nationals of nationality. In other words, the first step along the path of federalism had already been taken and, just as the freedom of action of the constituent members of a federal State was restricted under its

constitution, so the freedom of action of the members of the United Nations community in respect of far more important questions than those of nationality and statelessness was restricted by the Charter. The Commission would surely not be realistic if it ignored that tremendously significant development.

19. Mr. ZOUREK said that there was general agreement that statelessness was an evil, but there was wide disagreement as to how it should be fought. In his view, the only method which would yield positive results in the foreseeable future would be to submit recommendations which would have some chance of being accepted by governments.

20. As an example of the recommendations which the Commission could profitably make, he would suggest that it might recommend that no one should lose his nationality by marriage, unless he acquired the nationality of his spouse. That would be in accordance with the progressive trend of recent legislation. Under previous Czechoslovak legislation, for example, a woman who married an alien lost her nationality whether or not she acquired her husband's nationality. Under the new nationality law of 13 July 1949, a woman enjoying Czechoslovak nationality no longer lost such nationality on marriage to an alien unless by that marriage she acquired her husband's nationality under the law of the husband's country.

21. Mr. LIANG (Secretary to the Commission) agreed with Mr. Amado that better results could be achieved by going over the nineteen points presented for discussion in Section VI of Annex III to the special rapporteur's report. He doubted, however, whether that section was couched in terms that readily lent themselves to discussion, and thought that a working paper in a more "discussible" form might have to be prepared. The points for discussion listed in that section of Mr. Hudson's report were often in the form of statements, opinions, examples or probabilities etc., which it would be difficult to discuss. He recalled the view which he had expressed at the 157th meeting,¹ that the Commission might examine and define in precise terms the restrictions placed by international law upon the freedom of States to confer nationality or deprive a person of his nationality. In his view, the second sentence of article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws was nebulous and needed to be formulated more clearly.

22. After some further discussion, the CHAIRMAN put to the vote Mr. Córdova's proposal that the Commission proceed at once to consider the points for discussion contained in Section VI of Annex III to the special rapporteur's report.

Mr. Córdova's proposal was adopted by 12 votes to none, with 2 abstentions.

23. The CHAIRMAN said that, although in some respects Mr. Kozhevnikov's proposal conflicted with that of Mr. Córdova, he would put it to the vote.

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

24. Mr. KOZHEVNIKOV considered that the Commission should define more precisely what it intended to do as a result of the adoption of Mr. Córdova's proposal. Was it to prepare a draft convention, or a working paper formulating certain general principles for further examination?

25. The CHAIRMAN observed that, by adopting Mr. Córdova's proposal, the Commission had decided to discuss the nineteen points enumerated in Section VI of Annex III to Mr. Hudson's report, and then to decide whether a draft convention should be prepared, or whether it should confine itself to formulating general principles.

26. He wondered whether the special rapporteur would consider it appropriate for the Commission to examine points similar to point 1, which were not suitable for incorporation in a draft convention since they merely contained a statement of opinion.

27. Mr. HUDSON suggested that such points should be considered and criticized. Members of the Commission might have suggestions to put forward in connexion with point 1.

Point I

28. Mr. LAUTERPACHT asked the special rapporteur whether he had used the word "envisage" in point 1 in the sense that it was difficult to "conceive" measures which would eliminate statelessness or that it would be difficult to "recommend" them.

29. Mr. HUDSON said that he would be prepared to replace the word "envisage" by the word "recommend".

30. Mr. AMADO proposed that point 1 should not be taken up at the present stage, since the remainder of the discussion would show whether the view therein expressed was tenable.

31. Mr. HUDSON thought that point 1 was of fundamental importance. He personally would very much welcome any suggestions as to measures which might eliminate statelessness.

32. Mr. KERNO (Assistant Secretary-General) said that it would be valuable if the Commission considered the thesis put forward by the special rapporteur under point 1, though some members might feel that they had not sufficient material on which to base an opinion and that the matter should be studied further by the special rapporteur.

33. Mr. YEPES formally proposed that discussion of point 1, which embodied no principle, should be deferred until the other points had been disposed of.

34. Mr. CÓRDOVA considered that the special rapporteur must give reasons for his view that it was difficult to recommend any measures which would

¹ See summary record of the 157th meeting, para. 33.

wholly eliminate the statelessness of persons at present stateless. Was there, for example, anything against recommending that countries in which stateless persons were permanently resident should offer them nationality?

35. Mr. el-KHOURI suggested that it would be quite impracticable to attempt to force States to naturalize immigrants. He had in mind, for example, the case of Syria, which, at the end of the first world war, had been obliged to receive from Turkey a quarter of a million Armenians and persons of other nationalities.

36. Mr. AMADO pointed out that neither the factor of allegiance nor the link of loyalty with the State could be ignored. The time for world citizenship had not yet arrived.

37. Mr. SANDSTRÖM considered that it was possible to conceive in theory of certain measures which might eliminate statelessness, but they would not be practicable. That, as he understood it, was the meaning of point 1.

38. Mr. HSU said that statelessness might be real or apparent. In the second category he included refugees whose admission to a foreign country was a temporary measure, subject to disposal by political arrangements. Clearly the first category only should be dealt with on the legal plane. He would be interested to know whether it was possible to classify existing stateless persons in that manner, and to determine the approximate number of persons in each group. The two rules in point 2 might then be applied to the first category.

39. Mr. CÓRDOVA said that the political situation was such that it would be difficult for the Commission, as well as inappropriate, to propose political solutions, though there was nothing against its examining certain political factors which prevented the problem from being settled.

40. Mr. SCELLE urged the need for defining nationality. In certain countries, such as Switzerland, where women had not the right to vote, nationality did not necessarily carry with it the rights of citizenship.

41. He could not agree with point 1, as he believed that there were a number of perfectly feasible methods for at least attenuating the effects of statelessness. For example, a system might be devised for granting stateless persons legal status by giving them United Nations papers, which would not, however, confer a nationality upon them.

42. Mr. FRANÇOIS said that Mr. Scelle had raised an entirely different issue. Point 1 was concerned with nationality, and in his view Mr. Hudson's argument stood.

43. He agreed with Mr. Sandström that certain theoretical measures for eliminating statelessness could be devised, but it would be totally unrealistic to suppose that they would find application.

44. Mr. KOZHEVNIKOV said that the foregoing discussion brought out vividly the fact that the Com-

mission did not have adequate material to formulate specific recommendations.

45. He did not believe the matter could be approached at the level proposed by Mr. Scelle. Clearly the Commission should first consider the whole problem of nationality, which was the legal relationship between the State and the individual.

46. The CHAIRMAN put to the vote Mr. Yepes' proposal that discussion on point 1 be deferred until the remaining 18 points had been disposed of.

Mr. Yepes' proposal was adopted by 5 votes to 4 with 5 abstentions.

47. Mr. AMADO said that he had abstained from voting because he believed that point 1 should be dropped altogether, without discussion.

48. Mr. SPIROPOULOS said that he had abstained in order to give certain members who did not appear ready to state their views on point 1 an opportunity for further reflection.

Point 2

49. Mr. CÓRDOVA could not agree with rule (i) on point 2, as stated by the special rapporteur, since it seemed to give priority to the principle of *jus sanguinis*.

50. Mr. HUDSON said that Mr. Córdova had misunderstood his intention, which was that unless a child acquired a nationality *jure sanguinis* the *jus soli* would apply.

51. Mr. CÓRDOVA accepted Mr. Hudson's explanation.

52. Mr. el-KHOURI said that if rule (i) were adopted, statelessness would disappear in time because all children of stateless persons would acquire the nationality of the country in which they were born. He could not agree, however, that such a rule could be imposed upon States.

53. Mr. KERNO (Assistant Secretary-General) appreciated the doubts felt by Mr. Córdova about the drafting of rule (i), since that rule might be interpreted as meaning that countries practising *jus soli* should modify their legislation.

54. Mr. YEPES suggested that the French text of rule (i) was free of all ambiguity; the English should accordingly be brought into line with it.

55. He personally was in favour of the application of *jus soli*, and could therefore support rule (i).

56. Mr. SPIROPOULOS suggested that it was hardly appropriate for the Commission to vote on a statement of fact, which point 2 as a whole represented. If a vote could not be avoided at least the integrity of the text must be respected; it would be meaningless to vote on it by parts.

57. Mr. HUDSON agreed that the two rules must be taken together; and he realized that their adoption would present many difficulties to a number of States.

58. Mr. LAUTERPACHT shared Mr. Córdova's apprehension as to the implications of rule (i) as it stood, since, whatever the intention of the special rapporteur, it could be construed to mean that no State which applied the *jus soli* might confer nationality on a person who obtained it *jure sanguinis*. He believed, however, that the difficulty was one of drafting, since there seemed to be general agreement on what the substance of the rule should be.

59. Mr. AMADO was unable to understand Mr. Córdova's doubts. The text of rule (i) seemed to him perfectly unambiguous and acceptable, because it meant that countries applying *jus sanguinis* would in future apply *jus soli* as a subsidiary principle. In Brazil *jus soli* already applied.

60. Mr. SCELLE stated that the French text of rule (i) must be re-worded in order to eliminate the expression "*acquiert*" which, because it meant obtaining something in place of something else, was inapposite.

61. Mr. Liang (Secretary to the Commission) said that there was some force in Mr. Lauterpacht's view. He believed that the wording of the Harvard Research draft convention on nationality was preferable.² That text read:

"A State shall confer its nationality at birth upon a person born within its territory if such person does not acquire another nationality at birth".

62. Mr. el-KHOURI considered that, before going any further, the Commission ought to define what it meant by statelessness.

The meeting rose at 6.10 p.m.

² Harvard Law School, *Research in International Law, Nationality*, Supplement to *American Journal of International Law*, vol. 23 (1929).

159th MEETING

Tuesday, 8 July 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS

Present:

Members: Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhshi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F.

SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (continued)

SECTION VI OF ANNEX III: STATELESSNESS; POINTS FOR DISCUSSION (continued)

Point 2 (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of point 2 of the points for discussion in section VI of Annex III to the special rapporteur's report (A/CN.4/50), which read as follows:

"2. The general adoption of the following rules would preclude future additions to the number of stateless persons.

"(i) If no other nationality is acquired at birth, every person shall acquire at birth the nationality of the State in whose territory he is born. This would extend *pro tanto* the application of the *jus soli* rule in many countries.

"(ii) No person shall lose his nationality unless such person acquires another nationality."

2. Mr. LAUTERPACHT recalled that it had been suggested that the difficulties of phraseology which had been pointed out in connexion with rule (i) in point 2 could be solved by adopting the wording of article 9 of the Harvard Draft Convention on Nationality which read:

"A State shall confer its nationality at birth upon a person born within its territory if such person does not acquire another nationality at birth."

That wording was, however, open to the interpretation that a State could not confer its nationality at birth upon a person born within its territory if such person did acquire another nationality at birth. In his opinion, one of the ways of solving the difficulty would be to insert the following sentence after the first sentence of rule (i):

"A State may confer its nationality at birth upon a person born within its territory even if such person acquires another nationality at birth."

3. Turning to the wider question whether the solution envisaged in rule (i) was desirable and practicable, which was one of the matters the Commission had to consider, he pointed out that taken in conjunction with rule (ii), it would afford a fairly complete solution to the question of statelessness, except for certain exceptional cases of minor importance. For example, it would not cover the case of foundlings unless it were presumed that foundlings were born in the country in which they were found; neither would it cover a category of cases which had been dealt with, albeit

inconclusively, in The Hague Convention of 1930, namely, those where, in connexion with release from nationality in anticipation of naturalisation, the expectation of acquiring another nationality was not fulfilled. By and large, however, adoption of those two rules would eventually result in the elimination of statelessness. What then were the obstacles to their adoption?

4. It had been argued that adoption of those rules would entail a change in the laws of those countries whose relevant legislation was based solely on the principle of *jus sanguinis*. However, the number of countries rigidly wedded to that principle was limited, and in many of them important exceptions had recently been made to the principle in question. For example, Greece and Italy had admitted the applicability of the principle of *jus soli* to persons born in their territory, if such persons did not acquire a nationality *jure sanguinis*. Moreover, the change in legislation which adoption of rules (i) and (ii) would entail for *jus sanguinis* States would not involve complete abandonment of that principle. Lastly, the number of persons to whom such States would have to grant nationality would, as he thought a factual study might bring out, be much more limited than might have been supposed from the discussions in the Commission. In the vast majority of cases the nationality of another State would be acquired *jure sanguinis*.

5. The practical obstacles were therefore limited by comparison with the goal. Moreover, it should be borne in mind that adoption of rules (i) and (ii) represented a means of eliminating statelessness. The other suggestions made by the special rapporteur were essentially palliatives, which left the root of the evil untouched. In his (Mr. Lauterpacht's) view, rules (i) and (ii) were desirable and practicable, provided allowance was made for certain cases such as those referred to by Mr. el-Khoury at the previous meeting. Such cases were, however, exceptional. States would not often find themselves obliged to admit to their territory a large number of refugees. If those refugees were to remain in the country for a short time only, the question under discussion would hardly arise; on the other hand, if their stay was to be lengthy, it could well be argued that it was to the interest of the State that they should be made citizens of the State concerned, and not confined to the status of an alien minority.

6. It might be asked why the *ius sanguinis* States should be required to make a concession, and not the *jus soli* States. The answer was that the universal adoption of *ius sanguinis* would not, if limited to descent from a father, provide a satisfactory solution, since parenthood was open to dispute, whereas place of birth was not.

7. He regretted that the Commission had not considered Mr. Kozhevnikov's proposal further, at least to the point of ascertaining whether he meant that the question of statelessness could never be the subject of an international convention for the reason that it came solely within the province of domestic jurisdiction, or merely that the question was not ripe enough for an international convention to be drafted at the present

session. In his view the latter was a possible interpretation of Mr. Kozhevnikov's meaning, and to that extent he would endorse it.

8. The CHAIRMAN suggested that the important point made by Mr. Córdova at the preceding meeting could be met by using the following wording:

“Every person born in a State where nationality is not conferred *jure soli* and who does not acquire at birth another nationality *jure sanguinis* shall acquire at birth the nationality of the territory where he is born.”

9. Mr. HUDSON said that he had not attempted to cast the two rules in point 2 in the form of articles for inclusion in a draft convention, as he had intended them merely as points for discussion. If they were to be included in a convention, he would suggest that they be worded as follows:

“(i) Without prejudice to the possibility of its wider application to *jus soli*, a State shall confer its nationality at birth on a person born in its territory unless such person acquires at birth the nationality of another State *jure sanguinis*. For this purpose a foundling shall be presumed to have been born in the territory of the State in which it is found, until the contrary is proved; and birth on a national vessel or aircraft shall be deemed to constitute birth in the national territory.

“(ii) A State may not deprive a person of its nationality, or permit a person to renounce its nationality, unless at the time such person possesses or acquires the nationality of another State.”

10. Mr. KOZHEVNIKOV thought that Mr. el-Khoury had been right to raise the issue of what nationality was, seeing that Mr. Scelle had referred to the possibility of world citizenship. In his (Mr. Kozhevnikov's) view, there were three questions to be clarified, namely, what was nationality, who was to be regarded as the national of a given country, and what was meant by the concept of statelessness. He had already stated, in connexion with Mr. Scelle's remark regarding world citizenship,¹ his view that the concept of nationality was indissolubly linked with the concept of the State as a subject of international law.² In other words, nationality could be defined as a specific legal relationship between the individual and the State. From that link derived the dialectic relationship between the individual and the State in respect of mutual rights and duties.

11. In the Soviet Union there was a special law on nationality, which laid down a single nationality for the Union, so that every citizen of a member republic of the Union of Soviet Socialist Republics was a national of the Union as a whole. A precise answer to the question “Who is a national of the Union of Soviet Socialist Republics” was furnished by the law which provided that all persons who were subjects of the former Russian Empire on 7 November 1917 and had

¹ See summary record of the 157th meeting, para. 43.

² See summary record of the 158th meeting, para. 45.

not since lost Soviet nationality, together with all persons who had since acquired Soviet nationality in accordance with the law, were nationals of the Soviet Union. Under Soviet law, Soviet nationals could lose their nationality either by surrender or by deprivation.

12. Soviet law recognized and defined the concept of statelessness. It laid down that any person residing on Soviet territory who was not a Soviet national under the existing law, and who was unable to prove that he was a national of any other State, was regarded as stateless. Stateless persons did not enjoy the right to vote or the right of election but they did enjoy all other political rights recognized by the Soviet constitution, such as, for example, freedom of speech, freedom of assembly, etc.

13. It was in accordance with the spirit of Soviet legislation that the nationality of a child should be determined, in the first place, by its descent. Under Soviet law the nationality of a child under fourteen followed the nationality of its parents, in the event of both parents either becoming or ceasing to be Soviet nationals. The nationality of a child over fourteen could not be changed without its consent. In practice, if only one of the parents changed his or her nationality, the nationality of any child under fourteen was determined by agreement between the parents or, in default of such agreement, by the child's place of residence.

14. With regard to what had been said by Mr. Lauterpacht, he felt that his proposal had never been open to the first interpretation which Mr. Lauterpacht had placed upon it. He did not consider that international action with regard to statelessness should be indefinitely postponed; on the contrary, he had already indicated that co-operation, with the object of solving the problem, between States with widely differing systems of law was necessary. He had only wished to point out what appeared to him to be obvious facts, namely, that such action must be based on respect for the principle of national sovereignty and that questions of nationality and statelessness did primarily concern domestic jurisdiction. Moreover, the Commission had before it no adequate basis for a draft convention. It would be pointless to conclude a draft convention which would remain a dead letter, when it might become possible in due course to conclude a convention which would make a real and useful contribution to the universal solution of the problem. The present discussion, however, was a preliminary and general exchange of views, and he did not think that it would be appropriate for the Commission to take votes at that stage.

15. Mr. el-KHOURI asked what would be the position, under the legislation of the Soviet Union, of those persons who had proof that they were the nationals of another State but who were none the less not recognized by that State as its nationals. There were hundreds of thousands of persons in such a position, and the States in whose territories they found themselves at present could not be compelled to confer nationality on their children. Moreover, such persons might not wish their children to receive any nationality other than that of

the State from which they had come and to which they wished eventually to return.

16. Mr. HSU said that, in the light of the remarks of Mr. el-Khouri, it might be advisable in certain circumstances to except persons born to stateless refugees from the application of rule (i) in point 2.

17. Mr. SANDSTRÖM agreed with Mr. Lauterpacht that there was a tendency to move in the direction foreshadowed in rules (i) and (ii) in point 2 in the special rapporteur's report, but pointed out that for many countries, including his own, that tendency was only a beginning. In Sweden, the obstacle to further progress along those lines was that Swedish legislators considered that some link was necessary between the individual and the State of which that individual was a national. In those circumstances he could not but endorse the special rapporteur's view that it was unlikely that rules (i) or (ii) would win universal or general acceptance. On the other hand, he would have no objection to their being stated as ideals: for such States as could not immediately go so far, the Commission could offer as an intermediate solution the principles contained in points 12-19.

18. Mr. CÓRDOVA said that the wording suggested by Mr. Lauterpacht met his difficulty better than the text suggested by Mr. Hudson or that suggested by the Chairman. The question, however, was one of drafting, which could be left to the Standing Drafting Committee. Substantively, the Commission appeared to be in agreement that the rules stated in point 2 in the special rapporteur's report represented the best solution.

19. After further discussion, Mr. SPIROPOULOS suggested that the reply to the question asked by Mr. el-Khouri was clearly that nationality must necessarily be determined by the laws of the State whose nationality was claimed. The Commission should distinguish between traditional cases of statelessness, arising from the conflict of nationality laws, and cases of statelessness among refugees resulting from political causes. As the two categories differed in respect of origin, so they might differ in respect of the treatment which should be applied to them. And if the second category was left aside, it seemed to him that adoption of rules (i) and (ii) in the special rapporteur's report would be feasible.

20. Mr. ZOUŘEK said that rules (i) and (ii), as amended by the Chairman or Mr. Lauterpacht, would constitute a reasonable basis for discussion, provided it was agreed that exception should be made in the case, for example, of persons born while their parents were only temporarily resident in a country. Such difficulties would persist so long as nationality was regarded as a mere formal link between State and individual, conferring only privileges but no duties. He wondered, therefore, whether the Commission should not restrict the scope of the rule by stipulating that it should apply, for example, only to persons one of whose parents had been domiciled in the country in question for a prescribed period.

21. He could not agree with the suggestion made by Mr. Scelle that the Commission should distinguish between nationality and citizenship, both because he disagreed with such a distinction in principle, and because the legislation of many countries, including all the people's democracies, did not reflect the difference.

22. With regard to the scope of the Commission's recommendations, he was in complete agreement with the special rapporteur that the Commission should limit its attention to statelessness in the strict, legal sense of the term, and should leave entirely apart the question of refugees.

23. Mr. KERNO (Assistant Secretary-General) pointed out that the Secretary-General had been faced with the same problem when undertaking his Study of Statelessness. In section IV of the introduction to *A Study of Statelessness* he had pointed out that the Economic and Social Council resolution which had entrusted him with the task of making a study of statelessness had mentioned the protection of "stateless persons", but had not referred at all to "refugees", and had gone on to state:

"Clearly the fact that refugees are not mentioned does not mean that they must be excluded from the scope of the present study. In fact, a considerable majority of stateless persons are at present refugees... in view of the fact that the Council resolution deals only with statelessness, refugees will be included only in so far as they are stateless persons. ... It is evident, however, that if the study on the position of stateless persons must include refugees who are *de jure* or *de facto* stateless persons, it must also consider those stateless persons who are not refugees, even though this group is much less numerous than that of refugees who are stateless and even though its position is in certain respects more favourable than that of stateless refugees."³

In other words, the Secretary-General had recognized that there were two categories of stateless persons, in somewhat differing situations, from which it followed that two different solutions might have to be devised.

24. Mr. LAUTERPACHT considered that, although the discussion had brought the Commission nearer to finding a solution to the problem of statelessness, the time was hardly ripe for a formal vote, since it was doubtful whether agreement had been reached on the principal issues. If any vote had to be taken, he would suggest that that be done on a tentative basis.

25. It might be argued that the Commission had not progressed beyond acceptance of the proposition that if States were to adopt rules (i) and (ii) there would be no more additions to the number of stateless persons. It still remained to be decided whether, in the view of the Commission, statelessness should be eliminated through the application of rules (i) and (ii) embodied in an international convention. It was not enough to enunciate principles which were generally recognized

to be desirable. If the Commission confined itself to such action it would have done no more than to repeat the principle proclaimed in Article 15 of the Universal Declaration of Human Rights. Furthermore, if the Commission were to draft a convention intended merely to reduce cases of statelessness, it was unlikely that it would differ appreciably from The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930.

26. Mr. Sandström clearly attached great importance to the need for safeguarding the link between the individual and the State, and had referred in that connexion to the Swedish Law of 1950, which required persons born outside Sweden to reside in the country for a certain period before they reached 22 years of age, in order to qualify for Swedish nationality. He (Mr. Lauterpacht) agreed that the whole subject should be discussed, but pointed out that it was possible to exaggerate the conception of nationality as based on a "link". The link with a State created by the accident of a person's having been born in its territory was not substantially stronger than that acquired through one of the parents being a national of that State. In both cases the link was to some extent accidental.

27. Mr. KERNO (Assistant Secretary-General) said that the procedure of taking a provisional vote advocated by Mr. Lauterpacht was a good one, and had been followed at previous sessions in order to give special rapporteurs some indication of the views of the Commission and guidance for their further work.

28. The CHAIRMAN observed that at the present stage it might be possible to ascertain the sense of the Commission on the proposition that countries applying the *jus soli* rule should be free to confer nationality on persons born within that territory but who had acquired another nationality *jure sanguinis*. All the proposals before the Commission in effect amounted to that.

29. Mr. el-KHOURI regretted that he must emphasize that the States which were directly concerned with statelessness would never accept rule (i) under consideration. If the Commission's aim was to eliminate statelessness it was useless to devise rules which had no chance of being adopted by States.

30. Mr. FRANÇOIS suggested that the three texts before the Commission should be referred to the Standing Drafting Committee. He was personally in favour of that put forward by Mr. Hudson. He wished, however, to know what would be the meaning of the Commission taking a vote on those texts. Would an affirmative vote indicate approval of an ideal standard and of refraining from any proposals with less far-reaching aims? If so, he would be against such a procedure.

31. Mr. LAUTERPACHT suggested that it would be inappropriate for the Commission to vote at the present stage upon the three texts before it. He submitted the following proposal:

"It is the sense of the Commission that a draft

³ *A Study of Statelessness*, United Nations Publication, Sales No. 1949. XIV—2, p. 9.

convention on the elimination of statelessness should be prepared for the next session in the form of a report on the elimination of statelessness. In the view of the Commission, the report and the draft convention should be based on and conform to the principles generally formulated in paragraph 2 of section VI of annex III to the report of Mr. Hudson. The draft convention should be in the form of articles accompanied by exhaustive comment, discussion, and any relevant information".

32. Mr. KOZHEVNIKOV said he would deprecate the Commission's taking any definite decision at the present stage. It could go no further than a preliminary exchange of views, which would not in any sense be binding on the Commission but could be taken into account by the special rapporteur in presenting more specific recommendations for further examination at some future date.

33. Mr. ZOUREK supported the view of Mr. Kozhevnikov. It would be premature to take a vote on problems which had not yet been fully examined.

34. Mr. CÓRDOVA thought that members of the Commission were experienced enough to understand the nature of a provisional vote, the purpose of which was merely to give the special rapporteur some general directive to guide him in his work. If the Commission decided that the two rules in point 2 could form part of an international convention, the special rapporteur could proceed accordingly and prepare a draft, but he would be unable to do so until the Commission had expressed its view, however tentatively.

35. Mr. SANDSTRÖM said that a substantial majority of members would probably be in agreement with point 2 as a mere statement of fact. The Commission would be more sharply divided on point 3.

36. Mr. LIANG (Secretary to the Commission) said that four categories of States must be considered in connexion with rule (i): those whose laws were based solely on *jus sanguinis*; those whose laws were based solely on *jus soli*; those whose laws were based principally on *jus sanguinis* but also contained some provisions based on *jus soli*; and finally those whose laws were based principally on *jus soli* but also contained provisions based on *jus sanguinis*. Thus the effect of rule (i) would not be so far-reaching as was feared by certain members, though it would necessitate certain changes in the legislation of States in the first category. The rule would, on the other hand, be unnecessary for States where *jus soli* obtained. Furthermore, he thought that that rule might be better couched in the phraseology of article 9 of the Harvard Research draft.

37. Mr. LAUTERPACHT agreed with the Secretary that rule (i) was not so radical as it might at first sight appear to be, and a comment to that effect might well be made in the next report to be prepared by the special rapporteur.

38. Mr. SANDSTRÖM proposed that the Commission decide whether or not point 2 be put to the vote in

order to ascertain whether the Commission agreed with it as a statement of fact.

39. Mr. YEPES considered that the Commission could not vote on rule (ii) without first discussing it.

40. Mr. LAUTERPACHT said there was some force in Mr. Yepes' argument, but certain members might already be prepared to vote in favour of rule (i) because the principle it enunciated was self-evident.

41. Mr. SPIROPOULOS re-affirmed the doubts he had expressed at the preceding meeting concerning the propriety of putting to the vote a statement of fact whose validity was hardly open to doubt.

The Commission decided by 9 votes to 1, with 3 abstentions, that point 2 should be put to the vote.

42. The CHAIRMAN put to the vote point 2 as a whole as a statement of fact.

Point 2 was approved by 10 votes to 2, with 1 abstention.

43. Mr. YEPES explained that he had abstained from voting because the Commission's decision provided no directive for the special rapporteur.

44. Mr. el-KHOURI explained that he had voted against point 2 because, while being in favour of rule (ii), he could not support rule (i).

45. Mr. AMADO explained that he had voted in favour of point 2 merely because as a whole, it stated a fact, and not because he was in favour of adopting the two rules therein contained for inclusion in any draft convention.

Point 3

46. The CHAIRMAN invited the Commission to discuss point 3 of the points for discussion presented by the special rapporteur (section VI, Annex III, A/CN.4/50) which read as follows:

"3. The universal, or general adoption of the rules stated in paragraph 2 seems to be improbable, even if the rules were thought to be desirable".

47. Mr. HUDSON said that it was now up to the Commission to decide whether the two rules contained in point 2 should be embodied in a draft convention. He personally would vote against such a procedure.

48. Mr. YEPES proposed that point 3 should not be discussed at all, since it merely contained an expression of the special rapporteur's views.

49. Mr. KERNO (Assistant Secretary-General) observed that point 3 posed two separate problems; that of the possibility of the adoption of the rules in point 2 and that of their desirability. It was for the Commission to express its views on both problems.

50. Mr. SPIROPOULOS observed that Mr. Yepes must have misunderstood the meaning of the vote taken on point 2, or he would never have made his proposal. The Commission had not yet decided whether or not

the two rules in point 2 should form the foundation for a draft convention. All it had done was to state its agreement with the argument that their universal adoption would preclude further additions to the number of stateless persons. Unless point 3 were replaced by something more positive the Commission would in effect have made no practical progress whatsoever.

51. Mr. AMADO fully endorsed Mr. Spiropoulos' remarks. It was essential for the Commission to go further than mere agreement with point 2, and to enter the realm of practical possibilities.

52. Mr. CÓRDOVA agreed with the Assistant Secretary-General that the Commission must decide whether it was desirable to apply the rules stated in point 2, since the question of the probability of their being adopted did not come within its purview. He accordingly suggested that point 3 be replaced by the positive assertion contained in Mr. Lauterpacht's proposal, that the Commission intended to formulate a draft convention on the basis of those rules.

53. Mr. YEPES proposed that point 3 be replaced by the following text:

"It is desirable that the rules stated in paragraph 2 should be generally adopted and these rules should therefore be included in the report to be submitted to the Commission at its fifth session in 1953".

54. Mr. HSU said it would be most undesirable for the Commission to decide by only a narrow majority whether the two rules should be embodied in a draft convention. The possibility of separate conventions for the elimination and for the reduction of statelessness might therefore be considered.

The meeting rose at 1.5 p.m.

160th MEETING

Wednesday, 9 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsy Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (continued)

SECTION VI OF ANNEX III : STATELESSNESS ; POINTS FOR DISCUSSION (continued)

Point 3 (continued) and point 2 (ii) (resumed)

1. The CHAIRMAN invited the Commission to continue its discussion of point 3 of the points for discussion contained in section VI of Annex III to the special rapporteur's report on nationality, including statelessness (A/CN.4/50). Several proposals had been submitted to the Commission: first, a proposal by Mr. Lauterpacht calling for the preparation of a draft convention on the elimination of statelessness, in conformity with the rules contained in point 2;¹ secondly, a text submitted by Mr. Yepes, which urged the adoption of the rules contained in point 2;² and, thirdly, a proposal by Mr. Hudson that the Commission take a decision upon the following issue:

"Does the Commission wish to request a special rapporteur to draft a convention including the rules set forth in paragraph 2 of section VI of annex III of Mr. Hudson's report?"

2. Mr. SANDSTRÖM proposed that the special rapporteur be requested to draw up a draft convention for the elimination of statelessness based on the rules contained in point 2 and one or more other draft conventions designed to reduce statelessness. Once the Commission had completed that task, it would then be for the competent organs of the United Nations to adopt whichever draft they might prefer.

3. Mr. HSU supported Mr. Sandström's proposal and thought that since it was broader than the other proposals before the Commission, it should be put to the vote first.

4. Mr. CÓRDOVA agreed with Mr. Hsu, particularly as the possibility of more than one convention had clearly been contemplated by the Economic and Social Council in its resolution 319 B III (XI).

5. Mr. FRANÇOIS could not support either the proposal of Mr. Yepes or that of Mr. Lauterpacht. Both were too rigid, in that they limited the Commission's work to the preparation of a draft convention based on the rules set forth in point 2. He could not agree with the view that, whenever the Commission felt a certain rule of law to be desirable, it need not consider whether its adoption by States was probable. The Commission had a dual task, the codification of international

¹ For text of proposal, see summary record of the 159th meeting, para. 31. For text of point 2, see *ibid.*, para. 1.

² *Ibid.*, para. 53.

law and its progressive development. In respect of the former, the possibility of its recommendations being adopted was clearly of vital importance. In the case of the latter, the situation was somewhat different. Nevertheless, he would like to point out that the progressive development of international law could only proceed by stages and only if States were prepared for its implementation. It was inadvisable to ignore the extent to which States would be willing to modify their legislation in accordance with the recommendations of the Commission, and it served no useful purpose to minimize, as Mr. Lauterpacht had done, the possible resistance on the part of States to the adoption of the two rules in point 2.

6. Nor could he agree that the practice as a legal sanction of withdrawing nationality had already been to a large extent abandoned. Perusal of the document *A Study of Statelessness* (*op. cit.*) prepared by the Secretary-General indicated that many States used deprivation of nationality as a penalty, on grounds which were enumerated in Part Two, chapter I, of that document. He therefore had the gravest doubts as to whether rule (ii) in point 2, which had not been discussed by the Commission, would be acceptable to States.

7. In the light of the foregoing considerations he felt that the preparation of a draft convention on the basis of the two rules in point 2 would be no more than an untimely attempt at the development of international law, and one which was unlikely to be crowned with success. Thus, if the Commission decided to prepare two or more draft conventions, he would suggest that the special rapporteur be requested to take into account the modifications which would have to be made to the two rules in point 2 in order to make the drafts more acceptable to States.

8. Mr. KOZHEVNIKOV said that Mr. François' remarks had confirmed the view he had expressed at the previous meeting that the Commission was not ready to take an important decision of principle, and that it could not go beyond a preliminary exchange of views. He accordingly made the following proposal :

“The Commission instructs the special rapporteur to prepare a detailed report setting forth the views expressed at the present session, in order to enable the Commission, at its next session, to take a decision on the possibility of preparing a draft convention on the elimination or reduction of statelessness”.

9. Mr. KERNO (Assistant Secretary-General) said that there was nothing in resolution 319 B III (XI) of the Economic and Social Council to prevent the Commission from preparing more than one draft convention on statelessness. Mr. Sandström's proposal therefore represented an excellent approach.

10. Mr. YEPES said that all he had proposed was that the Commission declare it desirable that the two rules in point 2 be generally adopted. He was quite willing to leave it to the special rapporteur to decide how that should be done.

11. Mr. HUDSON, referring to the two rules contained in point 2, said that the replies from governments analysed in the report by the Secretary-General (E/2230-A/CN.4/56) did not indicate any disposition on the part of States to accept rules of that kind. In 1929 the Harvard Research Institute had put forward rule (i) as a principle which should be adopted. That proposal had, however, been made in a period of relative stability, whereas the present world situation was far less favourable to its adoption. The small number of ratifications of the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws demonstrated the difficulty of winning universal acceptance for such rules.

12. Mr. François had called attention to the fact that a number of States applied deprivation of nationality as a sanction, and those States would therefore be unlikely to adopt rule (ii) or to give serious consideration to a draft convention of which it formed part.

13. The two rules also raised certain practical difficulties. How was a State to judge whether another nationality was acquired at birth, or whether, if it deprived a person of his nationality, he would acquire another? No State could be expected to be judge of the laws of another country.

14. As to Mr. Lauterpacht's proposal, he wondered what precisely was meant by “preparing a draft convention in the form of a report”. Nor was he able to understand what Mr. Yepes meant in asking that the rules should be included in the report to be submitted to the Commission at its next session. No useful purpose could be served by either of those two procedures in view of the general recognition of the fact that it was unlikely that the rules would be adopted by States. In his view, to base a draft convention on them would be nothing but an idle manoeuvre.

15. On the other hand, there was nothing to prevent the Commission from preparing one or more draft conventions for the reduction of statelessness, and he had made certain suggestions in that direction in Annex III.

16. Mr. el-KHOURI said that it was the task of the Commission to prepare international instruments which had the prospect of general acceptance by States; otherwise its work would have no practical value. He did not think that any member of the Commission believed that the rules in point 2 had any chance of being generally accepted. If, for example, the Syrian Government wished to give Syrian nationality to the children of the refugees within its borders, it did not need any international convention to enable it to do so.

17. Mr. HSU moved that the proposals made by Mr. Yepes and by Mr. Lauterpacht be amended by the addition of the words :

“It is understood that the first of the two principles contained in paragraph 2 will not be made applicable to cases of persons born to stateless refugees in a State which has not legally accepted the refugees' settlement in its territory”.

18. He submitted that amendment in order to meet certain objections raised by Mr. el-Khoury at the previous meeting, and if it did not serve that purpose he would withdraw it. It dealt with a particular category of refugees and the exception made would not detract from the general principle.

19. He thanked Mr. François for emphasizing the fact that one of the Commission's functions was to promote the progressive development of international law. Some members seemed to regard that task with aversion, and in a spirit of pessimism and undue circumspection. Nothing would be achieved by such an approach. The Commission must not reduce itself to inactivity by doing nothing until the attitude of States became known. Its function was not to make political predictions. On the other hand, it could do much to influence States and to persuade governments to modify their views. If a few courageous nations were to take the lead, recommendations such as those at present under consideration would eventually gain universal acceptance.

20. He was in no sense a radical, but merely an advocate of the constructive approach. Recommending the adoption of the two rules would in no way preclude the Commission from preparing one or more draft conventions for the reduction of statelessness.

21. Mr. LAUTERPACHT welcomed Mr. Hudson's statement, because it showed where Mr. Hudson stood. Up to the present moment the only indication that the Commission had had of his (Mr. Hudson's) personal opinion was the somewhat inconclusive statement made in point 3. Mr. Hudson had now made it plain that he was opposed to framing a draft convention based on the two rules in point 2. However, he had failed to explain why States which might be expected to show reluctance to change their legislation within the framework of a general convention on the elimination of statelessness should be prepared to do so within the framework of a limited convention relating only to the reduction of statelessness. The amount of change required might not be substantially different in the two cases.

22. Mr. Hudson had stated that there was nothing in the replies submitted by governments in response to resolution 352 (XII) of the Economic and Social Council to indicate that they would be willing to adopt rules like those set forth in point 2. He (Mr. Lauterpacht) had made a careful perusal of the Secretary-General's report (E/2230-A/CN.4/56) and the analysis of the replies contained therein, and had come to the conclusion that governments were very much aware of the general trend towards the elimination of statelessness, and that their legislation was in many cases moving in that direction.

23. Mr. Hudson had suggested that very little had been achieved by The Hague Convention of 1930. Yet the 1930 Convention was one of the most significant international instruments, because it not only reflected the influence of public opinion in the matter of nationality, but had also been followed by a definite trend towards the amendment of national laws, a trend which found

expression in several resolutions of the Economic and Social Council, which spoke of the need for eliminating statelessness. It was for the Commission to give that trend legal expression, in accordance with a view that was becoming increasingly accepted—the view that statelessness was derogatory both to the authority of international law and to the dignity of the individual human being. The matter raised an important question of method and certain considerations relative to the Commission's functions. Admittedly the Commission could not but codify international law by stages. That was what was meant by progressive codification and development of international law. It did not mean that the drafts proposed by the Commission ought to leave unsolved the problems with which it was confronted, and merely reflect the existing legislation of States. Development implied a change. A change could not take place without, in appropriate cases, a change in the legislation of the individual States. The question which governments had to decide—and on which the Commission was entitled to express an opinion—was whether any sacrifice which was implied in such changes of legislation was justified by considerations of international progress and the general trend of public opinion on the subject.

24. Although—apart from the problem created by mass denationalization—the question of statelessness was intrinsically of limited importance, it raised conspicuously the general issue of the function of the Commission. That issue was whether the Commission was disposed to supply the legal form and the weight of its authority, based on a thorough examination of the matters put before it, to developments which public opinion felt to be overdue, or whether it was to treat as immutable any national legislation at variance with such changes as foreshadowed, for instance, by the Economic and Social Council, which had asked the Commission to draft instruments for the elimination of statelessness.

25. Thus, in reply to Mr. François, he did not deny that many States had enacted legislation depriving persons of their nationality by way of penalty. The issue was whether such legislation was sufficiently general, rational and serving any vital interest of States to be entitled to prevent the general elimination of statelessness.

26. In conclusion, he was willing to accept Mr. Sandström's proposal on the assumption that it did not, in fact, conflict with his own.

27. Mr. AMADO said that the duty of the Commission, as a body responsible for codifying and developing international law, was to declare what the existing law was on certain points and to recommend the direction in which it could be improved and developed. He could not associate himself with that school of idealistic international lawyers which believed itself competent to dictate to States what their vital interests were. He accordingly could not vote in favour of any of the proposals before the Commission, all of which seemed to him wholly impracticable.

28. Mr. LAUTERPACHT said that he would vote in favour of Mr. Yepes' proposal on the understanding that there was no contradiction between that proposal and his own, as amended by Mr. Sandström.

29. Mr. YEPES said that that was also his own understanding, and that he intended to vote in favour of Mr. Lauterpacht's proposal, as amended, as well as his own.

30. In reply to a question by the CHAIRMAN, Mr. HSU said that he would withdraw his amendment, since it had not commanded the support for which he had hoped.

31. The CHAIRMAN accordingly put Mr. Yepes' proposal to the vote.

Mr. Yepes' proposal was rejected by 7 votes to 5, with 2 abstentions.

32. In reply to a question by the CHAIRMAN, Mr. SANDSTRÖM explained that his proposal was that the first two sentences of Mr. Lauterpacht's proposal be replaced by the following text:

"The special rapporteur should be requested to prepare:

"(a) A convention on the lines of paragraph 2 of section VI of annex III to his report;

"(b) One or more conventions containing attenuation of those principles with a view to reducing statelessness."

33. Mr. SPIROPOULOS felt that the decision which had just been taken on the proposal of Mr. Yepes precluded the Commission from voting on sub-paragraph (a) of Mr. Sandström's amendment. With regard to sub-paragraph (b), the Commission should first consider the remaining points for discussion listed in Section VI of Annex III to the special rapporteur's report.

34. Mr. YEPES said that he personally could support sub-paragraph (a) of Mr. Sandström's amendment. He agreed, however, that the vote on sub-paragraph (b) should be deferred until points 4 to 19 had been discussed.

35. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Sandström's amendment appeared to be a compromise between the various points of view which had been expressed and, as such, must be regarded as a whole.

36. The CHAIRMAN and Mr. CÓRDOVA endorsed the view expressed by the Assistant Secretary-General.

37. Mr. SPIROPOULOS remained unconvinced. Much as he would have liked to vote in favour of any proposal which would mean progress towards a solution of the problem of statelessness, he did not see how the Commission, immediately after it had rejected the rules set forth in point 2, could ask the special rapporteur to prepare a convention on the lines of those rules.

38. Mr. AMADO supported the views expressed by

Mr. Spiropoulos and Mr. Yepes, so far as sub-paragraph (b) was concerned. The Commission had not yet discussed the second of the two rules set out in point 2, let alone the other points for discussion. It must first decide the question put by Mr. Hudson.

39. Mr. FRANÇOIS pointed out that what the Commission had rejected was a proposal that the rules set forth in point 2 should be taken as the sole basis for a single draft convention. Mr. Sandström's proposal was that the special rapporteur should be requested to prepare, in addition to a draft convention drawn up on that basis, one or more other drafts on a somewhat different basis, namely, for the reduction of statelessness.

40. After some further discussion on procedure, the CHAIRMAN pointed out that Mr. Hudson had formulated his question in lieu of the original point 3 in his report. Mr. Lauterpacht's proposal, with the amendment proposed to it by Mr. Sandström, and Mr. Kozhevnikov's proposal were both answers to that question. Under the rules of procedure of the General Assembly, those two proposals would have to be put to the vote in the order in which they had been submitted, unless the Commission decided otherwise.

41. Mr. KOZHEVNIKOV felt that it would be more logical, as Mr. Amado had suggested, to decide first whether the special rapporteur was to be requested to submit any draft convention or conventions at all to the Commission at its next session. He therefore moved that his proposal be put to the vote first.

42. Mr. ZOUREK supported Mr. Kozhevnikov's motion.

It was decided by 9 votes to 2 that Mr. Kozhevnikov's proposal be voted on first.

43. Mr. HSU said that he had voted against the motion that Mr. Kozhevnikov's proposal be put to the vote first because he felt that the Commission should abide by the procedure it had so far followed.

44. The CHAIRMAN then put Mr. Kozhevnikov's proposal to the vote.

Mr. Kozhevnikov's proposal was rejected by 7 votes to 5, with 1 abstention.

45. The CHAIRMAN then put to the vote the amendment proposed by Mr. Sandström to the first two sentences of Mr. Lauterpacht's proposal.

Mr. Sandström's amendment was adopted by 5 votes to 3, with 5 abstentions.

46. Mr. YEPES said that he had abstained from voting because he regarded sub-paragraphs (a) and (b) of Mr. Sandström's amendment as self-contradictory. The principles set forth in point 2 of section VI of Annex III to the special rapporteur's report were absolute principles, and he did not see what could be meant by "attenuating" them.

47. Mr. LAUTERPACHT said that, as the essence of his proposal had been substantially modified by

Mr. Sandström's amendment, he would withdraw the last sentence.

48. Mr. el-KHOURI said that he had abstained from the vote on Mr. Sandström's amendment because, although he did not like it, he greatly preferred it to the first two sentences of Mr. Lauterpacht's proposal. The last sentence of Mr. Lauterpacht's proposal, on the other hand, which provided that

"The draft convention should be in the form of articles accompanied by exhaustive comment, discussion and any relevant information"

served a useful purpose, and he would therefore sponsor it himself, subject to the words "The draft convention" being replaced by the words "The draft conventions" in view of the adoption of Mr. Sandström's amendment.

49. Mr. SPIROPOULOS asked whether Mr. el-Khoury did not agree that it would be sufficient to state merely that "The draft conventions should be in the form of articles accompanied by comment", which would be in accordance with the Commission's past practice.

50. Mr. el-KHOURI accepted Mr. Spiropoulos's suggestion.

Mr. el-Khoury's proposal was adopted, as amended, by 7 votes to 2, with 3 abstentions.

51. Mr. LIANG (Secretary to the Commission) referring to Mr. Sandström's amendment, suggested that the principles contained in points 4 to 19 of Section VI of Annex III to the special rapporteur's report could hardly be described as "attenuations" of the rules set forth in point 2. Indeed, those rules related to a somewhat different matter from that dealt with in points 4 to 19. He wondered therefore whether it might not be advisable to delete the words "containing attenuations of those principles" before reproducing in the Commission's report to the General Assembly the decision just taken.

52. Mr. el-KHOURI said that the amendment proposed by Mr. Hsu had been in the nature of an attenuation of the first of the two rules contained in point 2 of the points for discussion listed in Annex III to the special rapporteur's report, and that he regretted that that amendment had been withdrawn. Sub-paragraph (b) of Mr. Sandström's amendment meant that the special rapporteur would be empowered to suggest a limitation to the scope of application of the principles in ways similar to that which had been proposed by Mr. Hsu.

53. Mr. HSU pointed out that he had withdrawn his amendment because it had not commanded the support he had hoped for, particularly the endorsement of Mr. el-Khoury. He agreed with the Secretary that the words "containing attenuations of those principles" had little meaning in the text which had been adopted, and suggested that they might be deleted altogether.

54. In response to a request by Mr. SCELLE, the CHAIRMAN put to the vote Mr. Lauterpacht's proposal as amended, as a whole.

Mr. Lauterpacht's proposal as a whole was adopted, as amended, by 6 votes to 4, with 3 abstentions.

55. Mr. CÓRDOVA said that he had voted in favour of Mr. Sandström's amendment because the first part of it covered the essence of Mr. Lauterpacht's proposal, namely, that a draft convention should be prepared by the rapporteur based on the principles set out in paragraph 2 of section VI of Annex III to his report. Furthermore, it enabled the Commission to choose between two conventions, one for the total elimination of statelessness and the other for its reduction.

The meeting rose at 1.5 p.m.

161st MEETING

Thursday, 10 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (continued)

SECTION VI OF ANNEX III : STATELESSNESS ; POINTS FOR DISCUSSION (continued)

9.* The CHAIRMAN invited the Commission to continue its consideration of Annex III to the special rapporteur's report on nationality, including statelessness (A/CN.4/50).

10. He suggested that, in the light of the decisions taken on points 2 and 3, the Commission might confine

* Paras. 1—8 were devoted to the programme of work of the Commission for the remainder of the session.

its attention to those general principles contained in the remaining 16 points which had a direct bearing on methods of reducing statelessness.

Point 8

11. Mr. SANDSTRÖM proposed that the Commission should give an answer to the question posed by the special rapporteur in point 8, namely:

"Can any useful system of arbitration be devised, on analogy to the precedent established in Upper Silesia, for resolving conflicts between national laws which have resulted in statelessness?"

12. Mr. HUDSON thought there was very little possibility of devising such a system.

13. Mr. LAUTERPACHT suggested that the relevant information, which in effect amounted to half a page in Annex III to the special rapporteur's report, was too scanty to enable the Commission to form an opinion on the subject.

14. Mr. LIANG (Secretary to the Commission) said that he was not clear as to what Mr. Hudson had in mind. Did he envisage that specific disputes involving questions of nationality should be settled by an arbitral procedure such as that which the Commission had been discussing during the opening weeks of its present session?

15. Mr. SANDSTRÖM agreed with Mr. Hudson that the possibility of submitting to arbitration conflicts of national laws on nationality was slight. On the other hand, disputes as to the interpretation of a general convention on nationality might usefully be dealt with in that way.

16. Mr. el-KHOURI proposed that the question be answered in the negative.

17. Mr. LAUTERPACHT proposed that the Commission should not at the present stage give any answer at all, since it had no basis for forming a view one way or the other. Perhaps the special rapporteur might prepare extracts from Mr. Kaeckenbeeck's book, entitled "The International Experiment in Upper Silesia"¹ for the information of the Commission when it reverted to the subject at its next session.

18. Mr. ZOUREK pointed out that the system referred to in point 8 was a special one, in as much as it was linked with territorial changes governed by a special treaty. Under present conditions it would be idle to contemplate the possibility of submitting to arbitration conflicts of national laws on nationality. A negative answer must therefore be given to the question.

19. Mr. SPIROPOULOS thought that the question might be passed over altogether, since arbitration had very little relevance to the general issue, which was the elimination of statelessness.

20. Mr. CÓRDOVA considered that there was no need for the Commission to give answer to the question; indeed, it could hardly do so without more information.

21. Mr. el-KHOURI said that, in view of the foregoing arguments, he would withdraw his proposal and support that of Mr. Lauterpacht.

22. Mr. KOZHEVNIKOV said that conflicts of national laws in matters of nationality could not be resolved by arbitral procedures. He therefore considered that the reply to the question should be in the negative, a reply which would in no way detract from the general principle of arbitration.

23. Mr. SCELLE said there was no need even to pose the question, since quite clearly disputes arising out of conflicts between nationality laws could be solved by any of the methods, including arbitration, mentioned in Article 33 of the Charter of the United Nations.

24. Mr. ZOUREK observed that the special rapporteur had not asked whether particular cases could be submitted to arbitration, but whether an effective system of arbitration could be devised to solve conflicts between national laws which resulted in statelessness. No one would deny that a specific case could be settled by any method. On the other hand, the reply to the general question must be in the negative, at least so far as the present time was concerned.

25. Mr. LAUTERPACHT said that he was aware of the considerations which underlay the arguments put forward by Mr. Hudson in the last paragraph of section V of Annex III. It was conceivable, and it had indeed occurred in the past, that a State, in violation of its treaty obligations, might refuse to confer nationality. Such a matter could properly be submitted to arbitration.

26. Mr. CÓRDOVA said that he had been impressed by the strong arguments put forward by the special rapporteur in section V, 4, of Annex III, in favour of an international tribunal for the settlement of disputes on nationality and of individuals having direct access to it. He was therefore anxious that the special rapporteur be given further time to study the problem and to submit fresh material for the Commission's consideration.

27. Mr. HUDSON suggested that point 8 be deleted, and that no further discussion be held on it.

28. Mr. KERNO (Assistant Secretary-General) reminded the Commission that in the past it had not always been necessary to take a formal vote if the discussion provided guidance enough for the special rapporteur.

29. Mr. el-KHOURI remarked that there could be no objection to a special rapporteur's withdrawing part of his own report.

30. Mr. LIANG (Secretary to the Commission) said that if part of a report were withdrawn by its author, further discussion would be precluded, unless another

¹ London, Oxford University Press, 1942.

member of the Commission moved that it be considered notwithstanding.

31. Mr. ZOUREK failed to understand why there should be any objection to a vote being taken on the proposal relating to point 8. He personally had not been in favour of voting during the deliberations on statelessness, but since the Commission had decided to take tentative votes, it should abide by that decision.

32. Mr. SPIROPOULOS said that point 8 itself, which contained a question, could not be put to the vote. On the other hand, Mr. Zourek and Mr. Lauterpacht had each presented a definite proposal which ought to be put to the vote, and Mr. Zourek's first, since it was farthest removed from the text. He personally would support Mr. Lauterpacht's proposal.

33. Mr. KOZHEVNIKOV agreed with Mr. Zourek that the Commission should continue to follow the procedure applied so far in considering Annex III. Since the Commission had voted on the far more important issue of whether or not the special rapporteur be instructed to prepare a draft convention, or conventions, on statelessness, he failed to understand why the proposals under consideration should not also be voted upon.

34. Referring to the point mentioned by Mr. Córdova, he said that it was inadmissible that individuals should be allowed direct access to an international tribunal. In his view, States and States alone were the subjects of international law.

35. The CHAIRMAN put to the vote Mr. Zourek's proposal that the question in point 8 be answered in the negative.

Mr. Zourek's proposal was rejected by 5 votes to 2, with 4 abstentions.

36. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that for the time being, the Commission should give no answer to the question in point 8.

Mr. Lauterpacht's proposal was adopted by 6 votes to 2, with 4 abstentions.

Point 12²

37. Mr. HUDSON suggested that the Commission now take up point 12.

38. Mr. YEPES considered that the Commission should take up each point in turn. Although he had full confidence in the special rapporteur, he failed to understand why any point should be omitted.

39. Mr. SPIROPOULOS agreed with Mr. Yepes because he believed that members should be given an

opportunity to comment on any of the points made by the special rapporteur.

40. Mr. LAUTERPACHT pointed out that there was nothing more for the Commission to discuss under points 9 and 10, the first of which was a historical exposition and the second of which had implicitly been covered by the Commission's decision at the previous meeting. Point 11 could not conveniently be discussed until points 12 and 13 had been dealt with.

41. Mr. KOZHEVNIKOV endorsed the views expressed by Mr. Yepes.

42. The CHAIRMAN *rèuled* that the Commission take up point 12, for the reasons adduced by Mr. Lauterpacht.

43. Mr. LAUTERPACHT observed that Mr. Hudson had offered a very far-reaching solution to the problem of statelessness in proposing that a State applying *jus soli* should confer nationality on children born abroad if one of the parents was a national of that State. Abandonment of the usual distinction between the father and mother in that respect would necessitate a modification of practically all existing legislation on the subject. For example, under the United Kingdom Law of 1948, the father's nationality determined that of the child, so that an illegitimate child born of an English-woman abroad would not automatically acquire British nationality. However, the fact that the change implied in Mr. Hudson's proposal necessitated changes in the law of many countries was not an argument against it.

44. The qualification mentioned in the last sentence of point 12 might nullify to some extent the proposed change and he wondered precisely what additional identification of the parent with the State Mr. Hudson had in mind. He was aware that, in the United States of America, if one parent was an alien certain residential qualifications had to be fulfilled for the child to acquire United States nationality. Other States required evidence of identification of the child with the State, such as a declaration on reaching majority.

45. Those points would have to be considered in detail before any definite directives were given to the special rapporteur as to how he was to develop the subject further. He (Mr. Lauterpacht) would himself state by way of a preliminary expression of view that he was in favour of the rule put forward by the special rapporteur without any qualification as to an additional identification of the parent or of the child with the State. He realized that such a rule would inevitably require far-reaching changes in domestic law, but that was no reason for rejecting it.

46. Mr. CÓRDOVA was unable to understand the meaning of the phrase "the nationality of the State" in point 12.

47. Mr. HUDSON replied that the State referred to was the one of which one of the parents possessed nationality.

48. Mr. CÓRDOVA suggested that the meaning would

² Point 12 read as follows :

" 12. Supplementing existing law in *jus soli* countries, a child born abroad shall acquire the nationality of the State if one of the parents has such nationality, provided that it does not acquire at birth the nationality of another State. This may have to be qualified by some additional identification of the parent with the State."

be clarified if the words "of the State" were replaced by the words "of those States if one of the parents has such a nationality".

49. Mr. KERNO (Assistant Secretary-General) said that Mr. Córdova's doubts were clearly pertinent. The meaning of the English text was undoubtedly obscure, and had not been correctly conveyed in the French translation.

50. Mr. LAUTERPACHT asked whether he was right in thinking that the phrase referred to nationality of *jus soli* countries.

51. Mr. HUDSON replied in the affirmative. What he had in mind was that the principle of *jus soli* should be supplemented by a certain element of *jus sanguinis*. Thus a State must confer its nationality on a child born abroad if one of its parents possessed the nationality of that State, provided the child had not acquired the nationality of another State.

52. Mr. ZOUREK, giving an example of what he presumed Mr. Hudson had in mind, said that a child born in Czechoslovakia of a father from Uruguay, where *jus soli* applied, and a Czechoslovak mother would, under Mr. Hudson's rule, be entitled to acquire Uruguayan nationality were it not for the fact that under Czech law if one parent (either father or mother) were a Czechoslovak citizen a child born in that country acquired Czechoslovak nationality.

53. Mr. LIANG (Secretary to the Commission) suggested that there was a certain grammatical obscurity in the opening phrase of point 12, which would have to be cleared up.

54. Mr. el-KHOURI thought that the intention of the provision was clear, and that it served a useful purpose. To take a concrete example, *jus sanguinis* applied in Syria and *jus soli* in the United States of America. At present a child born to United States citizens in Syria acquired neither Syrian nor United States nationality. If the provision envisaged in point 12 were adopted, the United States of America would be obliged to confer United States nationality upon such child.

55. Mr. CÓRDOVA said that the provision left open the question as to what nationality should be conferred on a child born in a *jus sanguinis* country to parents who were nationals of *jus soli* countries but not of the same *jus soli* country. The wording would have to be expanded to state whether the nationality of the father or of the mother should be the determining factor in such cases.

56. Mr. el-KHOURI felt that it was unnecessary to settle that question in the convention.

57. Mr. KERNO (Assistant Secretary-General) pointed out that the provision in question would normally apply only to cases where both parents were nationals of a *jus soli* country, for if the father, or in most countries, the mother, was a national of a *jus sanguinis* country, the child would acquire at birth the nationality of that country. The provision would nevertheless fill a gap.

58. Mr. SANDSTRÖM thought that the meaning of the first sentence in point 12 was clear. He was more concerned with the meaning of the second sentence, and asked what the special rapporteur had in mind when he referred to "some additional identification of the parent with the State".

59. Mr. HUDSON replied that, under United States legislation for example, for a child to acquire United States nationality, the parent must have resided in the United States before the child was born.

60. Mr. YEPES said that, under Colombian law, a child born abroad to parents, one of whom possessed Colombian nationality, could not fully acquire such nationality until he had been domiciled for a certain time in Colombia. Nationality was a privilege, and it seemed only reasonable that no individual should finally acquire it until there was some real link between him and the country whose nationality he claimed. He therefore proposed that the words "or the child" be inserted after the words "of the parent" in the last sentence of point 12.

61. Mr. CÓRDOVA felt that, if the qualifications envisaged by the special rapporteur and by Mr. Yepes were admitted, the whole purpose of the provision would be defeated. It must be recognized that, unlike naturalization, which rested on the will of the State and of the individual, the acquisition of nationality at birth was largely a matter of chance.

62. Mr. HUDSON suggested that, as his drafting of the provision had been criticized, the first clause reading "Supplementing existing law in *jus soli* countries" should be deleted, that its purpose, which was explanatory, should be taken over into the commentary, and that the remainder of the first sentence should be re-worded as follows:

"A State must confer its nationality on a child born outside its territory, if one of the parents of the child possesses that State's nationality, provided that such child does not acquire at birth the nationality of another State either *jure soli* or *jure sanguinis*."

63. Mr. FRANÇOIS pointed out that the proposed new wording still did not state whether the nationality of the father or of the mother was to prevail in cases where their nationality differed.

64. Mr. HUDSON said that the wording he had proposed was in keeping with the 1933 Montevideo Convention on the Nationality of Women. On the other hand, he recognized that it might be too far-reaching to be acceptable in more than a few countries; if subsequent research showed that to be the case, the words "one of the parents has" might be replaced by the words "both the parents have".

65. Mr. LAUTERPACHT pointed out that, if the wording proposed by Mr. Hudson was approved by the Commission, as he hoped it would be, the Commission would be approving a change as revolutionary as that which it had rejected at the preceding meeting. It was

a fundamental innovation that the nationality of the father should be no more important than that of the mother in determining the transformation of nationality by descent.

66. Mr. SANDSTRÖM recalled that the points which the Commission was considering had been intended as points for discussion only, not as the articles of a draft convention, which would obviously have to be more elaborate than the texts which the Commission was at present in process of approving.

67. The CHAIRMAN agreed with Mr. Sandström; the Commission was at present engaged in approving general principles to serve as directives to the special rapporteur.

68. Referring to Mr. Yépes' proposal that the words "or the child" be inserted after the words "some additional identification of the parent" in the last sentence, Mr. AMADO pointed out that the Commission's aim was to eliminate, or at least to reduce, statelessness. That being so, it must necessarily envisage the amendment of existing legislation, since it was existing legislation that was the cause of statelessness. Indeed, as Mr. Córdova had said, the second sentence, even without the additional words proposed by Mr. Yépes, might have the result of seriously weakening the principle stated in the first sentence.

69. Mr. LAUTERPACHT felt that Mr. Yépes' main concern was to provide against cases of dual nationality. It was true that the Commission was envisaging the reduction of statelessness at the expense of possible additions to the number of cases of dual nationality. Dual nationality, however, was a relatively minor evil compared with the evil of statelessness.

70. After further discussion of Mr. Yépes' proposal, the CHAIRMAN pointed out that, under a large number of codes, including that of Colombia, the child enjoyed the nationality of the parent for so long as it was a minor. What Mr. Yépes wished to guard against was the possibility that a child born outside Colombia might finally acquire Colombian nationality at the age of 21 without ever having resided in Colombia. What the Commission was considering at present was the acquisition of nationality at birth, and there was therefore no conflict between the provision proposed by Mr. Hudson and the principles of Colombian law.

71. Mr. YEPES withdrew his proposal in view of what had been said, and in view of the fact that the question was covered by point 15.

72. Mr. LAUTERPACHT agreed with Mr. Amado and Mr. Córdova that, unless its scope were clarified, the second sentence could open the door to serious departures from the principle stated in the first sentence. If a proposal to delete the second sentence were made, he would support it.

73. Mr. HUDSON said that it would be impossible to define at the present time what additional identification of the parent with the State might be required. Inclusion

of some such provision would, however, greatly facilitate acceptance of the principle by many States.

74. Mr. AMADO proposed that the second sentence be deleted, for the reasons he had already given.

75. Mr. CÓRDOVA supported that proposal, but, with regard to what had been said by Mr. Lauterpacht on the question of dual nationality, urged the special rapporteur to bear in mind in general the desirability of not replacing statelessness, which was a wrong to the individual, by dual nationality, which was a cause of conflicts between States.

The proposal that the second sentence of point 12 be deleted was carried by 9 votes to 2 with 2 abstentions.

The first sentence of point 12, in the form suggested by Mr. Hudson (see paragraph 62 above), was approved by 9 votes to 1 with 1 abstention.

Point 13³

76. Mr. LAUTERPACHT asked whether the special rapporteur considered that point 13 was necessary, in view of the form in which point 12 had just been approved.

77. Mr. LIANG (Secretary to the Commission) said that, as he understood it, the special rapporteur's intention in point 13 had been to envisage a recommendation to *jus sanguinis* countries to apply that principle fully, without the exceptions which were at present made to it. Those exceptions would be excluded if the principle stated in the first sentence of point 13 were adopted. The effect of the second sentence, however, would be to re-introduce the possibility of such exceptions. In those circumstances, and if his understanding of the special rapporteur's intention was correct, he agreed with Mr. Lauterpacht that point 13 added nothing to what was stated in point 12, as approved, except that it covered children wherever they were born, whereas the wording used in the approved text of point 12 read: "...a child born outside its territory...".

78. Mr. HUDSON observed that points 12 and 13 were designed only to reduce cases of statelessness arising in the future, not to eliminate existing statelessness. In neither case did the second sentence defeat that more modest aim.

79. Replying to a question by Mr. ZOUREK, Mr. HÜDSON pointed out that the first sentence of point 13 merely imposed a minimum obligation on *jus sanguinis* States. It was not his intention to prevent such States conferring their nationality on children who had already acquired the nationality of another State.

³ Point 13 read as follows:

"13. Supplementing existing law in *jus sanguinis* countries, a child, wherever born, of a national shall acquire the nationality of the State, provided that it does not acquire at birth the nationality of another State. This may have to be qualified by some additional identification of the parent with the State."

80. Mr. CÓRDOVA said that, if point 13 were retained in addition to the text approved for point 12, cases of dual nationality would necessarily result.

81. Mr. KERNO (Assistant Secretary-General) said that in any event article 13 was now unnecessary, as the Secretary to the Commission had shown.

82. Mr. LAUTERPACHT proposed that point 13 be deleted.

Mr. Lauterpacht's proposal was carried by 10 votes to 2.

83. Mr. HUDSON suggested that in that case the words "born outside its territory" ought to be deleted from the text approved for point 12.

It was so agreed.

The meeting rose at 1.05 p.m.

162nd MEETING

Friday, 11 July 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS

Present:

Members: Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (continued)

SECTION VI OF ANNEX III: STATELESSNESS; POINTS FOR DISCUSSION (continued)

Point 14

(a) paragraph 1

1. The CHAIRMAN invited comment on the first paragraph of point 14, which read:

"A child born of unknown parents, of stateless parents, or of parents whose nationality is undetermined, shall acquire the nationality of the State in whose territory it is born."

2. Mr. KERNO (Assistant Secretary-General) said that he wished first to point out that, since points 4 to 19 dealt with the reduction of statelessness and point 2 with its elimination, it was unavoidable that there should be some overlapping, as was the case with point 14.

3. Mr. LAUTERPACHT suggested that it was premature to state that the Commission was at present considering merely the reduction of statelessness. The view could be held that the Commission was attempting to eliminate it, though not by the direct method envisaged in point 2. The effect of the rule which the Commission had approved at the previous meeting concerning the acquisition of nationality at birth would in fact be to eliminate cases of statelessness due to the conflict of nationality laws in that respect.

4. Mr. el-KHOURI recalled that the question which formed the subject of the first paragraph of point 14 had already been discussed at length. It was therefore unnecessary for him to repeat the grounds on which he opposed the principle that a child born of stateless parents should acquire the nationality of the State in whose territory it was born.

5. Mr. SPIROPOULOS and Mr. FRANÇOIS pointed out that, instead of "attenuating" the principle stated in rule (i) in point 2, to which various members of the Commission had raised grave objections, point 14 merely repeated it.

6. Mr. LAUTERPACHT did not attach great importance to the first paragraph of point 14, since it would apply to relatively few cases compared with the number to which the approved text of point 12 would apply.

7. Mr. HUDSON suggested that the Chairman ascertain the sense of the meeting with regard to the application of the rule stated in the first paragraph of point 14, first to children born of unknown parents, secondly to children born of stateless parents, and thirdly to children born of parents whose nationality was indeterminate.

8. Mr. AMADO supported the first paragraph as a whole.

9. Mr. YEPES also supported the first paragraph as a whole, since the principle of *jus soli*, on which it was based, provided the sole means of eliminating statelessness.

By 11 votes to none, with 2 abstentions, the rule stated in the first paragraph of point 14 was approved as applicable to children born of unknown parents.

By 7 votes to 5, with 1 abstention, the rule stated in the first paragraph of point 14 was approved as applicable to children born of stateless parents.

10. Mr. SPIROPOULOS explained that he had voted against making the rule applicable to the children of

stateless parents, not because of any lack of sympathy with the problem of reducing statelessness, but because another proposal, the purport of which was identical, had already been discussed at length by the Commission and rejected, and he felt that the Commission should be consistent.

11. Mr. KERNO (Assistant Secretary-General) suggested that further study might show that the application of the rule to the children of stateless parents was not, after all, of such importance, since the case of children only one of whose parents was stateless was covered by the text of point 12, as already approved.

12. With regard to the application of the same rule to children born of parents whose nationality was indeterminate, Mr. LIANG (Secretary to the Commission) suggested that, if what the special rapporteur had had in mind was cases where a child was born of parents who, although stateless, had claimed the nationality of a State, and their claim was still undecided, it was covered by the term "stateless persons". For there was no half-way house, legally speaking, between statelessness and nationality. He admitted that cases might occur of a child being born to parents whose nationality had been the subject of a challenge in a national or international court, and where such challenge was still undecided. In such cases it might be considered necessary to provide specifically for children born of parents whose nationality had not been determined.

13. Mr. LAUTERPACHT said that he understood the purpose of including those words to be that, pending determination of the nationality of its parents where such nationality had been challenged in the courts, a child should acquire the nationality of the State in whose territory it was born.

On that understanding, by 7 votes to 5, the rule stated in the first paragraph of point 14 was approved as applicable to children born of parents whose nationality was indeterminate.

The rule stated in the first paragraph of point 14 was approved as a whole by 7 votes to 4 with 1 abstention.

(b) *paragraph 2*

14. The CHAIRMAN invited comments on the first part of the second paragraph of point 14, reading as follows :

"A foundling shall be presumed to have been born in the territory of the State in which it was found, until the contrary is proved ;"

The rule contained in the first part of the second paragraph of point 14 was approved by 11 votes to 1.

15. The CHAIRMAN invited comments on the second part of the second paragraph of point 14, reading as follows :

"and birth on a national vessel shall be deemed to constitute birth in the national territory."

16. Mr. LAUTERPACHT suggested that the special rapporteur should give consideration to the question whether the rule should be extended to cover births in national aircraft.

17. Mr. FRANÇOIS felt that it might be preferable to leave aircraft aside, since extension of the rule to cover them would raise thorny questions of private international law. He noted also that the special rapporteur had not specified whether the rule applied only to births on the high seas, or whether it applied also to births in territorial waters or in port. In his view, the former course would be preferable, so as to avoid the possibility of conflicts with national laws, and because it might be difficult for the Commission to agree on any rule which went further than stating that birth on a national vessel on the high seas should be deemed to constitute birth in the national territory.

18. Mr. CÓRDOVA supported Mr. François' suggestion.

19. Mr. SPIROPOULOS agreed that if the convention went into too great detail it would give rise to difficulties; for example, under Anglo-Saxon law a ship anchored in territorial waters was assimilated, for almost all purposes, to a ship in port; under other systems of law it was not. In his view, there was no need for the Commission to regulate such details, as it was not the Commission's task to emulate the normal role of the courts.

20. Mr. SANDSTRÖM feared that adoption of a provision such as Mr. François envisaged would not represent any advance on the existing situation, and might be held to imply, *e contrario*, that birth on a national vessel in territorial waters or in port should not constitute birth in the national territory. The fact that a child was born on board a ship sailing in the territorial waters of a country, or anchored in one of its ports, did not constitute a sufficient link between the child and that country to justify the conferment of nationality. In such cases, as well as when the vessel was on the high seas, it seemed reasonable that the child should acquire the nationality of the vessel.

21. Mr. KOZHEVNIKOV said that, although the question was in theory an important one, in practice it would affect only very few cases. The rule contained in the clause under discussion was not essential to the purpose of the draft convention, and he proposed that the special rapporteur be instructed to leave it out of account.

22. Mr. ZOUREK felt that the Commission was not sufficiently well informed about the various complicated questions involved in the matter under discussion for it to give any directive to the special rapporteur. He therefore supported Mr. Kozhevnikov's proposal.

23. Mr. AMADO said that he would support Mr. Kozhevnikov's proposal on practical grounds. If the Commission failed to win the agreement of governments, its efforts would be fruitless.

24. Mr. YEPES and Mr. LAUTERPACHT agreed that the Commission was not sufficiently informed to give the special rapporteur any directives at present, but felt that that was rather a reason for leaving him free to submit, at the next session, a clear draft in the

light both of his further study and of the foregoing discussion.

25. The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that the Commission should instruct the special rapporteur to omit from the draft which he was to submit at the next session the rule contained in the second part of the second paragraph of point 14.

Mr. Kozhevnikov's proposal was rejected by 7 votes to 3, with 2 abstentions.

26. The CHAIRMAN then put to the vote the proposal made by Mr. Yépes and Mr. Lauterpacht that the Commission should merely request the special rapporteur to submit at the next session a new text prepared in the light of the foregoing discussion and of his further study of the matter.

Mr. Yépes' and Mr. Lauterpacht's proposal was adopted by 8 votes to none, with 4 abstentions.

Point 15

27. The CHAIRMAN invited comments on the rule contained in point 15, which read :

"If a child acquires no nationality at birth it may subsequently acquire nationality of the State to which it is specifically identified by criteria to be defined in an international convention, e.g., continuous residence within the territory of the State for a prescribed period, perhaps followed by a declaration to be made by the child at a certain age."

28. Mr. LAUTERPACHT said that in view of the provisions already approved by the Commission, it might appear that the rule contained in point 15 was unnecessary. Cases might, however, occur where despite those provisions, a child would acquire no nationality at birth. It might therefore be desirable to include in the convention a provision dealing with such cases. The rule stated in point 15 did not settle such cases; it merely referred to another international convention the vital question of the conditions which were to govern the acquisition of nationality in such cases. Surely those conditions should be stated in the convention which the Commission was to draft.

29. Mr. el-KHOURI pointed out that the rules which the Commission had approved would not of themselves ensure the elimination of statelessness arising at birth, since, for the reasons he had stated at the preceding meeting, the States most concerned would be unable to subscribe to those rules. In those circumstances the rule contained in point 15 should be retained, together with the reference to another international convention to which it might be possible for such States to accede.

30. Mr. CÓRDOVA said that, in order to make sure that the Commission's efforts to reduce statelessness were not blocked at every turn by the perfectly legitimate preoccupations of Mr. el-Khouri concerning stateless refugees, it might be advisable for the Commission to instruct the special rapporteur, in his future studies, to take into account, as a separate element, the

practical implications, in certain countries, of adherence to the rules which the Commission had approved.

31. Mr. el-KHOURI supported what he considered to be the very useful and practical proposal made by Mr. Córdova.

32. After further discussion Mr. HSU said he would support Mr. Córdova's proposal because, in his view, the Commission could not avoid taking a stand on the question of refugees.

33. Mr. KOZHEVNIKOV said that the problem of statelessness should not be confused with that of refugees and displaced persons. The Commission must confine itself to the first, which was a well-defined legal concept.

34. Mr. LAUTERPACHT said that the considerations he had in mind would be met if point 15 were redrafted to read :

"If a child acquires no nationality at birth, it shall subsequently acquire the nationality of the State to which it is specifically identified by criteria to be defined and dealt with by the special rapporteur in his next report."

Mr. Lauterpacht's text was adopted by 10 votes to 1, with 1 abstention.

Points 16 and 17¹

35. Mr. HUDSON thought that, if the Commission expressed general approval of points 17 and 18, it would be unnecessary for it to deal with point 16.

36. Mr. LAUTERPACHT disagreed with Mr. Hudson on the ground that point 18 dealt with a separate matter of greatest importance, namely, that of deprivation of nationality. Points 16 and 17, on the other hand, dealt with loss of nationality resulting from a change in personal status or in that of the parents, and could therefore be taken together. As the Commission had decided not to consider the Convention on the nationality of married persons, he believed that some mention of marriage as a change in personal status should be made at that point. He would accordingly suggest that points 16 and 17 be combined to read as follows :

"If the law of the State whose nationality is possessed by a person recognizes that such nationality may be lost as a consequence of a change in the person's personal status or in that of his parents [marriage, legitimation, recognition, adoption], such

¹ Points 16 and 17 read as follows :

"16. If the law of the State whose nationality is possessed by a person recognizes that such nationality may be lost as a consequence of a change in the person's personal status (legalisation, recognition, adoption), such loss shall be conditioned upon the acquisition of the nationality of another State in consequence of the change of personal status."

"17. A minor child shall not lose a State's nationality as a consequence of the loss of that nationality by either of its parents unless it acquires the nationality of another State."

loss shall be conditional upon the acquisition of the nationality of another State."

37. Mr. HUDSON said that he would have no objection to marriage being mentioned as one of the changes in personal status.

38. The CHAIRMAN put to the vote point 16 as drafted in Mr. Hudson's report, with the addition of marriage as one of the changes in personal status.

Point 16, as amended, was approved by 9 votes to 1, with 1 abstention.

Point 17 was approved by 9 votes to 1, with 1 abstention.

39. Mr. LAUTERPACHT said that provision should be made for a contingency covered in Chapter II, Article 7, of The Hague Convention of 1930, namely, loss of nationality occurring through a person not acquiring a new nationality after having obtained an expatriation permit from his own State. It could be left to the special rapporteur to decide how such a provision should be framed on the basis of paragraph 1 of Article 7.

40. Mr. el-KHOURI said that the Arab States of the Middle East region would have no difficulty in accepting such a provision, which conformed with their regulations.

41. Mr. HUDSON said that the matter raised by Mr. Lauterpacht would bring considerable difficulties in its train, since such a provision would seem to imply approval of the practice of certain States of requiring an expatriation permit before granting naturalization. The United States Government would certainly find it difficult to accept such a provision in view of the dispositions of the Law of 1867. It was largely for that reason that the United States of America had not supported the Convention of 1930.

42. Mr. SANDSTRÖM said that such a rule would surely apply only in those countries which required expatriation permits.

43. Mr. HUDSON said that, although he agreed with Mr. Sandström, his argument stood.

44. Mr. ZOUREK observed that such a rule would entail practical difficulties since an expatriation permit required irrevocable administrative action.

45. Mr. LAUTERPACHT could not agree that the inclusion of such a provision which, as Mr. Sandström had argued, would apply only in States which required an expatriation permit would in any way imply approval of the practice of requiring an expatriation permit.

46. He did not think that the practical difficulty mentioned by Mr. Zourek was weighty enough to rule out inclusion of such a rule, since an expatriation permit could always be granted in a conditional form.

Mr. Lauterpacht's proposal was adopted by 8 votes to 3, with 1 abstention.

Point 18²

47. The CHAIRMAN suggested that the Commission might approve the principle stated in point 18, and request the special rapporteur to consider the grounds on which deprivation of nationality might be allowed, taking into account those listed on page 140 of the Secretariat's *A Study of Statelessness* (*op. cit.*).

48. Mr. YEPES said that he would strongly oppose such instructions being given to the special rapporteur, since in his view it was inadmissible that States should have the right to deprive a person of his nationality. To apply such a sanction would be contrary to the Universal Declaration of Human Rights.

49. Mr. el-KHOURI considered that evasion of military service should not be penalized by deprivation of nationality.

50. Mr. FRANÇOIS agreed with the Chairman's suggestion, as it would be somewhat arbitrary if the provision were to be confined to the three grounds enumerated by the special rapporteur under point 18. Mr. Hudson should also be requested to consider those reasons for deprivation of nationality when it did not constitute a sanction in the proper sense of the term.

51. He had certain objections to the way in which point 18 had been drafted. For example, alternative (a) offered no guarantee whatsoever against abuse, and the first ground for deprivation, namely, "cancellation of naturalization on ground of non-compliance with governing law" went too far. He presumed that what the special rapporteur had in mind was naturalization obtained by fraud, and not any other contravention of the law. He was also unable to understand why the second ground should be applicable only to naturalized persons. Surely there were weighty reasons for its application also to persons who had acquired their nationality at birth.

52. Mr. KERNO (Assistant Secretary-General) observed that the provision under (a) in point 18 constituted a procedural guarantee against arbitrary action by States, but would in no way prevent them from depriving persons of nationality on any ground whatsoever. On the other hand, the provision contained in (b) would restrict the right of States in that respect, and would accordingly contribute to reducing statelessness.

53. Mr. LAUTERPACHT said that, in examining the question of deprivation of nationality, the Commission

² Point 18 read as follows :

" 18. No person shall be deprived of the nationality of a State, when such person does not acquire the nationality of another State. (a) except on decision in each case by a competent authority acting in accordance with due process of law ; or alternatively (b) except on the following grounds :

“ (i) cancellation of naturalization on ground of non-compliance with governing law ;

“ (ii) continuous residence of naturalized person abroad (or in the country of his origin) ;

“ (iii) evasion of military service.”

should be guided by the consideration that statelessness must be eliminated, and for that reason he agreed with the views expressed by Mr. Yépes, except that he did not admit any exceptions to the principle stated therein. He would accordingly propose that the introduction to point 18 be redrafted to read:

"No person shall be deprived of the nationality of a State by way of penalty or otherwise when such person does not acquire or already possess the nationality of another State."

54. Members would note that it was recommended in the Secretariat's *A Study of Statelessness* that:

"Nationality should not be withdrawn from persons who have established their domicile in a foreign country, whatever the length of their absence, unless they have acquired a new nationality."³

and that

"Deprivation of nationality should not be applied as a punishment."⁴

He hoped that those recommendations would be fully considered and accepted.

55. Legislation on deprivation of nationality differed. In France that penalty was only applied when a person possessed another nationality and had been guilty of actions contrary to the interests of the State. In many countries, among which were Denmark and the United Kingdom, the penalty was only applied to naturalized persons, and in that connexion it was interesting to note that the special rapporteur had condemned the distinction made between naturalized persons and persons who had acquired their nationality at birth (A/CN.4/50, V,2,c).

56. He himself, though he admitted that his view might be somewhat pedantic, did not even admit that naturalization by fraud should be punished by deprivation of nationality, in so far as such deprivation resulted in statelessness. There were other penalties which could be imposed in such cases.

57. Disloyalty and treason were frequently punished by deprivation of nationality, but in his view wrongly. A far more serious penalty was imposed in certain countries for that and other offences, by comparison with which deprivation of nationality was petty, unnecessary and not obviously dictated by imperative national interest. The fact that many States dispensed with such penalties suggested that no vital national interest was involved.

58. Mr. Amado had recently questioned the Commission's competence to dictate to States in matters concerning their vital interests. That attitude was perfectly tenable, but as a body of legal experts the Commission was undoubtedly entitled to indicate whether certain legal provisions were so closely linked with the vital interests of States as to permit a derogation from some fundamental principle which the Commission felt should be upheld. In the course of performing its work the Commission was continually

pronouncing itself upon such questions, and it should therefore examine with scrupulous care every ground for which States imposed deprivation of nationality, in order to determine whether it was reasonable and was unquestionably justified by considerations of national interest.

59. Mr. HSU agreed with the thesis expounded by Mr. Lauterpacht, as he considered deprivation of nationality to be an unenlightened practice which the Commission should not endorse. States could devise other penalties.

60. Mr. KOZHEVNIKOV considered that there was nothing to prevent the Commission from making recommendations to States as argued by Mr. Lauterpacht, provided it did so within the general framework of international law, which was based on the recognition of the independence of sovereign States. The Commission must not venture outside that framework, and nationality was a question which fell almost entirely within the domestic competence of States. He therefore considered that point 18 should be deleted altogether.

61. Mr. SPIROPOULOS considered that Mr. Lauterpacht's view was too far-reaching. Admittedly, at first sight deprivation of nationality seemed difficult to defend, but it was impossible to ignore the human factor and the nature of things. A State was an association, and as such was entitled to reject one of its members. If a sovereign State had some serious reason, such as the protection of its vital interests, for depriving a person of nationality, nothing would prevent it from doing so. Accordingly, deprivation of nationality was unavoidable, and any draft convention which sought to deprive States of that right would have very little chance of acceptance. It would be useless for the Commission to indulge in the creation of idealistic international instruments which would never be put into effect. On the other hand, it would be possible to set some limit on the right of States to deprive persons of their nationality and that was the matter to which the Commission should address itself.

62. Mr. ZOUREK appreciated the noble motives which underlay the desire to reform radically the existing practice of States, but the question was not as simple as it appeared. The Commission must take into account persons who voluntarily rendered themselves stateless by putting themselves outside their national community. If an individual deliberately broke the link imposing reciprocal duties and responsibilities between himself and the State the latter could not be expected to continue to discharge its obligations towards him.

63. It would be highly inconsistent to apply more stringent measures to naturalized persons, since they had obtained their naturalization only after exhaustive and careful enquiry into their *bona fides*. The accident of birth was surely not a guarantee of loyalty.

64. Again, he was unable to see how a State could proceed against one of its nationals who avoided military service by living abroad, unless by deprivation of nationality.

³ *A Study of Statelessness*, op. cit., p. 164.

⁴ *Ibid.*

65. In conclusion, the draft convention prepared by the Commission must be based upon rules which would be acceptable to States and conceived in such a way as not to encroach upon matters which exclusively related to a country's domestic jurisdiction.

The meeting rose at 1.5 p.m.

163rd MEETING

Monday, 14 July 1952, at 2.45 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsí Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50) (*continued*)

SECTION VI OF ANNEX III : STATELESSNESS ; POINTS FOR DISCUSSION (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of Annex III to the special rapporteur's report on nationality, including statelessness (A/CN.4/50).

*Point 18 (*continued*)*

2. Mr. KOZHEVNIKOV said that he had already stated his view that statelessness was a matter which, in the main, fell within purely domestic jurisdiction, a sphere in which no interference was allowed by international law. On the other hand, as he had already indicated, certain acts carried out by States went beyond that framework and assumed a political character.

3. Mr. YEPES proposed that point 18 be replaced by the following text :

"No person shall be deprived of the nationality of a State when such person does not acquire the nationality of another State, except on the following grounds :

- (i) cancellation of naturalization obtained by fraud;
- (ii) continuous residence of naturalized person abroad. For the purposes of this provision, continuous residence abroad shall be understood to mean unauthorised absence for at least two years from the country of adoption."

4. Mr. KERNO (Assistant Secretary-General) observed that Mr. YEPES' text differed from that of point 18 only by specifying a time-limit in sub-paragraph (ii) and by omitting sub-paragraph (iii).

5. Mr. el-KHOURI said he could accept point 18, but proposed that the words "(a)" and "or alternatively (b) except" be deleted, since clause (a) was procedural, and could govern all the grounds enumerated in sub-paragraph (i) to (iii).

6. Mr. CÓRDOVA was not in favour of allowing States to punish individuals by depriving them of their nationality. The inclusion of such a provision in a draft convention would imply approval of the principle.

7. He could not support clause (a), which would do nothing to guarantee the individual against arbitrary action by the State. Furthermore, it failed to take into account the case of an individual being deprived of his nationality by automatic operation of the law without any judicial process.

8. Mr. SANDSTRÖM said that if clause (a) was designed to cover the case of mass deprivation of nationality, he could not support it. On the other hand, if it was purely procedural there was no reason why it should not be accepted.

9. He doubted whether it was expedient for the Commission to attempt to draft a definite provision on the problem at the present stage, and he therefore proposed that the special rapporteur be requested to consider in detail the grounds on which persons were at present liable to deprivation of nationality, taking into account those listed on pages 140 and 141 of the Secretariat's *A Study of Statelessness* as having been provided in the laws of a number of States. The Commission might thus be furnished with more ample material for consideration at its next session.

10. Mr. CÓRDOVA said that he could support Mr. Sandström's proposal, provided the special rapporteur was requested to insert in the draft convention on the elimination of statelessness a provision to the effect that no person should be deprived of the nationality of a State when such person did not acquire the nationality of another State. That principle might be qualified by providing for certain exceptions in the draft convention, namely, that on the reduction of statelessness.

11. Mr. LAUTERPACHT considered that there was an encouraging degree of agreement on one of the two principal issues at stake. Some members, of whom he was one, held that no person should be deprived of the nationality of a State when such person did not possess or acquire the nationality of another State. Others, and their view was not so far removed as it would seem, considered that an exception should be made in respect of naturalized persons. The replies from governments analysed in the Secretary-General's report (E/2230-A/CN.4/56) on the problem of statelessness indicated that such exceptions were made in practice. Nevertheless, it should be asked whether minor exceptions, for example, the extremely rare cases of nationality acquired by fraud, were of sufficient weight to justify attenuating an important principle.

12. Mr. FRANÇOIS suggested that Mr. Lauterpacht was mistaken in thinking that there was a large measure of agreement in the Commission. Several members had indeed expressed opposition to his (Mr. Lauterpacht's) view.

13. Mr. CÓRDOVA pointed out that when naturalization had been obtained by fraud, it was erroneous to refer to its subsequent annulment as a form of deprivation of nationality, since, in such a case, no valid nationality had ever been acquired. The person in question would, he thought, recover his original nationality and no statelessness would therefore result. He cited in that connexion a hypothetical case of a Mexican citizen who had acquired United States nationality by naturalization. Should his naturalization be annulled on the ground that it was obtained by fraud, he would recover his Mexican nationality.

14. The ground given in sub-paragraph (ii) for deprivation of nationality seemed to him to be of minor importance, and not to justify an exception to the general principle.

15. The CHAIRMAN said that a fundamental question before the Commission was whether it approved the principle that no State might deprive a person of his nationality unless he already possessed, or acquired, another nationality. He would accordingly put that principle to the vote.

The principle was rejected by 7 votes to 3 with 1 abstention.

16. The CHAIRMAN then put to the vote the proposal made by Mr. Yepes and Mr. el-Khoury.

Mr. Yepes' text to replace point 18 was rejected by 7 votes to 4, with 1 abstention.

Mr. el-Khoury's amendment to point 18 was rejected by 6 votes to 5, with 2 abstentions.

17. Mr. YEPES said that Mr. Sandström's proposal, which was tantamount to recognition of a right contrary to the Charter of the United Nations, contrary to the Universal Declaration of Human Rights and contrary to everything which the Commission had so far been attempting to do, must be fully discussed before being put to the vote.

18. The CHAIRMAN explained that in accepting Mr. Sandström's proposal the Commission would not be adopting any principle, but merely instructing the special rapporteur to study in detail the grounds on which deprivation of nationality was imposed.

19. Mr. KERNO (Assistant Secretary-General) remarked that the special rapporteur was not being asked to make positive recommendations. The action proposed by Mr. Sandström would therefore not prejudice the principle.

20. Mr. SANDSTRÖM endorsed the remarks of the Assistant Secretary-General.

21. Mr. AMADO considered point 18 to be more or less satisfactory. The application of the principle that no one should be deprived of his nationality unless he had acquired another would be restricted to a far greater extent if the grounds enumerated on pages 140 and 141 in the publication *A Study of Statelessness* were accepted.

22. Mr. LAUTERPACHT agreed with the Assistant Secretary-General that the adoption of Mr. Sandström's proposal would in no way prejudice the principle at issue since, after further study of the question, the special rapporteur might possibly decide that none of the grounds on which persons were deprived of nationality justified derogation from the principle that statelessness should be eliminated.

23. He had some doubts, however, as to the scope of Mr. Sandström's proposal. It was to be assumed that the special rapporteur had already considered such grounds as those enumerated in the publication *A Study of Statelessness* and had concluded that only those he had listed under point 18 merited consideration. Perhaps, therefore, further examination of the problem might be limited to the latter.

24. Mr. AMADO could not understand why those members who were anxious to secure the elimination of statelessness should suppose that provision for exceptions such as were laid down in point 18 would seriously impair their purpose. Certain exceptions to a general rule were inevitable, and should not give rise to substantial objections.

25. Mr. FRANÇOIS pointed out that those members who supported Mr. Sandström's proposal did so because they felt dissatisfied with point 18 and considered that the matter had not been fully thrashed out. They were therefore in favour of the special rapporteur studying in greater detail grounds other than those listed in his report.

26. Some members had based their view that States should not have the right to deprive persons of their nationality on the argument that other sanctions could be applied. He could not agree with that contention, partly because it would not always be possible to apply sanctions against a person who had permanently expatriated himself. The Commission should also consider the case of a national who had entered the service of another State, and who had thus severed the

essential link which bound the national to the state of his nationality.

27. Mr. ZOUREK did not consider the grounds enumerated under point 18 to be satisfactory. For example, why should special treatment be meted out to naturalized persons, whose suitability to acquire a nationality was examined with such scrupulous attention? As he had already had occasion to point out, acquisition of nationality by accident of birth was no guarantee of loyalty. Other grounds for deprivation of nationality had to be considered and the Commission would have to have a far greater volume of material before it could take any decision of principle. He accordingly supported Mr. Sandström's proposal.

28. Mr. SPIROPOULOS said that the Commission should proceed very carefully. After the rejection of Mr. Yépes' proposal a tendency was manifesting itself to reduce to the utmost the number of exceptions to the principle that no person should be deprived of his nationality. Of course, loss of nationality in countries applying the *jus soli* principle, such as the United States of America and Latin-American countries, was far less important than, for example, in European countries where the principle of *jus sanguinis* prevailed.

29. A draft convention which did not allow of exceptions to the principle would have no chance of acceptance by the second category of States. Moreover, it was not always possible to apply other sanctions than that of deprivation of nationality against persons permanently resident abroad. Every State, like a private association, must have the right to expel one of its members.

30. Mr. YEPES suggested that the parallel between the State and private associations was not so close as Mr. Spiropoulos supposed. Deprivation of nationality violated an essential human right; and it was neither expedient nor right to allow States to cast out undesirable characters who would have to be admitted by some other State.

31. Confusion between citizenship and nationality must be avoided. Many of the acts which were punished by deprivation of nationality should rather be punished by deprivation of citizenship, an acquired right which the State could either limit or take away altogether. Such, for example, was the proper sanction against acts prejudicial to public security.

32. Mr. HSU was not in favour of recognition, in either of the two draft conventions to be prepared by the special rapporteur, of the right of States to deprive persons of their nationality. There was a substantial measure of agreement in favour of Mr. Sandström's proposal, and the Commission should allow the special rapporteur some latitude in pursuing his study of the problem.

33. Mr. LIANG (Secretary to the Commission) felt that there was some force in Mr. Yépes' argument that the Commission should consider certain questions of principle before taking a decision on Mr. Sandström's

proposal. That was desirable in order to indicate to the special rapporteur the trend of thought in the Commission.

34. Referring to Mr. Córdova's contention that cancellation of naturalization which had been acquired by fraud would not lead to statelessness because the original nationality would automatically be recovered, he doubted whether that would prove to be the case universally. For example, under Chinese law, a Chinese national desiring to acquire another nationality had to obtain an expatriation permit and, once that permit had been issued, he could not recover his Chinese nationality without instituting proceedings for naturalization.

35. Mr. KOZHEVNIKOV agreed with Mr. Yépes that a clear distinction must be made between citizenship and nationality. In some multi-national States the same rights of citizenship were enjoyed by all. In others, there were nationals who were not citizens. Some members were apparently referring to citizenship and not nationality.

36. Mr. LAUTERPACHT said that he would find it difficult either to support or to oppose Mr. Sandström's proposal which, though eminently reasonable, had certain drawbacks. For the special rapporteur to consider other grounds on which persons were liable to be deprived of their nationality, once he had decided to put forward only the three mentioned in point 18, might be a work of supererogation.

37. Turning to the arguments advanced by Mr. Spiropoulos, he pointed out that the United Kingdom, which applied a combination of the principles of *jus soli* and *jus sanguinis*, did not enforce deprivation of nationality as a penalty. Nor did France, except in the case of a person already possessing another nationality who behaved in a manner inconsistent with French national interests. Deprivation of nationality as a penalty did not exist in many countries.

38. Mr. Spiropoulos had also raised a wider issue and had contended that a State, being an association, was entitled to expel one of its members who acted contrary to the nature and spirit of such association. It should be remembered, however, that nationality was not a favour conferred by the State, but a function which the State performed within the framework of international law. Nationality was a link between the individual and the benefits which international law conferred upon him. There was a clear element of exaggeration in the argument that the State was an association of like-minded persons.

39. He did not believe that the Commission need spend any more time in discussing the merits of the grounds on which States might deprive persons of their nationality. Few of them would stand the challenge of reason, expediency or public sentiment, which was increasingly in favour of eliminating statelessness.

40. Mr. SANDSTRÖM observed that, since cases of nationality being acquired by fraud were so rare, the Commission should devote itself rather to the other

grounds on which far more persons were rendered stateless.

41. Mr. AMADO said that the wording of point 18 in the special rapporteur's report was perfectly clear and precise, and in his view, struck a happy compromise between the extreme views advanced during the discussion by various members of the Commission. Mr. Sandström's proposal, on the other hand, would give the special rapporteur little in the way of practical guidance.

42. Under Brazilian law no person could be deprived of Brazilian nationality unless he acquired the nationality of another State or unless he was convicted of treasonable activities against the State. The loss of political and civic rights was a question quite distinct from that of the loss of nationality.

43. After further discussion, the CHAIRMAN put Mr. Sandström's proposal to the vote.

Mr. Sandström's proposal was adopted by 8 votes to 1, with 3 abstentions.

Point 19

44. Mr. HUDSON said that, in accordance with a suggestion made by the Chairman, he wished to delete the introductory phrase from point 19. There was also an error in the final sentence. The correct text of point 19 should therefore read as follows :

"The following rules shall be applicable with reference to territory over which the sovereignty is transferred :

"(i) If the transferring State continues to exist, no person inhabiting the transferred territory shall lose his nationality as a consequence of the transfer, unless he acquires the nationality of another State ;

"(ii) The State to which the territory is transferred shall confer its nationality on the persons inhabiting the territory, subject to their option to retain the nationality of the transferring State if the latter continues to exist ;

"(iii) The State to which the territory is transferred may not impose its nationality against their will on persons who have previously inhabited the transferred territory but have established their habitual residence elsewhere.

"[Alternative—Leave this whole matter to be dealt with by treaty.]"

45. Mr. KERNO (Assistant Secretary-General) suggested that it would be logical to take sub-paragraph (ii) before sub-paragraph (i), since the general rule was that the inhabitants went with the territory.

46. The CHAIRMAN invited comments on sub-paragraph (ii).

47. Replying to a question by Mr. CÓRDOVA, Mr. HUDSON confirmed that if the principle contained in sub-paragraph (ii) was approved and incorporated in a convention, it would be binding on all States which

acceded to the convention and that such States would not be free to make contrary arrangements in the treaty providing for transfer of territory. In other words, the Commission must choose between the principle contained in sub-paragraph (ii) and the alternative principle that the whole matter of change of nationality consequent upon the transfer of territory be left to be dealt with by treaty.

48. Mr. CÓRDOVA pointed out that if the Commission left the whole matter to be dealt with by treaty, the present situation would not have been improved.

49. Mr. SANDSTRÖM said that in his view the whole matter should be dealt with by treaty.

50. The CHAIRMAN put the rule in sub-paragraph (ii) to the vote.

That rule was approved by 11 votes to 1, with 1 abstention.

51. The CHAIRMAN invited comments on sub-paragraph (i) of point 19.

52. Mr. CÓRDOVA pointed out that if, by virtue of the proviso contained in sub-paragraph (ii), all or a large proportion of the inhabitants of a transferred territory opted to retain the nationality of the transferring State, the State to which the territory was transferred would have within its borders an alien minority. Some proviso should therefore also be included in sub-paragraph (i).

53. Mr. LAUTERPACHT pointed out that if, in such cases, an individual opted to retain the nationality of the transferring State, the State to which the territory was transferred could expel him.

54. Mr. HUDSON reminded the Commission that it was not adopting legal texts but only approving principles.

55. The CHAIRMAN put to the vote the rule contained in sub-paragraph (i).

The rule contained in sub-paragraph (i) was approved by 11 votes to 1, with 1 abstention.

56. The CHAIRMAN invited comments on sub-paragraph (iii).

57. Mr. LAUTERPACHT said that the principle contained in sub-paragraph (iii) was a well-established one, which would be acceptable to most countries, but it was not directly germane to the question of statelessness. Such a rule should properly belong to the codification of the law of nationality, and should have no place in a draft convention for the reduction of statelessness.

58. Mr. SANDSTRÖM agreed with Mr. Lauterpacht, but suggested that the Commission should make clear in its report that it had not overlooked the question, but merely felt it would be inappropriate to refer to it in a convention whose aim was the reduction of statelessness.

59. Mr. LIANG (Secretary to the Commission) felt that the question dealt with in sub-paragraph (iii) would be highly pertinent to the work of codifying nationality laws, which he hoped the Commission would one day take up, but that it lay quite outside the field of statelessness, properly speaking.

On the understanding that the Commission's report would indicate that the Commission had considered the question, it was agreed, by 8 votes to none, with 2 abstentions, that the special rapporteur be requested not to devote any further attention to the question dealt with in sub-paragraph (iii).

60. Mr. ZOUREK drew attention to the paragraph in section II, 4(a) in the special rapporteur's report, reading as follows:

"After the Second World War, nationality was withdrawn *en masse* from persons of German and Hungarian races by Czechoslovakia and from persons of German race by Poland. Persons of German race were expelled to Germany under the Potsdam Agreement."

61. In point of fact, at the time of the occupation of Czechoslovakia by Nazi Germany in 1938 and 1939, almost all persons of German race had been given German nationality. When such persons had been deprived of Czechoslovak nationality after the Second World War, they had therefore acquired another nationality. Moreover, the law in question had provided that they could retain Czechoslovak nationality if they could furnish proof that they had remained loyal to Czechoslovakia or that they had played an active part in the allied struggle against Nazi Germany.

62. The CHAIRMAN said that the correction made by Mr. Zourek would be noted.

63. The Commission had now completed its discussion of the nineteen points contained in Section VI of Annex III to the special rapporteur's report, and the votes it had taken would serve as guidance for the special rapporteur in drafting conventions for presentation to the Commission at its next session, in accordance with the proposal made by Mr. Sandström and adopted at the 160th meeting.¹

Other points for discussion

64. Mr. LAUTERPACHT asked for confirmation of the fact that the Commission did not wish a convention to be drafted with a view to reducing existing cases of statelessness. In his view, that decision was correct, because, although the reduction of such existing cases of statelessness was an important and urgent problem, it was primarily one of a political nature and probably lay outside the Commission's field of work, which was the progressive development and codification of international law.

65. Mr. CÓRDOVA felt that, even if the Commission could hope for little practical success when dealing with

what was primarily a political problem, it would be subjected to much criticism if it did not at least consider the problem of reducing existing cases of statelessness. Resolution 319 B III (XI) of the Economic and Social Council had not, in his view, distinguished between existing cases of statelessness and cases arising in the future.

66. Mr. HSU agreed that the Commission should at any rate indicate how cases of existing statelessness could be reduced by juridical means.

67. The CHAIRMAN said that points 4 to 8 of the points for discussion contained in Section VI of Annex III to the special rapporteur's report related to the reduction of existing statelessness. Of those points, the Commission had discussed only point 8, on which it had decided to express no opinion. Points 4 to 7 appeared in the main to be limited to statements of fact, and as such had not been thought to provide a suitable basis for discussion.

68. Mr. KERNO (Assistant Secretary-General) thought that the only question in those four points which the Commission could usefully discuss was that contained in point 7, namely, whether any recommendations could be made similar to those contained in the resolution of the Economic and Social Council already referred to and in Article 34 of the 1951 Convention relating to the Status of Refugees.²

69. Mr. SANDSTRÖM felt that if the Commission could make useful recommendations there was no reason why it should not do so. In the circumstances, however, it could not add much to the recommendations already adopted.

70. Mr. ZOUREK recalled that the Commission had decided to defer a vote on point 1, which read "It is difficult to envisage any measures which would wholly eliminate the statelessness of presently stateless persons", until it had discussed the other points.³ The votes which had been taken on the other points might, however, make a vote on point 1 appear unnecessary.

71. Mr. HUDSON drew attention to the fourth paragraph of the preamble to Economic and Social Council resolution 319 B III (XI), in which the Council pointed out that it was necessary "both to reduce the number of stateless persons and to eliminate the causes of statelessness". The reference to reduction of statelessness might be interpreted as covering present and future cases.

72. It would be noted, however, that the various suggestions for reducing the number of existing cases of statelessness contained on page 168 of *A Study of Statelessness* (*op. cit.*) were all in the nature of recommendations to governments, and he doubted whether it was the Commission's task to make such recommendations. He had given much thought to devising other means for reducing existing statelessness, or for

² United Nations Publication, Sales No. 1951. IV. 4.

³ See summary record of the 158th meeting, para. 46.

¹ See summary record of the 160th meeting, paras. 32—45.

eliminating it, but had come to the conclusion that no attempt was likely to meet with success.

73. Mr. KERNO (Assistant Secretary-General) pointed out that, on the same page of *A Study of Statelessness*, the Secretary-General had expressed the view that governments could apply certain of the remedies he had proposed as a means of reducing existing statelessness without the conclusion of international agreements, and had continued: "In other cases either general or special agreements would be necessary. In almost all cases, however, the desired result would be attained with much more certainty through agreements."

74. Mr. LAUTERPACHT pointed out, with regard to that part of the Council's resolution referred to by Mr. Hudson, that if the causes of statelessness were eliminated, there would obviously be no need to reduce the number of cases of statelessness arising in the future. It seemed obvious, therefore, that the Council had been referring to the necessity of reducing the number of cases of statelessness already existing. To that end, however, it had, in the first and second operative paragraphs of the same resolution, made a number of recommendations to States. With reference to the International Law Commission, it had limited itself to urging that the Commission prepare at the earliest possible date a draft international convention, or conventions, for the elimination of statelessness.

75. Although he was still doubtful about the possibility of devising juridical measures for the reduction of existing statelessness, the question should in any case be mentioned in the Commission's report.

76. Mr. SPIROPOULOS felt that the Commission should bear in mind the fact that, when it had decided to take up the topic of nationality including statelessness, it had regarded the task as one of codification. The Economic and Social Council had made a general request to the Commission; it had not requested it to consider what was, as had been pointed out, a purely political problem involving no complicated legal issues.

77. Mr. HSU pointed out to Mr. Spiropoulos that at the very outset of its consideration of item 6 of its agenda, the Commission had decided to deal with the question of statelessness apart from that of the codification of the law of nationality.

78. Mr. AMADO said that all members recognized that the question of refugees was an urgent and important humanitarian problem. On the other hand, all countries were already giving attention to it as such. As Mr. Spiropoulos had pointed out, the legal problems involved were simple. The Commission had not been asked to consider that question and he did not see how it could make any useful recommendations concerning it.

79. Mr. LAUTERPACHT said that, to simplify the discussion, and because the special rapporteur had expressed no strong views on the question, he would propose that the Commission request the special rapporteur to give further consideration to the possibility

of reducing existing cases of statelessness by juridical means.

Mr. Lauterpacht's proposal was rejected by 5 votes to 4, with 3 abstentions.

80. The CHAIRMAN stated that the Commission had completed, for the present session, its consideration of item 6 of the agenda.⁴

The meeting rose at 6.5 p.m.

⁴ See however, summary record of the 172nd meeting, paras. 62—67.

164th MEETING

Tuesday, 15 July 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS

Present:

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

Secretariat: Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 5 of the agenda) (A/CN.4/53)

1. The CHAIRMAN invited the Commission to pass to the consideration of item 5 of the agenda, relating to the régime of the territorial sea, and of the report (A/CN.4/53) thereon prepared by the special rapporteur, Mr. François.

GENERAL

2. Mr. FRANÇOIS, introducing his report, said it was most opportune that the Commission should be giving it a first reading at the present session, since the question of the régime of the territorial sea was closely connected with those of the régime of the high seas and of the continental shelf, which were to be taken up again at the fifth session.

3. His task had been facilitated by the work done at the Conference for the Codification of International Law held at The Hague in 1930. It would be remembered that it had then been decided that it would be impossible to formulate a draft convention on the subject because of the wide divergencies of view on the breadth of the territorial sea. On all other points there had been virtual agreement. Taking as a basis the work of The Hague Conference, he was submitting a provisional draft regulation consisting of twenty-three articles, including one on the breadth of the territorial sea. As the Commission had provisionally allotted only four meetings for the consideration of the problem, it would probably be impossible for all twenty-three articles to be taken up. He would accordingly suggest that for the present the Commission confine itself to four main points.

4. The first was the juridical nature of the authority exercised by the coastal state over the territorial sea. He did not envisage that that should take up much time since, judging from the discussions on the continental shelf, there seemed to be a wide measure of agreement among members on that point.

5. The second point was the breadth of the territorial sea, and there the Commission would have to decide whether existing international law recognized a fixed limit, and if not, whether it could be determined *de lege ferenda*.

6. The third point related to the base line from which the breadth of the territorial sea should be measured. That problem had considerable topical interest in view of the judgment rendered by the International Court of Justice on 18 December 1951 in the *Fisheries Case* between the United Kingdom and Norway.¹ A question of principle would arise there as to whether the Commission was bound by a decision of the Court. That issue had been examined at the previous session in connexion with a discussion of the *Lotus Case*, and the Commission had decided that it was not bound by a decision of the Permanent Court of International Justice.² It should be borne in mind, however, that the circumstances were somewhat different, inasmuch as the *Lotus Case* had occurred twenty years ago and the division had been very close. In the *Fisheries Case* between the United Kingdom and Norway, on the other hand, the judgment had been approved by a substantial majority of the Court.

7. The fourth point was the delimitation of the territorial sea of two adjacent States, and was closely connected with the delimitation of the continental shelf. As numerous governments had indicated in their replies on the continental shelf, the delimitation of the latter was impossible without delimitation of the territorial sea.

8. The points he had enumerated were dealt with in articles 2, 4, 5 and 13 of his draft regulation, and he suggested that there was no need for the Commission to hold a general discussion on the report. It might

proceed immediately to the consideration of those four articles, since that would afford members an opportunity of raising all general points of major importance. He would ask, if members had no opportunity of commenting at the present session on points of lesser importance, that they submit their observations on such points to him in writing so that he might take them into account in preparing his second report for submission at the fifth session.

9. Mr. KOZHEVNIKOV said that he would make no secret of his impression that some members were attempting to speed up the Commission's work at all costs, regardless of its quality. The pace at which the Commission was working was not consonant with the gravity of the problems before it. Decisions were sometimes taken precipitously without prior discussion, and it often happened that the Commission was unable subsequently to disentangle what it had adopted at a preceding meeting. He wondered how science would progress if matters were decided by simple vote; it could not be denied that the Commission sometimes took what seemed to be almost mechanical votes on very important matters.

10. He was very much concerned that the report under consideration should not be dealt with in that way, and accordingly proposed the following resolution:

“WHEREAS the report on the régime of the territorial sea reached members of the Commission relatively late; calls, by virtue of its importance, for the most serious study; is of undoubted interest to all States, and especially to those with a seaboard and navy; and, moreover, clearly requires substantive modification,

“Therefore the INTERNATIONAL LAW COMMISSION, without having discussed the substance of the said report at its present session, INSTRUCTS the Secretariat of the United Nations to transmit, in accordance with the Statute of the Commission, the report and draft regulation on the régime of the territorial sea to the governments of all Members of the United Nations for their observations, and

“DECIDES to consider such observations and replies of governments, together with said report and draft regulation, at its next session.”

11. Once the Commission had been supplied with such additional material it could fruitfully deal with the report in a manner appropriate to its responsibilities.

12. Mr. LIANG (Secretary to the Commission) pointed out that the method adopted by the Commission for dealing with the problem of the régime of the territorial sea was in conformity with article 19 of its Statute. It was for the Commission to decide whether, in accordance with article 19, paragraph 2, governments should be requested “to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relative to the topic being studied...”

13. To the best of his knowledge the Commission had

¹ I.C.J. Reports 1951, p. 131.

² See summary record of the 122nd meeting, para. 71.

never yet circulated a report of a special rapporteur to governments for comment, but it was a matter of common knowledge that all United Nations documents were distributed to Member Governments.

14. Mr. SPIROPOULOS endorsed the Secretary's remarks and stressed that papers prepared by special rapporteurs appointed by the Commission were merely an expression of their personal view. Only texts approved by the Commission could be sent to governments for comment.

15. Mr. CÓRDOVA said that he would like to have access to the documentary material submitted by the Secretariat to the special rapporteur and mentioned in the comment to article 4.

16. Mr. LIANG (Secretary to the Commission) said that in response to a request by Mr. François the Secretariat had made a collection of laws on the territorial sea, which it intended to publish in book form, perhaps during 1953.³ But before that could be done the material would have to be carefully checked and edited. As it was extremely voluminous it would be impossible to make copies available to all members of the Commission at the present stage, but the Secretariat would be ready to deal with any individual request for particular information.

17. The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal.

Mr. Kozhevnikov's proposal was rejected by 10 votes to 2, with 2 abstentions.

18. Mr. KOZHEVNIKOV said that as his proposal had been rejected he wished to make some general observations on Mr. François' report, which repeated in the main the report prepared by him at the Conference for the Codification of International Law held at The Hague in 1930.

19. At first reading the draft articles prepared by the special rapporteur gave rise to a number of serious misgivings, the first being the use of the term "territorial sea" in place of the term "territorial waters" which occurred twice in General Assembly resolution 374 (IV), by which the Commission had been asked to give priority to the subject.

20. The second concerned the possibility of adopting a uniform maximum breadth for territorial waters. Mr. François had proposed that it be six nautical miles. He doubted whether that would be acceptable, since conditions varied widely and a number of States, including the Soviet Union, Bulgaria and certain Latin-American countries such as Colombia and Guatemala, had already adopted a limit of twelve nautical miles.

21. He also had weighty objections to article 2, which dealt in extremely vague terms with sovereignty over the territorial sea and failed to specify to what conditions prescribed by international law such sovereignty would be subject.

22. Article 6, relating to bays, laid down the rule that the belt of territorial sea should be measured from a straight line drawn across the opening of the bay, or, if the opening were more than ten miles wide, from a straight line drawn at the nearest point to the entrance at which the opening did not exceed ten miles. No such rule, however, was recognized by many States; indeed, its existence had been denied by the International Court of Justice in its judgment in the *Fisheries Case*, when it had declared: "In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."⁴

23. Neither could he agree with the provision in article 22 that, as a general rule, a coastal State should not forbid the passage of foreign warships in its territorial sea and should not require a previous authorization or notification.

24. Article 13, which had no parallel in the draft prepared at The Hague Conference, dealt with the delimitation of the territorial sea of two adjacent States, but failed to take existing practice into account.

25. In the light of the foregoing considerations, he would submit the following proposal:

"In view of the fact that the report on the régime of the territorial sea requires substantive modification, the Commission decides not to proceed at the present session with an article-by-article discussion of the draft regulation, but to confine itself to a general exchange of views, taking up the draft, article by article, at its next session."

26. The CHAIRMAN suggested that, like Mr. Kozhevnikov, other members might wish to make certain general remarks, having in mind the principal issues enumerated by the special rapporteur.

27. Mr. HUDSON said that it would be interesting to have the special rapporteur's views on the principal criticism levelled against the draft on the régime of the territorial sea worked out at The Hague Conference of 1930, a criticism which Mr. François had no doubt considered and which in his view might perhaps be dismissed. That criticism was that it was pointless to attempt to lay down a legal régime of world-wide application because conditions on various coasts differed so greatly. He had been struck by the force of that argument while studying the problem over the past six or seven years, during which time he had examined some 500 to 600 nautical charts.

28. Mr. ZOUREK said that the Commission should give a great deal of thought to its working methods, particularly when taking up a new subject so extensive

³ *Laws and Regulations on the Régime of the Territorial Sea*, United Nations Publication, Sales No.: 1957. V. 2.

⁴ *Fisheries Case*, Judgment of 18 December 1951: I.C.J. Reports 1951, p. 131.

and important as the one under consideration. In the present case the question of method was clearly governed by the time factor. As only four meetings were to be devoted to item 5, the Commission could not hope to deal with all twenty-three articles of the special rapporteur's draft regulation. On the other hand, it would be too restrictive to focus attention merely on the four points mentioned by Mr. François. It was very doubtful whether the palliative offered by the special rapporteur, namely, that members should forward their comments to him in writing, would prove very effective.

29. In studying the report, he had become convinced that it would be most useful, even indispensable, to ascertain the views of governments on certain specific points before attempting to draft a convention. He accordingly proposed that the Commission confine itself to drawing up a very clear and precise questionnaire, which governments could answer without extensive preliminary research. That questionnaire might cover the following points :

- (1) The breadth of territorial waters ;
- (2) The drawing of the base line ;
- (3) The drawing of the base line in bays ;
- (4) Definition of a bay ;
- (5) Régime of lighthouses erected in the high seas on rocks exposed only at low tide ;
- (6) Groups of islands, or islands situated along the coasts ;
- (7) Demarcation of the boundary between territorial waters in straits bounded by two or more coastal States, and where the combined breadth of the two belts of territorial waters exceeded the width of the strait ;
- (8) Delimitation of the territorial waters of two adjacent States ;
- (9) Right of passage ;
- (10) Arrest on board a foreign vessel in territorial waters ; and
- (11) Passage of warships.

30. Governments should also be asked whether they were in favour of the conclusion of an international convention even if agreement could not be reached on the breadth of territorial waters.

31. The preparation of the questionnaire would give all members of the Commission an opportunity of indicating their attitude on specific points, which would assist the special rapporteur in drafting his next report.

32. Mr. CÓRDOVA thought that, if the Commission wished to examine the régime of territorial waters thoroughly, it would have to take up every single article in Mr. François' draft. If Mr. Zourek's proposal were rejected he would support the special rapporteur's suggestion, on the understanding that members could request that articles other than those he had listed be considered.

33. Mr. FRANÇOIS observed that the report was only being given a first reading at the present session. All articles would be taken up at the fifth session.

34. Mr. YEPES said that he had abstained from voting on Mr. Kozhevnikov's proposal because he thought that, had it been discussed at greater length, some compromise solution might have been reached whereby the Commission would take up general issues relating to the régime of the territorial sea at the present session, and also send a questionnaire to governments.

35. Turning to the special rapporteur's report, he associated himself with Mr. François' view on the nature of the sovereignty exercised by States over the territorial sea.

36. He added that it was perfectly clear from a study of the report that the so-called three-mile limit for the breadth of territorial waters was a false dogma which modern international law had rejected. All the countries of America, from Canada to Chile and the Argentine, had adopted in one form or another a breadth of more than three miles, as had a large number of states of Europe, Asia and Africa. It could therefore be concluded that contemporary international law did not recognize a breadth of three miles as the limit of territorial waters. That was a false dogma which was quite unacceptable in the light of modern scientific knowledge.

37. The CHAIRMAN invited the Commission to take up article 2 in the special rapporteur's draft.

ARTICLE 2 : JURIDICAL STATUS OF THE TERRITORIAL SEA ⁵

38. Mr. HUDSON said that the phrase "subject to the conditions prescribed by international law" was too vague. The restrictions on the exercise of sovereignty over the territorial sea should be set forth in the draft convention or regulation. Personally, he only knew of one such restriction, namely, the right of innocent passage.

39. Using the phrase "coastal State", which had been adopted by the Commission during its discussions on the continental shelf, he suggested that article 2 be re-drafted to read :

"Sovereignty over this belt is exercised by the coastal State subject to the conditions set forth in this convention."

40. Mr. FRANÇOIS pointed out that, when drafting the articles he had not known what their ultimate fate would be, and for that reason had avoided mentioning a convention.

41. The important issue raised by Mr. Hudson concerning the possibility of drafting uniform rules would have to be examined, but he did not think that diversity of conditions throughout the world should preclude the formulation of a universally applicable régime taking those divergencies into account.

⁵ Article 2 read as follows :

"Sovereignty over this belt is exercised subject to the conditions prescribed by international law."

PROCEDURE TO BE FOLLOWED

42. Referring to Mr. Zourek's proposal, he (Mr. François) said that the difference between the two procedures envisaged was not so great as might at first sight appear. In his opinion, the Commission should discuss the problem and then draw up draft rules for submission to governments for comment. Experience had proved that to be a more efficacious method of obtaining the views of governments than the circulation of questionnaires, which were apt to remain unanswered and were looked on by government departments as an incubus. His argument was reinforced by the unlikelihood of replies being provided by governments before the fifth session.

43. Mr. el-KHOURI agreed with the Secretary that the Commission could not circulate to governments for comment a report which it had not examined itself.

44. There was no reason why, after consideration of the four articles specified by Mr. François, the Commission should not take up others.

45. Mr. KOZHEVNIKOV said that Mr. Zourek's proposal, which was entirely consonant with the Commission's Statute, merited full consideration, and should take precedence over his own.

46. Mr. SANDSTRÖM pointed out that, as the Secretary had already mentioned, article 19, paragraph 2, of the Commission's Statute provided merely that the Commission should request governments to furnish "the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary." It did not provide that it should ask governments for their views. Article 21, on the other hand, provided that the Commission should request governments to submit their comments on a draft, but only when the Commission considered it to be satisfactory.

47. The CHAIRMAN said that the proposal submitted by Mr. Zourek read as follows :

"The Commission decides to draw up at its present session a questionnaire on the matters dealt with in the report on the régime of the territorial sea and to send it to governments through the Secretary-General."

48. Mr. CÓRDOVA did not altogether agree that Mr. Zourek's proposal ran counter to the Commission's statute. The articles quoted by Mr. Sandström related to the procedure which was to be followed in respect of codification. It was true that some parts of the Commission's work on the régime of the territorial sea could be regarded as codification, and in that connexion he would point out that, so far as he knew, the provisions of article 19, paragraph 2, had not yet been complied with. In other respects, however, with regard to the limits of the territorial sea, for example, the work was one of progressive development of international law, so that the provisions of article 16 of the Statute should also be complied with.

49. Although it was perhaps over-optimistic to hope that all governments, or even the great majority, would reply to the questionnaire, it would be better to have the comments of only a few governments than none at all. It should be borne in mind, moreover, that the question was of great interest to governments, and that they might therefore be more inclined to reply than in the case of other questionnaires.

50. Mr. SPIROPOULOS felt that the Statute was perfectly logical. The views of governments could be regarded as irrelevant to the scientific work of codification, although it should be borne in mind that even in the field of codification the Commission was required, under article 22, to take the comments of governments into account in preparing its final drafts for submission to the General Assembly. The question at present under discussion was purely one of codification, and although he had great sympathy with Mr. Zourek's proposal, he could not support it, since it ran counter to the Statute.

51. Mr. AMADO associated himself with Mr. Spiropoulos' remarks. He felt bound to point out, however, that the special rapporteur had indicated, in a number of passages in his report, that the agreement of governments to the provisions drafted by the Commission would have to be obtained. The only question, therefore, was whether that agreement should be obtained, as it were, in advance.

52. Mr. LAUTERPACHT felt that on balance the arguments were in favour of sending out a questionnaire to governments. He would therefore support Mr. Zourek's proposal, provided the special rapporteur did not consider that it would seriously hold up his work. He realized that it would be an inconvenience to governments to have to reply to a questionnaire, but he did not agree that they would be any less likely to do so than to submit comments on specific proposals. The Commission might consider some procedure for persuading them to reply within a reasonable period. The special rapporteur need not in any case wait for governments' replies to the questionnaire before continuing his work on the régime of the territorial sea. The only practical question therefore, in his view, was whether a questionnaire could be drafted in the time at the Commission's disposal which would elicit not only statements of fact but expressions of view, such as those which had made the replies to the questionnaire on statelessness so valuable.

53. Mr. FRANÇOIS said that he was firmly opposed to Mr. Zourek's proposal, both for the reasons advanced by Mr. Spiropoulos and because he considered that the procedure established in the Commission's Statute was a great advance on previous procedure. Governments often felt themselves committed by their replies to a questionnaire ; no room was left for the changes of view and compromises required to reach subsequent agreement. If, on the other hand, the Commission submitted to governments rules which formed a whole and requested their comments on that whole, they might, for

the sake of the whole, accept individual provisions which they would have rejected had they been put to them separately at the outset.

54. He also opposed Mr. Zourek's proposal because he realized that it could not be expected that replies from governments would be received before April or May 1953 at the earliest, and he would therefore have no time to take them into account in preparing his report, which had to be submitted in advance of the next session. Moreover, if he was to base his proposals on the comments received from governments, it would obviously be necessary for him to wait until he had received the replies of all, or at least of the great majority; there was no assurance that the States most concerned would be the first to reply. In fact, adoption of Mr. Zourek's proposal would entail deferring until 1954 further consideration of the régime of the territorial sea, and therefore, as he had already pointed out, of the connected question of the continental shelf also.

55. Mr. KOZHEVNIKOV pointed out that the question under discussion had a bearing on all the Commission's work, and that it should be decided with reference to the Commission's basic functions. As a scientific body, the Commission must obtain the fullest possible data on the questions with which it had to deal. The value of Mr. Zourek's proposal as a means of ensuring that it had such data was evident, and he therefore supported it.

56. Mr. SCELLE agreed with Mr. François and Mr. Spiropoulos that experience had shown the advantages of the procedure laid down in the Commission's Statute over that which had spelt inactivity and frustration for the technical organs of the League of Nations.

57. Mr. LIANG (Secretary to the Commission) said that the question of the régime of the territorial sea was clearly one of codification. In his view, too, the procedure laid down in the Statute for such work was wise and logical. Very considerable material in the form of doctrine and legal texts was available, and the special rapporteur had now brought it up to date. Any views expressed by governments in reply to a questionnaire might well be *ad hoc* statements which would not carry the authority of the texts already at the Commission's disposal.

58. Mr. ZOUREK pointed out that the special rapporteur had himself indicated that the question could in many respects be regarded as one of progressive development. His (Mr. Zourek's) proposal did not aim at amending the Commission's normal procedure, but merely at adapting it to a particular subject of great importance. If the Commission asked governments for their views on certain specific aspects of the question which could be regarded as bearing on progressive development, he did not think it was over-optimistic to hope that replies would be received within six to eight months. Nor could he regard as valid the argument that a questionnaire was undesirable since governments

would consider themselves committed by their replies to it; their views on the régime of the territorial sea were already fixed.

59. The CHAIRMAN put Mr. Zourek's proposal to the vote.

Mr. Zourek's proposal was rejected by 9 votes to 3, with 2 abstentions.

60. The CHAIRMAN drew attention to Mr. Kozhevnikov's second proposal⁶ and asked its author whether its adoption would exclude subsequent discussion of the four articles which the special rapporteur thought of crucial importance, and of any other articles which the Commission subsequently decided to consider.

61. Mr. KOZHEVNIKOV said that any member of the Commission could of course refer to any article in the course of the general debate. The aim of his proposal was to prevent the Commission from considering the articles separately and voting on each of them.

Mr. Kozhevnikov's second proposal was rejected by 7 votes to 4 with 3 abstentions.

62. The CHAIRMAN said that the Commission would therefore follow the procedure suggested by the special rapporteur.

THE TERM "TERRITORIAL SEA"

63. Mr. KOZHEVNIKOV, referring to the Commission's decision to embark on a substantive discussion of the special rapporteur's proposals concerning the régime of the territorial sea, said that his comments on various points in the draft articles contained in the special rapporteur's report would be of a preliminary nature and that he reserved the right to revert to them later since the draft articles would need substantial final shaping before the next reading. Meanwhile, he again asked the special rapporteur why he had substituted the term "territorial sea" for the usual term "territorial waters", which had been used in General Assembly resolution 374 (IV).

64. Mr. FRANÇOIS had not understood that the General Assembly, which was not made up of legal experts, had intended to consecrate that term for all time. The reason why he had preferred the term "territorial sea" was, as pointed out in his comment to article 1, that use of the term "territorial waters" led to confusion owing to the fact that it was also applied to inland waters.

65. Mr. LAUTERPACHT said that the term "territorial sea" was still not current in English usage, and that he doubted whether there was any tendency for its use to increase. He appreciated the desirability of distinguishing between national waters and what the special rapporteur called the "territorial sea", but must point out in that connexion that the recent judgment of the International Court of Justice in the *Fisheries*

⁶ See para. 25 above.

Case obscured that distinction. On page 125 of the text of the judgment, for example, it was stated that there could be no doubt that the zone delimited by the Norwegian Royal Decree of 12 July 1935 (i.e., including national or inland waters), was none other than the sea area which Norway considered to be her territorial sea. Yet the primary purpose of that decree was to deal with what were claimed to be the national, the internal, waters of Norway. Neither had the distinction been observed in the separate or dissenting opinions. He did not, however, consider that the Commission was bound to follow the Court inasmuch as it failed to distinguish between national waters and the "territorial sea". On the contrary, he agreed with the special rapporteur that the distinction was vital, but suggested that he might consider expanding article 1 to make the meaning absolutely clear.

66. He recalled that it had been suggested by Mr. Hudson⁷ that the conditions subject to which sovereignty over the territorial sea was exercised should be set forth explicitly in the convention. It might be, however, that, by oversight or otherwise, the Commission would not list in the convention all such conditions. He wondered, therefore, whether it might not be preferable to say, as the special rapporteur had said, "subject to the conditions prescribed by international law."

The meeting rose at 1.5 p.m.

⁷ See paras. 38 and 39 above.

165th MEETING

Wednesday, 16 July 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS

Present:

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

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 5 of the agenda) (A/CN.4/53) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the special rapporteur's report on the régime of the territorial sea (A/CN.4/58), with special reference to articles 2, 4, 5 and 13, and recalled that Mr. Kozhevnikov had raised a preliminary question concerning terminology.¹

THE TERM "TERRITORIAL SEA" (continued)

2. Mr. HUDSON said that, contrary to what Mr. Lauterpacht had maintained, the International Court of Justice, in its judgment in the *Fisheries Case* between the United Kingdom and Norway, 1951, had not used the term "territorial sea" in any sense other than that in which the special rapporteur understood it. The sole object of the passage in the judgment quoted by Mr. Lauterpacht was to make clear that the lines drawn in the Norwegian Royal Decree of 12 July 1935, had been intended by the Norwegian Government to delimit Norway's territorial sea for all purposes, and not for purposes of fishing alone, and that the Court and the other party to the dispute had accepted the fact that that had been the Norwegian Government's intention. There had been no question, however, but that the territorial sea was the four-mile belt *outside* those lines.

3. There was something to be said in favour of the use of either term, "territorial sea" or "territorial waters". There would be no room for doubt, however, as to what was meant if article 1 were amended to read:

"The territory of a coastal State included a belt of marginal sea described as the territorial sea."

4. Mr. ZOUREK felt that the Commission should at least attempt to contribute towards the standardization of terminology, which at present differed so greatly in the matter under discussion. Despite the many years that had elapsed since the Conference for the Codification of International Law held at The Hague in 1930, the term "territorial sea", used in the Regulations drawn up at that Conference, had not gained currency either in English or in French. Governments had continued to use the ordinary term "territorial waters" in international agreements, and both the General Assembly and the International Law Commission itself, in its report on its third session, had preferred it to the term "territorial sea". It was true that the latter term had been used by the International Court of Justice in its judgment in the *Fisheries Case*, but it was noteworthy that it had not used it consistently.

5. The arguments advanced against the term "territorial waters" were, at first sight, convincing, but the Commission should weigh against them the consideration that the terms used in languages other than English or French corresponded for the most part to the term "territorial waters", and that confusion would accordingly arise if the latter term were changed to

¹ See summary record of the 164th meeting, paras. 19 and 63.

"territorial sea". The danger of confusion resulting from the use of the term "territorial waters" could easily be averted by giving a clear definition of that term in article 1.

6. For all those reasons, he proposed that the term "territorial waters" be substituted *passim* for "territorial sea" in the draft regulation contained in the special rapporteur's report.

7. Mr. SPIROPOULOS felt that the discussion lacked scientific or practical value. The fact that the General Assembly had used the term "territorial waters" was quite without significance; it had been used merely because it had been the term used in the original draft resolution submitted in the Sixth Committee; had another term been used in that draft resolution, it would have been reproduced equally in the resolution of the General Assembly itself. The term "territorial sea" was open to no misunderstanding, and he could not understand the objections to its use.

8. Mr. SCELLE expressed agreement with the view expressed by Mr. Spiropoulos.

9. Mr. YEPES felt that it was of some importance that the Commission should attempt to promote the standardization of legal terminology. He was personally in favour of the term "territorial waters", which was in more common usage, having been employed, for example, in the Treaty of Peace with Japan, and which could, moreover, be translated into other languages word for word, whereas the alternative term could not.

10. Mr. el-KHOURI agreed with Mr. Yepes.

11. Mr. SANDSTRÖM and Mr. SPIROPOULOS pointed out that the Commission was only concerned with drafting the text in English and French. The terms used could be translated into other languages by their semantic equivalents even if they were not exact word-for-word translations.

12. Mr. KOZHEVNIKOV thought that the question of terminology which he had raised was important, and had substantive implications. The Commission should therefore consider it carefully.

13. He wondered if, in view of the arguments that had been advanced, the special rapporteur still held the view that use of the term "territorial sea" would give rise to less confusion than would the use of the customary term, "territorial waters".

14. Mr. FRANÇOIS said that, as he had already indicated, he preferred to use the term "territorial sea" for two reasons: in the first place, the term "territorial waters" was likely to lead to confusion owing to the fact that it was also applied to inland waters; secondly, an international conference had already adopted the former term, and he thought that the Commission should have more cogent reasons than had so far been advanced for reverting to the term "territorial waters".

15. Mr. LAUTERPACHT thought that the question was not of extreme importance, but he felt it was an exaggeration to say that it was of no scientific or practical value. The special rapporteur should receive guidance from the Commission as to which term he should use throughout the draft regulation. Moreover, there appeared to be some element of doubt concerning the exact meaning of the two terms.

16. Mr. LIANG (Secretary to the Commission) suggested to Mr. Spiropoulos that if the term used in the original draft resolution submitted in the Sixth Committee had not been current, it would have been changed before the resolution was adopted by the General Assembly itself. It was not therefore altogether correct to suggest that no significance attached to the term used in that resolution.

17. As the special rapporteur had pointed out, the term "territorial sea" presented the one scientific advantage that it clearly excluded inland waters. On the other hand, inland waters had so far been the subject of little controversy in international law, and it was therefore possible that no student of the subject would be likely to be confused by the term "territorial waters".

18. Mr. AMADO said that, although he personally would prefer the term "territorial waters", he would support the term "territorial sea", for the reasons given by the special rapporteur.

19. Mr. SPIROPOULOS recalled that he had merely said that the discussion lacked practical or scientific importance. The subject itself was obviously of some importance, but the special rapporteur had chosen one term in favour of another for reasons which had not yet been refuted by any arguments of equal weight in favour of the other term. On the other hand, he saw no reason why the Commission should not use the term "*mer territoriale*" in French and "territorial waters" in English, if that would resolve the difficulty with which it was faced.

20. Mr. LAUTERPACHT said that if the special rapporteur made one slight alteration to the wording he had proposed for article 1, he could satisfy those members of the Commission who preferred the term "territorial waters" while still ensuring that its use would cause no confusion. That article at present read: "The territory of a State includes a belt of sea described as the territorial sea". If he replaced the last word by the word "waters" the reference to "a belt of sea" would still make it clear that inland waters were excluded.

21. Mr. FRANÇOIS said that if Mr. Zourek's proposal were adopted, he would certainly bear in mind the point made by Mr. Lauterpacht. Not that it was entirely convincing, however, since not everyone who referred to the draft regulation would turn first to article 1. Moreover, he still saw no good reason for using the term "territorial waters" in preference to "territorial sea".

22. The CHAIRMAN put to the vote the alternative terms "territorial waters" and "territorial sea".

The term "territorial sea" was adopted by 9 votes to 5.

ARTICLE 2 : JURIDICAL STATUS OF THE TERRITORIAL SEA (resumed from the 164th meeting)

23. The CHAIRMAN invited comments on the principle contained in article 2, which read:

"Sovereignty over this belt is exercised subject to the conditions prescribed by international law."

In that connexion he recalled the suggestion made by Mr. Hudson at the previous meeting and the special rapporteur's reply thereto.²

24. Mr. KOZHEVNIKOV said that the wording suggested by the special rapporteur was vague. It failed to say what was meant by sovereignty, by whom it was to be exercised, and what were the conditions prescribed by international law to which it was to be subject.

25. Mr. FRANÇOIS drew attention to the observations on article 1, paragraph 2, of the Regulations approved by the Second Committee of the 1930 Codification Conference contained in the Committee's report. Part of those observations read:

"Obviously sovereignty over the territorial sea, like sovereignty over the domain on land, can only be exercised subject to the conditions laid down by international law. As the limitations which international law imposes on the power of the State in respect of the latter's sovereignty over the territorial sea are greater than those it imposes in respect of the domain on land, it has not been thought superfluous to make special mention of these limitations in the text of the article itself."³

He had been guided by that view, but did not feel strongly about the necessity for that article, as the principle was already laid down in article 1. He had thought it unnecessary to specify that sovereignty should be exercised by the coastal State.

26. Mr. AMADO said that, in view of the wording of article 1, which read, in its present form, "The territory of a State includes a belt of sea described as the territorial sea", he saw no need for article 2 at all. It was unnecessary to provide that a State exercised sovereignty over its own territory, and the only important extra condition to which sovereignty over the territorial sea was subject, as compared to sovereignty over the domain on land, was, as everyone knew and recognized, in respect of the right of innocent passage. He suggested therefore that article 2 be deleted.

27. Mr. LIANG (Secretary to the Commission) pointed out that the substance of articles 1 and 2 of Mr. François' draft had been combined in a single article in the

1930 regulation. Mr. François had given no reasons for splitting it into two articles, and in his (Mr. Liang's) view the combination was preferable.

28. Mr. YEPES felt that article 2 should be retained so as to make clear that sovereignty over the territorial sea was not absolute, but was subject to certain conditions. He suggested, however, that the words "prescribed by international law" should be replaced by "recognized in international law".

29. Mr. CÓRDOVA agreed with Mr. Amado that there was no need to emphasize the conditions to which the exercise of sovereignty over the territorial sea was subject; neither was it necessary to do so with regard to sovereignty over territorial land. He suggested, therefore, that the words "subject to the conditions prescribed by international law" be deleted, and the article completed merely by the words "by the coastal State".

30. Mr. FRANÇOIS pointed out that, if the words "subject to the conditions prescribed by international law" were deleted, the entire article could be deleted since, as Mr. Amado had pointed out, it was unnecessary to stipulate that a State could exercise sovereignty over its own territory.

31. Mr. el-KHOURI agreed with the special rapporteur that if the last clause was deleted article 2 would lose its *raison-d'être*. He supported the article as it stood. If it was deleted, it might be assumed that sovereignty over the territorial sea was subject only to the conditions prescribed by international law in respect of sovereignty over the domain on land. The right of innocent passage was not, however, the only additional condition to which sovereignty over the territorial sea was subject.

32. Mr. SANDSTRÖM felt that the limitations imposed by international law on the exercise of sovereignty over the territorial sea were so important that attention should be drawn to them in the very first article of the draft regulation. He would therefore suggest that the special rapporteur bear in mind the suggestion made by the Secretary.

33. Mr. SCELLE said that he would merely point out that all the Commission's difficulties in the present respect would disappear if the word "sovereignty" were replaced by the word "powers" (*compétence*).

34. Mr. LAUTERPACHT said that the sovereignty of the coastal State over the territorial sea had been so well established that he did not think the Commission could accept Mr. Scelle's view. Mr. el-Khoury had given a complete answer to Mr. Amado's suggestion. It was vital that specific reference should be made to the limitations imposed by international law on sovereignty over the territorial sea, particularly in view of the recent tendency to increase the breadth of that sea.

35. Mr. KOZHEVNIKOV agreed that the principle of the coastal State's sovereignty over its territorial sea was so well established that Mr. Scelle's suggestion could not be considered further.

² See summary record of the 164th meeting, paras. 38 to 42.

³ Quoted in document A/CN.4/53 (mimeographed English text, p. 7; printed French text, comment to article 2, para. 1).

36. Mr. ZOUREK agreed with Mr. Amado that there was no reason why special mention should be made of the limitations to sovereignty over one particular part of the national territory, and that if the last phrase of article 2 was accordingly deleted, the entire article could be deleted.

37. Mr. HSU said that the sovereignty of the coastal State over its territorial sea should be recognized. With regard to Mr. Amado's suggestion, he sympathized with it but felt it preferable to refer to the limitations in question rather than to leave the matter vague.

38. The CHAIRMAN put to the vote Mr. Amado's suggestion that article 2 be deleted in its entirety.

Mr. Amado's suggestion was rejected by 7 votes to 2, with 5 abstentions.

39. The CHAIRMAN then put to the vote Mr. Córdova's suggestion that article 2 be amended to read: "Sovereignty over this belt is exercised by the coastal State".

Mr. Córdova's suggestion was rejected by 7 votes to 5, with 2 abstentions.

40. The CHAIRMAN said that it therefore appeared that the majority of the Commission agreed that the principle stated in article 2 in the special rapporteur's draft regulation should be retained without change.

41. Mr. KOZHEVNIKOV felt that such a statement was open to question so long as the principle itself had not been put to the vote.

42. Mr. HUDSON said that he had voted in favour of Mr. Córdova's suggestion to delete the words "subject to the conditions prescribed by international law", because he felt that adoption of those words would be tantamount to saying that there were some conditions prescribed by international law which, for some reason or another, the Commission was unable to ascertain and make provision for in its draft on the régime of the territorial sea. If those words were replaced by the words "subject to the conditions prescribed in the present regulation", he would support the article as a whole. In his view there would be no great difficulty about providing the conditions; he knew of none other than those indicated in the special rapporteur's report.

43. Mr. SPIROPOULOS said that the special rapporteur had to a great extent modelled the text of article 2 on that of article 1, second paragraph, of the draft prepared by The Hague Conference for the Codification of International Law. Moreover, he had referred to "the conditions prescribed by international law" for the same reason as had prompted the inclusion of the words "and the other rules of international law" in the latter text. That reason was the impossibility of making a convention exhaustive. If that could be achieved, as Mr. Hudson had argued, there would be no need for such a proviso, but he wondered whether the Commission could be certain of being more successful in that respect than The Hague Conference.

44. Mr. CÓRDOVA was greatly disturbed by Mr. Spiropoulos' argument, since, if accepted, it would mean that the door would be left open to an unlimited number of unspecified restrictions on sovereignty over the territorial sea. He believed that those restrictions should be limited and defined, and accordingly moved the substitution of the words "in this regulation" for the words "by international law", as proposed by Mr. Hudson.

45. Mr. AMADO said that, to the best of his knowledge, there was no major derogation from the principle of sovereignty over the territorial sea other than the right of innocent passage.

46. Mr. FRANÇOIS said that he would oppose Mr. Córdova's amendment, because it was an entirely unnecessary statement of the obvious.

47. Mr. CÓRDOVA observed that that argument applied with equal force to the words "subject to the conditions prescribed by international law".

48. Mr. LAUTERPACHT agreed with the views expressed by Mr. François and Mr. Spiropoulos since, although the Commission was an authoritative and meticulous body, some restrictions on sovereignty over the territorial sea might escape it.

49. Mr. YEPES proposed that the words "and by international law" be added at the end of Mr. Córdova's amendment, so as to make article 2 read as follows:

"Sovereignty over this belt is exercised by the coastal State subject to the conditions prescribed in this regulation and by international law."

50. Mr. AMADO observed that international law was a body of known rules. The view that it included rules that were at present unknown was totally unacceptable to him.

51. Mr. ZOUREK considered that, if the Commission was to succeed in its efforts to codify international law, it must take all the relevant rules into account or its work would be totally useless. It was unthinkable that the way should be left open for unforeseeable contingencies.

52. The CHAIRMAN put Mr. Yepes' proposal to the vote.

Mr. Yepes' proposal was adopted by 7 votes to 6, with 1 abstention.

53. Mr. AMADO observed that the adoption of that proposal would make it difficult for certain States to accept such a provision.

54. The CHAIRMAN declared that he understood the Commission to have adopted article 2, as amended by Mr. Yepes' proposal.

55. Mr. KOZHEVNIKOV observed that article 2 had not been put to the vote as a whole; had that been done, he would have abstained.

56. The CHAIRMAN proposed that the Commission

pass to article 4, in accordance with the decision taken at the preceding meeting.⁴

ARTICLE 3 : JURIDICAL STATUS OF THE BED AND SUBSOIL⁵

57. Mr. KOZHEVNIKOV pointed out that article 3 raised an important question of principle, namely, that of air space. Paragraph 1 would be acceptable provided the words "and air space" were added. As he understood it, the Commission's decision to confine discussions to certain articles in the special rapporteur's draft did not preclude members from commenting on other articles which appeared to raise important matters of principle.

58. Paragraph 2 of article 3 seemed to him obscure, and he considered that it should be deleted.

59. Mr. FRANÇOIS observed that, in accordance with the Commission's decision, article 4 should be taken up first.

60. Mr. CÓRDOVA said that, since the status of the bed of the territorial sea and the subsoil was closely linked with the question of sovereignty over the territorial sea, it should be considered forthwith.

61. Mr. LAUTERPACHT expressed the hope that the Chairman would interpret the Commission's decision on its method of work literally, since it was undesirable that members should be prevented from raising important matters of principle in addition to those which would come up in connexion with the examination of the articles which the Commission had agreed to deal with.

62. Mr. el-KHOURI considered the Commission's decision at the preceding meeting to have been a reasonable one. Article 4, dealing with the limits of the territorial sea, must be taken up before article 3.

63. Mr. AMADO said that, although he was in favour of the Commission adhering to any plan of work it had adopted since members were guided by such decisions in planning their private studies between meetings he supported Mr. Kozhevnikov in his view that article 3 should be taken up at once because of its relevance to the whole problem of sovereignty over the territorial sea.

64. Mr. FRANÇOIS appealed to the Commission, if it decided to take up article 3, to conclude its discussion at the present meeting in order to leave time for the consideration of major issues.

65. The reason why he had omitted to mention air space in article 3 was that, in discussing the régime of

the continental shelf, the Commission had decided not to deal for the time being with the status of the air.

66. Mr. CÓRDOVA considered that there was no justification for extending the Commission's decision in connexion with the régime of the continental shelf to the status of the air space above the territorial sea. The same considerations for recognizing the sovereignty of States over the territorial sea applied equally to the air space above it. If no mention was made of the air space, that would imply that the Commission was in favour of a different régime for it.

67. Mr. FRANÇOIS said that the status of the air above the territorial sea could not be considered apart from the status of the air in general, otherwise the Commission would be in danger of contemplating a special régime for the former.

68. Mr. KOZHEVNIKOV said that the foregoing discussion had confirmed his arguments. He therefore moved that article 3 be taken up.

69. Mr. SCELLE said that the Commission was in danger of confusing three elements. Undoubtedly it could plunge into a general discussion on sovereignty, which would be of absorbing interest but purely academic. If anything practical was to be achieved, the Commission must confine itself to examining the problem of the territorial sea alone.

70. Mr. ZOUREK said that, since article 3 dealt with the territory of a coastal State, it was inadmissible to omit mention of the air space above it, as had been done in article 2 of the draft prepared at The Hague Conference for the Codification of International Law in 1930.

71. The only argument which had been advanced against the Commission's considering article 3 was that to do so would conflict with a previous decision. But if the special rapporteur was to prepare a draft for the next session, he must be given appropriate directives.

72. The CHAIRMAN asked whether Mr. Kozhevnikov, in making his proposal, had intended that article 3 be dealt with before any other.

73. Mr. KOZHEVNIKOV said that he had not had that in mind, though it would certainly be more logical to discuss article 3 before considering the limits of the territorial sea. However, his main concern was that article 3 should be discussed at some time or another.

74. Mr. CÓRDOVA said that he himself would propose that article 3 be taken up immediately.

Mr. Córdova's proposal was rejected by 6 votes to 5, with 3 abstentions.

75. The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that article 3 be taken up at the present session as one of the main questions of discussion. He himself suggested that it be taken up after articles 4, 5 and 13 had been disposed of.

⁴ See summary record of the 164th meeting, paras. 4—8 and 62.

⁵ Article 3 read as follows :

" 1. The territory of a coastal State also includes the bed of the territorial sea and the subsoil.

" 2. Nothing in the present Regulation prejudices any conventions or other rules of international law relating to the exercise of sovereignty in these domains."

Mr. Kozhevnikov's proposal, subject to the Chairman's suggestion, was adopted by 12 votes to none, with 1 abstention.

ARTICLE 4 : BREADTH⁶

76. Mr. FRANÇOIS said that in dealing with article 4 the Commission must decide whether existing international law recognized a limit to the territorial sea over which States exercised sovereignty, and if so, what limit. If the Commission decided in the negative, it must consider whether it was possible to reach agreement on a limit.

77. Mr. HSU, referring to the words in parentheses, namely, "Nationalist Government", after the word "China" in the commentary on article 4, expressed surprise that such a parenthetical explanation should be called for, since the names of other States in the same section of the Report did not bear similar qualification as to governments. He did not think it appropriate that the Commission should be concerned with political questions. In view of the special rapporteur's use of those words, he felt bound to point out that only one government of China had been recognized by the United Nations. He believed, however, that the addition of the parenthetical note was a mere oversight on the part of the special rapporteur.⁷

78. Article 4 was the key article in the draft, and if agreement could be reached on it the remainder of the Commission's task would be relatively easy. If not, discussion of the other articles would be more or less academic.

79. If it were possible to fix a generally acceptable limit to the territorial sea, the existing anarchy would be ended and the freedom of the seas would be reinforced, since further encroachments by States would cease.

80. He could agree with the wording of article 4, apart from the limit of six nautical miles proposed by the special rapporteur. He believed a far more sound and practical one would be twelve nautical miles, which would meet the requirements of most States. Many States which had adopted the three-mile limit had extended the limit for one purpose or another, such as customs, fishing and so on. On the other hand, very few States amongst those listed by the special rapporteur had adopted a limit in excess of twelve nautical miles, and it should be possible to convince them of the need for moderation. It would clearly be impracticable to suggest a limit of less than twelve nautical miles. The twelve-mile limit was not too high a price to pay for universal acceptance, and those States which wished to observe a narrower limit would be free to do so.

The meeting rose at 1.10 p.m.

⁶ Article 4 read as follows :

"The breadth of the belt of sea defined in article 1 shall be fixed by the coastal State but may not exceed six marine miles."

⁷ The incriminated words were deleted from the printed edition of the report.

166th MEETING

Thursday, 17 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsy Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCHELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 5 of the agenda) (A/CN.4/53) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the Draft Regulation contained in the special rapporteur's report (A/CN.4/53) on the régime of the territorial sea.

ARTICLE 4 : BREATH (continued)

2. Mr. KOZHEVNIKOV said that he had already stated the reasons for his opposition to article 4, as drafted by the special rapporteur and had drawn particular attention to the fact that the breadth of territorial waters might differ from country to country, according to conditions.¹ Some countries had adopted the twelve-mile limit, and it would be remembered that, in its reply to the questionnaire sent out by the Conference for the Codification of International Law of 1930, China had declared in favour of a limit of fifteen nautical miles.

3. So far as he knew, the Government of the People's Republic of China had so far made no ruling on the width of its territorial waters, and it would be extremely interesting to hear the views of a representative of that Government chosen by the will of the people in the exercise of their sovereign rights. Unfortunately there was no representative of the legitimate government of China in the Commission but he had no doubt that such an abnormal situation would in due course be put right. He had only touched on the matter in very general terms, out of respect for the fundamental principle of

¹ See summary record of the 164th meeting, para. 20.

international law of non-interference in the domestic affairs of States.

4. It was common knowledge that international law prescribed no criterion for determining the extent of territorial waters. What it did prescribe was that the coastal State sovereignty over its territorial waters, and that every sovereign State had the indefeasible right to fix the breadth of its territorial waters. Both theory and practice were consistent there. That befitted the present state of inter-governmental relationships. Of course, some exceptions might be provided for by specific agreements, but that merely confirmed the immutability of the general principle.

5. Mr. AMADO said that he had studied article 4, which was the crucial one in the draft, with the most careful attention. He appreciated the practical difficulties in the shape of the wide divergencies in national legislation with which the special rapporteur had been faced. States were farther from reaching agreement on the matter than they had been at the Conference for the Codification of International Law, at which time, after exhaustive enquiries into the matter, it had been decided not to attempt to fix a uniform limit.

6. The special rapporteur was clearly extremely pessimistic about the chances of acceptance of his proposal of a limit of six nautical miles, since he knew that no legal criterion existed for selecting a particular figure. He must also be aware that a draft convention including such a provision would meet with serious opposition, and was hardly likely to attract many ratifications.

7. Several representatives attending The Hague Conference of 1930 had thought that the question of delimiting the territorial sea might be approached by reference to the contiguous zone. He himself deplored the tendency to confuse the territorial sea, over which the coastal State exercised sovereignty, with the contiguous zone, which came under the régime of the high seas.

8. In the light of the foregoing considerations, and because no legal criterion existed for determining the extent of the territorial sea, he had the gravest doubts whether the Commission could achieve anything by trying to impose uniformity in a matter where divergencies could not be avoided, or by attempting to codify non-existent rules. Perhaps the Commission should accept the fact that States must themselves fix the limit of their territorial sea, and concentrate on matters, such as the base line, in which agreement could be reached. He would add, however, that if most members of the Commission found article 4 acceptable, he would associate himself with the view of the majority. As Brazil adhered to the three-mile limit such a course would present neither theoretical nor practical difficulties for him.

9. Mr. YEPES said that at the 164th meeting he had made a long statement on the so-called three-mile rule, and had enumerated all the countries, starting from Argentina and ending with Yugoslavia, which had

rejected it.² He had demonstrated that most European countries, all Latin-American countries and numerous countries in Asia and Africa had in one form or another pronounced themselves against it. That rule, he had declared, was based on a false dogma which contemporary international law had rightly repudiated. None of those arguments had been mentioned in the summary record of the meeting, and he therefore wished to make a formal protest against such a method of presenting the Commission's records. He neither asked for nor would accept any explanation. All members who had heard his statement at the 164th meeting must have been surprised to see that it had scarcely been mentioned in the summary record.

10. The CHAIRMAN observed that the summary records were issued in provisional form, and that any member who wished to do so was entitled to submit corrections to them.

11. Reverting to the subject under discussion, he said that if it were decided that no rule determining the breadth of the territorial sea existed in international law, it would be useful for each member of the Commission to indicate his views as to what that limit should be.

12. Mr. CÓRDOVA suggested that, before the Commission took up the point mentioned by the Chairman, it must first address itself to the question asked by the special rapporteur, namely, whether there was any positive rule of law determining the breadth of the territorial sea.

13. Mr. HSU interposed that it was most regrettable that Mr. Kozhevnikov should have referred to the question of Chinese representation, which was a political issue entirely outside the Commission's terms of reference.

14. The CHAIRMAN declared that the task of the Commission, whose members were elected in their personal capacity and not as representatives of governments, was to examine legal questions and legal questions only.

15. Mr. el-KHOURI said that in his opinion international law knew of no rule determining the breadth of the territorial sea; nor, in fixing the distance, did States conform to any generally recognized principle. Indeed, as the commentary on article 4 indicated, different limits were fixed for different purposes. In seeking a uniform rule, and he was in favour of twenty kilometres, the Commission must take into account the maximum claims and needs of States.

16. It would be preferable if, in his next report, Mr. François were to give all distances in kilometres.

17. Mr. SANDSTRÖM was not convinced that the matter was so unregulated as had been suggested, or that States only had to proclaim a right to a certain belt of sea in order to exercise control over it, thus

² *Ibid.*, para. 36.

sweeping away by unilateral action the long-established rights of other States.

18. There was a general consensus of opinion that the belt of the territorial sea must be at least three nautical miles. Whether States could acquire the right to a wider belt depended on geographical and economic considerations, and also on what was understood by the high seas. There was certainly an element of acquisitive prescription, similar to that obtaining in civil law, in the rights exercised over the territorial sea. For example, northern European countries had established the right to a territorial sea four miles in breadth, and had warded off all attempts to encroach upon it.

19. It would probably be impracticable for the Commission to examine the legislation of each State, but perhaps the situation was not so anarchical as it would appear. There seemed to be some order in the disorder, that if the countries were listed, not in alphabetical order, but in regional groups, the limit of the territorial sea in Scandinavian countries, for instance, would be seen to be four miles, as he had already mentioned; in western European countries, North America, and Australia, three miles; in Mediterranean countries, including Portugal but excluding Israel, six miles; in Asiatic countries, with the exception of the Arab States, three miles; and in many South American countries, three miles. The relevant legislation of Central American countries seemed to vary considerably.

20. Mr. LAUTERPACHT said that he intended first to express his views about the existing law on the matter, and then to discuss changes *de lege ferenda*.

21. He was uncertain whether the special rapporteur, in article 4 of his draft, had expressed any definite views on the first point, and perhaps there was good reason for such restraint. He (Mr. Lauterpacht) did not think that under existing law any State was free to fix at will, with an effect binding upon other States, the breadth of its territorial sea, in excess of the traditional limit. The International Court of Justice, in its judgment in the *Fisheries Case* between Norway and the United Kingdom (1951), had recognized that States had latitude in selecting the base lines for calculating the width of the territorial sea, but that such latitude was restricted by important principles and considerations of which States could not be the sole judge. Had States been free to fix the limits of their territorial sea, the Norwegian Government would never have gone to the trouble of laying claim to a fishing zone on special legal, economic and historical grounds, but would have simply extended its territorial sea by a stroke of the pen. No one would contend that any international tribunal would treat seriously El Salvador's claim to a territorial sea 200 miles wide, or similar recent claims of some other States.

22. It would be useful to consider carefully the existing legislation of States on the matter, and he would suggest that in his next report the special rapporteur might group countries according to the limits they laid down, and give the distances both in kilometres and in nautical miles.

23. Without taking into account the amount of tonnage they represented, it would be seen that the majority of States still adhered to the three-mile or four-mile limit, and to the thirteen States listed by the special rapporteur as belonging to the former category such countries as Brazil, Canada, Ceylon, and Venezuela should be added. To that same group belonged also the considerable number of States adhering to the four-mile limit. Outside that impressive group, claims of other States to a wider limit were relatively recent. Had any State claimed at the beginning of the twentieth century a six or twelve-mile limit, its claim would have been met with immediate and emphatic opposition. It would be extremely useful if the special rapporteur were to give in his next report a historical analysis showing at what time the claims to a wider territorial sea had been made and how they had been received.

24. The legal position was that nothing decisive had yet happened to supersede the traditional three-mile rule, which, of course, was not invariable, and was subject to prescriptive rights, to particular geographical configurations and to rights flowing from the acquiescence of other States. The onus for justifying claims to a wider belt of territorial sea rested on the State in question, and would have to be substantiated before an international tribunal.

25. Taking up the question *de lege ferenda*, he said that the special rapporteur had not pressed any proposal of his own for changing existing law, but had expressed a preference, albeit in no optimistic vein, for a general limit of six nautical miles if at all practicable. Mr. François had said in his report that: "The champions of the freedom of the seas will have to realize that the general or quasi-general acceptance of the six-mile rule — which has already been adopted by a number of States — would put a stop to any tendency to adopt unilaterally a still greater distance".³ But it was highly questionable whether there was any ground for assuming that, if by some astonishing stroke of good fortune most States declared themselves in favour of a six-mile limit, others such as Bulgaria and the Soviet Union would relinquish their claim to a twelve-mile limit or would not go beyond that. He feared such a contingency was as improbable as the feasibility of settlement on a regional basis.

26. It was thus doubtful whether the proposal for a six-mile limit would settle the problem. If, as Westlake had argued in 1910, the three-mile limit had become "quite obsolete and inadequate" its extension to six miles would not decisively meet the case, particularly in the light of modern developments, such as the increased range of weapons, the speed of boats and other accomplishments of science. In the light of such development six—or ten or twelve—miles might be as inadequate as three miles so long as the solution to the problem was sought by reference to the number of miles. Yet it was not at all certain that that was the only approach to the problem.

³ A/CN.4/53, (mimeographed English text, p. 20; printed French text, comment to article 4, para. 21).

27. The principle of the freedom of the seas was one of international interest as distinct from national interest, and the three-mile limit was an expression of that principle. It might be argued that as States unconditionally recognized the right of innocent passage, the question of the breadth of that sea was not, perhaps, of paramount importance. However, it must be borne in mind that States had very wide powers of jurisdiction over vessels passing through that belt and might well interfere with the right of innocent passage.

28. As the proposal for a six-mile limit was no true solution, and as the principle of the freedom of the seas should not be lightly abandoned, the Commission might concentrate its attention on three matters. First, there was the possibility offered by the principle of the contiguous zone, which in some ways had tended to become part of customary international law. Secondly, there was the recognition of the right of coastal States to protect the natural resources, and particularly the fisheries, of their territorial sea—as distinct from a right to exclude foreign nationals from exploiting those resources. Thirdly, the Commission might consider a more orderly system of the régime of the high seas, which at present in some respects bordered upon anarchy and was conducive to waste.

29. In that manner it might be possible to obviate some of the problems arising out of the question of the width of the territorial sea, and it would be as well to proceed in the assumption that, given the existing political situation in the world, the possibility of devising a generally acceptable solution was remote. Even if the situation were different nothing short of an international legislature with power to impose its decisions could be effective in achieving a uniform rule. On the other hand, if some measure of agreement could be reached on the other rules adumbrated in the report, the evils of divergent national laws and of unilateral claims to a wide belt of territorial waters might be minimized.

30. Mr. ZOUREK said that, as no general treaty existed laying down a limit for territorial waters, the reply to the question asked by the special rapporteur as to whether there was a positive rule on the subject must be sought in existing practice and legislation. The information included in the commentary on article 4 showed that States did not consider themselves bound by any rule of international law in deciding the breadth of their territorial waters, and that they fixed it in accordance with their own interests. That might be a lamentable state of affairs which ought to be remedied by the progressive development of international law, but as Mr. Lauterpacht had argued, the possibility of reaching agreement at the present moment was very slight indeed.

31. He confessed himself unable to reply to the other question asked by the special rapporteur, namely, whether the Commission could propose a limit *de lege ferenda*, without first ascertaining the views of States with a seaboard. Unless their opinion was known it would be impossible to formulate a generally acceptable proposal.

32. Referring to the point raised by Mr. Hsu, he observed that Mr. Hsu himself had been the first to introduce a political element into the discussion at the preceding meeting. He (Mr. Zourek) wished to state that it was the Central People's Government of the People's Republic of China which, under international law, was alone entitled to represent that country.

33. The CHAIRMAN ruled that no reference to political matters or expressions of personal opinion on the status of any government could be entertained. The Commission, as a body of legal experts, had a very definite scientific task, and no political question came within its purview.

34. Mr. HSU accepted the Chairman's ruling.

35. Mr. CÓRDOVA expressed his appreciation of Mr. François' report, which was a real contribution to a study of the problem and a further proof of its author's wide knowledge and unremitting efforts to advance the codification of international law. His presentation of the report in the form of articles accompanied by detailed commentaries merited all praise.

36. If the Commission failed to find any rule in international law delimiting the breadth of the territorial sea, it would have to determine whether it should take action *de lege ferenda*. He was uncertain whether Mr. Lauterpacht believed in the possibility of stating a general rule, a matter on which legal authorities differed very considerably. For example, in the eighteenth century, Vattel, while expressing no definite opinion on the three-mile rule, said that national and economic considerations should prevail. De Martens had been in favour of a limit of three leagues, whereas Florio had held that the limit should be determined by necessity and the public interest. Hall, writing in 1880, had questioned whether the three-mile rule had ever been unequivocally determined, and Gidel had declared that it was not a positive rule of international law, but only one which existed in the municipal law of certain States.

37. He himself agreed with Mr. Scelle's view, quoted by the special rapporteur, that:

"In reality there is no rule established by custom, merely rules laid down by States, either unilaterally, or more rarely by treaty, compliance with which they enforce within the limits of their power... In short, there is anarchy."⁴

38. The American Institute of International Law, in preparing a draft on the territorial sea in 1927, had not ventured to prescribe its limit, a matter which it had decided must be left to representatives of governments. The Harvard Research draft of 1929, on the other hand, recognized the three-mile limit.

39. Attention should also be drawn to the Panama Declaration of 1939, whereby the American States claimed that, in the waters adjacent to the American

⁴ A/CN.4/53 (mimeographed English text, p. 17; printed French text, comment to article 4, para. 9).

continent, a zone 300 miles wide should be free from hostilities by non-American belligerents.

40. The special rapporteur had included in his report a list showing the present practice of States. He had, however, appeared to accept the view that a claim to exercise only certain rights over an area of sea did not constitute a claim to the whole of that area as territorial sea. A number of States, for example, had claimed to exercise exclusive fishing rights over a breadth of twelve or more miles of the belt of sea off their coasts, but maintained that their territorial sea was still only three miles wide. Similarly, some countries claimed the right to exert customs control over a greater breadth of sea than they indicated as their territorial sea. In his (Mr. Córdova's) view, the whole sea-area over which a State claimed to exercise any rights should be regarded as the territorial sea which it claimed. If a State laid claim to a twelve-miles-wide belt of sea for the purposes of exclusive fishing rights but did not claim to exercise any other rights beyond three miles, all that that meant was that it considered itself incapable in practice, or was undesirous, of exercising other rights outside that limit. But if it claimed the right, for example, to prevent aliens from fishing in an area, it was surely claiming sovereignty over that area.

41. The debate had confirmed his view that the Commission could take no action with regard to the breadth of the territorial sea. Attention had already been drawn to the passage in the special rapporteur's report which read:

"It seems very doubtful, indeed, that a compromise on the six-mile rule can easily be achieved. It is clear however that in view of all the conflicting views which have been expressed on this matter, no agreement will be possible if neither side is prepared to make concessions."⁵

The Commission was not composed of government representatives, and its members were not therefore in a position to make concessions or seek compromises on a political matter. The only contribution which the Commission might have made to the problem would have been to indicate a juridical basis for its solution. Unfortunately, no such juridical basis existed. The only juridical principle governing the breadth of the territorial sea which had ever been proclaimed was the principle, propounded by Bynkershoek, that the territorial sea of a State should be regarded as all areas of sea within cannon-range of its coasts. In Bynkershoek's day, the range of a cannon had been approximately three miles, and it was for that reason that a three-mile limit had been generally adopted. With modern weapons, such as rockets, that principle could clearly not provide a realistic basis for a solution of the problem. There was therefore no juridical basis on which the Commission could decide the question. It could only leave it to be settled by world-wide, or failing that by regional, agreements. In the latter connexion, even if a provision of world-wide application was agreed upon, by the General

Assembly or some other competent body, it should not preclude the possibility of regional agreements fixing other limits.

42. On the other hand, he agreed with the special rapporteur that failure to lay down any rules concerning the breadth of the territorial sea need not deter the Commission from continuing to strive for agreement on the other disputed questions, in the way that consideration had deterred the 1930 Codification Conference. The questions of what constituted sovereignty over the territorial sea, and of the restrictions imposed upon such sovereignty, were, in themselves, of the utmost importance.

43. Mr. SPIROPOULOS pointed out that the Commission had already agreed that a State's territorial sea was a belt of sea over which it exercised sovereignty, by which was meant full sovereignty, subject only to the conditions prescribed by international law. Outside that area, a State could, of course, exercise certain rights, and the belts of sea over which it did so were normally called contiguous zones. The concept of contiguous zones had been accepted by the Commission at its third session, and in article 4 of part II of the Draft Articles on the Continental Shelf and Related Subjects which it had then prepared it had even defined their maximum limits.⁶ The Commission could not therefore now accept Mr. Córdova's contention that the territorial sea was the belt of sea in which any rights were exercised by a State.

44. On the other hand, he agreed with Mr. Córdova that there was no legal principle for fixing the maximum breadth of the territorial sea. The right of coastal States to fix the limits of their territorial sea where they wished was subject only to the general interests of the international community. The question remained, of course, how far the territorial sea could extend before those general interests were harmed. The 1930 Codification Conference had not been faced with such great differences of view in the matter as was the Commission. At that conference no State had claimed a limit of twelve miles, and only one had claimed a limit of six miles. It had been mainly the insistence of certain countries on an extension of the limit to four miles which had caused the breakdown of the Conference. Subsequently, the example of that country which had asserted its claim to a limit of six miles had been followed by other countries in the same region. Now, however, some countries were claiming a limit of twelve miles, on grounds of national security. He did not think that the Commission, which was attempting a task of lasting codification, could base itself on an approach which was dictated by conditions which everyone hoped would be transient and which was unsupported by any well-established practice.

45. He agreed, therefore, with the special rapporteur's suggestion that the maximum limit should be fixed at

⁵ A/CN.4/53 (mimeographed English text, p. 20; printed French text, comment to article 4, para. 21).

⁶ See Report of the International Law Commission covering its third session, *Official Records of The General Assembly, Sixth Session, Supplement No. 9*, p. 20. Also in *Yearbook of The International Law Commission, 1951*, vol. II, p. 144.

six nautical miles. If that limit were accepted by the great majority of States, some progress in the work of codification would have been made. If that was impossible, however, he agreed that the question could be left open and that the Commission could usefully concentrate on the other aspects of the special rapporteur's report.

46. Mr. SCELLE said that he had listened with great interest to the statements by Mr. Lauterpacht, Mr. Córdova and Mr. Spiropoulos, all of which had confirmed him in his view that no rule of international law existed fixing the breadth of the territorial sea, and that none could exist. The only rule which applied in that respect was not a rule of law, but one of expediency, namely, the rule that the limits of the territorial sea ended *ubi finitur armorum vis*. In other words, the territorial sea was the area of sea which, at any given time, a State felt that it needed and that it could effectively defend. The State concerned would not extend that area so far as to provoke undue opposition from other powerful States. At one time, for example, the United States of America had wished to extend far beyond the three-mile limit the area in which it could search ships suspected of smuggling alcoholic liquor; it had proceeded to do so, concluding treaties for the purpose with those States whose opposition it had felt it worthwhile avoiding at that cost.

47. He agreed, in fact, with Mr. Lauterpacht that the Commission should move in the direction of the concept of contiguous zones; for, if that concept were adopted fully, the concept of the territorial sea would be robbed of all its meaning. In reality, each State claimed to exercise certain rights in certain zones, the breadth of which depended on its needs and strength. The fact must be faced that, in almost all respects, those needs were steadily expanding. The trend was therefore towards increasing conflicts and eventual anarchy. The best that could be hoped for in present circumstances was that there would be a rough equilibrium between the claims of the various countries with, perhaps, the possibility of recourse to arbitration or conciliation in case of dispute. What Mr. Lauterpacht and Mr. Córdova had said encouraged him to assert that, in the long run, no solution to the problem would be possible until an international legal authority, possessing obligatory jurisdiction over the various States, had been constituted.

48. Mr. AMADO felt that the concept of contiguous zones must be kept distinct from that of the territorial sea. The former related to the régime of the high seas, and it was in that context that it had been discussed at length at the previous session.

49. Mr. SCELLE said that his point was that if a State was permitted to exercise one right after another in zones extending beyond the limit of its territorial sea, the concept of the territorial sea became void of all significance. In his view, it was not a question of the exercise of sovereignty, but of particular rights (servitudes) possessed by the coastal State under international law. The only sovereignty which could be exercised on the high seas was the sovereignty of the

international community, expressed through international law.

50. Mr. CÓRDOVA asked whether Mr. Scelle did not agree that treaties delimiting the breadth of the signatory States' territorial sea constituted an element of international law.

51. Mr. SCELLE agreed that such treaties were international law for the signatory States. Their application could not however be world-wide or lasting, for the reasons he had already given.

52. Mr. SPIROPOULOS asked Mr. Scelle whether he would not consider it contradictory to international law for a State such as Italy to proclaim that the whole of the Adriatic, for example, was *mare clausum*.

53. Mr. SCELLE replied that in his view all areas of sea were international public domain. He did not recognize any State's sovereignty over any part of it. Still less, therefore, could he recognize the principle of *mare clausum*.

54. Mr. HSU said that he had listened with great sympathy to the statements supporting a limit of three miles, since his own early training in the matter had been based on that principle. Viewing the question as a member of the Commission, however, he felt bound to state that the arguments advanced in its favour were unconvincing. It was true that the majority of States had conformed to it in the past, but majority usage did not make international law. Moreover, those States which at present claimed to exercise various rights outside the three-mile limit, while still formally claiming that their territorial sea was only three miles wide, could not really be regarded as supporters of that limit.

55. On the other hand, he agreed with Mr. Lauterpacht that there were no good reasons in favour of a six-mile limit. Taking all considerations into account, he was convinced that a twelve-mile limit was the best, even though it might be too optimistic to hope for its immediate universal acceptance. If the Commission stated that a coastal State should exercise sovereignty over its territorial sea, he thought it was obvious that it must at least attempt to narrow the divergence of views on the limits of that sea. If it proposed a reasonable limit which would meet practical requirements, it would contribute to a solution of the problem, even though that solution lay somewhat outside its own responsibility.

56. Mr. HUDSON agreed with the special rapporteur "that a proposal to fix the breadth of the territorial sea at three miles would have no chance of success". He also agreed with him that "the problem must be solved, since if each State were left absolutely free to determine the breadth of its territorial sea itself, the principle of the freedom of the seas would suffer to an inadmissible extent".⁷

57. Of the 48 independent States mentioned in the list given in the special rapporteur's report, he calculated

⁷ A/CN.4/53 (mimeographed English text, p. 18; printed French text, comment to article 4, para. 16).

that only 22 accepted the three-mile limit — and even some of those extended that limit for certain purposes ; another 16, making 38 in all, accepted a maximum limit of six miles ; 10 were in favour of a greater breadth, but only two of them, Chile and El Salvador, claimed more than twelve miles. He had come to the conclusion, and he thought the special rapporteur agreed with him, that the Commission could not attempt to formulate a rule which would cover the practice of all States without exception. The special rapporteur had suggested that the limit should be not less than three but not more than six miles. That would exclude a considerable number of States, and he asked therefore whether the special rapporteur would not agree to the maximum breadth being raised to twelve miles.

58. It was true, he agreed, that whatever the limit set, certain States would continue to seek to establish certain zones in which they would exercise control for specific purposes. Those zones, however, would not necessarily be contiguous with the territorial sea. Furthermore a larger limit such as 12 miles would tend to discourage the establishment of those zones, and in that connexion it was worth pointing out that less than half the States which had expressed their views on the question at the 1930 Codification Conference⁸ had favoured the concept of contiguous zones. Whatever the figures chosen, provision would also have to be made for certain exceptions, established by history, with regard to the waters of certain seas and gulfs.

Further discussion was adjourned.

The meeting rose at 1.5 p.m.

⁸ See Conference for the Codification of International Law (The Hague, March-April 1930), Report of the Second Commission (Territorial Sea), League of Nations Publication, V. Legal, 1930, V. 9 (document C.230.M.117.1930.V), pp. 15—17.

167th MEETING

Friday, 18 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsy Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 5 of the agenda) (A/CN.4/53) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the Draft Regulation contained in the special rapporteur's report on the régime of the territorial sea (A/CN.4/53).

ARTICLE 4 : BREADTH (continued)

2. The CHAIRMAN, speaking in his capacity as a member of the Commission, recalled that the first point which the Commission had been considering was whether a rule of international law existed with regard to the territorial sea and its breadth. His view on that point was that both the writings of international law authorities and the attitude of governments showed that it was a universally recognized rule that coastal States had a right to exercise sovereignty, or at least very wide powers, over a belt of sea extending outwards from their coasts, and that that belt had a minimum breadth of three miles. On the other hand there was no agreement that the breadth should be limited to three miles. As Mr. Scelle had pointed out, no uniform rule existed in that connexion, and both writers and governments displayed an anarchy of thought and action ; in their theories, proposals and official pronouncements the breadth of the jurisdictional maritime zone had been variously proclaimed as anything from 3 to 300 miles, on different grounds and for different purposes. He could only subscribe therefore to Gidel's statement that :

"There is no rule of international law concerning the extent of the jurisdiction of the coastal State over its adjacent waters other than the minimum rule whereby every coastal State exercises all the rights inherent in sovereignty over the waters adjacent to its territory to a distance of three miles, and partial jurisdiction beyond that distance in the case of certain specific interests."¹

3. The three-mile rule had only been opposed in so far as it set a maximum limit. He knew of no authority who had attacked it on the ground that sovereign or jurisdictional powers over the maritime belt should be exercised within a lesser distance than three miles. Even those who opposed the three-mile rule recognized its existence, as could be seen from the passages by Borchard and Hyde quoted in the special rapporteur's report. Furthermore, a number of important international treaties had explicitly or implicitly recognized the three-mile limit as the accepted international rule, while other treaties stipulating a wider limit of maritime jurisdiction for specific purposes, such as the prohibition treaties between the United States of

¹ Quoted in document A/CN.4/53 (mimeographed English text, p. 17 ; printed French text, comment to article 4, para. 9).

America and other countries, had done so by way of an exception to the general rule.

4. On the other hand, he could find no evidence of a general agreement that the maximum breadth of the territorial sea should be fixed at any particular figure greater than three miles. At the 1930 Codification Conference, out of thirty-two delegations expressing concrete opinions on the subject, seventeen had been in favour of three miles, four in favour of four miles and eleven in favour of six miles. More recently a considerable number of States had claimed a maritime belt of twelve miles, but not always for a full exercise of all sovereign or jurisdictional rights, but only for certain specific purposes. Many other States had unilaterally fixed the breadth of their territorial sea at varying distances greater than three miles. But it seemed impossible to maintain that a rule of international law existed whereby a wider maritime belt was accepted by the community of States.

5. Neither could he recognize it as a rule of international law that each State had an unlimited right to determine the breadth of its territorial sea. States could only do so within a limit established by international law. He could not conceive of a rule that authorized a State to extend its maritime jurisdiction up to the coast-line of other States or that authorized two or more States bordering a particular sea to convert it, by bilateral or multilateral agreement, into a *mare clausum*. That would be the negation of law; it would be tantamount to proclaiming the reign of force and the abolition of the freedom of the seas. He would therefore be guided in his vote with regard to article 4 by the following conclusions.

6. First, there was a rule of international law that every State had a right to exercise sovereign powers over a belt of sea adjacent to its coastline to a minimum breadth of three miles. Secondly, there was wide disagreement as to whether the territorial sea should extend beyond three miles and, if so, how far. Thirdly, in very few cases indeed was it proposed that it should exceed twelve miles. Fourthly, in the absence of any general agreement on a maximum limit of three miles or any other particular limit, the conflict could not be solved by any existing rule of customary law, and a solution would have to be sought by international agreement. Fifthly, as a body charged with the progressive development and codification of international law, the International Law Commission was fully competent to study and declare when, on a certain subject, a rule of *lex lata* was applicable or a rule of *lex ferenda* was necessary. Lastly, therefore, the Commission could properly submit to governments, for their consideration and decision, a clause such as that contained in article 4 of the special rapporteur's report, whereby States could, if they so desired, regulate the matter by international agreement and reconcile their jurisdictional needs in respect of the waters adjacent to their coasts with the vital principle of the freedom of the seas.

7. Mr. KOZHEVNIKOV, after assuring the Chairman that he always confined his remarks to legal matters

even when forced to reply to statements which either clearly went outside that framework or tended to do so, wished briefly to express his views on a point raised at the previous meeting, namely, the so-called reciprocity between east and west with regard to the twelve-mile limit of the territorial sea.

8. The Soviet conception of international law derived from the belief that the function of international law was to be an instrument of peace and collaboration between countries, irrespective of their political or economic structure, and on the basis of sovereign equality and non-interference in the domestic affairs of others. The Soviet Union did not fear peaceful rivalry with the capitalist countries and it was not its fault that some of them had declined such peaceful rivalry, preferring a policy of force and adventurism. The Soviet conception of law rejected and utterly condemned the theory of force as the basis of law, which had been expounded by one member of the Commission who, invoking the alleged sovereignty of law, had proposed that the whole principle of the territorial sea be replaced by that of the high seas in the general sense of the term. Presumably, that would serve the interests of those who sought to establish a world-wide hegemony over the seas.

9. At the previous meeting, the — to him — equally absurd theory had been put forward that the three-mile limit was an international rule and should be taken as a starting point. That was nothing more than a view most frequently defended in British theory and practice. Pretensions to ascribe international significance to such a parochial attitude were naive. He could bring evidence to show that in Russia they had been exposed as totally without foundation as long ago as the 1830s. The false premise adopted by partisans of the three-mile limit as an international rule revealed the absurdity of their claim that the establishment of a wider limit was an innovation and that the onus for justifying it lay on the governments concerned. In Russia, for example, the twelve-mile limit had been established as early as 1909, in confirmation of existing practice.

10. All that was consistent with modern international law, which did not lay down any definite limit as an international standard. It was a sovereign right of each State to determine the breadth of its territorial sea; the remarks made in the Commission about anarchy and arbitrary action were inapposite. The characteristic features of international law as the regulator of relations between States, and the nature of those relations themselves, which demonstrated that the action of governments in respect of their territorial sea was not arbitrary but based on legitimate considerations recognized as such by international law, had been forgotten. Under the guise of suppressing alleged anarchy an effort was being made, which the Commission must oppose, to establish a supra-national dictatorship which would inevitably lead to the destruction of sovereignty and consequently of international law itself.

11. Mr. LIANG (Secretary to the Commission) said that he had listened with great interest to the debate.

With regard to the relationship between the territorial sea and contiguous zones, the commentary to article 4 in Part II of the Draft Articles on the Continental Shelf and Related Subjects² which the Commission had approved at its third session showed clearly the reasons why the Commission had accepted the concept of contiguous zones, namely, that the jurisdiction of a state in the territorial sea was general while in the contiguous zone it was fragmentary and supplementary. He suggested that it would be inconsistent now to argue that contiguous zones were merely an extension of the territorial sea, or that adoption of that concept robbed the concept of the territorial sea of all its meaning. He thought it was more accurate to state that contiguous zones were an attempt to alleviate the conditions brought about by the fact that the recent tendency to extend the area of sea in which a State wished to exercise certain rights was not yet reflected legally in an extension of the territorial sea.

12. He recalled that, after the 1930 Codification Conference, Gidel had stated that the idol of the three-mile limit was broken. Even if that were true, he did not think it had been broken as a result of that Conference. In any case there was no agreement on the matter. In the comment on article 2 of the Harvard Research draft³ it was stated : "The practice of States reveals no general acquiescence in the inclusion of a belt of more than three miles in width". In his view the truth was that by successive challenges a rule of international law might gradually lose all its authority, but that it was difficult to say exactly when it became obsolete. He did not think, however, that it was necessary for the Commission to decide whether the three-mile rule still existed. All that was required of it was to submit a concrete proposal, which, in the present case, should clearly be accompanied by a commentary conforming in all particulars to the provisions of article 20 of its Statute.

13. It had been suggested that the maximum limit should be set at twelve miles. He merely wished to remind the Commission that there were two sides to the question. Many States, including several major Powers, did not wish other States to extend their territorial sea beyond three miles. Adoption of a maximum limit of twelve miles would require a great concession on their part.

14. Mr. FRANÇOIS felt that the debate, which was the first on the subject in an international gathering since the 1930 Codification Conference, had been most instructive. He had been particularly interested in the views expressed by Mr. Scelle, but feared that they might give rise to some misunderstanding. Mr. Scelle had argued that there was nothing to prevent a State

² Report of the International Law Commission covering its Third Session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, p. 20. Also in *Yearbook of the International Law Commission, 1951*, vol. II, p. 144.

³ Harvard Law School, *Research in International Law. Nationality. Responsibility of States. Territorial Waters*. Special Supplement to *American Journal of International Law*, vol. 23 (1929), p. 250.

extending the belt of sea in which it claimed to exercise certain rights to as far as its interests required. That did not mean, however, that a State could extend its sovereignty over as large a belt of sea as it wished, for Mr. Scelle rejected the whole concept of State sovereignty over any portion of the seas. His view must be considered as a whole.

15. The great majority of the Commission, however, accepted the concept of State sovereignty over the territorial sea, but did not agree that States could extend the breadth of that sea at will. He felt that Mr. Scelle had painted the position in too dramatic a light. The problem was not whether to remove all restrictions on the breadth of the territorial sea, but only whether to increase it to six miles, or, as some States claimed, to twelve miles. In his view the few States that claimed more than twelve miles were confusing the territorial sea with the continental shelf.

16. Mr. Scelle had also stated that the concept of the contiguous zone robbed the concept of the territorial sea of all its significance. He would only recall that the Commission had already, at its third session, considered that question at length and agreed to permit contiguous zones for the exercise of certain specific rights of control. What the Commission was now considering was the breadth of the zone in which States should be permitted to exercise sovereign rights.

17. Mr. Lauterpacht had suggested that he (Mr. François) had omitted from the list given in his report certain of the States which at present applied the three-mile limit ; he would point out, however, that, as stated in his report, that list included only the States which applied that limit "either alone or in combination merely with a contiguous zone for customs, fiscal or sanitary control (the only contiguous zone which the International Law Commission declared its readiness to accept)".

18. With only thirteen States applying it, it really could not be claimed that the three-mile rule was still in force. On the other hand, almost no voice had been raised in support of the view that there should be no limit.

19. The objections to a twelve-mile rule were obvious : few claimed it, and many would oppose it. Its adoption, however, would make the rule of almost universal application, and almost entirely eliminate the problem of contiguous zones, whose maximum breadth the Commission had already fixed at twelve miles. Particularly as regards fishing rights, however, its adoption would be injurious to the interests of a number of countries. For that reason, therefore, he wondered whether the Commission could justifiably state that such a rule should be made a rule of international law.

20. In his view the Commission should, first, recognize that international law did not require the territorial sea to be restricted to three miles in breadth and, secondly, state that existing international law did not permit the territorial sea to be extended to more than six, or, if the Commission so decided, twelve miles in breadth. Agreement might be reached in an international

convention on a precise delimitation, but, as had been pointed out, such agreement, involving as it did political, economic and strategical considerations, lay outside the Commission's competence. There was no reason, however, why the Commission should not suggest to governments that a diplomatic conference be convened with a view to reaching such agreement and determining in what circumstances States should be permitted to depart from the limit agreed.

21. Mr. YEPES said that the three-mile rule neither conformed to existing international law, nor reposed on any scientific or technical basis. An examination of the figures quoted showed that all American States favoured a higher limit, so that a kind of American international maritime law did exist in the matter. A higher limit was also favoured by all European States, except the United Kingdom, Germany and the Netherlands. It was favoured also in Asia and Africa. Consequently 80 per cent of the world's population was opposed to the three-mile rule. In his view a minority could not be permitted to impose on the majority in regard to a question such as the freedom of the seas, which directly affected the interests of all peoples. Furthermore, the three-mile rule, which had been formulated for the first time by an Italian writer of the eighteenth century, was devoid of any scientific basis. Its strength had derived from its acceptance by the United Kingdom which, up to the beginning of the twentieth century, had been the greatest sea power in the world.

22. It was an established tradition in customary international law that all coastal States enjoyed the right to exercise sovereignty over a belt of sea along their coasts. It was also established in customary international law that that belt was limited in breadth. It was the Commission's duty to limit the breadth of the territorial sea so as to put an end to the anarchy which at present prevailed in that respect. The territorial sea was one of the most important questions before the Commission in the progressive development of international law.

23. In conclusion, he added that the maximum breadth of the territorial sea should be stated in kilometres and not in miles, so as to bring the approach to the problem up to date and into line with contemporary world conditions.

24. Mr. SPIROPOULOS observed that it was hardly necessary for Mr. Yepes to have addressed himself at such length to proving that the three-mile rule no longer existed, since the Commission, with the exception of Mr. Lauterpacht, seemed to have taken that general view, and even Mr. Lauterpacht had not expressed himself in very absolute terms.

25. It was, on the other hand, of interest to ascertain whether or not the right of States to fix the breadth of their territorial sea was restricted. In his view, the answer to that question was in the affirmative. Until the Conference for the Codification of International Law in 1930, the general opinion had been that the territorial sea should be three miles in breadth. At that time, however, a movement had started in favour of its extension to six miles. According to his recollection,

the initiative had come from the Italian Government, which had been prompted by considerations of prestige, but he was never able to understand what real interest there could be in such an extension.

26. True, if a dispute were taken to an international tribunal, it was doubtful whether the three-mile rule would be upheld, but, on the other hand, if a State laid claim to a belt of over six miles, it was doubtful whether that would be found to be in conformity with international law and the principle of the freedom of the seas. It had been argued that a twelve-mile rule would have a greater chance of adoption, but it was very doubtful whether, in the light of the opinions expressed by representatives of the great Powers at The Hague Conference in 1930, such a proposal would in fact secure universal acceptance. In present conditions it would probably only be supported by some half-dozen States.

27. He also doubted whether a diplomatic conference such as proposed by Mr. François would achieve anything useful if it tried to establish a uniform rule delimiting the territorial sea, since at best any proposal could only be adopted by a majority. It would be in vain to expect unanimity.

28. Mr. HSU agreed with the Secretary that adoption of a twelve-mile rule would require a sacrifice on the part of States which still adhered to the three-mile limit. That should not be impossible, however, particularly since such States had already to a considerable extent impaired the validity of the three-mile rule under cover of establishing contiguous zones. The elimination of anarchy and protection of the freedom of the seas from further encroachment were of sufficient importance to warrant States making concessions.

29. He could not agree with Mr. Spiropoulos that it was illusory to suppose that a uniform generally acceptable rule could be devised.

30. Mr. AMADO said he had already stressed the importance of not confusing the territorial sea with the contiguous zone. Any reasonable government was aware of its weighty responsibilities in respect of the territorial sea and was therefore interested in its limits being clearly defined. On the other hand, the responsibilities associated with a contiguous zone were of a transitory nature.

31. Mr. Yepes had stated that an anonymous Italian authority had formulated the three-mile rule, but that was not the way in which rules of international law were established.

32. He would not for the time being comment on Mr. François' proposal for convening a diplomatic conference as he had had no time to reflect upon it.

33. Mr. SANDSTRÖM said that he shared the view expressed at the previous meeting by Mr. Lauterpacht but, in order to advance the progressive development of international law, would vote in favour of Mr. François' proposal for a six-mile limit.

34. Mr. SCELLE said that while he had not been guilty of confusing the territorial sea with the contiguous zone, he nevertheless felt that the difference was only one of words. It perhaps consisted merely in States claiming 90 per cent sovereignty over the territorial sea, and only 50 per cent of sovereignty over the contiguous zone, and 20 per cent sovereignty over the continental shelf.

35. Mr. François had suggested that the breadth of the territorial sea be delimited at six or twelve miles. Indeed there was no reason why it should not be twenty-four miles. Since stress had been laid by certain members on the necessity of acceptance by governments, he might argue that by the time some kind of international agreement were reached on the subject, a twenty-four-mile rule would have a better chance of acceptance.

36. Mr. LAUTERPACHT said that, as he understood it, Mr. François had proposed, first, that the Commission should ascertain whether or not the three-mile limit had ceased to be a rule of international law and, second, that the Commission should declare that States were not entitled to extend their territorial sea beyond either six or twelve nautical miles. The first problem was of course of great legal interest and he suggested that the Commission treat it separately from the second.

37. Mr. CÓRDOVA considered that the Commission was more or less agreed that no three-mile rule existed in international law ; there was, however, another issue to be decided, namely, whether the Commission should propose a limit for the territorial sea. He, himself, and probably Mr. Scelle too, would reply in the negative. The Commission would then discuss whether or not to recommend a six-mile limit, and the calling of a diplomatic conference in the matter.

38. Mr. KOZHEVNIKOV said that, although the Chairman seemed to assume that Mr. François' proposals were to be taken as the basis for further discussion, a formal decision on the part of the Commission was necessary.

39. Mr. HSU considered that there was no need for the Commission to take up time in discussing whether or not to recommend a six or twelve-mile limit. The way in which the issue had been expressed by Mr. François was preferable.

40. Mr. CÓRDOVA said he had understood Mr. François to argue that the Commission should declare itself in favour of adopting a six-mile limit, but Mr. François had not explained in his report any juridical reason for that rule. Furthermore, countries with a six or twelve-mile limit were definitely in a minority.

The meeting rose at 11.40 a.m.

168th MEETING

Monday, 21 July 1952, at 2.45 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Date and place of the fifth session (item 7 of the agenda) (*resumed from the 150th meeting*)¹

1. The CHAIRMAN said that he had received the following communication from Mr. Kozhevnikov :

“ Dear Mr. Chairman,

“ Now that I have looked more closely into the question of where the next session of the Commission should be held, I find that I too am disposed to vote in favour of Geneva.

“ I should therefore be glad if you would arrange for this statement to be included in the summary record.

“ I have the honour to be etc.

(Sgd.) F. I. Kozhevnikov.”

2. Mr. el-KHOURI recalled that he too had abstained from the vote at the 150th meeting. As it now appeared that all other members of the Commission were in favour of holding the next session in Geneva, he would rally to their unanimous decision.

3. Mr. ZOUREK said that, as the last of those who had abstained from the vote at the 150th meeting, he too wished, on reflection, to vote in favour of the fifth session of the International Law Commission being held in Geneva.

4. Mr. CÓRDOVA said that he wished to place on record that, if he had been present on the occasion of the vote on the place of the next session, he also would have voted in favour of Geneva.

¹ See summary record of the 150th meeting, para. 90.

Régime of the territorial sea (item 5 of the agenda)
(A/CN.4/53) (continued)

ARTICLE 4 : BREADTH (continued)

5. The CHAIRMAN invited the Commission to continue its consideration of the Draft Regulation in the special rapporteur's report (A/CN.4/53) on the régime of the territorial sea. The proposal put forward by Mr. François at the previous meeting² had now been submitted in written form: it read as follows:

"1. The Commission recognizes that existing international law does not require the breadth of the territorial sea to be limited to three miles;

"2. The Commission declares that existing international law does not permit the extension of the territorial sea beyond six [or twelve] miles;

"3. The Commission suggests that a diplomatic conference be convened for the purpose of determining, by convention, the limits of the territorial sea."

6. Mr. CÓRDOVA thought the Commission was in agreement that no State could fix the breadth of its territorial sea by unilateral action, but that was not the same thing as suggesting that existing international law did not permit extension beyond a certain figure. No such suggestion had in fact been made, either during the course of the debate or by the special rapporteur himself in his report. Moreover, there appeared to be some contradiction between paragraphs 2 and 3 of Mr. François' proposal. If the limit was already fixed by international law, there seemed to be no point in holding a diplomatic conference to fix it by convention.

7. Mr. FRANÇOIS thought it was beyond doubt that the law of nations had always set, and still set, limits for the territorial sea. For a long time those limits had been set at three miles. What they were at the present time might be open to question; indeed, that was the question the Commission was discussing. He fully agreed with Mr. Spiropoulos that if a State claimed to exercise sovereignty over a belt of sea 20 to 30 kilometres from its coasts, and a dispute arising from that claim came before the International Court of Justice, the Court would have no hesitation in stating that such a claim was contrary to existing international law.

8. He saw no contradiction between paragraphs 2 and 3 of his proposal. In paragraph 2 the Commission merely stated the maximum breadth of the territorial sea under existing international law. That was no reason why a diplomatic conference should not be convened to seek to reach agreement on a single maximum figure, which might be either more or less than what existing international law permitted.

9. Mr. LAUTERPACHT asked what, in Mr. Córdova's view, was the practical difference between saying that existing international law prescribed no limit to the breadth of the territorial sea and saying that States were entitled to determine its breadth as they chose.

10. Mr. CÓRDOVA replied that, in his view, it was clear that States could not be permitted to determine the breadth of their territorial sea by unilateral action, since that would lead to anarchy. On the other hand the only juridical basis for fixing the limit of the territorial sea at a definite figure, that of cannon range, was obsolete. The limit could therefore only be fixed by political means.

11. Mr. LAUTERPACHT observed that, in other words, Mr. Córdova would not at present be able to say whether a State which unilaterally set the limits of its territorial sea at 20 miles was acting contrary to international law. That was perhaps rather negative, but Mr. Córdova's reply had at least been of value in clarifying his views.

12. The proposal which had now been submitted by Mr. François considerably enlarged the scope of the discussion. If it were adopted, the International Law Commission would be taking perhaps the most important decision it had ever taken in the course of its existence, for the issue involved was not confined to the particular matter of the breadth of the territorial sea; it affected the general powers and functions of the Commission, and the manner in which international law should evolve.

13. Mr. François suggested that the Commission should state that the historic three-mile rule was no longer part of international law. Mr. Yepes had gone further and asserted that the three-mile rule had never been generally observed and was now recognized only by a minority of States; in that connexion he had claimed that the United of America was no longer in reality a proponent of that rule. The attitude of one of the two greatest maritime powers in the world was clearly a matter of such interest that he (Mr. Lauterpacht) felt it desirable to examine Mr. Yepes' claim rather more closely.

14. In a note to the Government of El Salvador, written as recently as 12 December 1950, the United States Government had stated:

"The United States of America has, in common with the great majority of other maritime nations, long adhered to the principle that the belt of territorial waters extends three marine miles from the coasts. My Government desires to inform the Government of El Salvador, accordingly, that it will not consider its nationals or vessels or aircraft as being subject to the provisions of Article 7 [of the Constitution of El Salvador of 1950] or to any measures designed to carry it into execution."³

Similar statements had been made by the United States Government in notes addressed in recent years to the Governments of Argentina, Chile and Peru.⁴ It was moreover at the insistence of the United States Government that a provision declaring that it was the firm

³ Reproduced in *Laws and Regulations on the Régime of the High Seas*, United Nations Publication, Sales No.: 1951. V. 2., vol. 1, p. 301.

⁴ *Ibid.*, pp. 5, 7 and 17 respectively.

intention of the Parties to uphold the three-mile rule had been included in various of the treaties concluded between the United States and other governments for combating the smuggling of alcoholic liquors. Both traditionally and in fact the United States was one of the most stalwart supporters of the three-mile rule. The occasional claims of the United States, merely enforced and not recognized by other States, to the exercise of some jurisdictional rights for custom and similar purposes, could not properly be advanced as implying the abandonment of the historic attitude of the United States in the matter.

15. Canada and Venezuela, to take only two examples, were other countries traditionally wedded to that rule. Yet the special rapporteur had not included them in the list of countries applying the three-mile limit, on the ground, apparently, that for some purposes they claimed contiguous zones.

16. The origin of the four-mile limit applied by the Scandinavian countries lay largely in differing methods of computation. The Scandinavian States had not advocated a wide limit of territorial waters. Thus, in a note addressed by Sweden to the Soviet Union in 1950 and again in 1951 concerning the latter's claim to a twelve-mile limit in the Baltic, the Swedish Government had stated :

"While it is true that Sweden has never maintained that there are uniform rules governing the limit of territorial waters, there can be no doubt that European States have assigned fixed limits, dating from some centuries ago, to their territorial waters. In the case of the Baltic States these limits extended to three, and in certain cases, to four sea miles. In this way a legal code has been established whereby the sea beyond these territorial limits must be regarded as open sea, concerning which it cannot, under international law, be the subject of occupation. Any extension of territorial waters, therefore, in the view of the Swedish Government, amounts to an appropriation of the open sea, where the nationals of every State enjoy fishing and sailing rights without interference by other States."⁵

Similar statements had appeared in recent diplomatic notes sent to Iceland on behalf of the Belgian, Netherlands and French Governments.

17. Various members of the Commission had also contended that authorities on international law were in general agreement that the three-mile rule had ceased to exist. He did not think that a careful reading of the authorities bore out that contention. The view of many writers appeared to be not that the rule had ceased to exist, but that it had become, in the words used by Westlake, "quite obsolete and inadequate". The special rapporteur had expressed the view that it had lost its scientific basis ; he had not expressed the view that it had lost its legal basis.

18. Much had been made of Gidel's writings on the

subject. He (Mr. Lauterpacht) in turn would draw attention to a passage from that author's lectures at the *Académie de droit international* in which he had stated :

"Elle [the claim to a wider limit] n'a de valeur internationale que par l'assentiment individuel de chaque Etat et pour cet Etat seulement".⁶

19. He recalled that in his extremely interesting intervention, the Secretary had at the previous meeting questioned the theory that the three-mile rule had died with the 1930 Conference for the Codification of International Law. Mr. Spiropoulos had suggested that that rule had not ceased to exist at the time of the 1930 Conference, but that it had ceased to exist at some later stage. It would be interesting to know precisely when Mr. Spiropoulos thought it had ceased to exist.

20. In 1933 El Salvador and, as recently as 1941, Chile had acknowledged the three or four-mile rule. Several years later those countries had advanced claims which met with protest, on the subject. No legal significance could be attached to that sudden change. In his view, the Commission must have far more justification than it appeared to have at present before it could pronounce the demise of an historic rule which was still supported not only by some of the greatest maritime powers in the world but by many others as well. As he had already indicated, the question was of the utmost importance ; it was nothing less than whether international law was to be changed by an orderly process or by the unilateral action of States.

21. In his view, the Commission should in due course state that the relevant rule of international law, which was still in effect, was the three-mile rule ; but that international law permitted the extension of the territorial sea beyond three miles in certain cases where geographical or historical considerations militated in favour of such expansion or where the acquiescence of the other interested States was obtained. In that connexion the special rapporteur might usefully study how far the six-mile limit had become a rule of customary law for those States which had raised no objections to it. It was possible that, after thorough consideration, the Commission might decide to recommend that the limit be increased. Such a mechanical solution might be receptive. For that reason the Commission might indicate other means such as the increased use of contiguous zones, or certain rights of protection not amounting to the exclusion of foreign interests, of natural resources of the sea by the coastal States in the belt of sea adjoining their coasts.

22. Mr. LIANG (Secretary to the Commission) recalled that he had suggested that in order to capture the attention of governments and the scientific public, the Commission should accompany any specific recommendation it made with an exhaustive commentary conforming with the provisions of article 20 of its Statute. Adoption of paragraphs 1 and 2 of

⁵ Quoted by Professor C. H. M. Waldock in *British Year Book of International Law*, vol. 28 (1951), p. 127.

⁶ *Recueil des cours de l'académie de droit international*, 1934, vol. II, p. 180.

Mr. François' proposal without such a commentary might appear unwise. Moreover, it seemed realistic to suppose that if the Commission committed itself to the statements of principle contained in those two paragraphs, governments which still supported the three-mile rule would be reluctant to attend the diplomatic conference which Mr. François suggested in paragraph 3.

23. He wondered, therefore, whether the Commission should not either confine itself to suggesting that a diplomatic conference be convened, without pre-judging the questions that conference would have to consider, or, alternatively, study the whole question further with a view to making a specific recommendation, supported by an exhaustive commentary, which could serve as a basis for discussion for the General Assembly or for a diplomatic conference.

24. Mr. HSU said that there could be no doubt that the three-mile limit had been proved inadequate. Some States had already extended the limit to twelve miles; others were in the process of doing so; others still had found other means of achieving the same end while still formally proclaiming their adherence to the three-mile rule. In his view the Commission should not defer a decision on the question any longer. It should either recommend a twelve-mile limit, or if that was impossible, recommend that a diplomatic conference be convened for the purpose of determining the limit by convention.

25. Mr. SPIROPOULOS thought that Mr. Córdova had not explained away satisfactorily the contradiction evident in his contention that States were not free to extend the breadth of their territorial sea as they chose, but that there was no limit imposed by international law. In his (Mr. Spiropoulos') view, States had the power to determine the breadth of their territorial sea, but only within certain limits.

26. He agreed with Mr. Lauterpacht that over many years there had been general agreement that the three-mile limit existed. It was the Commission's task, however, to codify existing law, and to do so it must take into account the developments which had indisputably occurred.

27. He was sceptical about the outcome of a diplomatic conference for the purpose of determining a new limit. There was a fundamental divergence of view, and no solution could secure an overwhelming majority. In those circumstances, a convention would not improve the present situation and might even encourage extravagant claims for the extension of the territorial sea.

28. Mr. FRANÇOIS recalled, in reply to Mr. Lauterpacht, that he had listed as States applying the three-mile limit only those which applied it "either alone or in combination merely with a contiguous zone for customs, fiscal or sanitary control (the only contiguous zone which the International Law Commission declared its readiness to accept)". Canada claimed twelve miles of contiguous zone for fishing purposes, and Venezuela twelve miles of contiguous

zone for security and protection of interests. That was why he had not included them.

29. The Secretary had suggested that it confine itself to recommending that a diplomatic conference be convened. He wondered whether in that way the Commission would be fulfilling its task, which was to indicate existing law.

30. Mr. LIANG (Secretary to the Commission) said that in his view the best course would be to submit a specific recommendation with an exhaustive commentary at a later stage. But if the Commission wished to adopt Mr. François' proposal, he thought it should not commit itself to bare statements of principle such as those contained in paragraphs 1 and 2.

31. Mr. HUDSON agreed that, in six of the sixteen treaties concluded between the United States of America and other States for combating the smuggling of alcoholic liquors, the High Contracting Parties had declared their firm intention to uphold the three-mile rule, though it must be noted that they had not stated that that rule was a principle of international law. In the remaining ten treaties, however, those with Belgium, Chile, Denmark, France, Greece, Italy, Norway, Poland, Spain and Sweden, no such statement had been made. On the contrary, the provision to which Mr. Lauterpacht had referred had been replaced by the following:

"The High Contracting Parties respectively retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction."

He thought it would be useful if, in the commentary which he would prepare for his next report on the subject, the special rapporteur would indicate the dates of the relevant legislation in the various countries. A number of States had enacted legislation concerning the breadth of their territorial sea since 1930; so far as he knew, none of them had adhered to the three-mile limit.

32. Under paragraph 3 of Mr. François' proposal, the sole purpose of the diplomatic conference would be to determine the limits of the territorial sea. He wondered whether the special rapporteur would not agree that the question of the breadth of the territorial sea could not be considered in isolation. At the 1930 Conference for the Codification of International Law, it had been considered in conjunction with that of contiguous zones. Since 1930 a number of States had established non-contiguous as well as contiguous zones. In his view the terms of reference of any conference convened to determine the maximum breadth of the territorial sea should include the questions of all off-shore zones, whether contiguous or not, and also that of the baseline, with regard to which the judgment of the International Court of Justice in the Norwegian Fisheries dispute had provided a number of useful pointers.

33. Mr. KOZHEVNIKOV said that the Commission, in which such sharp differences of opinion had arisen on the fundamental issues associated with the delimitation of territorial waters, should address itself

to three problems. First, had there existed in the past a generally accepted rule on the extent of territorial waters? Secondly, if so, was it still valid, and, thirdly, was there a basis at present for establishing such a rule *de lege ferenda*?

34. The answer to the first question was in the negative, despite the attempt of certain members, adducing purely adventitious arguments, to claim the existence of a three-mile rule. The practice of the United Kingdom Government and the efforts of English legal authorities had not met with success and both theoretical and practical objections to that rule were to be found in the works of Russian jurists and the policy of the Soviet Union Government.

35. Objective examination of the second question would also lead to a negative conclusion, since no generally accepted rule delimiting territorial waters was to be found either in an international convention, in custom or in the municipal law of any country. The indisputable principle that the breadth of territorial waters was a matter for determination exclusively by coastal States was recognized both in international practice and national legislation.

36. As for the third question, he was extremely doubtful whether it would be possible to establish a rule *de lege ferenda* in view of the sovereign rights of States in the matter. He could not, however, agree that, if that were so, States would necessarily resort to arbitrary action.

37. Mr. François' proposal that the Commission recommend the calling of a diplomatic conference for determining by convention the limits of territorial waters was at first sight attractive, but was hardly likely to achieve results in view of the failure of the Conference for the Codification of International Law of 1930 and in the face of the fundamental principle that sovereignty was the basis of international law.

38. In order to correct the one-sided picture given by Mr. Lauterpacht when referring to the exchange of notes between the Soviet Union and Sweden in 1951, he would draw the attention of the Commission to the fact that the Soviet Government in its note had stated that the Swedish Government must be aware that no general rules establishing the breadth of territorial waters existed and that their delimitation fell within the exclusive competence of the coastal State.

39. Mr. CÓRDOVA said that, following Mr. Lauterpacht's remarks, he must again draw the Commission's attention to the view, with which he entirely agreed, expressed by Gidel that the so-called three-mile rule, which had never been a positive rule of international law, was rejected by the 1930 Conference for the Codification of International Law and had not been replaced by any other.

40. It was regrettable that so much weight should be given to the views of major maritime Powers which attempted to create rules of international law and to repudiate them when they no longer suited their purpose. It was clearly in deference to the fact that several major Powers, including the United States, had

signed treaties declaring their intention to uphold a three-mile limit that Mr. Schücking had modified his original proposal for a six-mile limit, submitted to The Hague Conference.

41. Riesenfeld had argued in his book *The Protection of Coastal Fisheries under International Law*⁷ that the policy of the United Kingdom Government had undergone a change and that it had become increasingly interested in seeing that the territorial sea of other States was kept as narrow as possible. A similar argument had been developed by Pearce Higgins and Colombos.

42. Mr. Lauterpacht had emphatically declared his belief that the three-mile rule still existed, yet he had admitted in his seventh edition of Oppenheim that: "Technical developments in sea transport and communications, in the range of guns, and other changes have not been altogether without effect upon the three-miles rule".⁸

43. He (Mr. Córdova) could not associate himself with the view of Mr. Spiropoulos that the Commission should not recommend a diplomatic conference because it was bound to fail. Such a consideration should not prevent the Commission from making a definite proposal as to what the limit of the territorial sea should be.

44. Referring to the method of classifying States according to the territorial sea to which they laid claim, he said it would have to be based on a definition of the rights exercised over the belt. It would then be possible to establish what was the most common practice. It would be most useful if the special rapporteur thought fit to include such an analysis in his next report.

45. Mr. AMADO, in the light of the Commission's discussions, moved that Mr. François' proposal be replaced by the following:

"1. The Commission recognizes that, as regards the limitation of the territorial sea to three miles, international practice is not uniform.

"2. The Commission considers that extension of the territorial sea beyond twelve miles is not authorized by international practice.

"3. In view of the lack of uniformity in international practice the Commission has been unable to propose a general formula for recommendation."

He had no definite opinion to express at the present stage on the third point in Mr. François' proposal.

46. Mr. YEPES said that, despite Mr. Lauterpacht's brilliant efforts to prove the contrary, the conclusion to be drawn from the Commission's discussions was that the three-mile limit was not a general rule of international law. Mr. Lauterpacht had not succeeded in demonstrating why States which represented only 25 per cent of the population of the world should impose such a rule upon others.

⁷ (Washington, Carnegie Endowment, 1942).

⁸ *International Law: A Treatise*, 7th ed. (London, Longmans, Green and Co., 1948), vol. I, p. 445.

47. He could accept point 1 of Mr. François' proposal provided it were re-cast in an affirmative form to read:

"The Commission declares that general international law in force no longer recognizes as a generally accepted legal principle the rule that the extent of the territorial sea must be limited to three miles."

48. He could not support point 2, unless the special rapporteur succeeded in convincing him that there was a rule of international law which would enable the Commission to declare that the territorial sea should not be extended beyond six or twelve miles. In his view, such a declaration was entirely arbitrary and had no scientific basis whatsoever.

49. He opposed point 3 on the grounds that it would convey an extremely bad impression for a body of experts to propose the holding of a diplomatic conference for purposes of deciding strictly legal questions. Such a recommendation, he believed, would not be well received by the General Assembly. He would only be in favour of a diplomatic conference if the Commission were in a position to submit to it a carefully elaborated draft on the territorial sea and all related questions.

50. Finally, he expressed his disagreement with the view of certain members that there was no limitation on the right of States to determine the breadth of their territorial sea. Such unconditional sovereignty would be contrary to common sense, to the interests of other States and to those of the community as a whole, and would therefore constitute an abuse of law. In his view there was no doubt whatsoever that custom, defining the breadth of the territorial sea, prescribed limits on the right of States to determine it.

51. Mr. ZOUREK said the Commission should have confined itself to considering the question raised by the special rapporteur in his introductory statement on his report, namely, whether there was any positive rule of international law delimiting territorial waters and, if not, whether one could be established *de lege ferenda*, but as the discussion had gone somewhat further, he felt bound to comment on Mr. François' proposal.

52. To begin with point 2 of that proposal, no concrete argument had been adduced to substantiate such a thesis. He knew of no principle prohibiting extension of the territorial sea beyond a certain limit. No general treaty existed on the matter and the practice of States varied considerably. The only real defence advanced had been that of the freedom of the seas, but the defence was a weak one since that principle related to the régime of the high seas and had no connexion with the breadth of territorial waters, a matter which States were free to determine in accordance with their interests. There was no rule of international law which prevented them from doing so.

53. He was extremely sceptical of the utility of convening a diplomatic conference at the present time, as suggested in point 3 of Mr. François' proposal. At all events, it was premature to make such a recommendation, until the Commission was in a position to

prepare a complete draft on territorial waters and the related issues.

54. Mr. SCELLE agreed with Mr. Hudson that it would be impossible to isolate and deal separately with the problem of delimiting the territorial sea. He himself went further in thinking that, if the problem of contiguous zones could be settled, the rest would be easy.

55. Article 38, paragraph 1, sub-paragraph (b) of the Statute of the International Court of Justice stated that the Court should apply "international custom, as evidence of a general practice accepted as law". In his view, there was no general practice on delimiting the territorial sea and, even if there had been, it would not have constituted a rule of international law unless recognized as such by jurists. Few would deny that legal opinion had weight in such matters. Accordingly, he would support point 1 in Mr. François' proposal and oppose point 2.

56. The Conference for the Codification of International Law, which had met at a time when the international community was far less divided than it was at present, had achieved nothing. If a diplomatic conference were to be convened now, it would fail lamentably and its failure would be dangerous. It was not for the Commission to recommend a course of action that was bound to end in a fiasco.

57. Mr. el-KHOURI thought point 1 ought to have been expressed more affirmatively to read: "The Commission notes that existing international law universally recognizes a width not less than three miles for the territorial sea of coastal States".

58. Nor could he agree with point 2, as presented by the special rapporteur, since it suggested that there was a rule prohibiting the extension of the territorial sea beyond a certain limit. No such rule existed, though it was acknowledged that States were not free to extend their territorial sea at will. It was, however, open to the Commission to propose a limit and in his view it should be 20 kilometres which was practically equivalent to 12 miles. He was accordingly in favour of point 2 being redrafted in that sense.

59. As to point 3, he could not agree that it was for the Commission at the present stage to recommend the convening of a diplomatic conference. It should rather submit its proposal for limiting the territorial sea to 20 kilometres to the General Assembly. That organ could then decide whether or not a conference should be convened on the matter.

60. Mr. FRANÇOIS, referring to Mr. Hudson's question as to whether a diplomatic conference should not dealt with other matters in addition to the breadth of the territorial sea, said he agreed that it should but that he could not make a proposal to that effect until those other matters, such as the baseline, had been discussed. It should be remembered that his proposal was very tentative since their examination of his report was only in its preliminary stages.

61. He would be interested to see Mr. Amado's text in writing and would confine himself at the present stage

to suggesting that it was impossible to speak of international practice as authorizing the extension of the territorial sea. Surely only the law could authorize.

62. He had already answered the question asked by both Mr. Yepes and Mr. Zourek as to what principle prohibited the extension of the territorial sea. The principle was of course the freedom of the seas. He must contest Mr. Zourek's argument that States were the sole judge in the matter. The three-mile limit had been observed for centuries and accepted as a rule of law.

63. Mr. CÓRDOVA asked whether the special rapporteur considered that the principle of the freedom of the seas authorized the delimitation of the territorial sea at six or twelve miles.

64. Mr. FRANÇOIS replied in the affirmative. In the past a three-mile limit had been recognized. Admittedly the consensus of opinion at the present time might be that the limit was now six or twelve miles.

65. Mr. SCELLE observed that, despite Mr. François' argument, States had not refrained, during the period in which the three-mile limit was alleged to have been accepted as a rule of law, from exercising their sovereignty beyond that limit.

66. Mr. FRANÇOIS pointed out that any State which had attempted to extend its territorial sea beyond three miles had met with firm opposition on the part of the international community.

67. Mr. SPIROPOULOS appealed to the special rapporteur to withdraw point 3 from his proposal, since it was not a matter on which the Commission ought to take a decision until it had examined the whole of the report.

68. Mr. FRANÇOIS expressed his willingness provisionally to withdraw point 3 of his proposal.

The meeting rose at 6.10 p.m.

169th MEETING

Tuesday, 22 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsy Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F.

I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 5 of the agenda) (A/CN.4/53) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft Regulation contained in the special rapporteur's report on the régime of the territorial sea (A/CN.4/53).

ARTICLE 4 : BREADTH (continued)

2. The CHAIRMAN, speaking as a member of the Commission, said that he wished to explain his reasons for opposing Mr. François' proposal.¹

3. Point 1 was tantamount to a declaration that there was no rule of international law limiting the territorial sea to three miles. He failed to see any justification for such a sweeping statement. There did not appear to him to be sufficient evidence to support such an assertion. Since the day when a Netherlands jurist established the breadth of the territorial sea at the range of the cannon, which an Italian engineer calculated at three miles, there had been a rule which was respected and applied by most States.

4. Reference had been made to a statement by Gidel that "the idol" of the three-mile rule had fallen at The Hague Conference in 1930;² but it must be pointed out that, of the thirty-two governments represented at that Conference, seventeen had voted in favour of the three-mile limit and four in favour of a four-mile limit, while eleven were for a six-mile limit, including the Portuguese representative who was the only one to mention the possibility of a twelve-mile limit.

5. Reference had also been made to apparently contradictory statements by the same author. In his view, Gidel's last word in the matter was that quoted by the special rapporteur in his report :

"There is no rule of international law concerning the extent of the jurisdiction of the coastal State over its adjacent waters other than the minimum rule whereby every coastal State exercises all the rights inherent in sovereignty over the waters adjacent to its territory to a distance of three miles, and partial jurisdiction beyond that distance in the case of certain specific interests."

In his (Mr. Alfaro's) view, that statement corresponded to the facts. There was a positive rule of international law which recognized a minimum of three miles as the breadth of the territorial sea, and it was the Commission's duty to state it ; but it should also state clearly that any claim that a wider belt was the rule today could only be based on unilateral action taken by a certain number of States. The Commission might also

¹ See summary record of the 168th meeting, para. 5.

² *Ibid.*, 167th meeting, para. 12.

state that governments and individual writers held different views on whether the three-mile limit should be extended, and, if so, how far.

6. Mr. Amado's amendments³ appeared therefore to reflect the actual situation more accurately than Mr. François' proposal, and he would be prepared to support it provided the words "twelve miles" in paragraph 2 were replaced by the words "three miles".

7. Mr. HUDSON recalled that, at the 1930 Hague Conference for the Codification of International Law, the Second Committee had taken no decision as to whether existing international law recognized any fixed breadth of the territorial sea. The various representatives present had merely voiced their opinions and, in that connexion, Mr. Gidel, of the French delegation, had remarked :

"It is to be understood that this is to be a provisional expression of opinion. It is not a categorical or final declaration of our attitude. Each delegation will announce its position in principle."⁴

The Chairman had replied :

"I quite agree with what Mr. Gidel says, and the views expressed must be interpreted accordingly."⁵ Moreover, the views which had been expressed had been hedged about with various qualifications relating to contiguous zones, etc.

8. The CHAIRMAN pointed out that he had merely been endeavouring to show that there was no evidence to support the existence of a rule of international law that the breadth of the territorial sea should be more than three miles.

9. Mr. AMADO pointed out that his amendments referred to "international practice". It could not be denied that delimitation of the territorial sea at between three and twelve miles was accepted as a matter of international practice.

10. Mr. LAUTERPACHT asked what evidence Mr. Amado could produce that States had accepted extension of the territorial sea up to twelve miles any more than they had accepted its extension to fifty or two hundred miles.

11. Mr. AMADO agreed that he knew of no cases which threw any light on that question. Extension of the territorial sea up to twelve miles was, however, a recognized practice, and he thought the special rapporteur would confirm that.

12. Mr. SCELLE asked whether Mr. Amado meant that no rule of law existed in the matter, but only a rule of procedure.

³ *Ibid.*, 168th meeting, para. 45.

⁴ Extracts from the Provisional Minutes of the Thirteenth Meeting of the Second Committee, Conference for the Codification of International Law (The Hague, March—April 1930), Report of the Second Commission (Territorial Sea), League of Nations Publication, *V. Legal* 1930, *V*. 9, (document C.230. M.117. 1930. V), p. 15.

⁵ *Ibid.*

13. Mr. AMADO replied that that was precisely his meaning.

14. Mr. KOZHEVNIKOV said that he had listened to Mr. Alfaro's statement with great interest, but he was more convinced than ever that not only was the three-mile rule not part of existing international law, but that it never had been. At the 1930 Conference a number of representatives had spoken in favour of a three-mile limit, but a very large proportion of governments, even of those States represented at the Conference, had maintained that there was no basis for such a limit. Whatever Mr. Gidel had said, it could not be supposed that the views then expressed had been other than carefully considered. In fact, then, there had been no three-mile rule in 1930, and it could hardly be claimed that it had come into being since. International law and practice admitted of no limitation to the breadth of the belt of sea which a State could claim as its territorial sea, and the Commission could not attempt to impose a non-existent standard or rule.

15. In any event it seemed that the Commission would be unable to reach a decision without further consideration of existing legislation and practice. If it attempted to make a formal recommendation at its present session, it would only be creating difficulties for itself and misleading public opinion. He therefore proposed, if the general discussion was now concluded, that the Commission defer a decision on the question of the breadth of the territorial sea.

16. Mr. SPIROPOULOS said that he was in agreement with Mr. Kozhevnikov as regards his proposal. As a wide divergence of view prevailed in the Commission, any vote on the precise breadth of the territorial sea could only yield a decision by a narrow majority.

17. He proposed therefore that, in the special rapporteur's draft of article 4, the words "but may not exceed six marine miles" be replaced by the words "but the freedom of that State to legislate on the matter is limited by the principle of freedom of the seas," and that the attached comment, after sketching the historical background, proceed along the lines of paragraphs 1 and 3 of Mr. Amado's amendments. In that way it would be possible, he hoped, to secure unanimous agreement, and to comply with the provisions of article 20 of the Commission's Statute.

18. Mr. LIANG (Secretary to the Commission) said that he was in full agreement with Mr. Spiropoulos that no unanimous or even preponderant decision could be reached in favour of any of the points of view expressed, except for some very general one such as Mr. Spiropoulos himself had put into words. He felt, however, that further consideration should be given to Mr. Kozhevnikov's proposal. He thought it was clearly the intention of the Statute that on any particular subject the Commission's work should be submitted as an integrated whole, and not piecemeal. It should ensure that it was judged by the final fruits of its work. There was, of course, nothing to prevent the Commission from submitting progress reports on a subject it was

considering, but the General Assembly might be misled, and public opinion perturbed, by only a few brief sentences on so complex a question; moreover, members of the General Assembly might not have time during the General Assembly session to refer to the Commission's summary records so as to understand the background to those necessarily somewhat laconic sentences.

19. Mr. CÓRDOVA feared that the wording proposed by Mr. Spiropoulos would not prove very helpful and might even cause confusion. He saw no reason why the Commission should not take a definite stand on certain questions. A preponderant majority of the Commission held the view that the three-mile rule no longer existed in international law. A vote on that question would at least give some guidance to the special rapporteur.

20. Mr. LAUTERPACHT said that he did not feel as sure as Mr. Córdova that an overwhelming majority of the Commission favoured the abolition of the three-mile rule. In any event, it must be realised that such a decision would, in the first place, give the Commission a kind of publicity which was wholly undesirable. Based as it would be on only three days' debate, which were themselves based on five pages of statistics and six of other information, he feared that it would be most damaging to the Commission's prestige. Secondly, it would prejudge the issues before any political conference that might be convened to seek a political solution to the matter; it would make difficult the co-operation of many States faced by a rash decision of the Commission on an issue of great significance. Thirdly, by preventing him from devoting further constructive thinking to the problem as a whole, and particularly to the possibility of alternatives to an extension of the territorial sea, it would hinder rather than help the special rapporteur. Lastly, it might open the floodgates to further exorbitant claims on the subject.

21. He would therefore vote for Mr. Spiropoulos' proposal, and if that was not generally acceptable, for that of Mr. Kozhevnikov.

22. Mr. SCELLE said that he could accept either Mr. Amado's or Mr. Spiropoulos' proposal, since both merely stated a fact, but he preferred Mr. Kozhevnikov's proposal, which in the circumstances was perhaps the most prudent.

23. Mr. ZOUREK felt that a majority of the Commission were already in agreement that the three-mile limit had never existed as a general rule of international law and that if all the information on the subject were submitted to the Commission at its next session, even those members who at present argued that the three-mile rule had existed and still did exist would be compelled to admit that in fact it had never existed as a general rule.

24. Mr. SPIROPOULOS suggested that Mr. Kozhevnikov's proposal be amended in the sense that, while deferring a decision, the Commission should also request the special rapporteur to consider the various points of

view that had been expressed and the various proposals that had been made and then submit specific proposals to it at its next session.

25. Mr. HUDSON suggested that the Commission might at least be able to reach general agreement on the following text, as guidance to the special rapporteur:

"1. The Commission notes that, in the present state of international law and practice, it is possible to say that the minimum width of the territorial sea of each coastal State is three marine miles, but it is not possible to say that any maximum width has been established. It notes also, however, that few States have fixed a width in excess of twelve miles.

"2. The Commission thinks it desirable that a greater uniformity in the delimitation of the territorial sea should be brought about, and to this end it suggests that no coastal States should fix a greater width of its territorial sea than twelve miles."

26. The CHAIRMAN put to the vote Mr. Spiropoulos' amendment to Mr. Kozhevnikov's proposal.

Mr. Spiropoulos' amendment was adopted by 10 votes to 1 with 1 abstention.

27. The CHAIRMAN then put to the vote Mr. Kozhevnikov's proposal as thus amended.

Mr. Kozhevnikov's proposal as thus amended was adopted by 9 votes to 2 with 1 abstention.

28. Mr. HSU said he had voted against Mr. Kozhevnikov's proposal not because he was opposed to postponement of a decision but because the proposal precluded discussion of Mr. Hudson's text, which appeared to him both sound and useful.

ARTICLE 5 : BASE LINE⁶

29. The CHAIRMAN invited the Commission to pass to the consideration of article 5 of the Draft Regulation contained in the special rapporteur's report.

30. Mr. FRANÇOIS said that the question of the base-

⁶ Article 5 read as follows :

"1. As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.

"2. Nevertheless, where a coast is deeply indented and cut into, or where it is bordered by an archipelago, the base-line becomes independent of the low-water mark and the method of base-lines joining appropriate points on the coast must be employed. The drawing of base-lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

"3. The line of low-water mark is that indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides.

"4. Elevations of the sea bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea."

line had been dealt with at The Hague Conference for the Codification of International Law in 1930. Since then there had been the very important judgment of the International Court of Justice in the *Fisheries Case* between the United Kingdom and Norway, a judgment which had been rendered by 10 votes to 2.⁷ As a preliminary issue, the Commission would have to decide whether it wished to enter into the substance of the problem of the base-line, or whether it would confine itself to endorsing the judgment of the Court.

31. Mr. AMADO said that paragraph 1 of article 5 reproduced almost exactly the text prepared by Sub-Committee No. II⁸ of the Second Committee of The Hague Conference, the only difference being the introduction of the words "As a general rule" in Mr. François' draft.

32. He supported the special rapporteur's formula recognizing the low-water mark as the line from which to measure the breadth of the territorial sea. That standard had for some time been gaining ground both in theory and in the practice of States and had recently received the sanction of the International Court, which had declared in its judgment in the *Fisheries Case*:

"The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory."⁹

33. Paragraph 3 of article 5 also closely followed the Report of Sub-Committee No. II, but he considered that the proviso should be deleted, since, if the low-water mark in official charts departed appreciably from the line of mean low-water spring tides, those charts would not be accurate and their validity would be questioned by any legal tribunal.

34. The principle contained in paragraph 4, which also appeared in the Report of Sub-Committee No. II, could be accepted without difficulty.

35. That, however, was not the case with paragraph 2 of Mr. François' text, which had no counterpart in the draft prepared at The Hague Conference. There, in his opinion, the special rapporteur had gone too far. The expression "deeply indented and cut into" could give rise to doubts which would allow States to fix their base-line in a manner more consonant with their own interests than with those of international law and the freedom of the seas. States would be tempted to try to demonstrate that their coast-line corresponded to that definition, in order to claim the right to adopt the method of straight lines between appropriate points on the coast.

⁷ *Fisheries Case*, Judgment of December 18th, 1951 : *I.C.J. Reports 1951*, p. 116.

⁸ See the Report of Sub-Committee No. II, League of Nations Publication, *V. Legal*, 1930, *V. 9* (document C.230. M.117. 1930. V), Annex II.

⁹ Judgment, *op. cit.*, p. 128.

36. The special rapporteur had obviously been influenced by the judgment of the International Court in the *Fisheries Case*, but it must be remembered that that judgment related to the very special and altogether unique configuration of the Norwegian coast-line. The special nature of the case was amply demonstrated by the considerations which had governed the investigation of the Norwegian Commission appointed by Royal Decree in 1911 on the delimitation of the territorial waters of Finnmark, to which Gidel referred in his book *Le droit international public de la mer* (vol. III, at p. 643). He doubted, therefore, whether a rule applicable to the special configuration of the Norwegian coast-line could be elevated to the status of a general rule as was done in paragraph 2 of article 5.

37. Another factor had rendered the *Fisheries Case* a special one, and that was the part played in it by the concept of "historic waters". Although the recognition of historic titles to certain waters was not the only consideration upon which the judgment of the Court had been based, the Court had given a good deal of weight to the concept of *possessio longi temporis*, and Judge Hackworth had declared his concurrence in the operative part of the judgment for the reason that he considered the Norwegian Government to have proved "the existence of an historic title to the disputed areas of water".

38. For the aforementioned reasons, he proposed the deletion of paragraph 2. The succeeding articles on bays, islands, groups of islands, straits, and the delimitation of the territorial sea at the mouth of a river, adequately covered the problems associated with establishing a base-line on deeply indented coasts. Should disputes arise in the future involving coast-lines with a special configuration such as that of Norway, the tribunal concerned would be guided by the judgment of the Court in the *Fisheries Case*.

39. Mr. HUDSON, referring to the two questions posed by the special rapporteur, said there was no reason why the Commission should not enter into the substance of article 5, which was crucial to the whole draft and, in his opinion, even more important than article 4.

40. He regretted that such prominence should have been given by the special rapporteur to the Report of Sub-Committee No. II of The Hague Conference, a prominence which was hardly justified by the dubious quality of that report. The Sub-Committee had consisted of only thirteen representatives of the forty-eight States attending the Conference. It had sat for a fortnight only, and its report had never been considered by the Second Committee; nor was it mentioned, as was the Report of Sub-Committee No. I of the Second Committee, in the final act, or given any official status.

41. The answer to Mr. François' second question was that the Commission would have to pay a great deal of attention to the judgment of the International Court in the *Fisheries Case*, since it was the first authoritative pronouncement on the matter and removed much of the confusion which hung like a haze round the Conference of 1930. The Court in its judgment did not lay

down any mandatory solution for determining the base-line of a deeply-indented coast. It was open to States to adopt the approach advocated by the Court and reproduced by the special rapporteur in the second sentence of paragraph 2 in article 5. It would be remembered that the Court had also declared that, in drawing base-lines, States were justified in taking economic considerations into account. He saw no reason why the Commission should contest the validity of the principles laid down in the Court's judgment which, to some extent, had been incorporated by the special rapporteur in his draft.

42. He considered paragraph 1 of article 5, based on a text prepared by Sub-Committee No. II of The Hague Conference, objectionable in that it would be applicable only to a coast-line which confronted the sea, and that was frequently not the case. As at present formulated, paragraph 1 begged the question, and he hoped Mr. François would draw on his vast store of knowledge on the subject under consideration to elucidate the meaning of "low-water mark" and explain whether any account was to be taken of the eighteen-year period after which the tides changed. He (Mr. Hudson) was against elevating the line of the low-water mark to a position of such importance.

43. Referring to paragraph 3, he thought that the definition of the low-water mark as the line of mean low-water spring tides was not clear. Furthermore, to accept a line indicated on official charts which, incidentally, frequently omitted to show the low-water mark properly, would be inconsistent with the judgment of the Court.

44. There was one approach to the whole problem of the base-line which had not been mentioned by the special rapporteur, and it was that offered by a provision incorporated in six treaties concluded by the United States with other governments in the early twenties, which read as follows :

"The Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast-line outwards and measured from the low-water mark constitute the proper limits of territorial waters."

"Extending from the coast-line outwards" was, of course, the operative phrase and might conveniently be considered in relation to a State like Cuba which had an unusual coast-line, for long the subject of diplomatic correspondence. The coast of that State consisted of a long line of reefs enclosing vast areas of water. The Spanish Government had proclaimed that line as the base-line for the territorial sea and the areas within the reefs accordingly became inland waters. Various governments admitted the propriety of that claim and the line was referred to as an exterior or political coast-line. Such a concept was endorsed by the judgment of the Court in the *Fisheries Case*.

45. The definition of the coast-line was necessary and must be dealt with by reference to bays and off-shore islands, since many States, such as Norway, to some extent the Netherlands, Saudi Arabia in its law of 1949,

and Egypt in its law of 1951, drew their base-line outside the outermost islands.

46. Mr. LAUTERPACHT said he intended to confine his remarks to paragraphs 1 and 2 of article 5, though he might have to refer to articles 6 and 10 which were relevant to the problem of the base-line.

47. The special rapporteur had made judicious and selective use of the elements of the Court's judgment in the *Fisheries Case* and had practically adopted in its entirety its standard of the straight line to replace the low-water mark line. On the other hand, although the Court had found that no ten-mile rule existed in respect of bays and islands, Mr. François appeared to adopt such a rule, whether *de lege ferenda* or *de lege lata*.

48. In paragraph 1 the special rapporteur seemed to be following the report of Sub-Committee No. II of The Hague Conference and in that connexion Mr. Hudson's attention might be drawn to the fact that there was nothing in the judgment in the *Fisheries Case* to authorize the entire elimination of the low-water mark as a means of determining the base-line. Indeed the Court had declared, in its judgment, that :

"Where a coast is deeply indented and cut into, . . . the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast-line to be followed in all its sinuosities . . ."¹⁰

In other words, the low-water mark was still a presumptive base-line, although it was recognized that it might yield to the principle of straight base-lines. He therefore had no objections of substance to paragraph 1 ; he welcomed it.

49. As the judgment of the Court in the *Fisheries Case* was rendered by an overwhelming majority, namely by ten votes to two, it should be treated with the greatest respect and the special rapporteur was perhaps right in treating it as the starting point of a new development in the law. It had been stated by Mr. Hudson that the judgment had removed much of the confusion which reigned at the time of The Hague Conference. On the other hand, the judgment in its substantive aspects was based on subjective tests, some of which were reflected in paragraph 2 of article 5. For example, that paragraph stated that : "The drawing of base-lines must not depart to any *appreciable extent* . . . the sea areas lying within these limits must be *sufficiently closely linked*". The nature of that subjective element had apparently been appreciated by the Court which had declared :

"The delimitation of sea areas has always an international aspect ; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it,

¹⁰ *Op. cit.*, pp. 128—129.

the validity of the delimitation with regard to other States depends upon international law.”¹¹

It was accordingly important to recognize, either in the text or in the commentary on it, that the validity of a delimitation by a State of its territorial sea was of international concern and subject to review by an international authority.

50. Mr. YEPES considered it was impossible to achieve a universally applicable solution to the problem of the drawing of base-lines, owing to the wide variations in the conditions of coasts. Nor could the Court's judgment in the *Fisheries Case* offer such a solution, since it related to a coast with highly individual characteristics. Some flexible formula would have to be sought which could be applied as appropriate to each case.

The meeting rose at 1 p.m.

¹¹ *Ibid.*, p. 132.

170th MEETING

Wednesday, 23 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS

Present :

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

Secretariat : Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 5 of the agenda) (A/CN.4/53) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Draft Regulation contained in the special rapporteur's report (A/CN.4/53) on the régime of the territorial sea.

ARTICLE 5 : BASE-LINE (*continued*)

2. Mr. FRANÇOIS, replying to some of the comments made on article 5, said he realized that he was not proof against criticism for having borrowed the whole article, either from the report of Sub-Committee No. II

of the Second Committee of the Conference for the Codification of International Law of 1930 or from the judgment of the International Court in the *Fisheries Case* between Norway and the United Kingdom.

3. He could not agree with Mr. Hudson, who had reproached him for having to a great extent followed the report of Sub-Committee No. II, that its work was devoid of merit. That Sub-Committee, under the chairmanship of Mr. Göppert, had consisted of thirteen members and had been assisted by a committee of experts including the well-known United States authority, Mr. Boggs. The committee of experts had had as chairman Admiral Surie of the Netherlands, a recognized authority on matters pertaining to the territorial sea, who had participated in The Hague Peace Conference and the London Naval Conference.

4. Until the previous meeting he (Mr. François) had never heard any criticisms of the work of Sub-Committee No. II of the kind advanced by Mr. Hudson. On the contrary, the general opinion hitherto had been that the draft articles prepared by it were a valuable contribution. That opinion was shared by one of the most distinguished authorities on the subject, Mr. Gidel. In the circumstances, the Commission might well be guided by the work of the Sub-Committee.

5. The question of base-lines raised a general issue connected with the method of dealing with highly specialized matters on which members of the Commission did not have the necessary technical knowledge. There were three possible courses of action : the Commission could either refer such matters to governments, consult experts, or derive its conclusions from published expert opinion. If the last-mentioned course were chosen, the report should indicate clearly the material on which the Commission had drawn, since governments might wish to instruct their own experts to examine it. It appeared to him highly dangerous for the Commission itself to modify the conclusions of technical experts. For that reason he would hesitate before accepting any substantial amendments to texts derived from the report of Sub-Committee No. II.

6. As regards the word “entire” in paragraph 1, to which Mr. Hudson appeared to object particularly, he would have no objection to its deletion, since it was apparent from the provisions of paragraph 2 that paragraph 1 could not apply to all coasts.

7. As Mr. Amado had criticized paragraph 3, he would refer him to the commentary¹ on the report of Sub-Committee No. II, which brought out clearly the meaning of the article.

8. The Preparatory Committee for the Codification Conference had been aware of the different interpretations to which the expression “low-water mark” might lend itself, and had stated that that was a technical point to which the attention of governments should be

¹ Acts of the Conference for the Codification of International Law, Vol. I, League of Nations Publication (document C. 351, M.145. 1930. V), p. 131; Report of the Second Commission, League of Nations Publication V. Legal, 1930. V. 9 (document C.230, M.117. 1930. V), p. 11.

drawn in order that agreement might be reached. The expression "line of mean low-water spring tides" had been adopted after careful consideration by experts. That formula took into account the effect of the moon and storms, and there was no valid reason why the Commission should consider itself competent to find a better one.

9. Mr. HUDSON had criticized paragraph 4 on the grounds that it was incomprehensible. Sub-Committee No. II, however, could not be held responsible since such a provision occurred in the North Sea Fisheries Convention of 1882 and, as far as he knew, no doubts had hitherto been raised as to its meaning which was that, even if an elevation of the sea bed was only uncovered at low tide, provided it was situated within the territorial sea, the limits of the territorial sea would thereby be extended further out into the high seas. That point of view corresponded with the observation by the Preparatory Committee of The Hague Conference on the replies of governments on point VI (definition of an island) in the questionnaire. That observation read as follows :

"A compromise may be contemplated. It will consist in allowing an island (i.e., an isolated island) to have its own territorial waters only if it is above water at high tide, but in taking islands which are above low-water mark into account when determining the base-line for the territorial waters of another island or the mainland, if such islands be within those waters."²

10. He was extremely gratified that Mr. Lauterpacht should appear ready to recognize that the judgment of the International Court in the *Fisheries Case* foreshadowed the future development of law in respect of base-lines. He (Mr. Lauterpacht) seemed, however, to detect a contradiction in the attitude of the special rapporteur in accepting the decisions of the Court for one article and departing from them in others, notably articles 6 and 10. He would therefore refer the Commission to part of his comment on article 6 which read :

"In its judgment of 18 December 1951 in the *Fisheries Case*, the International Court of Justice pointed out that, although the ten-mile rule with regard to bays has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. The Court considers that consequently the ten-mile rule has not acquired the authority of a general rule of international law.

"The rapporteur has nevertheless inserted the Sub-Committee's article in article 6, since the Commission's task is not merely to codify existing law but also to prepare the progressive development of the law".³

² Conference for the Codification of International Law, Bases of Discussion, vol. II. Territorial Waters. League of Nations Publication, V. Legal, 1929. V. 2 (document C.74, M.39, 1929. V), p. 54.

³ A/CN.4/53 (mimeographed English text, p. 26; printed French text, comment to article 6, paras. 2—3).

11. In his comment on article 10, he had quoted the following observations by the Court :

"The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the 'skjaergaard'. Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

"In this connexion, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals."⁴

He had thereafter added that he had "inserted article 10 not as expressing the law at present in force, but as a basis of discussion, should the Commission wish to study a text envisaging the progressive development of international law on this subject".⁵

12. He did not therefore think that Mr. Lauterpacht's criticism was well founded. There was an essential difference between articles 6 and 10, which related to new rules of law that, in the opinion of the Court, could not yet be considered as being in force, and article 5, which embodied the two rules in force for determining base-lines.

13. The Commission would in no way derogate from the judgment of the Court in the *Fisheries Case* as a whole if, in pursuance of its task of promoting the progressive development of international law, it were to adopt the articles he had proposed.

14. Both Mr. Lauterpacht and Mr. Amado had expressed dissatisfaction with the vagueness of paragraph 2 of article 5, and he admitted the force of that criticism, particularly with regard to such phrases as "deeply indented" and "base-lines must not depart to any appreciable extent from the general direction of the coast". The Court had not achieved greater precision, and he doubted whether the Commission would be more successful. It would therefore be well advised to follow the directives suggested by the Court.

15. Mr. Lauterpacht had rightly observed that the absence of definite guidance in paragraph 2 might result in having to submit a dispute on its interpretation to a judicial body or an arbitral tribunal. It was a matter of common knowledge, however, that such disputes were liable to arise in connexion with far more specific provisions, and it was one of the duties of States, as members of the international community, to submit such disputes to peaceful settlement.

16. Mr. Amado had argued with good reason that the judgment of the Court related to a very special case and that great care must be exercised in giving it general

⁴ A/CN.4/53 (mimeographed English text, p. 30; printed French text, comment to article 10, para. 2).

⁵ Ibid. (printed French text, comment to article 10, para. 3).

application, but the Court had not limited itself solely to the case of Norway. It had declared, for example, that: "Where a coast is deeply indented and cut into, as is that of Eastern Finnmark... the base-line becomes independent of the low-water mark...",⁸ and it was well known that such conditions obtained elsewhere, as, for example, in Iceland and Scotland.

17. In that connexion, he failed to understand the suggestion implicit in Mr. YEPES' comments at the previous meeting that rules appropriate to Europe would not be applicable to the American continent and could not form part of a general rule.

18. Mr. YEPES observed that all he had wished to emphasize was that the provisions of paragraph 2 of article 5 would not be applicable to certain areas of the world and could not therefore be elevated to the status of a universal rule.

19. Mr. LAUTERPACHT thanked the special rapporteur for his detailed and conscientious reply to the comments of members on article 5. He wished again to focus attention on the somewhat vague, discretionary and subjective element implicit in the judgment of the Court in regard to the drawing of base-lines, in view of which some provision must be made, perhaps in article 5, for the impartial determination of the legitimacy of the base-lines used.

20. In support of his argument, he drew the attention of the Commission to such expressions as "reasonable" and "moderate" used by the Court in considering the legitimacy of certain claims made by the Norwegian Government, and to its emphasis on the need to make use of small-scale maps in determining base-lines. He hoped those elements would be duly considered in great detail by the special rapporteur in preparing his next report.

21. Mr. Amado had argued that the judgment of the Court in the *Fisheries Case* was confined to special circumstances arising from the particular configuration of the Norwegian coast. There were a number of passages in the judgment to support that view, as for example: "Such a coast, viewed as a whole, calls for the application of a different method".⁹ That argument that the method of straight lines was imposed by particular geographical conditions, had also been advanced by writers such as Gidel and Boggs. He was still inclined, however, to agree with the special rapporteur that the Court had applied a general principle to the specific case of Norway, and his view was confirmed by the following statement of the Court:

"Consequently, the Court is unable to share the view of the United Kingdom Government that 'Norway, in the matter of base-lines, now claims recognition of an exceptional system'. As will be shown later, all that the Court can see therein is the

application of general international law to a specific case."⁸

22. As he did not attach a great deal of importance to the question whether the judgment of the Court was *de lege lata* or *de lege ferenda*, the contradiction between article 5 and articles 6 and 10 in the special rapporteur's draft was of no great moment. The special rapporteur's work on article 6 was particularly valuable, since the judgment of the Court in the *Fisheries Case* lent itself to the interpretation that the legal concept of a bay had been abolished altogether, a concept which Mr. François had succeeded in salvaging.

23. Mr. KOZHEVNIKOV said that, as some speakers had referred to article 6 in the course of the discussion on article 5, he was bound to remind the Commission of the objections he had raised to that article at the 164th meeting.⁹

24. Mr. YEPES proposed that the first sentence of paragraph 2 in article 5 be replaced by the following text:

"As an exception, in certain parts of the world where special geological, morphological or historical circumstances necessitate a special régime, because the coast is deeply indented or cut into or because there are islands or archipelagoes in its immediate vicinity, the base-line may be independent of the low-water mark. In this special case, the method of base-lines joining appropriate points on the coast may be employed."

The purpose of his amendment was to emphasize that paragraph 2 related to a particular rule which was not universally applicable, and that it was permissive, but not obligatory on States, to adopt the straight-line method where the coast-line was deeply indented or cut into. He was against that provision being mandatory as in the text framed by the special rapporteur.

25. Mr. KOZHEVNIKOV said that the Commission was holding a preliminary discussion on matters of principle and had agreed not to put to the vote article 4 in Mr. François' report. In his view, it would hardly be appropriate to vote on article 5 either. It should be enough merely to instruct the special rapporteur to take into account the views expressed and proposals submitted by members.

26. The CHAIRMAN observed that the Commission's decision on article 4 related to that article only. An amendment to article 2 for example, had been put to the vote. The Commission must obviously follow the procedure most appropriate to each article, and it was sometimes desirable to ascertain the general consensus of opinion by means of a vote. It was always open for any member of the Commission to propose that a particular text be not voted upon.

27. Mr. SPIROPOULOS agreed with the Chairman and considered that, as views on article 5 did not appear

⁸ *Fisheries Case*, Judgment of December 18th, 1951: *I.C.J. Reports 1951*, p. 128—129.

⁹ *I.C.J. Reports 1951*, p. 129.

⁸ *Ibid.*, p. 131.

⁹ See summary record of the 164th meeting, para. 22.

to differ very significantly, the Commission might vote on the principles it embodied and on Mr. Yépes' amendment, without in any way binding itself as to wording.

28. Mr. FRANÇOIS said he would appreciate being given more precise indications of the trend of opinion in the Commission. A vote on article 5 would be valuable as revealing the attitude of those members who had not expressed their views in the general debate.

29. He considered Mr. Yépes' amendment to be largely a matter of wording, and it would be remembered that the Commission had decided not to concern itself with drafting at the present stage. He was unable to understand the purpose of the words "in certain parts of the world" in that amendment.

30. Mr. SPIROPOULOS suggested that the special rapporteur's preoccupation would be met by the deletion of the words "geological, morphological or historical" in Mr. Yépes' amendment.

31. Mr. YEPES accepted Mr. Spiropoulos's suggestion. He also accepted the deletion of the words "in certain parts of the world".

32. Mr. ZOUREK doubted whether it was appropriate to mention archipelagoes in a general provision relating to deeply indented coast-lines. Archipelagoes should surely be dealt with in connexion with article 10.

33. Despite Mr. François' explanations, he still found paragraph 4 obscure. Was a drying rock to be considered as an island? In the next draft to be prepared by the special rapporteur some strictly technical information would have to be included to make the provisions comprehensible.

34. Mr. HUDSON said he was unable to understand the purpose of Mr. Yépes' amendment, particularly the significance of the words "geological, morphological or historical".

35. Referring to paragraph 4, he said he was unable to find any provision of that kind in the North Sea Fisheries Convention of 1882.¹⁰

36. It had been suggested that the Commission might have to discuss the ten-mile rule in connexion with article 6, but that rule could only have any meaning if the territorial sea were delimited at three miles. Furthermore, the practice of States did not appear to justify the claim for its existence; for example, Argentina had for years claimed, as inland waters, bays which in one case were at least forty miles wide at the entrance, while similarly Canada claimed the whole of Hudson Bay, and such claims had not been contested. It was therefore entirely premature to consider the ten-mile rule until the breadth of the territorial sea had been established.

37. Mr. FRANÇOIS said that, if the Commission accepted the principle in paragraph 4, its drafting could always be improved. As he had framed it, the provision

related only to drying rocks, as he had followed Sub-Committee No. II in distinguishing between drying rocks and islands. The Harvard Research draft, on the other hand, applied the same rule to both.

38. Mr. el-KHOURI said it would undoubtedly be difficult to find a universally applicable rule for drawing base-lines. He found the principles in article 5, however, acceptable.

39. He did not, on the other hand, think that Mr. Yépes' amendment did anything to mitigate the difficulties of the problem and he was unable to understand the relevance of geographical, morphological and historical circumstances.

40. Mr. HUDSON proposed the deletion of the words "along the entire coast" from paragraph 1 of article 5.

41. Mr. FRANÇOIS accepted Mr. Hudson's amendment.

42. The CHAIRMAN said he intended to put each paragraph of article 5 to the vote separately, it being understood that the Commission was voting on substance rather than on wording.

Paragraph 1, as amended, was approved by 8 votes to none, with 1 abstention.

Mr. Yépes' amendment, as modified, to the first sentence of paragraph 2 was approved by 5 votes to 1, with 4 abstentions.

Paragraph 2, as amended, was approved by 10 votes to 1, with 1 abstention.

43. Mr. AMADO proposed that paragraph 3 be voted in two parts, the first up to the words "used by the coastal State". As he had already explained, the latter part of the paragraph seemed to him entirely superfluous, since an official chart which departed appreciably from the line of mean low-water spring tides would not be used for drawing the base-line. Furthermore, such a provision was dangerously subjective and might give rise to ambiguity. Who was to determine whether a line departed appreciably from the line of mean low-water spring tides?

The words: "The line of low-water mark is that indicated on the charts officially used by the coastal State" in paragraph 3 were approved unanimously.

44. Mr. SCELLE asked whether it was Mr. Amado's wish that the second clause in paragraph 3 should simply be omitted, or whether he wished to replace it by some other criterion. Not all States possessed expert hydrographic services, and an international body of the standing of the Commission could not assume that official charts were always accurate.

45. Mr. AMADO still felt that the cases where official charts were more than slightly inaccurate were so infrequent as to make it unnecessary to introduce the element of subjective appreciation contained in the second clause.

46. Mr. HUDSON said that the English and French texts of paragraph 3 did not tally, the phrase "the line

¹⁰ See text in de Martens, *Nouveau Recueil Général*, 2ème série, vol. IX, pp. 556—563.

of mean low-water spring tides" not being an exact translation of the phrase "*la laisse moyenne des plus basses mers bimensuelles et normales*". The English text was actually preferable to the French, since the lunar months included two neap tides as well as two spring tides. There was no reason why the Commission should repeat the error into which a sub-committee of the 1930 Conference had fallen.

47. Mr. FRANÇOIS said that he would ascertain before the next session what exactly had been the criterion which Sub-Committee II of the Second Commission of the Codification Conference had intended to lay down.

48. He drew Mr. Amado's attention to the passage from that Sub-Committee's report which he had quoted in his own report.¹¹ The Sub-Committee had pointed out that, in practice, different States employed different criteria to determine the line of low-water mark, one being the low-water mark indicated on the charts officially used by the coastal State, and the other that referred to in the second clause of his draft for paragraph 3. He had followed the Sub-Committee in giving preference to the first criterion, as it appeared to be the more practical, but in order to guard against abuse, had added a proviso that the line indicated on the chart must not depart appreciably from the more scientific criterion.

49. Mr. YEPES agreed that the Commission must ensure that the line of low-water mark conformed to a scientific criterion. He therefore supported the second clause of paragraph 3. If a dispute arose as to whether a chart did or did not "appreciably" depart from that criterion, it could be referred to an international tribunal.

50. The question of bringing the English and French texts into line could well be left until the next session.

51. Mr. AMADO said that, in the light of the explanations given by the special rapporteur, he would be prepared to accept the second clause of paragraph 3.

52. Mr. SCELLE wondered, however, whether the Commission could not find a more general criterion than the "scientific" criterion set forth in that clause, since first it was apparently open to question on scientific grounds, and secondly it would not exclude charts which were unacceptable on other grounds, as being out of date, for instance.

53. Mr. SPIROPOULOS recalled that the Sub-Committee whose recommendations had been challenged had been composed of scientific experts. He did not think the Commission was in a position to criticize its recommendations on a scientific question. It must either accept them or, if it was not satisfied, set up a committee of experts itself.

54. Mr. HUDSON said that he would merely point out

that the Sub-Committee's recommendations meant two wholly different things in English and in French.

55. Mr. LAUTERPACHT felt that the Commission was in a position to decide whether the first clause in paragraph 3 should be subject to a proviso along the lines of the second clause, on the understanding that before the next session the special rapporteur would attempt to clarify the question raised by Mr. Hudson.

On the above understanding the second clause of paragraph 3 was approved by 8 votes to 2, with 3 abstentions.

56. Mr. SCELLE said that he had abstained because he could not vote for a provision which he did not understand.

57. The CHAIRMAN then put to the vote paragraph 3 as a whole.

Paragraph 3 was approved by 10 votes to 1, with 2 abstentions.

Paragraph 4 was approved by 12 votes to 1.

Article 5 as a whole, as amended, was approved by 8 votes to 1, with 3 abstentions.

58. Mr. SCELLE said that he had abstained in the vote on article 5 as a whole, because he had voted in favour of some of the paragraphs and against others.

59. Mr. KOZHEVNIKOV said that he had abstained in the vote on article 5 as a whole because he had abstained in the vote on the amendment proposed by Mr. Yepes to paragraph 2. If that amendment had not been adopted, he could have voted for the article as a whole.

60. Mr. ZOUREK said that he had abstained for the same reasons as Mr. Kozhevnikov, and also because he felt that the drafting amendments he had suggested should be taken into account.

61. The CHAIRMAN then drew attention to article 13, which was the next article which the Commission had decided to consider.

62. Mr. LAUTERPACHT, on a point or order, said that in his view the question of bays was quite as important as the question of base-lines. He therefore proposed that article 6 be added to the list of the articles which the Commission was to consider.

63. Mr. YEPES seconded Mr. Lauterpacht's proposal.

64. Mr. FRANÇOIS recalled that the point had already been made that article 6 could not be dealt with as long as the breadth of the territorial sea remained undecided.

65. Mr. SPIROPOULOS said that he would have agreed with Mr. François if he had been sure that the Commission would propose a definite figure for the limits of the territorial sea. As he was not sure, he would support Mr. Lauterpacht's proposal, but would suggest that article 6 be considered after the other articles which the Commission had already decided to consider, namely articles 13 and 3.

¹¹ A/CN.4/53 (mimeographed English text, p. 22; printed French text, comment to article 5, para. 1).

66. Mr. el-KHOURI associated himself with the suggestion put forward by Mr. Spiropoulos.

After further discussion Mr. Spiropoulos' suggestion was adopted by 8 votes to 2 with 1 abstention.

Programme of work

67. The CHAIRMAN felt it necessary to draw attention to the fact that the time then allocated for final consideration of the draft on arbitral procedure had already been used up.

68. He thought all members of the Commission were agreed on the importance of reaching at least general decisions on the régime of the territorial sea. In view of the very careful work done by the Standing Drafting Committee it might not be necessary to devote as much time to arbitral procedure as had been estimated. Unless a previous decision by the Commission were reversed, it would also, however, have to consider at its present session the question of the review of its Statute. In that connexion he understood that some members felt it would be inopportune to review the Statute, since the term of office of the present members of the Commission would end in 1953. Moreover, the Commission had stated in its report on its third session that it was "unable to say that either lack of clarity in the statutory provisions, or inflexibility of the procedures prescribed, has interfered with its achievement of 'rapid and positive results'".¹²

69. Mr. CÓRDOVA recalled that, as was clear from paragraph 70 of the report of the Commission on its third session, his appointment as special rapporteur on the question of review of the Statute had been subject to acceptance by the General Assembly of the Commission's recommendation that it be placed on a full-time basis. As that recommendation had not been accepted, he had felt it unnecessary to prepare a report. In the circumstances he did not believe that the Commission should attempt to submit recommendations for revision of its Statute, which, as the Chairman had pointed out, had not hampered the Commission in its work. Moreover, any suggestions the Commission submitted would only give rise to alternative suggestions by members of the General Assembly, and the result would be to help neither the General Assembly nor the Commission itself.

70. Mr. LIANG (Secretary to the Commission) said that he would merely add to what Mr. Córdova had said that the drafting of the Statute had been a lengthy and thorough affair and that it might be unwise to attempt to revise it at the present time, particularly since it had been the general view at the last session of the General Assembly that more time was needed before the functioning of the Commission under its present Statute could be evaluated.

71. Mr. HSU recalled that all the procedures which had been laid down for the Commission had been intended as provisional. The Commission had been asked by the General Assembly to give its views on those procedures in the light of its experience, in order to benefit not the present members of the Commission but their successors. In the circumstances, however, he agreed that it might be undesirable to take up the question at the present session.

72. Mr. LAUTERPACHT thought that all members of the Commission shared the Chairman's hope that further discussion of the articles in the draft on arbitral procedure would be brief. He recalled, however, that the Commission had agreed that those articles should be accompanied by explanations, and he understood that it had been the Commission's previous practice to examine such explanations sentence by sentence. That might take time. In any case he would be opposed to any undue haste about a question which was so important and had, so far, been the subject of such careful consideration.

73. With regard to reviewing the Commission's Statute, he agreed with Mr. Córdova, so far as the present session was concerned, but felt that the Commission should devote some time towards the close of its next session to tabulating the results of its experience over the past five years for the benefit of those members who would succeed the present members. He also felt that it should devote at least two or three days' consideration at its present session to the machinery for continuing its work between the present session and the next, a question on which, as he had previously indicated, he would have a number of observations to make.

74. Mr. SCELLE recalled that the Commission had already decided that its report to the General Assembly on the present session should include the draft articles on arbitral procedure, with explanations. He had only just received the final text of those articles from the Standing Drafting Committee, and because of the short time at his disposal, and also in order to keep the question of arbitral procedure to a proportionate length in the Commission's report, he was confining himself to preparing such explanations as appeared to him necessary to make clear the Commission's intentions. He did not think their consideration would take long, and he hoped no further discussion at all would be allowed on the articles themselves.

75. On the other hand he agreed with Mr. Lauterpacht that it was only the present members of the Commission who, from their experience, could make useful suggestions for improving its methods of work, and he felt that the Commission might well devote three or four meetings at the present session to considering that question.

76. The CHAIRMAN pointed out that the only question which the Commission had to decide at once was whether it wished to reverse its previous decision to review its Statute at its next three meetings.

77. Mr. HUDSON suggested that the question still

¹² Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858) para. 70. Also in Yearbook of the International Law Commission, 1951, p. 138.

remained whether the Commission wished the special rapporteur on that subject to submit a report to the next session.

78. The CHAIRMAN felt that that question could be considered when the Commission came to draw up the provisional agenda for the next session.

79. Mr. FRANÇOIS thought that it was difficult to separate the two questions. Some members of the Commission, for example, would only agree to deleting the item from the agenda of the present session if they knew that it would be taken up at the next session. He personally saw no possibility of adding that item to the already crowded agenda for the next session, and thought it would be perfectly possible to devote a few days' consideration to it at the present session.

80. Mr. SPIROPOULOS suggested that the Commission need take no final decision at present to delete from the agenda of the present session the item concerning review of the Statute; the item should merely be set aside for the time being with a view to allowing the Commission to continue consideration of the régime of the territorial sea, and thereafter to take up the draft articles on arbitral procedure, with explanations.

Mr. Spiropoulos' suggestion was adopted by 12 votes to none, with 1 abstention.

The meeting rose at 1.5 p.m.

171st MEETING

Thursday, 24 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS

Present :

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

Secretariat : Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 5 of the agenda) (A/CN.4/53) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the Draft Regulation contained in the special rapporteur's report (A/CN.4/53) on the régime of the territorial sea.

ARTICLE 13 : DELIMITATION OF THE TERRITORIAL SEA OF TWO ADJACENT STATES¹

2. Mr. FRANÇOIS drew attention to the various solutions to the problem of delimiting the territorial sea of two adjacent States indicated in the comment on Article 13 of his draft regulation. Those solutions would give the same line of delimitation in the theoretical case where the frontier was at right angles to the coast and the coast-line was absolutely straight. If the frontier was at 45 degrees to the coast-line, prolongation of the land frontier would be grossly unfair to one of the two States; if the coast-line was indented, it would be illogical to draw a line perpendicular to the coast at the point where the frontier reached the sea. Use of a median line appeared to be the only fair and logical solution in such cases; that line had been defined by the well-known American authority on such matters, Whittemore Boggs, as "a line every point of which is equidistant from the nearest point or points on the coast-lines of the two States".² That geometric concept was perhaps rather difficult for laymen to understand, and he himself had found it so, but he had every confidence in the expert qualifications of Mr. Whittemore Boggs.

3. As he had also indicated, however, the rule of the median line would not be applicable in certain exceptional cases. Those cases were not purely theoretical. He had referred, for example, to the case of the mouth of the Scheldt in the "Wielingen". At the 1930 Conference for the Codification of International Law, Mr. Barbosa de Magalhaes had suggested that there was one other case in Latin America which was really analogous, and he suggested that it was not perhaps necessary for the Commission to take those two cases into account. On the other hand, cases were not infrequent where the line of delimitation had to be drawn through the estuary of a river whose navigable channel did not follow the median line, and the line of delimitation would therefore present serious inconveniences; the Commission might consider that it was necessary to provide for cases of that kind.

4. Mr. HUDSON said that he had given careful consideration to the written and oral explanations of Mr. Whittemore Boggs concerning what he understood by the median line. He was not, however, entirely convinced, and hoped that the special rapporteur would further study the whole question, and particularly the results of applying the rule of the median line in particular cases. He himself had studied the question as it affected certain parts of the world, from a practical point of view, and feared that application of the rule of the median line would not be satisfactory in a

¹ Article 13 read as follows :

"The territorial sea of two adjacent States is normally delimited by a line every point of which is equidistant from the nearest point on the coastline of the two States."

² W. Boggs, "Delimitation of Seaward Areas under National Jurisdiction", *American Journal of International Law*, vol. 45 (1951), p. 256.

number of cases, particularly where the frontier reached the sea near a promontory.

5. The special rapporteur had cited Gidel in support of his statement that the rule of the median line had been put into effect in a number of cases. In the passage referred to, Gidel had mentioned the 1910 agreement between Canada and the United States of America, fixing a line of delimitation in the Passamaquoddy Bay.³ In his (Mr. Hudson's) view that agreement could not be quoted as one in which the rule of the median line had been applied. Any attempt to apply the principle of the median line in that case would actually have run up against the difficulty caused by the presence in the Bay of two islands, Grand Manan and Petit Manan, which would presumably have had to be somehow taken into account. In fact he could not find any principle which had served as a basis for drawing the line; agreement between the two States concerned had been reached, and no difficulties had arisen since.

6. Another case which had a bearing on the problem before the Commission was that of the United States frontier with Mexico along the Rio Grande. In 1848 the two Governments had concluded an agreement, extending the land frontier for a distance of three leagues towards the open sea from the mouth of the river.⁴ It had not been quite clear, however, where those three leagues were to begin or end, and some fifty years later an administrative agreement clarifying the point had been concluded. What was of interest was that, in that case too, neither the original agreement nor the administrative agreement had been based on any principle. He felt indeed that, even if some general principle were laid down, States should be free to disregard it provided they reached agreement. And presumably that was the meaning of the word "généralement", mistranslated as "normally", in the English text in the article drafted by the special rapporteur.

7. Where there were islands or archipelagoes in the vicinity of the point where the frontier reached the sea, as in the case of Passamaquoddy Bay, he did not think that any general principle could be laid down. Where there were not, it seemed that three solutions could be envisaged. First, the land frontier could be extended towards the open sea; but in that case it must be the general line of the land frontier, and not merely the line of the frontier near the coast, which was often deflected, for one reason or another, from the general line. Secondly, the line could be drawn perpendicular to a small portion of the coast-line. Thirdly, it could be drawn perpendicular to the general direction of the coast-line.

8. He noted that the special rapporteur had said that, in its judgment of 23 October 1909 on the maritime frontiers between Norway and Sweden, the Permanent Court of Arbitration had adopted the second solution.

Gidel at least had interpreted that judgment as based on the third solution, although admittedly the matter was not clear from the operative part of the judgment. In his view, however, the third solution was preferable to either of the other two which he had suggested, and certainly preferable to the rule of the median line, and he would commend it to the special rapporteur's particular and serious attention.

9. Mr. LAUTERPACHT said that he had listened with great interest to the statements by Mr. François and Mr. Hudson, which had, however, only confirmed him in his view that the Commission was not the appropriate body to discuss such technical questions. He had studied the question at issue in connexion with the delimitation of the continental shelf in the Persian Gulf, and had hesitantly come to certain provisional conclusions, but he felt that the Commission needed expert advice in the matter. It might set up a very small committee, composed, say, of the special rapporteur and Mr. Hudson, assisted by an expert like Mr. Whittemore Boggs and an expert cartographer. It would then be able to consider the committee's recommendations when they were presented by the special rapporteur.

10. Mr. AMADO said that he did not see how the Commission could come to any conclusion in the matter at the present time, particularly in view of the fact, pointed out by the special rapporteur, that it had no leads from the 1930 Conference on which to work.

11. The special rapporteur had indicated a number of solutions without giving detailed arguments for or against them. The only conclusion which he appeared to have reached was that "the International Law Commission *might* adopt in principle the rule of the median line". He had immediately gone on, however, to indicate cases in which that rule would not be applicable. There was, in fact, no unanimity either of legal precedent or of scientific opinion, and in the circumstances the only course which appeared to be open to the Commission was to request the special rapporteur to make a closer study of the question before the next session with a view to deciding whether or not he could submit a clear-cut and definite recommendation upon which the Commission could act.

12. Mr. CÓRDOVA agreed that the Commission was not in a position to propound a technical rule on a question which required expert scientific knowledge. His own efforts to understand the theory of the median line had been in vain, and he did not see how the establishment of a committee could help those members of the Commission not represented on it to understand the theory any better. He recalled, however, that when the Commission, at its third session, had considered the delimitation of the continental shelf of two adjacent States, it had approved a juridical rule, reading as follows:

"Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under

³ G. Gidel, *Le Droit international public de la mer*, vol. III, p. 769.

⁴ Treaty of Peace, Friendship, etc., signed at Guadalupe Hidalgo, on 2 February 1848. Text in de Martens, *Nouveau Recueil Général des Traités*, vol. XIV, p. 7.

the obligation to have the boundaries fixed by arbitration."

It was difficult to see how the Commission could go any further as regards delimiting the territorial sea of two adjacent States. On the other hand, it could not, as Mr. Amado has suggested, leave the question entirely open.

13. Mr. YEPES said that he, too, felt himself in some perplexity about a question which lay quite outside the field of expert knowledge of members of the Commission, as was clear from the fact that the articles in which Mr. Whittemore Boggs had propounded his theory had not appeared in a legal publication, but in a geographical review. On the other hand, the question was one which the Commission must solve, and in order to assist the special rapporteur in his task, he had drafted the following article, based on the judgment of the Permanent Court of Arbitration of 23 October 1909 concerning the maritime frontiers between Norway and Sweden :

"In the absence of any special convention between two adjacent States fixing their maritime frontier, their territorial sea is delimited by a line perpendicular and at right angles to the coast at the point at which the frontier between the two territories reaches the sea".

He did not ask that that text should be voted on, but merely commended it to the attention of the special rapporteur.

14. Mr. el-KHOURI felt that it would be impossible to draft a universally applicable rule stating in precise terms how the territorial sea of two adjacent States should be delimited. The Commission should therefore restrict itself to stating a rule in fairly general terms and leave it to the experts to determine precisely how the line should be drawn in each individual case.

15. Mr. KOZHEVNIKOV said that, in order not to repeat himself, he would merely remind members of the Commission of what he had said at the 164th meeting with regard to article 13.⁵ The Commission could certainly not accept article 13 in its present form. On the other hand he had some doubts about seeking expert advice, although the question must be studied further.

16. The CHAIRMAN, speaking as a member of the Commission, said that it seemed clear that the difficulty in which the Commission found itself arose from the fact that it was required to pronounce upon a technical rule, and that that rule was one which could not be applied in all imaginable cases.

17. He suggested that three different kinds of case could occur. In the first kind, where the frontier ended on a concave indentation of the coast-line, there was no difficulty about applying the rule of the median line ; and indeed the great majority of the illustrations given by Mr. Whittemore Boggs had been cases of that

kind. Secondly, the frontier could end on a convex indentation of the coast-line ; in such cases the rule of the median line appeared to be meaningless, whereas it seemed to be perfectly satisfactory to draw a line perpendicular to the coast at the point at which the frontier reached the sea. Thirdly, it might be necessary to draw the line of delimitation through a river or a bay ; in such cases the principle of the median line or the principle of the "thalweg" could be applied as local conditions determined.

18. He wished to suggest for the consideration of the special rapporteur that it be left to the experts to decide the technical question precisely how the line was to be drawn in each case, and that the Commission confine itself to seeking to formulate a juridical principle which would be applicable in all cases. It might state, for example, that the line of delimitation should be drawn in such a way as not to leave any portion of the territorial sea of one State in front of the coast-line of another State.

19. Mr. SPIROPOULOS felt that the Commission should first decide whether it wished to secure expert advice. If it did, it could hardly restrict itself to two experts, as Mr. Lauterpacht had suggested. In other words, financial implications would arise. Moreover, if the experts failed to agree, as he thought very likely, how was the Commission to decide ? If the Commission decided not to seek expert advice, there was no reason why it should feel itself obliged to formulate a provision on the subject. After all, the draft regulation would not be exhaustive in other respects. If it wished to include some general provision, however, it could include one similar to that which it had approved in respect of the continental shelf, though compulsory arbitration might be thought undesirable in a matter which was purely one of codification.

20. Mr. LIANG (Secretary to the Commission) pointed out that article 16 of the Statute provided that :

"The Commission may consult with scientific institutions and individual experts ; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts."

There were various modes of consultation with experts. A meeting of experts could be convened under United Nations auspices, but it must be borne in mind that in all United Nations bodies the principle of equitable geographical distribution was observed. Alternatively the Commission could invite an expert or experts to testify before it. Lastly it could seek the advice of scientific institutions with expert knowledge in the matter under discussion or cognate matters ; one advantage of that method would be that it would involve no additional expense.

21. The Commission might however decide eventually that it had been unable to reach agreement on a number of questions ; one of those questions might, though he hoped it would not, be the breadth of the territorial sea ; the Commission might also have to report that,

⁵ See summary record of the 164th meeting, para. 24.

for rather different reasons, it had been unable to reach agreement on the delimitation of the territorial sea of two adjacent States.

22. If the Commission saw fit to lay down a purely juridical principle for delimiting the territorial sea of two adjacent States, backed up by adequate documentary evidence, such a principle might have to be stated in very general terms.

23. Mr. FRANÇOIS said that he would regret the Commission's taking no action on a question of such obvious importance. He recalled, moreover, that the Commission had decided that it could not state any more precise rule for delimiting the continental shelf between two adjacent States until it had laid down a rule for delimiting the territorial sea between two adjacent States. Adoption of the same rule as had been adopted for the continental shelf would not represent much progress even if recourse to arbitration in case of disagreement were made compulsory, unless some more precise rule were formulated to guide the arbitral tribunal.

24. It was obvious that the Commission needed expert advice before it could proceed further, but he did not think that article 16(e) of the Statute was intended to cover contingencies such as that which had arisen. He did not see how, constituted as it was at present, the Commission could itself conduct satisfactory consultations with experts. All that it could do was to state in its report that it appeared to be necessary to convene a joint conference of jurists and scientific experts to solve the technical question at issue. If the General Assembly accepted that suggestion, the results achieved by the Conference would provide a basis for the Commission's draft.

25. If the Commission confined itself to requesting him to study the matter further he feared very much that it would be faced with the same difficulties at its next session.

26. Mr. ZOUREK said that the method of delimiting the territorial sea of two adjacent States adopted by the Bulgarian government in its decree of 10 October 1951 had the great virtue of simplicity, and would be effective in preventing disputes.⁶

27. The special rapporteur seemed to be in favour of the method of the median line, but it was clear from the discussion that it could not be applicable to all cases and was therefore unacceptable.

28. As he had proposed at the 164th meeting, governments rather than experts should be consulted so that the Commission might ascertain the practice of States.⁷ Once that information had been assembled, the Commission would be in a position to examine the problem more thoroughly.

29. Mr. HSU said he had considerable sympathy with Mr. François' views. The Commission must seek to

find ways of formulating general rules and not allow itself to be defeated by difficulties. If the Commission could not find a single universally applicable rule for delimiting the territorial sea of adjacent States it would be preferable to devise several rules rather than to abandon the attempt.

30. The possibility of consulting experts merited consideration and perhaps Mr. François could follow the example of Mr. Hudson, who had enlisted the help of a specialist in writing his report on nationality including statelessness (A/CN.4/50). Such a method should not be too costly.

31. He was uncertain whether it would be expedient for the Commission to deal with the question of the delimitation of the territorial sea in the same way as it had dealt with the continental shelf, until it had obtained expert opinion.

32. Mr. CÓRDOVA said that the Commission was being too ambitious in attempting to find a general rule of law applicable to a vast number of very diverse cases. There was, for example, no rule in civil law delimiting the boundaries between private properties on a lake-side. Clearly such matters must be left to individual decision based on expert opinion. Delimitation of the territorial sea depended on geographical and other considerations of considerable complexity and must therefore be carried out by agreement between States or, failing that, by arbitration.

33. Mr. AMADO deprecated the suggestion that he was a partisan of facile solutions. Part of the Commission's task in promoting the progressive development of international law and its codification was to deduce certain general rules from the practice of States. To the best of his knowledge, the special rapporteur had not yet succeeded in demonstrating that a rule on the delimitation of the territorial sea of two adjacent States existed or could be derived from practice.

34. Mr. SPIROPOULOS agreed with Mr. Amado. It was not always possible to formulate general rules of law of universal application. It would be useless to seek the views of experts on the delimitation of the territorial sea, since they would in all likelihood only be found to differ widely.

35. It would be inadmissible for the Commission to reach a different decision on the delimitation of the territorial sea from that reached on the delimitation of the continental shelf, in view of the close connexion between the two questions. There were then two possible courses: either the special rapporteur might indicate in his final report that the Commission had failed to reach a decision on the delimitation of the territorial sea of two adjacent States, which would imply that the boundary would have to be determined by agreement between States and, if that proved impossible, by obligatory recourse to arbitration; or the Commission might explicitly advocate the rule adopted for the delimitation of the continental shelf.

36. He would not oppose a general formula on the lines suggested by the Chairman, since it was consistent

⁶ See text in *Laws and Regulations on the Régime of the Territorial Sea*, United Nations Publication, Sales No. 1957.V.2, p. 80.

⁷ See summary record of the 164th meeting, para. 30.

with the Commission's decision on the continental shelf. He emphasized the need for the Commission to take a definite decision as to whether or not it should seek expert advice, and, if so, in what form.

37. Mr. HSU, replying to Mr. Amado, said he had only intended to criticize a negative approach. If the Commission was unable to deduce general rules from practice it must derive them from legal principles.

38. Mr. LAUTERPACHT urged the Commission to reject two of the proposed courses of action, both of which would in fact amount to doing nothing. The first was that the Commission should eventually declare itself unable to propose a rule delimiting the territorial sea of two adjacent States and recommend that the question be referred to a mixed commission of jurists and experts. The second was that the Commission should advocate the same solution as for the continental shelf. He submitted that the decision on the continental shelf was no solution: all that the Commission had achieved was to propose a provision whereby, failing agreement, delimitation of the continental shelf between States was to be submitted to compulsory arbitration — *ex aequo et bono* if necessary. Naturally some governments would not be prepared to submit a question to compulsory arbitration which would not be based on specific legal rules.

39. He could not agree that it was beyond the capacity of the Commission to solve problems associated with the delimitation of the territorial sea because it did not possess the requisite technical knowledge. The difficulties were not insurmountable and the matter was capable of regulation in accordance with legal principles of general application, such as those mentioned by Mr. Hudson, Mr. Alfaro and Mr. el-Khoury.

40. In his view, therefore, the Commission should instruct the special rapporteur to pursue his study, in consultation with experts. He did not deny the possibility of disagreement between experts but Mr. François, with the trained detachment and discernment of a jurist, would be able to reach his own conclusions, and present them, together with a detailed commentary, to the Commission at its next session.

41. Mr. SPIROPOULOS reaffirmed his conviction that, since the delimitation of the territorial sea was intimately linked with that of the continental shelf, the two could not be treated differently.

42. Mr. LAUTERPACHT pointed out that the Commission's decision on the continental shelf was in effect to postpone a solution because it was unable or unwilling to formulate rules. At all events, it was not an urgent question since it would be some time before resources of the sea-bed and subsoil of the continental shelf were exploited. Settlement of the problem of the territorial sea, on the other hand, ought not to be deferred.

43. Mr. SPIROPOULOS observed that the decision on the continental shelf had been taken on the understanding that the question of the delimitation of the territorial sea would be taken up soon after.

44. Mr. FRANÇOIS considered that the decision on the continental shelf did not preclude the Commission from seeking to formulate rules on the delimitation of the territorial sea.

45. Mr. CÓRDOVA said that, if the Commission were to lay down a general rule on the breadth of the territorial sea or adopt a method for its delimitation, it would have to revert to the question of the continental shelf.

46. Mr. SCELLE was sceptical about the possibility of framing a general rule on delimiting the territorial sea applicable to extremely varied conditions. For example, an acceptable method of delimitation between two given States might not be suitable for delimiting the territorial sea of one of them and a third state. Such matters, in his opinion, could only be settled by agreement between States acting on expert advice. The decision reached concerning the delimitation of the continental shelf represented a real rule of law. The Commission could go no further than to advocate compulsory arbitration. It should refrain from seeking to achieve the impossible.

47. Mr. FRANÇOIS said that, pushed to its logical conclusion, Mr. Scelle's argument would mean that the Commission had very little to do other than to recommend that any matter concerning which there was no clearly recognized rule should be submitted to arbitration. Conflict of interests between States was always possible and was not a reason for abstaining from establishing general rules of law. It was the Commission's duty to codify international law and Mr. Lauterpacht was right in arguing that its decision on the continental shelf was no solution. If Mr. Spiropoulos' contention concerning the interrelation of the decisions on the continental shelf and the territorial sea were accepted, the Commission would find itself in a vicious circle.

48. Mr. SCELLE explained that he was not opposed to the Commission attempting to formulate general rules. He merely wished to say that, in the case of the territorial sea, failure was inevitable.

49. Mr. KOZHEVNIKOV said that the Commission had to decide two questions: first, whether to delete article 13 from the draft and conclude the debate on it, and secondly, whether or not to instruct Mr. François to continue his studies on the problem and submit his findings to the Commission at the next session. He proposed that the decision on consultation with experts be postponed until the next session.

50. If the Commission adopted his proposal it must take up Mr. Zourek's proposal that governments be consulted on certain definite points concerning the territorial sea.

51. Mr. CÓRDOVA considered that, in addition to the issues mentioned by Mr. Kozhevnikov, the Commission would also have to decide whether or not to apply its decision on the continental shelf to the delimitation of the territorial sea.

52. Mr. HUDSON said that, on the basis of the foregoing remarks, the Commission might give an answer to four questions which he would formulate as follows:

“1. Does the Commission wish to exclude the subject of article 13 from consideration?

“2. If not, does the Commission wish to repeat what was said concerning the continental shelf?

“3. If not, does the Commission wish to confide the problem to the special rapporteur?

“4. If so, does the Commission wish to suggest that the special rapporteur place himself in contact with experts?”

53. Mr. KOZHEVNIKOV said that, as he had not participated in the discussions on the continental shelf, he could not express any opinion on question 2.

54. Mr. FRANÇOIS asked whether an affirmative reply to question 3 would preclude the Commission from recommending the establishment of a mixed commission of experts and jurists.

55. Mr. SPIROPOULOS observed that an affirmative reply to question 3 would not prejudge the future action to be taken by the Commission on article 13.

56. Mr. SCELLE said that, by instructing the special rapporteur to continue his study of the problem, the Commission did not necessarily exclude the possibility of his recommending a similar solution to that adopted on the continental shelf.

57. Mr. YEPES agreed with Mr. Scelle.

The Commission replied in the negative to question 1 by 8 votes to 2 with 2 abstentions.

The Commission replied in the affirmative to question 3 by 9 votes to none with 3 abstentions.

58. Mr. LIANG (Secretary to the Commission) referring to question 4, pointed out that budgetary appropriations could not be considered by the General Assembly unless the Secretary-General were presented with a definite decision by the Commission and gave an estimate of the costs. It would therefore have to be established whether consultation of experts would involve expenditure. The Secretariat would want to be represented when a decision of this nature was to be taken, even in a private meeting.

59. Mr. HUDSON said he envisaged such consultation as purely informal and personal. The special rapporteur could do it by correspondence and it would cost nothing.

60. Mr. FRANÇOIS said that he could do no further useful work on article 13 without expert advice.

61. Mr. AMADO considered that there were many more pressing problems than the one under consideration on which the Commission should have the opinion of experts. He therefore thought it preferable for Mr. François to continue his work independently and for the Commission to decide at the next session whether or not to obtain expert assistance.

62. Mr. CÓRDOVA said that the course advocated by Mr. Amado would be a waste of time. The special rapporteur had already indicated his inability to make any progress without expert advice.

63. Mr. SPIROPOULOS observed that, if the Commission accepted Mr. Kozhevnikov's proposal, further work on article 13 would have to be postponed until the next session.

Mr. Kozhevnikov's proposal that the Commission decide at its next session whether or not to seek expert advice was rejected by 7 votes to 4 with 2 abstentions.

The Commission replied in the affirmative to question 4, formulated by Mr. Hudson, by 8 votes to 2 with 1 abstention.

64. Mr. el-KHOURI and Mr. YEPES said that they had voted in favour of an affirmative answer to question 4 on the understanding that the special rapporteur would consult experts in the manner indicated by Mr. Hudson.

65. Mr. CÓRDOVA pointed out that fees must be paid for expert advice.

66. Mr. HUDSON said he was certain that Mr. Boggs would not require payment for any advice he could render.

67. Mr. LIANG (Secretary to the Commission) said that if Mr. Hudson were right, no financial implications were involved in the Commission's decision on question 4.

The meeting rose at 1.25 p.m.

172nd MEETING

Friday, 25 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F.

I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

**Régime of the territorial sea (item 5 of the agenda)
(A/CN.4/53) (continued)**

1. The CHAIRMAN invited the Commission to continue its consideration of the Draft Regulation in the special rapporteur's report (A/CN.4/53) on the régime of the territorial sea.

ARTICLE 13 : DELIMITATION OF THE TERRITORIAL SEA OF TWO ADJACENT STATES (continued)

2. Mr. ZOUREK said there was general agreement in the Commission that the information at its disposal on the delimitation of the territorial sea of adjacent States was not sufficient to enable it to give definite directives to the special rapporteur. Some members had indeed argued that it would be impossible to frame a generally applicable rule on that matter, but as it had been decided to retain article 13, the Commission must first acquaint itself more fully with existing practice so as to be in a position to determine whether the argument was well-founded. He accordingly submitted the following proposal :

"The International Law Commission decides to consult governments, through the Secretary-General, on the delimitation of the territorial sea of two adjacent States, asking them in particular for information on the way in which they have solved the problem in practice."

He believed that replies could be received to that very specific question in time for the rapporteur to take them into account in preparing his next report.

3. Mr. FRANÇOIS said he could support Mr. Zourek's very useful proposal provided the enquiry was strictly limited to the existing method of delimitation. If that were done governments might be asked to provide the information by about 1 January 1953 so that he could discuss it with three or four experts before drawing up his next report.

4. Mr. YEPES considered Mr. Zourek's proposal a valuable one but, as a matter of form, rather than consulting governments he considered that the Commission should merely ask for information on the existing practice of States.

5. Mr. ZOUREK said that he did not wish to preclude governments from expressing their views as to what were the best means of delimiting the territorial sea of two adjacent States.

6. Mr. FRANÇOIS said that it could be left open to governments to append to the information supplied any comments they thought necessary.

7. Mr. HUDSON observed that what the Commission was interested to ascertain was not the practice of one State but of two adjacent States.

8. Mr. LIANG (Secretary to the Commission) said it was incumbent upon him to warn the Commission that enquiries couched in very general terms met with little response from governments. They replied with far greater alacrity to precise questions. The enquiry proposed by Mr. Zourek would probably demand a certain amount of study and it might be of assistance to governments if they were provided with the text of article 13 and the summary records of the discussions on it.

9. Mr. FRANÇOIS said he would be most unwilling to circulate the text of article 13 to governments at the present state, since the Commission had only discussed it in a very preliminary way. It would not be any great imposition on governments to ask them for information solely on the existing methods of delimiting their territorial sea with adjacent States.

10. Mr. LIANG (Secretary to the Commission) said that he had only been concerned to emphasize the need for framing the question clearly. In the form proposed by Mr. Zourek it lacked precision. He had only suggested that governments be provided with the text of article 13 in order to acquaint them with the nature of the problem.

11. Mr. YEPES, referring to Mr. Hudson's observation, said there could be no doubt that the Commission was not asking for information on unilateral delimitations of the territorial sea.

12. Mr. KOZHEVNIKOV expressed his support for Mr. Zourek's proposal since it was essential for the special rapporteur to have at his disposal all the relevant information to enable him to judge whether a general rule could be deduced from existing practice.

13. The CHAIRMAN put to the vote the substance of Mr. François' and Mr. Yepes' amendments to Mr. Zourek's proposal, namely that governments be asked to supply information on existing practice in delimiting the territorial sea of two adjacent States, and that it be left open to them to comment on that information.

The amendments were approved by 12 votes to 1.

The substance of Mr. Zourek's proposal, as amended, was approved by 12 votes to 1.

**ARTICLE 3 : JURIDICAL STATUS OF THE BED AND SUBSOIL
(resumed from the 165th meeting)**

14. The CHAIRMAN drew the attention of the Commission to article 3, which it had decided at its 165th meeting to examine at the request of Mr. Kozhevnikov whose principal objection to it was its omission of any reference to the air space above the territorial sea.¹

¹ See summary record of the 165th meeting, para. 75.

15. Mr. KOZHEVNIKOV said that, since article 3 referred to the territory of a coastal State, there was no justification for omitting mention of the air space above the territorial waters, as it had been mentioned in article 2 of the text prepared at the Conference for the Codification of International Law of 1930. He accordingly proposed the addition at the end of paragraph 1 of the words "and also the air space above the territorial sea".

16. He also proposed the deletion of paragraph 2, the meaning of which was obscure.

17. Mr. FRANÇOIS said that, as he had already indicated at the 165th meeting,² he had had two reasons, the first of which admittedly was not decisive, for omitting from paragraph 1 any mention of the air space. The first was that the Commission, in discussing the continental shelf, had decided not to deal with the air space above it. The second was that the air space was subject to special regulations which could not be dealt with in the draft under consideration.

18. It had been recognized at the Hague Conference that there was no customary law on passage through the air and that the matter was entirely regulated by general or special conventions. He would have no objection to following the text prepared at the Codification Conference on the matter.

19. Mr. CÓRDOVA suggested that the first reason mentioned by Mr. François was hardly convincing, since the reason why the Commission had decided not to deal with the air space above the continental shelf was that it was agreed that the waters above the continental shelf formed part of the high seas.

20. The situation with regard to the air space above the territorial sea on the other hand was very different. Defence needs were one of the main considerations why the sovereignty of the coastal State over its territorial sea was recognized, and control of the air space above that belt was also of vital interest to them.

21. Although no customary law existed on the air space, which was entirely regulated by conventions, the special rapporteur might consider the possibility of extending to it the principle of innocent passage.

22. Mr. FRANCOIS said he could not undertake such a study. Conventions on air navigation did not recognize the principle of innocent passage.

23. Mr. el-KHOURI supported Mr. Kozhevnikov's amendment to paragraph 1, but opposed the deletion of paragraph 2, since that paragraph would become essential if the amendment to paragraph 1 were accepted. The purpose of paragraph 2 would be to ensure that existing conventions on the air space were not prejudiced by the other provisions of the draft.

24. Mr. LAUTERPACHT expressed his willingness to support Mr. Kozhevnikov's amendments. It would open the door to misunderstanding if the air space were not mentioned in paragraph 1. The principle that the coastal

State exercised sovereignty over the air space above it had been clearly recognized in the Convention relating to the Regulation of Aerial Navigation of 1919 and the Convention on International Civil Aviation of 1944.

25. He could not agree with Mr. François that paragraph 2 was necessary in order to leave no room for doubt that the right of innocent passage did not apply to the air space, since articles 14 and 15 clearly stated what was meant by the right of passage. The deletion of paragraph 2 could not lead to any misunderstanding.

26. Mr. HUDSON agreed with both of Mr. Kozhevnikov's amendments. Although Mr. el-Khoury was correct in arguing that the inclusion of paragraph 2 was due to the existence of conventions on the air space, none of them was applicable to the territorial sea and paragraph 2 was therefore unnecessary.

27. Mr. AMADO said he was in favour of Mr. Kozhevnikov's amendment to paragraph 1. Clearly if an attempt was made to define the territory of a coastal State, the air space above the territorial sea could not be omitted.

28. Mr. SPIROPOULOS declared his support for Mr. Kozhevnikov's amendments for the reasons adduced by Mr. Lauterpacht, Mr. Hudson and Mr. Amado.

29. Mr. ZOUREW supported Mr. Kozhevnikov's amendment to paragraph 1, since it was a rule of international law that the coastal State exercised sovereignty over the air space above its territorial waters. He was also in favour of the deletion of paragraph 2, which was ambiguous. What, for example, were "other rules of international law" in respect of the air space.

30. In reply to a question by Mr. el-KHOURI, Mr. FRANÇOIS said he was prepared to accept Mr. Kozhevnikov's amendment for the deletion of paragraph 2.

31. Mr. HUDSON said he was uncertain whether the expression "air space" was an appropriate one in the light of modern developments. He doubted whether the sovereignty of the coastal State was confined to that area alone. An American writer had recently suggested that "air space", which had admittedly been used in the Convention on International Civil Aviation of 1944, should be replaced by "flight space".

32. Mr. SPIROPOULOS considered the suggested alternative deplorable.

Mr. Kozhevnikov's amendment to paragraph 1 was adopted unanimously.

Mr. Kozhevnikov's amendment for the deletion of paragraph 2 was adopted by 10 votes to none with 2 abstentions.

33. The CHAIRMAN invited the Commission to consider article 6, in conformity with its decision of the previous meeting.

² *Ibid.*, paras. 65 and 67.

ARTICLE 6 : BAYS³

34. Mr. LAUTERPACHT said that, in moving the consideration of article 6, he had not intended that it be put to the vote.⁴ He had simply wished to put forward some general considerations. The International Court of Justice in its judgment in the *Fisheries Case* had declared that the ten-mile rule on bays had not "acquired the authority of a general rule of international law".⁵ The special rapporteur, however, had in article 6 advocated the ten-mile rule — although possibly, *de lege ferenda* only.

35. In article 5, the special rapporteur had followed the Court in retaining the principle that base-lines must not depart appreciably from the "general direction of the coast". It was arguable that as a bay was determined by drawing a line across the entrance from headland to headland, and that as that line necessarily followed the general direction of the coast, all bays were, according to the judgment of the Court, internal waters, in that they were not bays in the sense of international law. Moreover, the Court seemed prepared to assimilate to internal waters minor curvatures which were not bays. It seemed possible, therefore, to argue that the Court had abolished altogether the legal concept of a bay, the size of which was no longer of any significance unless great enough to alter the general direction of the coast. He attributed great importance to the legal concept of a bay and welcomed the fact that the special rapporteur endeavoured to rescue it from the apparent consequences of the Court's judgment.

36. The special rapporteur might also take into account, in preparing his next report, the fact that, as a result of the judgment in the *Fisheries Case*, part of straits previously regarded as high seas had become inland waters and therefore, unless special provision were made therefor, not even subject to the right of innocent passage.

37. It had been suggested that it would be difficult to discuss the width of the opening of a bay until a decision had been taken on the breadth of the territorial sea. He would submit that the interrelation of the two distances was not as close as it appeared, since otherwise States which adhered to the three-mile rule would have applied the six-mile rule to bays.

38. As was well known, however, the United Kingdom, like most other States adhering to the three-mile rule, had at the Codification Conference accepted the ten-mile rule for bays, a rule which had been endorsed by the Preparatory Committee and Sub-Committee No. II of the Second Committee of the Conference. It had been established from the replies of governments

³ Article 6 read as follows :

"In the case of bays the coasts of which belong to a single State, the belt of territorial sea shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles."

⁴ See summary record of the 170th meeting, paras. 62—66.

⁵ *Fisheries Case*, Judgment of December 18th, 1951 : *I.C.J. Reports 1951*, p. 131.

on that occasion that the great majority of States, which gave a direct answer to the questionnaire on the subject, adhered to the ten-mile rule for bays. It was only recently that it had been extended by certain States such as Egypt and Saudi Arabia. Apart from the special case of "historic bays" most legal authorities were in favour of the ten-mile rule.

39. Mr. CÓRDOVA said it had always been recognized that there was a connexion between the maximum breadth of the territorial sea and the maximum breadth, across the opening, which bays could have for them to be considered as inland waters. He wondered whether the special rapporteur had ever heard a rule formulated to the effect that the second figure should be three-and-a-third times the first.

40. He also asked whether the special rapporteur did not think that, in determining to what extent a bay was part of the territorial sea and to what extent it was part of inland waters, it was necessary to take into account not only its width across the opening, but also whether it made a deep or a shallow indentation into the coast-line in comparison with its width across the opening.

41. Mr. FRANÇOIS said that he was not altogether convinced by Mr. Lauterpacht's claim that the International Court of Justice had abolished the legal concept of a bay by adopting as a criterion the general direction of the coast-line, since the Court's judgment related only to a very heavily indented coast-line. Mr. Córdova's second question bore on the same point, but although it had often been claimed that there should be some ratio between the width of a bay across its opening and its depth as an indentation into the coast, no agreement had ever been reached.

42. There could surely be no doubt that there was a very close connexion between the maximum breadth of the territorial sea and the maximum width of bays, across the opening, although he had never heard it suggested that the second should be three-and-a-third times as great as the first. On the basis of the three-mile limit for the territorial sea it would have been logical to lay down a six-mile limit for bays, but it had been variously pointed out that it would be preferable to take a somewhat larger figure, and the practice had grown up of fixing the limit at ten miles. If the limit of the territorial sea was now raised to six miles, it would clearly be impossible to retain the figure of ten miles for bays ; the figure would have to be raised at least to twelve, and probably to fifteen or twenty miles.

43. Mr. AMADO agreed that there was an obvious connexion between the maximum breadth of the territorial sea and the maximum breadth of bays across the opening, for the reasons indicated by the special rapporteur. All members of the Commission knew that the ten-mile limit for bays had had its origin in the three-mile limit for the territorial sea. He agreed therefore with the special rapporteur that for the present the Commission could only refrain from giving an opinion on the question, and it seemed that Mr. Lauterpacht did not wish it to do otherwise.

44. Mr. KOZHEVNIKOV said that, in order to avoid repeating the arguments he had advanced at the 164th meeting,⁶ he would merely state that the Commission could not approve article 6 in its present form, since it did not reflect existing international law; in particular it ignored the International Court of Justice's judgment in the *Fisheries Case*; the Court's judgment was of such a nature that it had to be taken into account.

45. If he had rightly understood Mr. Lauterpacht, he appeared to have reverted to a concept which had already failed to find support in the Commission, namely, that of a three-mile limit for the territorial sea; for the connexion between that limit and a ten-mile limit for bays was undeniable. He did not indeed understand why Mr. Lauterpacht had wished to raise the question of bays at the present time. In his view it was obvious that the special rapporteur would have to study the whole question much more thoroughly, with a view to submitting a realistic recommendation to the Commission at its next session. If article 6 were put to the vote in its present form, he would be unable to support it.

46. Mr. el-KHOURI said that, in view of the action which the Commission had taken with regard to the breadth of the territorial sea, he wished to suggest to the special rapporteur that the only way in which it could be consistent was to adopt, instead of the second sentence of article 6, a general rule worded somewhat as follows:

“If the opening of the bay is more than double the breadth of the territorial sea, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed double the breadth of the territorial sea.”

47. Mr. HUDSON said that he had been surprised by the suggestion that a definition of a bay existed in international law. As far as he knew, no such definition existed, and certainly none based on the ratio between the width of an indentation and the extent of its incision inland.

48. He had also been surprised by the assertion that the great majority of States which had sent replies on the question to the Preparatory Committee of the 1930 Codification Conference had been in favour of a ten-mile limit for bays. Of the twenty-two States which had replied, less than half had in fact been in favour of that limit; some had favoured a lower limit, and some a higher limit.

49. It was true that in certain cases, for example in the system established by the North Sea Fisheries Convention of 1882, the ten-mile limit appeared to have given satisfaction. It was interesting to note, however, that that limit had not been rigidly adhered to in the North Atlantic Coast Fisheries Arbitration award, which had been accepted in the main by the United Kingdom Government as well as by the United States Govern-

ment. It was interesting also that, on the occasion of the recent union of Newfoundland with Canada, the Prime Minister of Canada had made a statement in the Canadian Parliament to the effect that the Canadian Government would approach other States with a view to their acceptance of the Canadian claim that the entire Gulf of the St. Lawrence should be regarded as forming part of the inland waters of Canada, for at both entrances to the Gulf of the St. Lawrence the width across the opening exceeded ten miles.

50. Mr. LAUTERPACHT recalled that he had merely stated that the majority of States which had sent direct replies to the Preparatory Committee of the 1930 Codification Conference had been in favour of a limit not exceeding ten miles.

51. Mr. YEPES said that, even if the close connexion between the maximum breadth of bays, across the opening, and the maximum breadth of the territorial sea had not been clear beforehand, the discussion had brought it out. The ten-mile limit for bays proposed in article 6 appeared to have its origin in the three-mile limit for the territorial sea, and as he had shown that that latter limit had been imposed on the international community by a small minority of States and bore no relation to the existing situation, he could not support article 6 in its present form. Moreover Mr. Hudson had shown that the ten-mile limit for bays did not in fact correspond to existing international law.

52. Mr. ZOUREK said that, as the International Court of Justice had recognized in the *Fisheries Case*, there was no rule of existing international law providing that bays which were more than ten miles wide across the opening should not be regarded as wholly inland waters. The only question which the Commission need consider, therefore, was whether it should attempt to lay down a rule *de lege ferenda*. He did not think there was any need to do so, for the present at least, since all governments would decide the question by reference to what they fixed as the limit of their territorial waters. Moreover, as had been pointed out, no precise definition of bays existed. For those reasons he agreed with the special rapporteur's suggestion in his report that “the Commission should refrain from giving an opinion” on the question, and if article 6 was put to the vote in its present form, he would have to vote against it.

53. Referring to Mr. el-Khoury's suggestion, Mr. FRANÇOIS pointed out that, when the breadth of the territorial sea had been generally limited to three miles, many States had felt unable to accept a six-mile limit for bays. Moreover, if Mr. el-Khoury's suggestion were adopted and three miles subsequently retained as the maximum breadth of the territorial sea, the ten-mile rule for bays, such as it was, would be abolished.

54. Mr. CÓRDOVA said that the principle suggested by Mr. el-Khoury was that which had originally been accepted in principle. In practice, however, it had been found inapplicable, because it meant that a triangular area of high seas was left at the entrance of the bay or river-mouth, and that gave rise to difficulties with regard

⁶ See summary record of the 164th meeting, para. 22.

to the exercise of territorial authority. For that reason the great majority of States had ceased to apply the principle and, as had been stated by the Harvard Research, "during the course of the past century it has become fairly well established that a bay, the entrance to which does not exceed 10 miles in width, constitutes a part of the littoral States' territorial waters".⁷ He agreed that the special rapporteur should be requested to study the question further.

55. Mr. el-KHOURI said that the Commission could neither accept article 6 in its present form nor at the present time replace the figure "ten miles" by any other figure. Nor again could it wash its hands of the whole question. The difference of view existed, and it was surely the Commission's duty to attempt to resolve it. With regard to the objection raised by Mr. CÓRDOVA, he pointed out that wherever the line was drawn, a small triangular area of sea would fall outside it.

56. Mr. YEPES supported Mr. el-Khourí's suggestion, which should satisfy both those who could accept article 6 in its present form and those who could not. It had the further advantage that, once the maximum breadth of the territorial sea was fixed, the maximum width of bays, across the opening, in order that they should be wholly comprised within inland waters, would automatically be fixed too, without its being necessary for the Commission to revert to that question.

57. In order to afford guidance to the special rapporteur, he thought it would be desirable for the Commission to decide between the principle of the ten-mile rule and the principle contained in Mr. el-Khourí's suggestion, which he personally would support.

58. Mr. KOZHEVNIKOV said that the Commission appeared to be in general agreement that a ten-mile rule for bays could not be accepted. He did not think, however, that agreement had been reached on the principle formulated by Mr. el-Khourí. In the circumstances the only course open to the Commission was to instruct the special rapporteur to give further study to the question, in the light of the views which had been expressed at the present session, with a view to submitting to the next session a proposal which would be acceptable to the majority.

59. Mr. FRANÇOIS said that it was clear that the Commission as a whole was not in favour of the ten-mile rule. He would of course be guided by that fact, but suggested that, leaving that aside, he should be given full latitude in studying the question further.

60. Mr. SPIROPOULOS proposed that the Commission request the special rapporteur to study further the question of bays, in the light of the foregoing discussion, and in particular, of the suggestion put forward by Mr. el-Khourí.

⁷ Harvard Law School, *Research in International Law. Nationality. Responsibility of States. Territorial Waters*. Special Supplement to *American Journal of International Law*, vol. 23 (1929), p. 266.

Mr. Spiropoulos' suggestion was unanimously adopted.

ARTICLE 13 (resumed from above)

61. The CHAIRMAN indicated that the Commission had completed its consideration of the special rapporteur's report on the régime of the territorial sea. Speaking as a member of the Commission, he recalled that when the Commission had been seeking a formula regarding the delimitation of the territorial sea of two adjacent States, he had suggested that it might adopt a general juridical rule.⁸ After further consideration, and particularly in view of the fact that fundamentally different problems appeared to be involved in the case of concave and convex indentations of the coast-line, he now wished to suggest the following text, not as a basis for discussion, but only for the attention of the special rapporteur :

" 1. The delimitation of the territorial sea of two adjacent States should be established in accordance with the following general principles :

“ (a) Where the configuration of the coast permits it, the boundary is a line drawn perpendicular to the line of general direction of the coast, in the vicinity of the point at which the land frontier between the two States reaches the sea.

“ (b) Where the configuration of the coast requires another line, the boundary is a line, every point of which is equidistant from the nearest point on the coast-line of each of the two States.

" 2. The boundaries of the territorial sea of two adjacent States shall be demarcated by agreement between them. Failing agreement, the parties are under the obligation to have the boundaries established by arbitration."

Nationality, including statelessness (item 6 of the agenda) (resumed from the 163rd meeting)

62. The CHAIRMAN announced that, as the outcome of an informal meeting of the Commission, Mr. Hudson had submitted the following proposal :

" In reliance on article 16 (e) and article 21 (l) of its Statute, the Commission decides to invite Dr. Ivan Kerno to serve, after his separation from the Secretariat, as an individual expert of the Commission charged with work on the elimination or reduction of statelessness, under the general direction of the Chairman of the Commission.

" It also decides to report the above decision to the Secretary-General."

63. Mr. KOZHEVNIKOV recalled that he had had no opportunity at the informal meeting to state his views on the principle underlying Mr. Hudson's proposal. After full consideration of the relevant provisions in the Statute, he felt obliged to oppose the principle that appointments could be made in the way proposed. The

⁸ See summary record of the 171st meeting, para. 18.

Statute offered other means of solving the problem, for example the appointment of an assistant rapporteur from among the members of the Commission, and he believed that that course had been adopted in the past. He proposed therefore that the Commission decide first the question of principle underlying Mr. Hudson's proposal, before going on to decide on its application in the present case.

64. The CHAIRMAN said that, in accordance with the wish expressed by Mr. Kozhevnikov, he would first put to the vote the question of principle, whether or not the Commission could appoint individuals to serve as experts on the Commission, in reliance on articles 16 (e) and 21 (l) of its Statute.

65. Mr. ZOUREK said that he would vote in the negative on that question of principle, since the whole of article 16 of the Statute was prefaced by the words : "When the General Assembly refers to the Commission a proposal for the progressive development of international law".

The question of principle was decided in the affirmative by 11 votes to 2.

66. Mr. KOZHEVNIKOV said that, in view of that decision, he wished to propose that, in the particular case under consideration, the Commission should appoint one of its members to act as assistant rapporteur.

Mr. Kozhevnikov's proposal was rejected by 11 votes to 2.

67. The CHAIRMAN then put to the vote the proposal submitted by Mr. Hudson.

Mr. Hudson's proposal was adopted by 11 votes to none, with 2 abstentions.

Programme of work (resumed from the 170th meeting)

68. The CHAIRMAN said that the Commission had next to consider the draft on arbitral procedure prepared by the Standing Drafting Committee, and the explanations prepared by the special rapporteur. It was his intention to take the articles one by one, first ascertaining whether there were any comments on the wording submitted by the Standing Drafting Committee, and then inviting observations on the explanation concerning the article.

69. Mr. KOZHEVNIKOV said that, in his view, a vote should be taken on each article, and a final vote on the draft as a whole.

70. Mr. SCELLE pointed out that the articles had already been discussed at length. Their substance had been approved by the Commission and had not been altered by the Standing Drafting Committee. In a few cases, which he had indicated in his explanations, there had been some doubt as to what the Commission's decision had been, and the Commission would therefore have to decide whether in such cases the text which the Standing Drafting Committee had submitted

accorded with the Commission's intentions. He presumed, however, that there was no question of reopening discussion of all the articles. It would, of course, be open to any member of the Commission to vote against the draft as a whole.

71. Mr. KOZHEVNIKOV agreed that there was no need to repeat the earlier discussions. Drafting questions could, however, conceal questions of substance, and the Commission was bound therefore to consider the whole draft carefully, article by article, in order to ascertain whether any such questions of substance arose.

72. Mr. SPIROPOULOS felt that there was no real difference of view between Mr. Kozhevnikov and Mr. Scelle. Clearly the Commission could not decide in advance whether articles submitted by the Standing Drafting Committee would give rise to questions of substance.

73. Mr. LAUTERPACHT, on a point of order, expressed the hope that it would be possible for the Commission to devote two or three meetings, preferably in private session, to consideration of the Commission's work programme and methods of work during the forthcoming year.

74. The CHAIRMAN pointed out that the remaining time at the Commission's disposal would probably be fully taken up with consideration of the draft on arbitral procedure, examination of the comments received from governments on the draft articles on the continental shelf and related subjects and discussion of further steps to be taken in connexion with the work on the régime of the high seas and approval of the Commission's report to the General Assembly.

75. Mr. SCELLE pointed out that the draft on arbitral procedure would form part of the Commission's report to the General Assembly. He presumed that when the Commission came to approve that report, it would not have to examine the draft on arbitral procedure a second time.

76. The CHAIRMAN confirmed that Mr. Scelle's presumption was correct.

The meeting rose at 1.10 p.m.

173rd MEETING

Monday, 28 July 1952, at 2.45 p.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35) (resumed from the 156th meeting)

CONSIDERATION OF THE DRAFT ARTICLES SUBMITTED BY THE STANDING DRAFTING COMMITTEE

2.* The CHAIRMAN invited the Commission to consider the Draft on Arbitral Procedure (A/CN.4/L.35),¹ a document consisting of thirty-two articles submitted by the Standing Drafting Committee together with comments by the special rapporteur, Mr. Scelle.

3. Mr. YEPES suggested that those articles which had not been redrafted by the Standing Drafting Committee need not be discussed.

4. Mr. KOZHEVNIKOV said that the Standing Drafting Committee had altered very considerably the shape of the set of articles provisionally adopted by the Commission ; certain articles had been combined, and the position of others transposed. It would therefore be advisable for the Commission to go through the present draft article by article.

5. Mr. ZOUREK reminded the Commission of his intention to submit an amendment to article 4.

6. The CHAIRMAN stated that, although substantive discussion of the articles had been concluded, members

* Para. 1 concerned the programme of work for the remaining meetings.

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

could raise objections to any article in the text prepared by the Standing Drafting Committee if they thought that it did not conform with what had been decided by the Commission.

7. Mr. KOZHEVNIKOV asked whether each article was to be put to the vote separately during the second reading.

8. The CHAIRMAN replied that only the draft as a whole would be put to the vote. The Commission had already voted on each individual article.

9. Mr. KOZHEVNIKOV said that, as the new text was different from that provisionally adopted by the Commission, it was important to determine precisely the views of members on it. He therefore proposed that each article be put to the vote again.

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

10. Mr. el-KHOURI said that the voting during the first reading had often been extremely close and he accordingly proposed that the results should be given in the report.

11. Mr. SCELLE said that he had contemplated doing so but had decided against it, partly because the Secretariat had informed him that it would be a new departure, and partly because such information was liable to give a distorted impression of the general opinion. He had, however, been careful to indicate the occasions on which quasi-unanimity had been achieved.

12. Mr. KERNO (Assistant Secretary-General) confirmed that hitherto no text prepared by the Commission had been accompanied by a record of the voting. Such information could be obtained from the summary records and should not burden the Commission's reports.

13. Mr. ZOUREK considered that the comments on each article should not only indicate the results of the voting, but also reflect the views of the minority, which in several cases was a considerable one.

14. Mr. SCELLE said that it would be altogether impracticable to expect special rapporteurs to give a detailed analysis of minority opinions ; such an analysis would inevitably double or triple the length of their reports. It was the weight of the arguments in favour of a text rather than the number of votes it secured which was important.

15. In reply to Mr. KOZHEVNIKOV, he said that wherever the Standing Drafting Committee had departed even in the slightest degree from the Commission's decision, the fact was clearly indicated.

16. Mr. LIANG (Secretary to the Commission) pointed out that the Commission had never indicated voting results on any of the texts adopted by it. He personally believed that it should continue to follow that practice.

17. Mr. CÓRDOVA agreed. It would merely weaken

the authority of the Commission's decisions, which were taken by a majority vote, if the size of the majority were indicated. Such information was available in the summary records.

Mr. el-Khoury's proposal was rejected by 8 votes to 2, with 2 abstentions.

18. The CHAIRMAN suggested that the Commission examine the draft article by article and take up the comments afterwards, since they had only recently been circulated to members.

It was so agreed.

Article 1 [1]

No observations.

Article 2 [2]

Paragraph 1

No observations.

Paragraph 2

19. Mr. SCELLE explained that the Standing Drafting Committee had recommended the deletion of the words "for the completion of the arbitration proceedings and" after the words "measures to be taken" in paragraph 2, on the ground that their meaning was obscure and that they might confer far wider powers on the tribunal than had been intended by the Commission.

It was agreed, by 8 votes to none with 3 abstentions, to delete the words "for the completion of the arbitration proceedings and" in paragraph 2.

20. Mr. LAUTERPACHT suggested that the last sentence in article 16: "Each party is under a duty to take the measures indicated to it" should be inserted also in paragraph 2 of article 2.

21. Mr. HUDSON pointed out that article 2 related to provisional measures prescribed by the International Court of Justice, whereas article 16 concerned provisional measures indicated by the arbitral tribunal.

22. Mr. SCELLE observed that in the French text the word used in both cases was "*prescrire*", which left no doubt as to the obligatory nature of the provisional measures. The last sentence in article 16 was therefore almost redundant and should be deleted therefrom rather than added to article 2. Perhaps Mr. Lauterpacht's preoccupation would be removed if the English and French texts of article 16 were brought into line by the substitution of the word "prescribe" for the word "indicate" in the former.

23. Mr. LAUTERPACHT agreed that the substitution of the word "prescribe" for the word "indicate" in article 16 would render the last sentence unnecessary.

It was agreed to defer further consideration of the point raised by Mr. Lauterpacht until article 16 was taken up.

Article 3 [3]

Paragraph 1

24. Mr. HSU proposed the substitution of the word "a" for the word "the" before the word "compromis" in paragraph 1, since it was the first time the "compromis" had been mentioned.

25. Mr. SCELLE thought the original text should stand, since, as was indicated in the comment on article 1, "the compromis" was that referred to in article 9.

26. Mr. LIANG (Secretary to the Commission) suggested that there was some force in Mr. Hsu's argument. It should be made clear in paragraph 1 that "the compromis" was that referred to in article 9.

27. Mr. SCELLE proposed the insertion of the words "referred to in article 9" after the words "in the compromis" in paragraph 1.

Mr. Scelle's amendment was accepted.

28. Mr. ZOUREK reminded the Commission of the objections he had raised at the 140th meeting² to the method of appointment of members of the arbitral tribunal, as envisaged in article 4 of the draft presented by the special rapporteur in his second report (A/CN. 4/46). On that occasion he had not been in a position to present a definite alternative, but had been informed by the Chairman that it was open to all members of the Commission to propose the reconsideration of any article at a later stage. He accordingly took the present opportunity to submit the following as an alternative to paragraphs 2, 3 and 4 of article 3:

"1. If the appointment of the members of the arbitral tribunal is not made within three months from the date of the request for constitution of the tribunal, each of the Parties to the dispute shall designate a commissioner who must not be a national of one of the Parties or habitually resident in its territory. Appointments shall be made jointly by the commissioners thus designated.

"2. If no agreement is reached on the matter within three months from the date on which the commissioners referred to in paragraph 1 were designated, each of the national groups nominated by the Parties to the dispute in accordance with article 4 of the Statute of the International Court of Justice shall designate two persons who must not be nationals of one of the Parties or habitually resident in its territory. The persons thus designated shall form a commission which shall make the necessary appointments by a majority vote."

29. Mr. SCELLE observed that Mr. Zourek's amendment was one of substance, since it would result in an entirely different system of appointment from that laid down in paragraphs 2, 3 and 4 of article 3.

² See summary record of the 140th meeting.

The CHAIRMAN ruled Mr. Zourek's amendment out of order.

Article 4 [5 and 6]

Paragraph 1 [5]

30. Mr. HSU suggested that the drafting of paragraph 1 was ambiguous. It was first stated that the parties could act in whatever manner they deemed most appropriate, and then one method of proceeding, and one only, was mentioned. If there were others, they should also be mentioned.

31. Mr. HUDSON said that, for much the same reasons as had prompted Mr. Hsu's comment, he had in the Standing Drafting Committee proposed the deletion of the words "may act in whatever manner they deem most appropriate and".

32. Mr. SCELLE said that, although strictly speaking Mr. Hudson and Mr. Hsu had made a legitimate criticism of the text, it was sometimes necessary to violate the rules of logic a little. The phrase to which Mr. Hudson had objected stated a general principle and was not entirely redundant.

33. Mr. CORDOVA suggested it should be made clear that the words "may refer the dispute to a tribunal etc." represented one method which the parties might adopt. That could be done by placing a full stop after the word "appropriate" and substituting the word "They" for the word "and".

34. Mr. HUDSON accepted Mr. Córdova's amendment.

35. The CHAIRMAN, speaking as a member of the Commission, suggested that that amendment might convey the erroneous impression that paragraph 1 dealt with two separate things.

36. Mr. LAUTERPACHT suggested that the Chairman's point would be met if a semicolon were placed after the word "appropriate" and not a full stop.

Mr. Lauterpacht's suggestion was accepted.

Paragraph 2 [6]

37. Mr. LAUTERPACHT explained that the Standing Drafting Committee had recommended the deletion of the words "of high moral character and" after the words "among persons" from paragraph 2, on the grounds that that was an obvious requirement when selecting arbitrators and that an express provision on the subject was somewhat pedantic.

38. Mr. el-KHOURI failed to see any good reason for such an omission, since it was far more difficult to find persons of recognized competence in international law than persons of high moral character.

39. Mr. CÓRDOVA observed that the two qualities did not necessarily go together but, at all events, high

moral character was of greater importance than competence in international law.

40. Mr. YEPES said he was in favour of the Standing Drafting Committee's recommendation, since the retention of the words "of high moral character" in paragraph 2 might suggest that in other cases it was not a necessary qualification.

It was agreed, by 6 votes to 4, with 2 abstentions, to delete the words "of high moral character and" in paragraph 2.

41. Mr. SPIROPOULOS said he had voted in favour of the deletion of the words since in his view the less said in legal instruments about morality the better and, furthermore, the requirement was obvious.

42. Mr. HSU said he had voted in favour of the Standing Drafting Committee's recommendation because the proviso at the beginning of paragraph 2: "With due regard to the circumstances of the case" might be interpreted to mean that it was possible to choose as arbitrators persons who were not of high moral character.

43. Mr. SCELLE said that the Standing Drafting Committee had recommended the deletion of the words "The sole arbitrator or the majority of the arbitrators shall be chosen from among nationals of States having no special interest in the case" because, as Mr. Hudson had contended, such a provision would preclude the appointment of national arbitrators, particularly where the tribunal consisted of two persons.

The Standing Drafting Committee's recommendation was adopted unanimously.

44. Mr. FRANÇOIS asked why the Standing Drafting Committee should have dropped the words "Nevertheless, generally speaking", which had figured in article 6 of the original text in the special rapporteur's second report (A/CN.4/46), and which were useful in allowing for the appointment of the head of a State as arbitrator.

45. Mr. SCELLE replied that those words had been deleted because they were too vague. The third paragraph of the comment on article 4 made it clear that, although most members of the Commission were against the appointment of important political personages or heads of States, they did not wish to prohibit it.

46. Mr. CÓRDOVA suggested that the text of the article should be amplified in order to make that clear.

47. Mr. SCELLE observed that the text should not be read separately from the commentary.

48. Mr. LAUTERPACHT and Mr. YEPES considered that the words "With due regard to the circumstances of the case" covered the contingency satisfactorily.

49. Mr. el-KHOURI also considered that the opening phrase in paragraph 2 made it plain that recognized

competence in international law was not a *sine qua non* in choosing arbitrators.

50. Mr. HUDSON observed that the use of the word "should" rather than the word "shall", after the words "or the arbitrators" in paragraph 2, further strengthened the proviso in the opening phrase.

51. Mr. ZOUREK observed that the French text should be brought into line with the English by substituting the word "*devraient*" for the word "*devront*" in paragraph 2.

It was so agreed.

Article 5 [7]

Paragraph 1

No observations.

Paragraph 2

52. Mr. LIANG (Secretary to the Commission) pointed out that there might be an interval between the time when the tribunal began to function and the time when the proceedings, properly speaking, began.

53. Mr. LAUTERPACHT suggested that, in order to meet the point raised by the Secretary, the words : "provided that the tribunal has not yet begun to function" be replaced by the words : "provided that the tribunal has not yet begun its proceedings".

It was so agreed.

Articles 6, 7 and 8 [8, 9 and 11]

No observations.

Article 9 [12]

54. Mr. SCELLE pointed out that it was very rare in practice for an arbitration treaty itself to specify all the points listed in the eleven sub-paragraphs of article 9. It was for that reason that he suggested that the words : "Unless there is a treaty of arbitration which suffices for the purpose" be replaced by the broader wording : "Unless there are prior provisions on arbitration which suffice for the purpose".

55. Mr. YEPES supported Mr. Scelle's suggestion.

56. Mr. LAUTERPACHT also supported Mr. Scelle's suggestion, which had the advantage over the text proposed by the Standing Drafting Committee that it would cover clauses, or a chapter, dealing with arbitration in a general treaty. He moved its adoption on the understanding that a more elegant English rendering of the phrase suggested by Mr. Scelle would be submitted to the Commission for approval at its next meeting.

On that understanding Mr. Scelle's suggestion was adopted.

Article 10 [14]

Paragraph 1

No observations.

Paragraph 2

57. Mr. SCELLE pointed out, with regard to paragraph 2, that if the parties were bound by an undertaking to arbitrate, the tribunal would be constituted, by virtue of the provisions of article 3, even if no *compromis* had been drawn up. In order to remove any doubt on that point, which was vital to the whole purpose of the draft, he suggested that the phrase "and if the tribunal has already been constituted" be replaced by the phrase "and when the tribunal has been constituted".

Mr. Scelle's suggestion was adopted by 9 votes to none with 2 abstentions.

58. Mr. YEPES suggested that in the French text, the word "et" be deleted from the phrase "*dans un délai raisonnable et qu'il fixera lui-même*".

59. Mr. SCELLE pointed out that the phrase had been omitted in error from the English text.

Mr. Yepes' suggestion was adopted by 5 votes to none with 3 abstentions.

60. The CHAIRMAN said that, in view of the changes made to it, he would put to the vote the text of paragraph 2 of article 10, as amended.

Paragraph 2 as amended was approved by 7 votes to none with 2 abstentions.

Article 11 [19]

No observations.

Article 12 [20]

Paragraph 1³

No observations.

Paragraph 2

61. Mr. ZOUREK felt that paragraph 2 of article 12 conflicted with article 9 (g), which provided that the parties should conclude a *compromis* specifying "the law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono* ". If the parties did not give the tribunal the power to adjudicate *ex aequo et bono* , it would have no option, if international law were silent, but to bring in a finding of *non liquet* .

62. Mr. LAUTERPACHT thought the Commission had agreed, after lengthy discussion, that it was impossible for international law to be completely silent on any question which could be submitted to arbitration.

63. Mr. ZOUREK did not agree that the Commission had considered the prior question of principle, whether international law could be silent on a question submitted to arbitration. It had only weighed the merits

³ In document A/CN.4/L.35, paragraph 1 read as follows :

"Subject to any provision in the *compromis* concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice."

of the various concrete proposals which had been made. In his view questions could be submitted to arbitration on which international law was silent, either because they fell solely within the province of municipal law, or because they had not been the subject of international regulation.

64. Mr. SCELLE said that it was his view that, by referring a dispute to arbitration, the parties to the dispute manifested their desire for it to be settled, and therefore implicitly gave the arbitral tribunal the power to adjudicate *ex aequo et bono* in the event of the silence or obscurity of international law. In other words, unless the parties stated explicitly in the *compromis* that it should not have that power, the arbitral tribunal had the power to adjudicate *ex aequo et bono*, if necessary.

65. Mr. LAUTERPACHT felt that after lengthy discussion the view had prevailed that the tribunal did not possess the power to adjudicate *ex aequo et bono*, unless such power were explicitly conferred on it by the parties. He hoped therefore that the opposing view, just voiced by Mr. Scelle, would not find a place in the comment.

66. Mr. SCELLE said that if the view propounded by Mr. Lauterpacht was accepted, Mr. Zourek's objection was perfectly valid.

67. After further discussion, the CHAIRMAN put to the vote the question whether there was a contradiction between paragraph 2 of article 12 and article 9 (g).

The question was decided in the negative by 8 votes to 1 with 1 abstention.

Article 13 [24, para. 5]

68. Mr. LIANG, Secretary to the Commission, suggested, on the principle that two different words should not be used to denote one and the same thing, that article 13 be amended to read as follows :

"Subject to any provision in the *compromis* concerning the procedure of the tribunal, the tribunal shall be competent to formulate its own rules of procedure." ⁴

It was so agreed.

Article 14 [23] ⁵

69. Mr. SCELLE said that the Standing Drafting Committee had been of the opinion that article 23 of his second draft (A/CN.4/46) should be deleted, despite the fact that it had been tentatively adopted, with amendments, by the Commission.

⁴ In document A/CN.4/L.35 this article read as follows :

"Subject to any provision in the *compromis* concerning the procedure to be followed by the tribunal, the tribunal shall be competent to formulate the rules of procedure to be applied."

See summary record of the 183rd meeting for additional change.

⁵ In document A/CN.4/L.35 this article was unnumbered and was not followed by a comment.

70. Mr. ZOUREK recalled that a proposal to delete article 23 of Mr. Scelle's second draft had already been made and rejected.⁶ In his view that article should therefore be retained, the more so since it had an importance in the text as a whole.

71. The CHAIRMAN said that Mr. Zourek was correct in stating that a proposal to delete the article had already been rejected. Personally, he felt that it should be retained.

72. Mr. SCELLE said that his personal opinion, too, was that the article should be retained.

73. Mr. LAUTERPACHT said that he could not agree that the Commission was irrevocably bound by its previous decisions. It had already approved a number of changes made by the Standing Drafting Committee to the texts it had provisionally adopted. The Standing Drafting Committee's reason for proposing the deletion of the article under consideration was that it stated a principle which was so obvious that it did not need to be stated.

74. Mr. KOZHEVNIKOV recalled that the Commission had agreed that it would not alter its previous decisions so far as the substance was concerned, but only with regard to questions of form and drafting. The present question raised considerations of substance, and the Commission's previous decision should therefore be maintained.

75. The CHAIRMAN agreed with Mr. Kozhevnikov that the Commission could not reopen a discussion on questions of substance. He felt, however, that the question at present under discussion was mainly one of form.

76. Mr. YEPES pointed out that, under article 30 (c), an award could be contested by one of the parties on the ground that there had been a serious departure from a fundamental rule of procedure. He agreed therefore that the original article 23 should be retained because it laid down that the equality of the parties was a fundamental rule of procedure.

77. Mr. KERNO (Assistant Secretary-General) pointed out that there were other fundamental rules of procedure which were not mentioned in the draft.

78. Mr. el-KHOURI and Mr. SCELLE felt that the significance of the provision under consideration would be enhanced if it were made the first paragraph of article 14.

79. Mr. HUDSON agreed that the provision in question should be included in another article, but suggested that it be made a second paragraph of article 13, reading as follows :

"Such rules of procedure shall in no case violate the principle of the equality of the parties before the tribunal."

⁶ See summary record of the 148th meeting, para. 21.

80. Mr. LAUTERPACHT still considered the provision unnecessary. However, if some members of the Commission felt it desirable to retain it, it should be retained. Properly, the question of equality of the parties arose in connexion not only with procedure but also with evidence and with the application of substantive law. In order to simplify discussion, however, he would support Mr. Hudson's suggestion.

81. Mr. YEPES and Mr. ZOUREK thought that the discussion showed that the provision in question was of sufficient importance to warrant its being retained and placed in an article by itself.

82. Mr. LIANG (Secretary to the Commission) suggested that if the provision were retained, it should be differently worded, since a declaration of principle appeared somewhat out of place among detailed provisions regarding the powers of the tribunal.

83. The CHAIRMAN put to the vote the question whether the substance of the provision should be included in the final draft.

Its inclusion was decided in the affirmative by 10 votes to none with 1 abstention.

84. Mr. YEPES proposed that the provision be retained as a separate article to read as follows :

"The parties are equal in any proceedings before the tribunal."⁷

Mr. Yepes' proposal was adopted by 6 votes to 3 with 3 abstentions.

85. Mr. SCELLE pointed out that the Commission had still to decide where the article was to be placed. He proposed that it be placed immediately after article 13, to which, as Mr. Hudson had pointed out, it was in fact complementary.

86. Mr. YEPES proposed that the article be made the first article of Chapter IV, as the principle enunciated in it governed all questions of the tribunal's procedure.

87. The CHAIRMAN said that he would first put Mr. Scelle's proposal to the vote.

Mr. Scelle's proposal was rejected by 6 votes to 4 with 1 abstention.

88. The CHAIRMAN said that he would next put Mr. Yepes' proposal to the vote.

89. Mr. SCELLE said that he merely wished to point out that, if the article were placed where Mr. Yepes proposed, it would govern article 11, dealing with interpretation of the *compromis*, and article 12, concerning the law to be applied and *non liquet* findings, all of them questions with which it was totally unconnected.

⁷ In document A/CN.4/L.35 this article which was unnumbered read as follows :

"The equality of the parties before the tribunal is an underlying principle of the law of arbitration."

Five votes were cast in favour of Mr. YEPES' proposal, and 5 against; the proposal was accordingly rejected.

The meeting rose at 6.25 p.m.

174th MEETING

Tuesday, 29 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35) (continued)

1. The CHAIRMAN invited the Commission to con-

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

tinue consideration of the Draft on Arbitral Procedure (A/CN.4/L.35).¹

CONSIDERATION OF THE DRAFT ARTICLES SUBMITTED BY THE STANDING DRAFTING COMMITTEE (continued)

Article 14 [23] (continued)

2. Mr. YEPES said that he wished to withdraw the proposal he had made at the previous meeting that the provision formerly contained in article 23 which the Commission had decided to maintain in the form: "The parties are equal in any proceedings before the tribunal" be inserted at the beginning of chapter IV as a separate article. On reflection he felt that it should be inserted as a separate article to follow article 13.

3. Mr. LAUTERPACHT said that it was self-evident that the tribunal must administer the law impartially. He could not conceal his view that it was unnecessary to say so.

4. Mr. HUDSON also opposed the inclusion of such a provision as the revised article. In the terms in which it had been approved by the Commission, it was unsuitable for inclusion in a chapter dealing with the powers of the tribunal. He thought therefore that, if its substance was to be maintained, the article should be couched as follows:

"The tribunal shall at all times respect the principle of the equality of the parties before it."

He made it clear, however, that he himself could not vote for the article.

5. Mr. SCELLE observed that the Commission had already adopted a definite text at the previous meeting. There remained only the question where it was to be placed.

6. Mr. LIANG (Secretary to the Commission) agreed with Mr. Hudson that it might be difficult to find an appropriate place in chapter IV for the revised text of original article 23 unless the title of that chapter were made less restrictive. On the other hand there could be objections to such expressions as "at all times" and "respect" in Mr. Hudson's text. Perhaps Mr. Hudson might consider a text running somewhat as follows:

"The tribunal shall have regard for the principle of equality of the parties."

7. Mr. HSU believed that it might be wiser to have no such provision in the text. Others of a similar character which enunciated self-evident principles had not been retained. He therefore moved that the matter be reconsidered.

8. Mr. ZOUREK argued that the Commission could not reopen discussion on the principle as to whether such a provision was to be included in the draft. If it

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

did so he would insist that the Chairman's ruling on the amendment he had proposed to article 3 be reversed and that that text be submitted for consideration.

9. Mr. SCELLE agreed with Mr. Zourek. During the first reading of his (Mr. Scelle's) draft, the Commission had decided to retain article 23, and had confirmed that decision at the previous meeting by a vote. The Commission should refrain from perpetually going back on its decisions. He was therefore unable to accept the reasons for Mr. Hsu's motion.

10. Mr. HSU said that he had considerable sympathy with Mr. Scelle's view and had only moved reconsideration of the matter on the grounds that such a general statement of an obvious principle could be dispensed with.

Mr. Hsu's motion was defeated by 5 votes to 3 with 3 abstentions.

Mr. Yepes' proposal that the provision be included as a separate article to be placed after article 13 was adopted by 5 votes to 3 with 2 abstentions.

Article 15 [24]²

11. No observations.

Article 16 [27]³

12. Mr. HUDSON suggested that the word "arbitral" be deleted from the French text to bring it into line with the rest of the draft.

It was so agreed.

13. Mr. HUDSON referred to the special rapporteur's comment on article 16 which stated that "the fact that the English and French texts are not in complete conformity is due to the technical peculiarities of Anglo-Saxon or Latin procedure, the sense and scope of the articles are, however, identical in the two texts" He said he was unable to understand why that deficiency should not be made good. It was unthinkable that the Commission should admit to being incapable of doing so.

14. Mr. SCELLE replied that, after careful consideration, he had concluded that, for the reasons he had explained in his comment, it was impossible to evolve two absolutely concordant texts but the sense and scope of both versions were absolutely identical.

15. The CHAIRMAN said that the French text of article 16 was perfectly comprehensible to anyone familiar with continental legal procedure. All that was necessary was to find the precise English equivalents for the terms used.

² Corresponds to article 14 in document A/CN.4/L.35.

³ In document A/CN.4/L.35 this article read as follows:

"For the purpose of securing a complete settlement of the dispute, the tribunal shall rule on objections to the admissibility of any claims or counter-claims presented to it."

16. Mr. LIANG (Secretary to the Commission) pointed out that the purpose of article 16 was to emphasize the power of the tribunal to rule on counter-claims. It was hardly necessary to state its power to rule on the principle claim in the dispute since that was one of its essential functions.
17. Mr. HUDSON considered that article 16 was superfluous and could be omitted.
18. Mr. LAUTERPACHT suggested that the words "counter-claims or other claims arising out of the subject-matter of the dispute" be substituted for the words "claims or counter-claims presented to it".
19. Mr. KERNO (Assistant Secretary-General) asked whether article 16 was not in fact redundant in view of article 11, under which the tribunal was the judge of its own competence and possessed the widest powers to interpret the *compromis*.
20. Mr. LIANG (Secretary to the Commission) asked whether the special rapporteur would agree that article 16 was concerned with counter-claims as distinct from the principal claim, which was the subject-matter of the dispute, and that the words "*principales ou*" and "*et notamment des demandes*" should therefore be deleted from the French text.
21. Mr. SCELLE said he could agree to the deletion suggested by the Secretary and would indeed have no objection to Mr. Lauterpacht's amendment. All he was concerned to ensure was that, in order to secure a complete settlement of the dispute, the tribunal should be empowered to rule upon the admissibility of any claim. He could not, however, agree to Mr. Hudson's view that article 16 could be omitted.
22. Mr. SPIROPOULOS observed that the only new element in article 16 was the recognition of the tribunal's power to consider counter-claims, which was a departure from customary arbitral practice. In his opinion an arbitral tribunal could only rule on claims rising out of the *compromis*. Was it the intention of the special rapporteur that the tribunal must admit any counter-claims?
23. Mr. SCELLE said that Mr. Spiropoulos had brought the discussion back to two fundamentally different theories of arbitration: the jurisdictional theory, which emphasized the securing of a complete settlement of the dispute, and the theory of diplomatic arbitration, in which the procedure was recognized to depend strictly on the will of the parties. The latter theory, when applied in practice, allowed the parties to prohibit the tribunal from dealing with certain aspects of a case and frequently resulted in the need for a second arbitration. His draft was based on the former theory, which was reflected in article 13 of the League of Nations Covenant. Mr. Spiropoulos' view conformed more closely to existing practice, but he (Mr. Scelle) was hoping to achieve progress in his draft along the lines already laid down in certain existing international instruments.
24. In reply to Mr. Spiropoulos' question of the admissibility of counter-claims, he said that that depended upon whether they required a ruling to enable the tribunal to effect a complete settlement of the dispute.
25. Mr. CÓRDOVA shared Mr. Scelle's view as to the purpose of article 16. Nevertheless, the present wording did not make it entirely clear whether the tribunal could rule only on the admissibility of counter-claims and not on their substance. His difficulty would be removed if the words "objections to the admissibility of" were deleted.
26. Mr. SCELLE agreed that the tribunal could decide on the substance of counter-claims. He accepted Mr. Córdova's amendment, which would greatly improve the text.
27. Mr. KOZHEVNIKOV said that, out of respect for the Chairman's declaration at the previous meeting that discussion on the substance of the draft had been concluded, he had intended to confine his remarks to matters of drafting. As, however, the Commission appeared to have departed somewhat from the procedure laid down, he felt bound to explain his attitude on article 16. He would be prepared to support the deletion of that article which, by placing the tribunal above the parties and endowing it with very wide powers indeed, went far beyond the scope of traditional arbitral procedure. The article seemed to be in conformity with the general spirit of the draft which, as he had already indicated, was unacceptable to him.
28. Mr. el-KHOURI considered that the special rapporteur's purpose, which was to ensure that the tribunal could effect a complete settlement of the dispute could be achieved only if article 16 were accepted as it stood, it being made clear that the tribunal would admit all claims.
29. Mr. SCELLE urged Mr. el-Khoury to reconsider his view; the tribunal must be free to reject a claim.
30. Mr. LIANG (Secretary to the Commission) suggested that the objections to article 16 might be removed by the substitution of the words "decide on the incidental or additional claims or counter-claims" for the words "rule on objections to the admissibility of any claims or counter-claims presented to it".
31. Mr. LAUTERPACHT said he would like to modify his suggested amendments to article 16, so as to make it read as follows:
- "For the purpose of securing a complete settlement of the dispute, the tribunal shall decide on any counter-claims or additional or incidental claims arising out of the subject-matter of the dispute."
- Mr. SCELLE said he could accept either of the texts presented by the two previous speakers.
- The text proposed by Mr. Lauterpacht was adopted by 8 votes to none, with 3 abstentions.*

Article 17 [26]⁴

32. Mr. YEPES, referring to the discussion on article 2 at the previous meeting, proposed the substitution of the word "prescribe" for the word "indicate" in the English text of article 17.

Mr. YEPES' proposal was adopted.

33. Mr. YEPES said that he was not sure, on the other hand, whether the second sentence of article 17 should be deleted as had been suggested at the previous meeting.⁵ It was not altogether redundant, as some purpose might be served by stating that the parties were bound to follow the provisional measures prescribed by the tribunal.

34. Mr. LAUTERPACHT proposed that the second sentence be deleted so as to bring the article into line with article 2.

It was agreed to delete the second sentence of article 16.

Article 18 [29]⁶

No observations.

*Article 19 [30]⁷**Paragraph 1*

35. Mr. CÓRDOVA asked whether the absence of one member of the tribunal would prevent it from proceeding with the case.

36. Mr. LAUTERPACHT replied in the negative, pointing out that the word "should" had been used and not the word "shall".

Paragraph 2

No observations.

*Article 20 [28]⁸**Paragraph 1*

No observations.

Paragraph 2

37. Mr. HUDSON suggested the substitution of the word "case" for the word "cases".

Mr. Hudson's suggestion was adopted.

Article 21 [16 and 17]⁹

38. Mr. CÓRDOVA asked whether discontinuance of proceedings meant abandonment by one of the parties of its claim.

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

⁵ The second sentence read as follows: "Each party is under a duty to take the measures indicated to it."

⁶ Corresponds to article 17 in document A/CN.4/L.35.

⁷ Corresponds to article 18 in document A/CN.4/L.35.

⁸ Corresponds to article 19 in document A/CN.4/L.35.

⁹ Corresponds to articles 20 and 21 in document A/CN.4/L.35.

39. Mr. SCELLE replied in the affirmative.

40. Mr. HUDSON proposed that article 21 (in doc. A/CN.4/L.35) be transposed to form a second paragraph of article 20 (in doc. A/CN.4/L.35), and that the words "withdrawn from the tribunal" in the former article be replaced by the word "discontinued", so as to bring it into line with the wording of article 20 (in doc. A/CN.4/L.35).

Mr. Hudson's proposal was adopted.

Article 22 [18]

No observations.

Article 23 [31]

41. Mr. SPIROPOULOS said that he merely wished to point out that it was sometimes impossible for the tribunal to render the award within the period fixed by the *compromis*.

42. Mr. SCELLE said that he personally considered that the tribunal should not be prevented from rendering its award merely because the parties had inadvertently fixed too short a period in the *compromis* to allow it to complete its proceedings. The Commission, however, had not accepted that view.

43. Mr. LAUTERPACHT said that the whole of article 23 constituted a compromise which had been reached only after lengthy discussion. In those circumstances he felt it would be prudent to refrain from reopening discussion on any part of it.

44. Mr. SCELLE pointed out that article 23, as at present drafted, might result in the continuance of the dispute. Its tendency therefore was contrary to that of other provisions in the draft, for example, that prohibiting a finding of *non liquet*. He agreed, however, that unless the Commission decided otherwise, it could not reopen discussion on the question of substance involved.

*Article 24 [32]**Paragraph 1¹⁰*

45. Mr. HUDSON pointed out that the words "*présent ou*" in the French text, had no equivalent in the English text and should be deleted.

46. Mr. LAUTERPACHT said that the words "being present or duly summoned to appear" had been agreed on after a lengthy discussion. The English text should therefore be brought into line with the French text, not *vice versa*.

It was so agreed by 6 votes to none with 4 abstentions.

¹⁰ Paragraph 1 in document A/CN.4/L.35 read as follows:

"1. The award shall be drawn up in writing and communicated to the parties. It shall be read in open court, the agents and counsel of the parties being duly summoned to appear."

47. Mr. CÓRDOVA proposed that the words "and counsel" be deleted.

48. Mr. HUDSON and Mr. SPIROPOULOS supported Mr. Córdova's proposal.

49. Mr. YEPES pointed out that counsel were mentioned as well as agents in a corresponding article of the Statute of the International Court of Justice.

Mr. Córdova's proposal was adopted by 6 votes to 1 with 2 abstentions.

Paragraphs 2 and 3

No observations.

Article 25 [34]

No observations.

Article 26¹¹

50. Mr. LAUTERPACHT pointed out that the words "in the award" had no equivalent in the French text, which should be brought into line with the English in that respect.

51. Mr. SCELLE agreed that the words "*contenues dans la sentence*" should be added to the French text.

It was so agreed.

Article 27 [35]

52. Mr. KERNO (Assistant Secretary-General) pointed out that the words "from the date it is rendered" did not precisely convey the Commission's intention, which was that the award should be binding from the very moment it was rendered. The expression was, however, commonly used in some legal instruments, and there might be no practical objection to retaining them.

53. Mr. SPIROPOULOS suggested that those words could simply be omitted. The award could not be binding before it had been rendered, and if nothing was said to the contrary it would be understood that it was binding as soon as it was rendered.

54. Mr. el-KHOURI supported Mr. Spiropoulos' suggestion.

55. Mr. ZOUREK and Mr. SCELLE pointed out that the question could not be left in the air as Mr. Spiropoulos had suggested, since it could be argued equally well that the award was binding upon the parties only from the time they learned of it.

56. Mr. CÓRDOVA proposed that the words "from the date it is rendered"¹² be replaced by the words "as soon as it is rendered".

It was so agreed.

¹¹ This article is based on an additional provision submitted by Mr. Zourek (see summary record of the 154th meeting, para. 33).

¹² These words were added by the Standing Drafting Committee on the basis of an addition proposed by Mr. Zourek (see summary record of the 154th meeting, para. 33).

Article 28 [37]

57. Mr. HUDSON suggested that, in both paragraphs, the words "at the request of any party" be replaced by the words "at the request of either party".

It was so agreed.

Article 29 [38, 39 and 40]

Paragraph 1

58. Mr. HUDSON suggested that the words "the party claiming revision", which occurred twice, be replaced by the words "the party requesting revision".

It was so agreed.

59. Mr. LAUTERPACHT pointed out that the English text contained no equivalent to the words "*sur la solution du litige*" which appeared in the French text. He suggested that what was really meant was "of such a nature as to have a decisive influence on the award", and that that wording should be used instead of "of such a nature as to be of a decisive character".

It was so agreed.

60. Mr. HUDSON felt that the word "new" should be deleted before the word "fact". It was not the fact that was new, but its discovery.

61. Mr. SCELLE said that in French, at any rate, the term "*fait nouveau*" was a commonly used term, with a precise meaning.

62. Mr. CÓRDOVA and Mr. FRANÇOIS pointed out that the meaning was defined in the remainder of the paragraph and that the word "new" was therefore out of place in paragraph 1, but should be retained in the other paragraphs.

It was agreed that the word "new" be deleted from paragraph 1, but retained in the other paragraphs.

Paragraphs 2, 3 and 4

No observations.

Article 30 [42]

No observations.

Article 31 [43]

Paragraph 1

No observations.

Paragraph 2

63. Mr. CÓRDOVA pointed out that a limit of sixty days was much too short for lodging an application for annulment of the award on the ground of corruption. In his view an award should be declared null where there was corruption on the part of a member of the tribunal, irrespective of the time elapsed after the award had been rendered.

64. Mr. SCELLE pointed out that corruption on the part of a member of the tribunal need not necessarily affect the award. He agreed, however, with Mr. CÓRDOVA that the time-limit set for applications for annulment on the ground of corruption was far too short, as it was also far too short for applications for revision. He thought, nevertheless, that the Commission could not reconsider those two questions at the present session, but should consider them carefully when it took up the draft again.

65. Mr. LAUTERPACHT suggested that the perfectly valid point made by Mr. CÓRDOVA could be met with no great difficulty, by amending the paragraph to read as follows:

"In cases covered by paragraphs (a) and (c) of article 30, the application must be made within sixty days of the rendering of the award."

66. The CHAIRMAN pointed out that, if no limit were fixed for submitting applications for annulment of the award on the ground of corruption, there was a danger that, in virtue of paragraph 3, one of the parties might stay execution of the award by intimating that it was investigating the possibility of corruption on the part of one of the members of the tribunal.

67. Mr. LAUTERPACHT pointed out that under paragraph 3 it was only the formal application which would result in execution being stayed.

Mr. Lauterpacht's amendment was adopted by 7 votes to none, with 2 abstentions.

68. Mr. CÓRDOVA said that, in view of the point made by Mr. Scelle, the Commission should consider adding to article 30(b) the words "and that such corruption influenced the award".

69. Mr. SCELLE pointed out that article 30 merely provided that the validity of the award could be challenged by either party on one of three grounds. It would be for the tribunal to decide the question, and in doing so it would, in the case of corruption, naturally take into account the question whether that corruption had influenced the award.

Paragraph 3

70. Mr. KERNO (Assistant Secretary-General) said that he felt it his duty to state his view that paragraph 3, already objectionable in that possibly unavoidable delay on the part of the tribunal might delay execution of a just judgment, had been rendered doubly objectionable by the amendment to paragraph 2. He hoped that when the Commission took up the draft again it would consider very carefully the desirability of amending paragraph 3 to read:

"The application shall *not* stay execution unless otherwise decided by the Court."

71. Mr. el-KHOURI said that he did not agree with the Assistant Secretary-General. The practical objections to paragraph 3 were not so great as the objections to an award being executed notwithstanding the filing of an application for annulment.

Article 32 [44]

No observations.

72. The CHAIRMAN pointed out that the Commission had completed its consideration of the Draft on Arbitral Procedure submitted by the Standing Drafting Committee (A/CN.4/L.35). He would now put these articles, as amended and as a whole, to the vote. The Commission would take up the comments to the articles at the next meeting.

The Draft on Arbitral Procedure, contained in document A/CN.4/L.35, was adopted, as amended and as a whole, by 9 votes to 3.

73. Mr. HUDSON, in explanation of his vote against the adoption of the Draft as a whole, stated that he was unable to support many of its provisions, particularly those envisaging limitations on the freedom of the parties resorting to arbitration.

The meeting rose at 1 p.m.

175th MEETING

Wednesday, 30 July 1952, at 9.45 a.m.

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

Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35) (continued)

CONSIDERATION OF THE DRAFT COMMENTS SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to consider the introduction to the Draft on Arbitral Procedure and the comments on the articles in that draft (A/CN.4/L.35).¹

General

2. Mr. KOZHEVNIKOV asked whether the introduction and comments were intended to reflect the views of the Commission as a whole or merely the views of the special rapporteur. He thought the latter was the case, and that the sole purpose of the present discussion was to provide guidance for the special rapporteur.

3. Mr. SCELLE explained that, in the introduction and comments, he had endeavoured to express not his own views but those of the Commission, as reflected in its decisions.

4. Mr. KOZHEVNIKOV suggested that, even if it were held that the comments ought to represent the views of the Commission as a whole, there was insufficient time for detailed consideration of them. In the circumstances, he thought the Commission should decide that it was not committed to the comments and that they merely represented the special rapporteur's views.

5. Mr. SCELLE said that he could not agree to Mr. Kozhevnikov's suggestion, which would be quite contrary to the Commission's previous practice. The whole of document A/CN.4/L.35, including the introduction and comments as well as the articles themselves, was intended to form part of the Commission's report covering the work of its fourth session and, as such, must be approved by the Commission.

6. The CHAIRMAN said that he was in complete agreement with Mr. Scelle that the Commission could only submit to the General Assembly texts which had been approved by a majority of its members. It had been the practice of the Commission that dissenting views of individual members might be reflected in the Commission's reports only by means of appropriate footnotes.

7. Mr. YEPES said that he could not support Mr. Kozhevnikov's suggestion, which was contrary to the Commission's traditions. Moreover, the comments drafted by the special rapporteur appeared to him to reflect faithfully the views of the majority of the Commission.

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

8. Mr. LIANG (Secretary to the Commission) recalled that the Commission had previously decided:

"1. That the draft on arbitral procedure, accompanied by explanations, be issued as a Commission document and submitted to the governments for comments and included in the report of the Commission to the General Assembly this year as a provisional draft;

"2. That the special rapporteur be invited to prepare and to present to the Commission at its next session a full commentary on the draft on arbitral procedure, with a view to the submission of the final draft and commentary to the General Assembly in 1953."²

It seemed then that the explanations, or "comments" as they were now called, had clearly been intended to be the explanations of the Commission. On the other hand, the Commission's report to the General Assembly with regard to arbitral procedure would, for the present year, be merely a progress report, and it was not to be expected that the General Assembly would discuss the articles, much less the explanations. Furthermore, as was clear from paragraph 2 of the Commission's decision, a full commentary would still have to be prepared by the special rapporteur and approved by the Commission at its next session for submission, in compliance with article 20 of the Commission's Statute, to the General Assembly.

9. Mr. KOZHEVNIKOV said that he did not interpret the Commission's decision in that way. Document A/CN.4/L.35 was made up of two parts, one of which obviously had to be approved by the Commission as a whole, and the other, is his opinion, equally obviously was the work of the special rapporteur. Moreover, his own interpretation of the decision appeared to be fully in accordance with the provisions of article 21 of the Statute, which did not provide that explanations and supporting material attached to the Commission's documents should themselves be approved by the Commission.

10. The CHAIRMAN said that his ruling was that the Commission must adopt the comments, for the reasons which had already been given. It would of course be open to any individual member of the Commission to vote against any part of the comments or against them as a whole.

11. Mr. LAUTERPACHT said that he had some sympathy with Mr. Kozhevnikov's views, not as regards the responsibility for the comments—that, he thought, should lie with the Commission—but as regards the practical question whether the Commission had sufficient time to devote to the comments on each article the critical and exhaustive consideration that would be required before it could adopt them as its own. There was much in the comments with which he could not agree, and much that seemed to him redundant. On

² See summary record of the 156th meeting, paras. 1—29, especially paras. 5 and 18.

the other hand, the comments failed to mention certain questions of importance.

12. He agreed that the Commission should abide by its previous decision that the draft articles should be accompanied by explanations or comments. That did not necessarily mean, however, that those explanations or comments should accompany each article. There was no reason why they should not take the form of an introduction to the draft, explaining its main principles and indicating the innovations it contained. He noted that the special rapporteur had indeed drafted a few introductory paragraphs, in addition to the comments on each article.

13. The Draft on Arbitral Procedure contained in document A/CN.4/L.35 represented an important contribution to international arbitration law. It contained a number of significant innovations. In the first place, it introduced a system of safeguards against the parties frustrating the obligation to have recourse to arbitration, at any stage of the procedure. Secondly, it safeguarded the independence of the arbitral tribunal by laying down the principle of its immutability, i.e. that, once set up, its composition was independent of the will of one party. Thirdly, it provided explicitly that the arbitral tribunal could not bring in a finding of *non liquet* and that it was the judge of its own competence and procedure. Fourthly, it provided for revision and annulment of the award under prescribed conditions. Fifthly, it linked arbitral procedure in certain respects to the International Court of Justice.

14. The introductory paragraphs drafted by the special rapporteur barely mentioned some of those important innovations.³ They should therefore be redrafted, and

³ See summary record of the 180th meeting, para. 64. Paras 1—4 of document A/CN.4/L.35 are identical to paras. 11—14 of the "Report."

The other paragraphs read as follows :

" 5. With regard to the Draft on Arbitral Procedure, the Commission wishes to record certain general observations.

" 6. First, governments undertake to resort to arbitration in two different ways : either in respect of an actual dispute arising between them at a given time ; or in an abstract manner, in advance, through an undertaking to resort to arbitration if disputes should arise between them in a particular matter or even in any matter. This is what is called the arbitration clause, which may be found in any bilateral or multilateral treaty or form the subject of a general or special treaty on arbitration. In either case, the undertaking to resort to arbitration or "undertaking to arbitrate" constitutes, between the governments signing it, a legal bond of which either may demand execution.

" 7. Secondly, it often happens that the obligation to arbitrate cannot be carried out because the governments in respect of which it is invoked have numerous means of evasion. They may first claim that the obligation has lapsed ; that the circumstances in which it was contracted have changed ; that the obligation assumed has not the scope attributed to it by the plaintiff, etc. ; in short, that the circumstances of the dispute are not, or are no longer, arbitrable. A recalcitrant government may also multiply the difficulties and impede the drafting of the *compromis*, refuse to agree on the choice of judges, the procedure to be followed, the rules of law to be applied, etc. Examples of this kind are innumerable.

" (a) the arbitrability or non-arbitrability of the dispute,

that might best be done by a small drafting committee, which should include the special rapporteur and the general rapporteur.

15. If the introductory paragraphs were expanded in that way, it would be unnecessary, for the purposes of the report on the present session, to retain the comments on the individual articles. He attached great importance, however, to a full commentary on each article being prepared for the next session, in accordance with paragraph 2 of the Commission's decision recited by the Secretary. In his view the Secretariat had the available resources to prepare such a full commentary, which would round off in a fitting manner the Commission's work on one of the first topics of international law it had selected for codification.

16. Mr. SCELLE said that all the innovations to which Mr. Lauterpacht had referred were, without exception, indicated either in the introduction or in the comments on the individual articles.

17. In the past, when the Commission had adopted a text, it had defined what it meant. That, as he had indicated, was the sole purpose of the comments he had drafted. Mr. Lauterpacht's suggestion amounted to putting into abbreviated form what would be stated at length in the commentary which was to be prepared for the next session, and he could not support it.

18. Mr. KOZHEVNIKOV said he had understood that the Commission was discussing only the question of procedure. As Mr. Lauterpacht had given his view on the comments as a whole, however, he (Mr. Kozhevnikov) wished to say, in all frankness, that in his opinion, the draft articles did contain certain important

i.e. the binding nature of the prior undertaking to arbitrate can be determined by a judicial body whose decision shall be binding on the parties.

" (b) the arbitrator or tribunal competent to settle the dispute can always be constituted and be able to deliver judgment ;

" (c) the arbitral tribunal or arbitrator will be competent to draft the *compromis* if necessary, where the parties are unable to do so, and can thus issue the necessary orders for proceedings to continue up till, and including, the award.

" 9. Of course, if the parties are themselves able to agree in the *compromis* on all the above questions, they remain absolutely free to do so and the action described above will not be necessary. But it should be pointed out that, although the undertaking to resort to arbitration may be based on the *compromis*, it is also frequently anterior thereto (even in the case of a current and concrete dispute). The undertaking to arbitrate then derives from a *nudum pactum* and is not extinguished by the inability of the parties to reach agreement on the terms of the *compromis*. It is this undertaking which constitutes the legal bond, and the *compromis* is merely its execution.

" 10. The Commission is aware that its task, even in so traditional a field, is not only to codify international practice but to develop the law, and it first endeavoured to make use of legislative material already long accepted by the international community and by public opinion. But it did not deny itself the right to make innovations. Its progressive work consists mainly in the logical adaptation of such traditional materials : the classical method of their utilization has sometimes been changed, but the essential characteristics of arbitral procedure have not been overlooked.

innovations, but innovations did not always mean progress. He did not regard it as progress when the Commission departed from the principles of international law, in particular, the principle of national sovereignty; he did not regard it as progress when the Commission attempted to substitute a supra-national authority for the sovereignty of States; and he did not believe that public opinion would regard such innovations as progress either.

19. He did not think, therefore, that the Commission could take any very great pride in the articles it had adopted. In that connexion, he felt bound to state that the introduction appeared to reflect the views and aspirations of the special rapporteur, rather than those of the Commission as a whole. If the Commission was to consider and approve the introduction and the comments, despite the reasons he had given against such a course, he would suggest that consideration of the introduction be deferred until it had taken a decision on the comments on the individual articles.

20. Mr. LIANG (Secretary to the Commission) recalled, with regard to what had been said by Mr. Lauterpacht, that it had been the Commission's practice in the past to accompany texts it had finally adopted with explanations. Thus, in the Commission's report on its first session, the Draft Declaration on Rights and Duties of States had been accompanied by a number of explanatory paragraphs entitled "Guiding Considerations", "Summary of Contents" and "Observations concerning the Draft Declaration". The special rapporteur had pointed out that he had indicated the guiding considerations underlying the Draft on Arbitral

" 11. The freedom of governments is not affected, since the proposed draft convention will not bind them unless they have subscribed to it. The acceptance of any convention involves a restriction of sovereignty.

" 12. As was to be expected, two currents of opinion have arisen in the Commission. They have in fact always existed among jurists.

" One view is that arbitration should be essentially a diplomatic method of settling disputes, and hence that the parties should be allowed as much latitude as possible in the procedure followed, and the option of breaking it off at any point. This principle of so-called diplomatic arbitration hardly seems compatible with the definition given in article 37 of The Hague Convention of 1907 for the pacific settlement of international disputes, under which settlement of disputes by arbitration should be on the basis of respect for law. But this method does take the fullest account of the interests of States. It is also calculated to prejudice the legal authority of the institution and its traditional role as a source of law.

" The second view, that of so-called jurisdictional arbitration, aims in the opposite direction — at removing arbitration from the political sphere — and brings into the foreground the principle of removing the cause of the dispute by adopting a legal solution. Obviously this is calculated to restrict government action and the importance of the *compromis* in favour of the arbitral tribunal with powers which necessarily tend to resemble those of a court in the ordinary sense and to get further and further away from the method of conciliation or mediation.

" 13. Hence the present text involves frequent recourse to the International Court of Justice wherever disagreement between the parties seems likely to obstruct the proceedings. It is for this reason too that the text rejects the practice

Procedure, either in the introduction or in the comments. Other members of the Commission might consider, however, that those indications were not detailed enough. In that case they could submit amendments to the paragraphs in question.

21. Mr. Lauterpacht had suggested that the introduction be re-examined by a small drafting committee, and he (Mr. Liang) thought the suggestion an excellent one. If the introduction were expanded, it would presumably take in much of the substance at present contained in the comments on the individual articles, and in those circumstances it might be thought unnecessary to have any comments on the individual articles included in the report on the present session. The subject matter of those comments, as at present drafted, could of course be included in the full commentary which was to be prepared for the next session, and which Mr. Lauterpacht had suggested should be drafted by the Secretariat. The Secretariat would be ready to undertake that task, under the general supervision of the special rapporteur, provided it was given sufficient time.

22. The CHAIRMAN thought that the Commission would save time by considering the comments on the individual articles first, as Mr. Kozhevnikov had suggested.

23. Mr. SCELLE agreed that that would be the most practical course. He himself would have a number of amendments to suggest, in consequence of the changes which had been made to the text of the articles at the two preceding meetings.

24. Mr. HSU recalled that the special rapporteur had indicated that there was some inconsistency between certain of the articles. He hoped the Chairman would permit the special rapporteur to draw attention to such inconsistencies and to make suggestion for their elimination.

25. The CHAIRMAN said that, whenever attention was drawn to an apparent inconsistency, the Commission would first have to decide whether such inconsistency really existed. If so, it would then have to decide what action to take, if any.

26. He invited the Commission to proceed to consideration of the comments on the individual articles contained in document A/CN.4/L.35.

Comment on article 1 [1]

First paragraph

27. Mr. LAUTERPACHT asked whether the statement that article 1 was "not purely declaratory" meant that it was not purely declaratory of existing international

of *non liquet* and provides for revision and appeal for annulment of the arbitral award. The Commission is alive to the fact that to give jurisdiction to a tribunal in this way is calculated to curtail the frequency of recourse to arbitration. But the majority of the members felt that as in monetary matters, it was preferable to ensure that the institution should be efficient and sound rather than risk the danger of inflation."

law. If so, the second sentence implied that, under existing international law, the undertaking to arbitrate did not have binding force when it was unaccompanied by any provisions on procedure.

28. Mr. SCELLE said that the statement that the article was not purely declaratory meant only that it did not affirm a self-evident fact. Under existing international law, the undertaking to have recourse to arbitration, the *nudum pactum* of Roman law, did constitute a legal obligation, even in the absence of a *compromis*.

29. Mr. LIANG (Secretary to the Commission) pointed out that the words "is not purely declaratory", in the English text, were not an exact equivalent of the words "*n'est pas de nature purement énonciative*" in the French text, which would be more accurately rendered by "is no mere assertion".

30. Mr. LAUTERPACHT expressed himself satisfied with the explanations which had been given.

Second paragraph

31. With regard to a point raised by Mr. HSU concerning the last sentence of the comment on article 1, Mr. FRANÇOIS pointed out that that sentence was wrongly rendered in English.⁴ The correct meaning was that the official record of the Council's meeting would serve as proof of the parties' acceptance of the Council's resolution.

32. Mr. HSU pointed out that it frequently happened that the parties did not accept a resolution at the meeting at which it was adopted, but accepted it later in writing. He suggested, therefore, that the last sentence be deleted, since even in the French text, it did not correspond with the facts.

33. Mr. LIANG (Secretary to the Commission) pointed out that, if the last sentence were deleted, there would remain no reference to the form of the undertaking to arbitrate, which was the crux of paragraph 2. He agreed, however, that the last sentence, as at present worded, even in the French text, did not cover the great majority of cases.

34. Mr. YEPES suggested that the last two sentences be deleted.

35. Mr. LAUTERPACHT felt that, if the last two sentences were deleted, the meaning of the sentence preceding them would not be clear.

36. Mr. SCELLE said that the last two sentences gave merely one example and did not, therefore, perhaps throw much light on the preceding sentence. He could accept Mr. Yepes' suggestion that they be deleted.

Mr. Yepes' suggestion was rejected by 5 votes to 3 with 2 abstentions.

⁴ That sentence read as follows: "The official record of the Council's meeting would provide the authentic text of any such resolution."

37. Mr. HUDSON suggested that the last sentence be amended to read as follows:

"The official records of the United Nations would provide the authentic text of the undertaking."

38. Mr. SCELLE doubted whether the parties' acceptance would always be recorded in the official records of the United Nations.

Mr. Hudson's suggestion was adopted by 8 votes to none with 4 abstentions.

Comment on article 2 [2]

First paragraph

39. Mr. LAUTERPACHT proposed the deletion of the words "as compared with the preliminary draft" after the words "important innovation" in the first sentence, and suggested, in the interests of improved drafting, that the words "sanction the legally binding force of the mere" be replaced by the words "secure the effectiveness of the" in the second sentence.

It was so agreed.

40. Mr. LAUTERPACHT proposed the deletion of the word "really" before the word "covered" in the third sentence.

It was so agreed.

41. Mr. LIANG (Secretary to the Commission) asked whether the word "prior" in the second sentence was strictly necessary.

42. Mr. HUDSON replied in the affirmative, since it was essential to make clear that a previous undertaking to resort to arbitration was meant.

Second paragraph

43. Mr. SCELLE said that he hoped he had succeeded in bringing out the important points in article 2, which was a crucial one. He had wished to focus attention on the issue of "arbitrability", and in that connexion had referred to the provisions in a number of general treaties of arbitration concluded by the United States with other countries for the constitution of commissions of enquiry for deciding that issue. Paragraph 15 in his first report on arbitral procedure (A/CN.4/18) had dealt with that subject.

44. Mr. HUDSON said that, to his regret, he must contest the accuracy of that statement. No commission of enquiry had ever been convened to decide on the question of arbitrability arising from a particular treaty, although the United States was party to some thirty treaties incorporating a provision of that kind.

45. Mr. SCELLE said that he had never claimed that the commissions of enquiry had functioned; he had merely referred to the fact that provision had been made for their being set up. He had also wished to underline the fact that it had been the consistent policy of the United States Department of State, whatever the political party in power, to have such a provision

included in arbitration treaties. The fact that it had no practical effect was a separate issue.

46. However, to meet Mr. Hudson's objections, he was prepared to substitute the words "provided for" for the word "had" after the words "American diplomacy has" in the second sentence.

47. Mr. YEPES proposed that the words "American diplomacy" be replaced by the words "The practice of the United States".

Mr. Scelle's and Mr. Yepes' amendments were adopted.

48. Mr. LAUTERPACHT proposed the substitution, in the fourth sentence, of the word "view" for the word "desire", of the words "and not" for the words "itself and not merely", and of the words "is the suitable organ" for the words "should be called upon".

It was so agreed.

Third and fourth paragraphs

No observations.

Comment on article 3 [3]

First paragraph

49. Mr. LAUTERPACHT proposed the deletion of the first paragraph, which appeared superfluous.⁵

It was so agreed.

Second paragraph

50. Mr. LAUTERPACHT suggested the deletion of the inverted commas round the word "necessary" in the fourth sentence.

It was so agreed.

51. Mr. SCELLE said that he was prepared to withdraw the last sentence, which to a considerable extent expressed his personal view.

52. Mr. KOZHEVNIKOV was in favour of that deletion: it was inappropriate for the special rapporteur to advance his personal views in a commentary, which should give an objective account of the consensus of opinion in the Commission.

53. Mr. CÓRDOVA thought the last sentence served a useful purpose, since it was necessary to state the position of an arbitral tribunal in international law.

54. Mr. ZOUREK contended that the last sentence touched on a most controversial point in the theory of arbitration and embodied a view which was certainly not that of most of the members of the Commission. It was one held by a particular school of international lawyers. Such subjective expressions of opinion should not be included in the commentary. He was therefore in favour of the deletion of that sentence.

⁵ This paragraph read as follows:

"This article begins a second chapter of the preliminary draft."

It was decided by 5 votes to 4 with 3 abstentions to retain the last sentence in the second paragraph.

55. Mr. LAUTERPACHT proposed the deletion of the word "two" in the last sentence of the second paragraph, since more than two States might be parties to a dispute. He also proposed the substitution of the word "States" for "nations".

It was so agreed.

Third paragraph⁶

56. Mr. SCELLE said that the third paragraph required amplification by the substitution of the words "the terms 'arbitral tribunal' or 'the tribunal' mean" for the words "the term 'arbitral tribunal' means".

It was so agreed.

57. Mr. CÓRDOVA suggested that, in order to obviate confusion, the opening words of the third paragraph should read: "In this Draft".

58. Mr. KOZHEVNIKOV considered that, in view of the nature of the draft, the word "preliminary" ought to be retained.

59. Mr. SPIROPOULOS suggested that the point was a minor one. All that it was important to specify in the third paragraph was the meaning of the terms "arbitral tribunal" and "tribunal". The opening phrase could be deleted without danger of misunderstanding.

60. Mr. KERNO (Assistant Secretary-General) thought that if the opening phrase were deleted it might be concluded that the definition of the terms mentioned in the third paragraph only held good for article 3.

61. The point raised by Mr. Kozhevnikov was covered by the explanation in paragraph 4 of the introduction.

Mr. Córdova's amendment was adopted.

62. Mr. YEPES pointed out that the English and French texts of the third paragraph did not tally, as the words "*l'organe judiciaire*" did not appear in the former. He believed the French text should be regarded as the authentic one, particularly since the tribunal was referred to as a judicial body in the last sentence of the second paragraph.

63. The CHAIRMAN said he was doubtful whether it was appropriate to refer to an arbitral tribunal as a judicial body.

64. Mr. SCELLE said that there was no substantial difference between the two texts and there was no need to amend the English version.

The third paragraph as amended was approved by 9 votes to none with 2 abstentions.

Fourth paragraph

No observations.

⁶ The third paragraph read as follows:

"In the text of the preliminary draft, the term 'arbitral tribunal' means either a single arbitrator or a body consisting of several arbitrators."

*Comment on article 4 [5 and 6]⁷**First paragraph*

65. Mr. KOZHEVNIKOV, referring to the special rapporteur's admission to having included a personal expression of view in his comment on the previous article, said that the statement in the first sentence, that article 4 represented a "very liberal" solution, was a subjective statement and had an inappropriate polemical tinge.

66. Mr. SCELLE said he was prepared to delete the words "very liberal" if they shocked any member of the Commission, although he believed them to be an accurate description of the effect of the Commission's decision to delete a provision that the sole arbitrator or the majority of the arbitrators should be chosen from among nationals of States having no special interest in the case. That decision would result in the parties, enjoying a wide freedom of choice. Indeed, its ultimate effect might be that the tribunal would no longer be a judicial body as he understood it, but rather a conciliation commission. He had been struck by the latitude of article 4 as it now stood. Indeed, in its present form it was diametrically opposed to his whole theory of arbitration.

67. He must repudiate Mr. Kozhevnikov's allegation that he had been guilty of subjectivity in his comment, but was prepared to modify the first paragraph so as to indicate plainly that the Commission had recognized the full freedom of the parties to appoint the members of the tribunal, and had not even indicated a preference for the provision in article 22 of the Revised General Act for the Pacific Settlement of International Disputes of 1949, according to which an arbitral tribunal was to

⁷ The comment on article 4 read as follows :

"The very liberal solution here adopted is similar to that provided by Article 22 of the General Act on Arbitration. The Commission has here subscribed to the theory of "non-political" arbitration implicit in Article 37 of the 1907 Convention for the Pacific Settlement of International Disputes. The arbitral award must be rendered "on the basis of respect for law". It was with this end in view that the two paragraphs of the article were adopted.

"The rule thus laid down is not, however, absolutely inflexible. The Commission did not wish to exclude cases in which the technical nature of the issue might lead the parties to choose judges not exactly fulfilling the requirements of the last part of paragraph 2. This is the sense of the introductory words "with due regard to the circumstances of the case".

"During the long discussion on this paragraph, the majority of the Commission was against arbitration by important political personages or heads of State; but it did not wish to prohibit such appointments.

"The Commission also implicitly sanctioned the system of "national arbitrators". It had previously adopted a third paragraph providing that the sole arbitrator or the majority of the members of the tribunal should be chosen from among nationals of States having no special interest in the dispute. The Drafting Committee thought it better to omit this provision which might make it impossible to appoint tribunals consisting of two or three arbitrators.

"Moreover the Commission was unwilling to follow the provisions of the General Act by stating a preference for a tribunal of five members."

be composed of five members, so as to ensure a majority from States which were not parties to the dispute.

68. Mr. FRANÇOIS said there was no ground whatsoever for describing the provisions of article 4 as "very liberal". The rights recognized had never been questioned.

69. Mr. LIANG (Secretary to the Commission) suggested that there was another objection to the first sentence of paragraph 1, in that, article 4 did not appear to have very much in common with article 22 of the General Act.

70. He also felt that the statement in the third sentence should be substantiated, since otherwise it was difficult to discern its relevance.

71. Mr. HUDSON suggested it should be made clear that the provisions of article 4 applied even when there was no prior undertaking to arbitrate and that the article as a whole, therefore, had a wider application than article 3.

72. Mr. ZOUŘEK suggested that no reference should be made to the theory of "non-political" arbitration, since it was impossible to remove arbitration altogether from the sphere of politics. It was unnecessary to mention that very questionable theory, since there was general agreement in the Commission that arbitration provided for the settlement of disputes, on the basis of respect for law. On the other hand there was a fundamental difference of opinion in the Commission on the second principal feature of arbitration, which was the freedom of the parties to choose the arbitrators, and it was desirable that the comment on article 4 should reflect faithfully and objectively the discussions on that point.

73. Mr. SCELLE pointed out that the theory of "non-political" arbitration had been very fully discussed in the Commission and reference to it could hardly be omitted from the comment.

74. Mr. LAUTERPACHT expressed the hope that Mr. Scelle would refer to that theory somewhere in the commentary since many members of the Commission attached importance to it.

75. He also hoped he would not be too much influenced by the suggestion that a distinction be drawn between cases where there was a prior undertaking to arbitrate and cases where there was not. The whole draft was based on the assumption that there was a prior undertaking to arbitrate.

Second paragraph

No observations.

Third paragraph

76. Mr. SCELLE said that he would substitute the words "liable to degenerate into purely political disputes" for the words "by important political personages or heads of State".

77. Mr. YEPES said that he preferred the original text of the third paragraph, which reflected more accurately the Commission's discussions. It would be remembered that it was he who had drawn attention to the disadvantages of selecting heads of State to act as arbitrators.

78. Mr. SCELLE said that he had not been absolutely certain as to what the sense of the Commission had been on that issue and had noted that Mr. Amado, Mr. François, Mr. el-Khoury and Mr. Lauterpacht had all raised objections to the argument developed by Mr. Yepes.

79. Mr. KERNO (Assistant Secretary-General) pointed out that if Mr. Scelle's amendment were adopted, the final phrase of the third paragraph, reading "but it did not wish to prohibit such appointments", would have to be omitted.

80. Mr. FRANÇOIS considered that the appointment of heads of States to act as arbitrators must not be excluded.

Fourth paragraph

81. Mr. FRANÇOIS suggested that it would be inappropriate to refer in the commentary to action by the Standing Drafting Committee. All references to it should be replaced by the word "the Commission".

82. Mr. SCELLE agreed.

83. He then declared that he would submit a new text for the comment on article 4 in the light of the observations made in the Commission.⁸

Fifth paragraph

No observations.

The meeting rose at 1.15 p.m.

⁸ See summary record of the 177th meeting, paras. 1—25.

176th MEETING

Thursday, 31 July 1952, at 9.45 a.m.

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

Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS.

Present:

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

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35) (continued)

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

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

Comment on article 5 [7]

First paragraph

2. Mr. LAUTERPACHT proposed the deletion of the first sentence which seemed to him unnecessary.² The paragraph would then open with the words: "This article is based etc.".

Mr. Lauterpacht's proposal was adopted.

3. Mr. SCELLE said that, if the reference to the case of the Hungarian Optants seemed either unnecessary or undesirable, he would be quite prepared to omit it.

It was agreed to delete at the end of the paragraph the words "the scandalous possibilities of which were revealed by the celebrated case of the Hungarian Optants".

4. Mr. ZOUREK proposed the deletion of the words "as opposed to diplomatic or political arbitration", which implied that hitherto all arbitration had been of a diplomatic or political character—a highly questionable thesis. Nor was the comment on article 5 the proper place for emphasizing the distinctive features of the present draft in relation to existing law and practice.

5. Mr. SCELLE said that if those words were deleted the whole sentence must be dropped. The purpose of a number of articles in the draft was to foster a development in the direction of judicial arbitration, which had

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

² The first sentence read as follows: "This article, again, is of undoubtedly doctrinal and practical importance."

started in 1907 with the adoption of article 37 of the Convention for the Pacific Settlement of International Disputes.

6. He had not argued in the paragraph that the principle of the immutability of the tribunal was contrary to the character of arbitration as it had developed in the past, but had merely indicated that it was in conformity with the theory of judicial arbitration. Formerly States had been free to alter the composition of the tribunal. He was not aware of having in any way distorted the views of the Commission on that point.

7. Mr. LAUTERPACHT considered that the paragraph should be retained. He doubted, however, whether the exact meaning of the expression "jurisdictional" arbitration" would be clear to an English reader. Presumably the special rapporteur meant arbitration conceived as a legal process.

8. Mr. SCELLE suggested that the word "juridictionnel" in the French text be translated by the word "judicial".

It was so agreed.

9. Mr. FRANÇOIS said that he had some misgivings concerning the phrase "as opposed to", which seemed to suggest that the theory of diplomatic arbitration was favourable to changes in the composition of the tribunal.

10. Mr. CÓRDOVA suggested that Mr. François' preoccupation would be removed if the words "as distinguished from" were substituted for the words "as opposed to".

Mr. Córdova's suggestion was adopted.

11. Mr. KOZHEVNIKOV reminded the Commission that it had been agreed to deal with all general questions of principle, on which opinion was often divided, in the introduction. He accordingly proposed that they should not be referred to in the individual comments. As a corollary to that proposal, he now moved the deletion of the entire paragraph.

12. Mr. SCELLE argued that some repetition in the comments of statements made in the introduction on matters of general principle was inevitable, since otherwise the comment would be virtually devoid of all content.

13. Mr. LAUTERPACHT agreed with Mr. Scelle. Matters of principle should be touched upon in the introduction in a general way and their specific application to certain articles dealt with in the comments.

14. Mr. ZOUREK thought that, if the general purpose of the draft and how its provisions differed from existing practice were expounded in the introduction, there was no need to mention matters of principle in the comments, which should be confined to technical explanations. Otherwise repetition was bound to occur, as in the third paragraph of the comments on article 5, and the last sentence in the second paragraph of the comment on article 3.

15. Mr. SCELLE said it was the duty of the special rapporteur to point out the links between different articles, and that was the reason for the repetition criticized by Mr. Zourek.

16. Mr. YEPES opposed Mr. Kozhevnikov's proposal, the effect of which would be to render the comments useless. Repetition was not necessarily a defect.

17. Mr. LAUTERPACHT said that Mr. Kozhevnikov and Mr. Zourek, who had made a valuable contribution to the discussions on the special rapporteur's draft, had finally dissociated themselves from it by voting against the text as a whole. They might therefore wish to consider whether they wished to take up the time of the Commission by raising procedural questions.

The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that no matter of principle should be referred to in the comments on the articles, on the ground that it had already been dealt with in the introduction.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 2.

18. Mr. KOZHEVNIKOV said that, in view of the rejection of his first proposal, he would not press his subsidiary proposal for the deletion of the paragraph.

The CHAIRMAN put to the vote Mr. Zourek's proposal for the deletion of the words "as distinguished from diplomatic or political arbitration".

Mr. Zourek's proposal was rejected by 7 votes to 2, with 2 abstentions.

Second and fourth paragraphs

19. Mr. LAUTERPACHT suggested that the opening phrase of the second paragraph, reading: "The ideal is, in fact," was not very felicitous. He presumed that the special rapporteur meant that the underlying principle was that, once a dispute had been submitted to the tribunal, the composition of the tribunal should remain unchanged until the award had been rendered.

20. Mr. SCELLE said that the ideal, which was impossible of attainment at the present time, was the absolute immutability of the tribunal. However, he would be prepared to go even further than he had in the original and substitute the word "principle" for the word "ideal".

21. Mr. YEPES said that he preferred the original wording since immutability of the tribunal had not yet been recognized as a principle.

22. The CHAIRMAN suggested that the fourth paragraph be transposed to the beginning of the second, which would then open: "The principle laid down in paragraph 1 is in fact, etc."³

The Chairman's suggestion was adopted.

³ The fourth paragraph read as follows: "This principle is laid down in paragraph 1."

Third paragraph⁴

23. Mr. LAUTERPACHT asked whether it was possible to speak of an arbitral tribunal both as "a common organ of the parties" which they could, under certain conditions laid down in paragraph 2 of article 5, alter, and as a "judicial organ of the international community".

24. Mr. SCELLE said that, in his opinion, the theory propounded in the third paragraph was logically consistent; indeed the Commission had endorsed it at the previous meeting by deciding to retain the last sentence in the second paragraph of the comment on article 3. He considered that the goal should be to ensure that arbitral tribunals were as similar as possible to standing legal bodies such as domestic tribunals or the International Court of Justice.

25. Mr. CÓRDOVA said that he had interpreted the third paragraph to mean that, although the existence of an arbitral tribunal depended in some measure on the will of the parties, it was also an organ of the international community and an instrument for ensuring that justice between States was done. It was the international community which conferred certain powers on the tribunal through the parties.

26. Mr. SCELLE said that he was perfectly prepared to omit the third paragraph, which put forward a theory to which he believed the Commission had subscribed. The theory was that when two States set up an arbitral tribunal it constituted a *common* organ and not a bipartite body, as some authorities had held. For example, in the case of commercial treaties between two States, certain matters were removed from the municipal jurisdiction of either and became subject to what could only be described as a "common" law of the two. An arbitral tribunal set up in pursuance of such treaties was thus an organ of an international legal community created by the agreement of those two States.

27. Mr. KOZHEVNIKOV said that Mr. Scelle's remarks confirmed his belief that the comments represented the views of the special rapporteur rather than those of the Commission.

28. Mr. SCELLE observed that the theory mentioned in the third paragraph of his comment on article 5 was not his invention. As special rapporteur, he had had to choose between two conceptions of arbitration and had inserted the third paragraph in the belief that the Commission had associated itself with his views. If that was in doubt he was willing to delete the paragraph, since that would have no practical effect on the system envisaged in the draft.

29. Mr. el-KHOURI said he had no objection to the third paragraph. An arbitral tribunal which was authorized to settle disputes between States was an organ of the international community.

⁴ The third paragraph became the last sentence of para. (2) in the "Report".

30. Mr. FRANÇOIS proposed the deletion of the third paragraph.

Mr. François' proposal was rejected by 7 votes to 3 with 2 abstentions.

Fifth paragraph⁵

31. Mr. ZOUREK asked whether the statement in the last sentence of the paragraph really represented the view of the Commission.

32. Mr. SCELLE replied that the point had been discussed at great length and it had been agreed almost unanimously that an arbitrator appointed by an international authority could in no circumstances be replaced either by one party or by agreement between them. Without such a provision the International Court of Justice would be reduced to the status of a mere consultative organ.

Sixth and seventh paragraphs⁶

No observations.

Comment on article 6 [8]

33. At Mr. HUDSON's suggestion, *it was agreed to delete the last sentence reading: "The same does not apply to article 7 concerning the withdrawal of an arbitrator".*

Comment on articles 7 and 8 [9 and 11]

No observations.

*Comment on article 9 [12]⁷**First paragraph*

No observations.

⁵ Para. (3) in the "Report".

⁶ Paras. (4) and (5) in the "Report".

⁷ The comment on article 9 read as follows: [Beginning same as in the "Report"]

"..."

"Its conclusion is now assured, since if the parties fail to agree on the provisions to be included, the *compromis* may be drawn up by the tribunal itself, which has been set up to that end. Thus the revised procedure and the possibility of a preliminary partial *compromis* concerning only the constitution of the tribunal are not calculated to minimise the importance of the general *compromis* but, on the contrary, to strengthen it.

"Another article proposed by the rapporteur (Article 13 of his preliminary draft) was deleted by the Commission because it gave the tribunal wide powers of discretion as regards compliance with the clauses of the *compromis*. The Commission considered that, in principle, these clauses should be the responsibility of the parties, and hence that the tribunal was bound by them subject, however, to arrangements which may be provided for by subsequent articles. In any case, the parties retain wide powers to direct the conduct of the proceedings, in accordance with the individualistic spirit with which many of the modern codes of procedure are still imbued."

"A preamble adopted by the Commission referred to two possible forms of the undertaking to arbitrate; an undertaking deriving from the *compromis* itself and a prior undertaking. The Drafting Committee considered this preamble unnecessary and decided to delete it.

"The eleven paragraphs of..."

Second and third paragraphs

34. Mr. SCELLE proposed the deletion of the third paragraph which referred only to the action taken by the Commission and therefore had no place in the commentary.

35. Mr. HUDSON proposed the deletion of the second paragraph for the same reason.

36. Mr. SCELLE said he was prepared to accept Mr. Hudson's proposal. He had only inserted the second paragraph in order to demonstrate that, in deciding that the tribunal must comply strictly with the clauses of the *compromis*, the Commission had been less liberal than its special rapporteur, and had rejected article 13 in the preliminary draft, which gave it wide powers of discretion in that respect.

It was agreed to delete the second and third paragraphs.

Fourth paragraph

37. Mr. YEPES suggested that, in the fourth paragraph, and also in the fifth to tenth paragraphs inclusive, the word "lettre" in the French text should be replaced by the word "paragraphe".

It was so agreed.

Fifth paragraph⁸

38. Mr. LAUTERPACHT felt that the fifth paragraph was not relevant to paragraph (a) of article 9 itself. Moreover, the way in which it was worded was somewhat controversial. He, for one, had never associated article 13 of the League of Nations Covenant with the question of the scope of the original undertaking to arbitrate. He proposed, therefore, that the whole paragraph be deleted.

39. Mr. SCELLE recalled that he had proposed following the wording used in article 13 of the League of Nations Covenant, but that the Commission had rejected his proposal. He would not object to deletion of the reference to that article, but hoped that the subject-matter of the last sentence of the fifth paragraph would be retained, since it had been thoroughly discussed by the Commission. He felt, moreover, that even if it did not refer specifically to the League of Nations Covenant, the Commission should indicate the important change it had made, compared to the provisions of the Covenant, in that respect.

⁸ The fifth paragraph read as follows :

"Paragraph (a) is more in the nature of a recommendation than an actual obligation imposed on the parties, for the text makes no provision for penalties. The Commission did not see fit to insert, at this point, the provision of Article 13 of the League of Nations Covenant under which the *whole* of the subject-matter of a dispute between the parties, in respect of which there is an undertaking to arbitrate, must be submitted to the tribunal. It follows that in drafting the *compromis*, the parties are free to limit by mutual consent the scope of the original undertaking to arbitrate."

40. Mr. YEPES agreed that the last sentence should be retained in order to reveal the Commission's intention, which had been to avoid any disagreement in interpreting the scope of the original undertaking to arbitrate.

41. Mr. CÓRDOVA also agreed that the last sentence should be retained.

42. Mr. HUDSON pointed out that article 13 of the League of Nations Covenant did not state that the whole subject-matter of a dispute *in respect of which there was an undertaking to arbitrate* must be submitted to arbitration. Article 13 read as follows :

"The members of the League agree that, whenever any dispute shall arise between them *which they recognize to be suitable for submission to arbitration...*, they will submit the whole subject-matter to arbitration..."

The second sentence of the fifth paragraph of the comment could not therefore be retained in its present form.

43. Mr. YEPES suggested that the fifth paragraph be replaced by the following :

"Paragraph (a) meets the need for defining the subject-matter of the dispute clearly in the *compromis* itself so as to avoid any disagreement on the scope of the undertaking to arbitrate."

He thought that that wording expressed the exact significance of paragraph (a), which, he recalled, he himself had proposed.

44. Mr. LIANG (Secretary to the Commission) said that in his view the last sentence of the fifth paragraph could only mean that in drafting the *compromis* the parties were free to limit, by mutual consent, the aspects of the dispute to be submitted to arbitration. It would seem that, properly speaking, that would not constitute a limitation of the scope of the original undertaking to arbitrate.

45. Mr. el-KHOURI recalled that the comments which the Commission was at present discussing were only intended to be provisional ; the final commentary would be approved at the next session. He suggested therefore that it would be prudent for the Commission to avoid committing itself to comments which might be open to question. There was no objection to leaving aside such controversial points until the fifth session, when they could be discussed fully. He therefore supported the proposal to delete the whole of the fifth paragraph.

Mr. Lauterpacht's proposal that the fifth paragraph be deleted was adopted by 7 votes to 3 with 2 abstentions.

46. The CHAIRMAN stated that that vote did not prevent the Commission from voting on Mr. YEPES' suggestion, which consisted in a substitution for the text that had been rejected.

47. Mr. HUDSON said that he strongly opposed Mr. YEPES' suggestion.

Mr. YEPES' suggestion was rejected by 4 votes to 3 with 5 abstentions.

Sixth paragraph⁹

48. The CHAIRMAN pointed out that, in view of the decision to delete the fifth paragraph, the sixth would have to be reworded as follows :

"Paragraphs (a), (b) and (c) require no explanation" instead of "Paragraphs (b) and (c) require no explanation".

Seventh paragraph¹⁰

No observations.

Eighth paragraph¹¹

49. Mr. LIANG (Secretary to the Commission) noted that the word "immutability" had been used in previous drafts, but nowhere in the present one. Article 7, paragraph 3, referred only to the remaining members of the tribunal having power, in the event of withdrawal of one of the members, to continue the proceedings. The words "concerning the principle of immutability" did not therefore appear to be entirely appropriate. He suggested the use of the word "continuity".

50. Mr. HSU thought the word "immutability" expressed precisely what the special rapporteur had in mind.

51. Mr. LIANG (Secretary to the Commission) said that if members of the Commission were satisfied with the present wording, he would not press the point.

Ninth paragraph¹²

52. Mr. KERNO (Assistant Secretary-General) suggested the deletion at the end of the paragraph of the words in parentheses : "We shall come back to this important matter."

It was so agreed.

Tenth paragraph¹³

53. Mr. KERNO (Assistant Secretary-General) suggested the deletion of the word "important" before the word "power".

It was so agreed.

Eleventh paragraph¹⁴

54. Mr. YEPES proposed the deletion of the second sentence and the substitution for the words "It appears

to have taken", at the beginning of the third sentence, of the words "The Commission takes."¹⁵

55. Mr. SCELLE accepted Mr. YEPES' amendments, the first of which he had intended to move himself.

Mr. YEPES' amendments were adopted.

Twelfth paragraph¹⁶

56. Mr. LAUTERPACHT proposed the deletion of the twelfth paragraph, since the tribunal's power to make recommendations could be compared to many other things besides the power to issue regulations.

Mr. Lauterpacht's proposal was adopted.

Thirteenth paragraph¹⁷

57. Mr. LIANG (Secretary to the Commission) pointed out that the special provisions referred to in the thirteenth paragraph were those provided for in paragraph (h) of article 9. Paragraph (h), like all the other paragraphs of article 9, was governed by the introductory paragraph, which now read :

"Unless there are prior provisions on arbitration which suffice for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, in particular ;"

There did not therefore appear to be any difference between the obligatory effect of article 9 (h) and that of articles 29 to 32.

58. Mr. LAUTERPACHT said that the purpose of article 9 (h) was to state that, if the parties wished to conclude any special provisions concerning the procedure for revision or other legal remedies, if, for example, they wished to provide that applications for revision must be made within twelve months of the discovery of a new fact, instead of six months as provided for in article 29, paragraph 2, or that the validity of the award could be challenged on grounds other than those listed in article 30, or that an application for annulment should not stay execution notwithstanding article 31, paragraph 3, then such provisions must be inserted in the *compromis* and those provisions would be binding on the arbitral tribunal, in so far as they were not contrary to the general provisions of articles 29 to 32.

59. Mr. KERNO (Assistant Secretary-General) pointed out that if that was the meaning of article 9(h), then

¹⁵ The second sentence read as follows : "But what is to be understood by judgment *ex aequo et bono* was not clearly defined by the Commission".

¹⁶ This paragraph read as follows :

"The power which may be given to the tribunal to make recommendations is similar to the power to issue regulations, as in the Bering Straits case."

¹⁷ Para. (9) in the "Report". It read as follows :

"As regards the special provisions concerning revision of the award and other legal remedies, account must here be taken of articles 29 to 32, which are considered to be obligatory and thus reduce the effect of the *compromis* to that of mere procedural recommendations."

⁹ Para. (3) in the "Report".

¹⁰ Para. (4) in the "Report".

¹¹ Para. (5) in the "Report".

¹² Para. (6) in the "Report".

¹³ Para. (7) in the "Report".

¹⁴ Para. (8) in the "Report".

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

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

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

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

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

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

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

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

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

Mr. Lauterpacht's proposal was adopted.

Comment on article 10 [14]

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

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

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

It was so agreed.

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

case of the 1907 Convention on the Pacific Settlement of Disputes.

It was so agreed.

The meeting rose at 1.5 p.m.

177th MEETING

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

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

Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35) (*continued*)

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

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

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

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

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

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

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

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

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

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

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

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

Fifth and sixth paragraphs

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

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

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

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

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

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

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

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

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

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

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

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

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

difference being that the award of the former was binding.

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

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

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

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

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

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

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

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

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

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

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

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

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

Seventh paragraph

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

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

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

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

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

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

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

Mr. Lauterpacht's amendment was adopted.

Comment on article 11 [19]³

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

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

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

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

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

30. Mr. SCELLE agreed with Mr. Lauterpacht.

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

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

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

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

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

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

Comment on article 12 [20]⁴

First paragraph

No observations.

Second paragraph

35. Mr. HUDSON said that he did not have sufficient knowledge of the municipal law of all countries to judge

⁴ The comment on article 12 read as follows:

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

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

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

whether the statement in the second sentence was well-founded.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53. Mr. ZOUREK opposed the mechanical transposition of principles relating to domestic judicial bodies to arbitral tribunals, since there were certain fundamental differences between the two. Municipal law represented a complete system whereas there were many matters pertaining to the relations between States on

which no international law existed. The problems associated with arbitration could not be resolved by reference to recognized principles of municipal law. If any parallels were to be drawn, and he doubted whether it could be done successfully, they must be sought in the field of private domestic arbitration.

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

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

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

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

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

It was so agreed.

Third paragraph

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

Comment on article 13 [24]

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

Comment on article 14 [23]⁶

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

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

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

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

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

Mr. Scelle's proposal was adopted.

Comment on article 15 [24]⁸

First paragraph

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

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

It was so agreed.

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

It was so agreed.

Second paragraph⁹

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

It was so agreed.

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

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

Mr. Hudson's suggestions were adopted.

64. Mr. HUDSON and Mr. LAUTERPACHT suggested

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

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

⁹ The second paragraph read as follows :

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

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

It was so agreed.

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

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

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

Third paragraph¹⁰

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

It was so agreed.

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

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

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

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

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

It was so agreed.

¹⁰ The third paragraph read as follows :

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

*Fourth paragraph*¹¹

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

It was so agreed.

*Comment on article 16 [27]*¹²*First paragraph*

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

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

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

Mr. Scelle's proposal were adopted.

Second paragraph

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

It was so agreed.

*Comment on article 17 [26]*¹³

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

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

It was so agreed.

*Comment on article 18 [29]*¹⁵

No observations.

¹¹ The fourth paragraph read as follows :

"The Commission deleted all reference to presumptions."

¹² Corresponds to article 15 in document A/CN.4/L.35.

The comment read as follows :

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

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

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

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

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

*Comment on article 19 [30]*¹⁶

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

"This article requires no comment."¹⁷

It was so agreed.

The meeting rose at 1.5 p.m.

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

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

178th MEETING

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

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present:

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

Secretariat : Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Law of treaties (item 3 of the agenda)

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

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

taining the text tentatively adopted by the Commission at its third session and a commentary thereon. He had subsequently, however, tendered his resignation as a member of the Commission and his report had not been discussed at the present session.

2. It was therefore necessary for the Commission to elect a successor to Mr. Brierly and to refer to him all the material relating to the law of treaties, with a request that he present the whole subject to the Commission in such manner as he might deem advisable for the continuation and conclusion of the work on that subject at the fifth session.

3. Mr. YEPES reminded the Commission that, when the election of a special rapporteur on the law of treaties had first been discussed, he had proposed that such a vast subject should be entrusted to several members;² he now repeated his proposal. That procedure would have the additional advantage of enabling more members of the Commission to enjoy the honour of acting as special rapporteur.

4. Mr. SPIROPOULOS pointed out the disadvantages of a report written by several authors, each of whom would inevitably approach the subject from a different angle. It would be preferable to elect one special rapporteur, provided he was prepared to accept the burden which the work entailed.

5. Mr. YEPES explained that his proposal was based on his conviction that the law of treaties involved a number of quite distinct and separate subjects which could conveniently be treated by different members.

6. Mr. FRANÇOIS agreed that the law of treaties was a subject of vast scope, but the appointment of several special rapporteurs would not ensure that the Commission would have time to discuss the problem as a whole at its next session. At the third session it had recognized that the special rapporteur would have to restrict his study to certain definite aspects. He therefore proposed that Mr. Brierly's successor should confine himself at the present stage to the topics selected.

7. Mr. YEPES pointed out that, at its first session, the Commission had decided to deal with the law of treaties as a whole. Was it therefore justified in narrowing the field of study?

8. The CHAIRMAN drew the attention of the Commission to the last sentence in paragraph 75 of the report on its third session,³ which read:

“The special rapporteur was also requested to do further work on the topic of the law of treaties as a whole and to submit a report thereon to the Commission.”

9. Mr. LIANG (Secretary to the Commission) said he had understood Mr. François' proposal to mean that, so far as the next session was concerned, the new special rapporteur should confine himself to the topics already

taken up by Mr. Brierly, and not that the work on the law of treaties in general should be done in a piecemeal fashion. It was incontestable that only a complete draft on the law of treaties should be submitted to the General Assembly in conformity with article 16, paragraph (j) of the Commission's Statute, but that could not be achieved at the moment. Mr. François had indicated the only practical course.

10. Mr. SPIROPOULOS agreed with Mr. François that the new special rapporteur would have first to complete Mr. Brierly's work, which could not be left unfinished. He would then be in a position to assess how the work could be continued.

11. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Spiropoulos. The law of treaties was no more vast a subject than the régime of the high seas or of the territorial sea, both of which had been entrusted to Mr. François. It was not desirable to divide the work on the law of treaties among several members.

12. Mr. HSU suggested that the Commission should first elect a successor to Mr. Brierly, in order to ascertain how much he would be able to do by the next session.

13. He considered Mr. François' proposal to be too restrictive but recognized the force of the practical considerations on which it was based. Mr. François should be given an assurance that discussion of the two subjects on which he was special rapporteur would be concluded at the next session.

14. Mr. FRANÇOIS said that his principal concern was that the Commission should not attempt to overload its agenda for the fifth session. It would be unrealistic to suppose that it could consider more aspects of the law of treaties than those on which Mr. Brierly had already begun work.

15. Mr. LIANG (Secretary to the Commission) pointed out that Mr. Brierly had prepared a commentary on the articles tentatively adopted by the Commission at its third session. His state of health, however, had prevented him from carrying out the remainder of the task entrusted to him by the Commission and that would have to be completed by his successor. At the same time it would be unwise to tie the new special rapporteur's hands too much, because, until he had studied all the material, he would not be in a position to foresee how the work could develop.

16. There were no grounds for Mr. François' fear that the agenda of the fifth session would be overburdened, since the new special rapporteur would obviously be unable to submit a draft covering the whole subject by then.

17. Mr. SPIROPOULOS observed that at the fifth session, priority would have to be given to discussion of the régime of the high seas and the territorial sea.

18. Mr. FRANÇOIS stated that the disposition of agenda items for the fifth session had not been his only preoccupation. He was also anxious not to impose too heavy a burden on Mr. Brierly's successor. If the latter

² See summary record of the 32nd meeting, para. 57.

³ Report of the International Law Commission covering the work of its Third Session, *op. cit.*, para. 75.

were to prepare material on parts of the law of treaties other than those dealt with by his predecessor, his work might be wasted since the Commission would undoubtedly have no opportunity of discussing it at the next session.

19. Mr. KERNO (Assistant Secretary-General) wondered whether it was wise to try to bind the hands of the special rapporteur in advance in the manner proposed by Mr. François.

20. The CHAIRMAN put to the vote Mr. François' proposal that the special rapporteur on the law of treaties should confine himself to the subjects already dealt by Mr. Brierly.

Mr. François' proposal was rejected by 5 votes to 2 with 4 abstentions.

Mr. Yépes' proposal was rejected by 5 votes to 2 with 3 abstentions.

21. Mr. el-KHOURI, referring to Mr. Yépes' proposal, pointed out that in accordance with article 16 (d) of its Statute, the Commission could always appoint some of its members to work with the special rapporteur.

22. The CHAIRMAN suggested that the Commission should refer to the special rapporteur elected to succeed Mr. Brierly all the material relating to the law of treaties, together with a request that he present the whole subject to the Commission in such manner as he deemed advisable for the continuation of the work on that subject at the fifth session.

23. Mr. CÓRDOVA said that such instructions would give sufficient latitude to the special rapporteur.

The Chairman's suggestion was adopted.

Régime of the high seas (item 4 of the agenda)

24. The CHAIRMAN invited the Commission to consider first what action should be taken with regard to the draft articles prepared by the Commission on the continental shelf, and related subjects.⁴ He proposed the following text, which could either be included in the Commission's report to the General Assembly concerning its fourth session or reproduced as a separate resolution, as the special rapporteur preferred:

"The International Law Commission,

"Considering that the drafts prepared in the course of its third session on the continental shelf and other kindred matters have been given the publicity contemplated in paragraph (g) of article 16 of the Statute of the Commission, and, particularly, that such drafts have been communicated to governments for presentation of their comments in accordance with paragraph (h) of the same article,

"Considering that a certain number of governments have submitted their comments on the said matters, and that the comments of other governments should be deemed to be forthcoming,

"Considering that certain scientific institutions

and non-governmental organizations have likewise undertaken to study the drafts prepared by the Commission and that publications have already appeared and may continue to appear as the result of such a study,

"Invites the Secretary-General of the United Nations to request those governments which have not yet replied to the questionnaire submitted to them to present their comments within the shortest possible time; and

"Invites the special rapporteur to study the replies of governments, as well as other comments brought about by the publication of the above-mentioned drafts, and to present another report, dealing with these matters, so that the Commission may discuss it during its fifth session and modify the drafts insofar as may be deemed necessary by reason of such comments."

25. Mr. KERNO (Assistant Secretary-General) said that at its recent Conference in Madrid the International Bar Association, which was a non-governmental organization, had given close attention to the question of the continental shelf, and in particular to the Commission's work thereon.⁵ After discussion, it had adopted a resolution approving the draft articles prepared by the Commission at its third session, with the sole exception of article 1, defining the term "continental shelf". The view had been expressed that that definition should be geographical, rather than based upon the exploitability of the submarine areas in question. He thought the Commission could be confident, however, that the members of the International Bar Association would do all in their power to encourage their respective governments to reply to the questionnaire submitted to them by the Commission, where they had not already done so.

26. Mr. HUDSON asked whether the text proposed by the Chairman meant that the Commission would not consider the question of the continental shelf at all at the present session.

27. The CHAIRMAN replied in the affirmative.

28. Mr. HUDSON said that, that being so, he must express his regret that it was considered impossible for the Commission to examine, at the present session, such replies as had already been received from governments.

29. Mr. FRANÇOIS said that it seemed obvious that the Commission had not time at the present session to examine in any detail the replies already received from governments. Apart from that, to do so would be premature, first because several governments with a great interest in the question had not yet replied, and secondly because the majority of scientific institutions had not yet expressed their views on the articles drafted by the Commission; the International Bar Association had done so, but he had not had an opportunity to study

⁴ See International Bar Association, *Fourth Conference Report, Madrid 1952* (The Hague, Martinus Nijhoff, 1954) p. 295.

⁴ *Ibid.* Annex.

the records of its discussions. For all those reasons, he supported the Chairman's proposal.

30. Mr. SPIROPOULOS said that the Commission had in fact no choice but to accept the Chairman's proposal, which was in complete conformity with the provisions of its Statute.

31. Mr. LAUTERPACHT said that he would have welcomed the Chairman's proposal even more warmly if it had contained some assurance that work on the continental shelf would be completed at the fifth session. The question was still topical, and the Commission's work on it had been generally appreciated. But it would not necessarily remain topical once it had been shown that the practical potentialities of the doctrine of the continental shelf were limited. The Commission should therefore aim at finishing its work on the continental shelf in 1953. There was no reason why it should not do so. It was unrealistic to expect that many more replies would be received from governments, and he did not think that any comments by non-governmental organizations would affect fundamentally the work the Commission had already done.

32. Mr. CÓRDOVA thought all members of the Commission were in substantial agreement with Mr. Lauterpacht, and suggested that the text proposed by the Chairman be amended so as to make it clear that the report presented by the special rapporteur at the next session would be a final report, and that the action taken by the Commission on it would be final.

33. Mr. KERNO (Assistant Secretary-General) suggested that, in order to meet the point made by Mr. Lauterpacht and at the same time conform with the wording of the Statute, the second part of the last paragraph of the text proposed by the Chairman be amended to read as follows:

"and to present a final report dealing with these matters, so that the Commission may, after considering and modifying it so far as may be deemed necessary, adopt it with a view to submission to the General Assembly."

It was so agreed.

The text proposed by the Chairman was adopted as amended.

34. The CHAIRMAN then invited the Commission to consider what action should be taken with regard to other questions pertaining to the régime of the high seas. He proposed the following text, which, again, could either be included in the Commission's report to the General Assembly concerning its fourth session or reproduced as a separate resolution, as the special rapporteur preferred:

"*Whereas* pursuant to the recommendation contained in General Assembly resolution 374 (IV) of 6 December 1949, the Commission appointed Mr. J. P. A. François, special rapporteur on the subject of the régime of the territorial sea, and discussion of his report on the said subject was accordingly given priority over the subject of the régime of the high

seas so that it could be discussed by the Commission during its fourth session,

"The International Law Commission

"*Decides to refer to its fifth session the report of the special rapporteur on the régime of the high seas concerning the different points dealt with in Chapter VII of the report of the Commission covering the work of its third session; and, in particular,*

"*Invites the special rapporteur to study the International Convention for the Unification of Certain Rules relative to Penal Jurisdiction in Matters of Collision on the High Seas and Other Risks of Navigation, signed at Brussels on 10 May 1952, and to complete his report by including all such observations as may be pertinent by reason of the aforesaid Convention."*

35. Mr. LAUTERPACHT pointed out that the questions belonging to the régime of the high seas and referred to in the Chairman's text had been before the Commission for even longer than the question of the continental shelf. He would be grateful to the special rapporteur if he could state whether he thought they could be finally disposed of at the next session.

36. Mr. FRANÇOIS said that in his view that would be impossible, since the Commission had not yet ascertained the views of governments on these points.

37. Mr. LAUTERPACHT said that the question he had asked raised once more the whole question of the Commission's methods of work.

38. Mr. SPIROPOULOS said that, if the Commission had been able to consider the special rapporteur's third report on the régime of the high seas at the present session, it could have submitted its conclusions to governments for comment. Unfortunately it had not been able to do so. The Commission would not come to an end, however, with the expiry of the term of office of its present members, and there was no reason why, after considering the special rapporteur's report at its next session, it should not then submit its conclusions to governments for their comments, which could be taken into account at the sixth session.

39. He felt obliged, however, to repeat what he had already said at the previous sessions, namely, that the special rapporteur had not so far evolved any general rules covering the whole subject of the régime of the high seas; he had only studied certain aspects of that régime, some of which, indeed, such as the nationality of ships, might be considered unconnected with it.

40. Mr. LIANG (Secretary to the Commission) said he was glad that Mr. Spiropoulos had again drawn attention to that question. The Commission had done a great deal of work on isolated aspects of the régime of the high seas, but had never considered it as a whole or the relationship between its various parts. That was a task which it might have to undertake at its next session. Moreover, he was sure that Mr. Lauterpacht would agree that the commentary on the régime of the high seas should be at least as exhaustive as that appended

to the draft articles on arbitral procedure. He wondered therefore whether Mr. Lauterpacht really felt it would be desirable to attempt to complete work on the régime of the high seas in 1953.

41. Mr. FRANÇOIS said that it was perfectly true that Mr. Spiropoulos had drawn attention at previous sessions to the incomplete nature of his reports. The Commission's views on that point were, however, clearly stated in paragraph 183 of its report on its second session, in the following sentence:

"The Commission was of the opinion that it could not undertake a codification of maritime law in all its aspects and that it would be necessary to select the subjects the study of which could be begun by the Commission as a first phase of its work on the topic."⁶

42. Mr. LAUTERPACHT said that he would merely point out that it seemed that the only fruits of the Commission's first five years' work in the field of codification would be the draft articles on arbitral procedure and, or so at least the Commission had just resolved, the draft articles on the continental shelf.

43. He shared the hope that the special rapporteur would submit to the Commission at its next session an exhaustive commentary on the régime of the high seas, comparable to the commentaries prepared by the Harvard Research. That would of course involve a great deal of work, and if the special rapporteur so desired, means should be found of providing him with research assistants, even if that entailed some additional expense for the United Nations. The Commission had already committed itself to what might prove to be considerable expense in authorizing the special rapporteur to obtain expert advice on certain aspects of the régime of the territorial sea; it had even better justification for committing itself to additional expense for the purpose he had suggested. The Commission could, in the present condition of the world, hope for no rapid progress in the field of codification through formal international conventions. Its main contribution might well prove to be in the field of scholarly and authoritative research and restatement of international law.

44. Mr. LIANG (Secretary to the Commission) wished to make it clear that it would be extremely difficult to obtain authority to engage research assistants who were not regular members of the Secretariat, and even more difficult if such assistants were not to work at Headquarters, but to be placed at the disposal of the special rapporteur. He could give an assurance that the Secretariat would do its best to prepare an adequate commentary on the régime of the high seas within a reasonable time, under the guidance of the special rapporteur. The articles on that subject had not yet been adopted, however, unlike the articles on arbitral

procedure. It might therefore be considered premature to begin work on the commentary forthwith.

45. Mr. LAUTERPACHT said that he did not regret the time which had been devoted to the present discussion, since it bore on a question affecting the whole work of the Commission. With regard to the commentary, he wished to state frankly that, if it was to serve the purpose it was designed to serve, it should be substantially fuller than the brief comments accompanying the draft articles on the territorial sea, which had not been fully adequate to enable the Commission to form an opinion on the issue involved unless its members were prepared to undertake their own study and research.

46. The CHAIRMAN noted that no objections had been made to the text he had proposed. The special rapporteur had assured him that, so far as he was concerned, his report to the Commission in 1953 would be a final report. The Commission could not, however, now decide what further action it would have to take on the basis of that report.

The text proposed by the Chairman was adopted.

...

Law of treaties (item 3 of the agenda) (resumed from above)

53.* The CHAIRMAN called for nominations for a successor to Mr. Brierly as special rapporteur on the law of treaties.

54. Mr. SCELLE proposed Mr. Lauterpacht, who would be particularly well qualified to succeed Mr. Brierly in that post.

55. Mr. YEPES seconded, and Mr. el-KHOURI supported Mr. Scelle's proposal.

56. Mr. LAUTERPACHT said that he greatly appreciated Mr. Scelle's action in nominating him and that of those who had seconded and supported his nomination. Before a vote was taken, however, he felt obliged to point out, firstly, that he was under the disadvantage of not having attended the Commission's previous discussions on the subject. Secondly, although he would naturally take into consideration the material prepared by Mr. Brierly and treat with the utmost respect the articles which had already been tentatively adopted by the Commission, he could not be bound by them in advance. Thirdly, it would be his intention to approach the task in the manner he had recommended to the special rapporteur on the régime of the high seas, a manner which had not appeared to find favour with the Commission as a whole. Lastly, he would not wish to submit his report piecemeal, and could not therefore undertake to submit any part of it at the next session.

⁶ Report of the International Law Commission covering its second session, *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, para. 183. Also in *Yearbook of the International Law Commission, 1950*, vol. II, p. 383.

* Paras. 47—52 concerned the resignation of Mr. Hudson as special rapporteur on the question of nationality including statelessness.

57. Mr. SPIROPOULOS thought Mr. Lauterpacht had perhaps overlooked the fact that the term of office of all the present members of the Commission would expire at the close of the next session.

58. Mr. LIANG (Secretary to the Commission) suggested that what Mr. Lauterpacht had in mind, with regard to his last point, was his final and complete report. If the Commission decided to consider the subject of the law of treaties at its next session, it might be considered unnecessary for Mr. Lauterpacht to submit a report in the technical sense of the word; he could merely place before the Commission the results of his consideration, so far, of the material amassed.

59. Mr. HUDSON said he was beginning to be infected with the ambitious optimism which Mr. Lauterpacht had expressed with regard to other subjects on the Commission's agenda. He ventured to hope, in fact, that it would be possible for the special rapporteur on the law of treaties to submit to the Commission at its next session a final and exhaustive report on that subject, to which, he recalled, the Commission had decided to give priority. Even if that proved impossible, however, he thought it important that the present members of the Commission should be able to hand down to their successors at least some concrete achievements in that field.

60. On the other hand he agreed that the new special rapporteur on the law of treaties could not be bound by the tentative conclusions which had already been reached.

61. Mr. CÓRDOVA thought it was clear that the Commission must act on the assumption that none of its present members would be re-appointed in 1953 and that the special rapporteur on the law of treaties must therefore submit some kind of report to the fifth session. With Mr. Lauterpacht's other observations he thought all members of the Commission would agree.

62. Mr. SPIROPOULOS pointed out that the same question would arise at the next session in respect of all subjects on which final recommendations had not been made, since it would not then be known whether or not the special rapporteurs on those subjects would be re-appointed by the General Assembly. If, in those circumstances, the Commission refrained from instructing the special rapporteurs to continue their work just as though their re-appointment were assured, a year would be lost. If they were not re-appointed, *ad hoc* arrangements could be made. He agreed that it was most undesirable for the Commission to report piecemeal on a subject, but that was no reason why it should not itself consider the various aspects separately. Indeed, he did not see how it could proceed otherwise.

63. Mr. YEPES felt that the Commission owed it to itself to devote further consideration at its next session to the subject of the law of treaties, to which it had always given priority and had already devoted the greater part of two sessions.

64. Mr. CÓRDOVA agreed with Mr. Spiropoulos that

the fact that the Commission should not report piecemeal to the General Assembly on a subject did not prevent it from considering various aspects of a subject a few at a time. The Commission's report to the General Assembly at its next session would therefore be merely a progress report so far as the law of treaties was concerned, and the Commission should make it clear that it was intended as such, and did not require any action by the General Assembly.

65. Mr. LAUTERPACHT said that he would have no great difficulty in preparing a report on certain aspects of the law of treaties for submission to the Commission at its next session. However, that was beside the point. It was contrary to all his methods of work to state his views on a subject before he had considered it in all its aspects. Moreover, he did not understand how it was thought that the Commission would have time to consider the law of treaties at its next session, when it had already been decided that it should consider the régime of the high seas, the régime of territorial waters, the question of the continental shelf and the question of statelessness.

66. He appreciated the technical difficulty in appointing a special rapporteur who would not report during his term of office as a member of the Commission but, as Mr. Spiropoulos had pointed out, that difficulty was not confined to the present case. If the Commission attached importance to considering one or a few aspects of the law of treaties at its next session, he would support any proposal that another member of the Commission be appointed special rapporteur, or, alternatively, request more time to consider further the various observations that had been made.

67. Mr. el-KHOURI observed that, since the question under discussion was not confined to any particular case, the Commission ought to consider including in its Statute some provision similar to article 13, paragraph 3, of the Statute of the International Court of Justice, which read:

“The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced they shall finish any cases which they may have begun.”

68. Mr. HSU agreed with the view that the present members of the Commission should be able to hand down to their successors at any rate a provisional text on the law of treaties. He asked, therefore, whether Mr. Lauterpacht believed that it would be impossible for him to submit even a preliminary report to the Commission at its next session.

69. Mr. LAUTERPACHT pointed out that to prepare a preliminary report covering the whole subject entailed covering the whole subject. He regretted that his other commitments would make it quite impossible for him to do that by the opening of the next session. If the Commission could not agree to appoint another special rapporteur, he would have to consider whether he could, after all, present a report on one aspect of the

subject, although he had already explained that he was loath to do so.

70. Mr. LIANG (Secretary to the Commission) recalled that he had frequently expressed the view that it was undesirable for the Commission to submit texts to the General Assembly piecemeal. It had always been the practice of the Commission, however, to consider the various aspects of a subject separately and one, or a few, at a time, and he thought it was desirable that it should abide by that practice. Consequently, he suggested that the special rapporteur be asked to submit to the Commission at its next session a reasoned plan of work for dealing with the subject as a whole. The Commission could discuss that plan and, if sufficient time remained after other subjects which were further advanced had been dealt with, it might also consider one aspect of the law of treaties, such as the question of their interpretation, on the basis of a report submitted by the special rapporteur in whatever form he thought fit.

71. Mr. KERNO (Assistant Secretary-General) recalled that the Commission had not only given priority to the subject of the law of treaties; it had given it top priority. Ever since the Commission's first session, he had hoped that work on the whole of that subject would be completed by the end of the Commission's first five years of existence; it would certainly be very disappointing if that period ended with nothing to show for their efforts.

72. He quite understood that the special rapporteur could not simply step into the shoes of Mr. Brierly. What had been done so far was not, however, just the personal work of Mr. Brierly. The Commission had discussed the whole subject twice at considerable length. There was, therefore, no question of making a new start. He was confident that it would be possible for Mr. Brierly's successor as special rapporteur to submit to the Commission at its next session a report which, in some respects, would be a final report, but in others not.

73. Mr. HSU moved the adjournment of the discussion in order to permit Mr. Lauterpacht to consider further the views which had been expressed. He did so the more hopefully because he felt that Mr. Lauterpacht's present hesitations sprang largely from the fact that he thought a detailed and exhaustive commentary, along the lines of those prepared by the Harvard Research, essential. But the truth was that, however much the Commission might wish otherwise, it could not produce such a commentary. Fortunately, to command respect it was not obliged to depend so much on documentation as on the soundness and usefulness of its recommendations.

74. Mr. HUDSON supported the motion for adjournment.

The motion for adjournment of the discussion was adopted.

The meeting rose at 6.25 p.m.

179th MEETING

Monday, 4 August 1952, at 2.45 p.m.

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

Chairman : Mr. Ricardo J. ALFARO

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Law of treaties (item 3 of the agenda) (*continued*)

1. The CHAIRMAN recalled that, at the previous meeting, Mr. Lauterpacht had been proposed as Mr. Brierly's successor as special rapporteur on the law of treaties but that, following an exchange of views, further consideration of the question had been adjourned in order to give him time for reflection.
2. Mr. LAUTERPACHT said that he had given further thought to the question in the light of the discussion at the previous meeting and had come to the conclusion that there was, after all, no imperative objection to the report on the law of treaties being presented in instalments. If he were elected, therefore, he would submit to the Commission at its next session a report covering one aspect of the subject together with an outline of the whole work.
3. Mr. HUDSON said that he welcomed Mr. Lauterpacht's statement, but wondered whether the

Commission, with its present membership, was competent to make any appointments extending beyond the end of 1953, when the present members' term of office would expire.

4. The CHAIRMAN said that clearly Mr. Lauterpacht could be appointed rapporteur only for as long as he was a member of the Commission. If he were not re-elected by the General Assembly for a further five years, other arrangements would have to be made.

5. Mr. KERNO (Assistant Secretary-General) said that the General Assembly would doubtless make all the necessary transitional arrangements to bridge the gap between the close of the fifth session and the opening of the sixth. At present the Commission obviously could not look further ahead than the end of 1953.

Mr. Lauterpacht was unanimously elected special rapporteur on the law of treaties to succeed Mr. Brierly.

Development of a twenty-year programme for achieving peace through the United Nations

10.* Mr. LIANG (Secretary to the Commission) recalled that the Commission's report, covering the work of its third session, included the following paragraph :

"The Commission took note of General Assembly resolution 494 (V) of 20 November 1950 and, pursuant to paragraph 2 thereof, gave consideration to point 10 of the 'Memorandum of Points for Consideration in the Development of a Twenty-Year Programme for Achieving Peace through the United Nations', submitted by the Secretary-General. As will be seen from the present report as well as from its previous reports to the General Assembly, the Commission is making every effort to speed up its work for the progressive development and codification of international law."¹

11. He had now been asked to communicate to the Chairman of the Commission the following letter from the Secretary-General, dated 19 May 1952 :

"I have the honour to transmit, for the information of the International Law Commission, the text of the enclosed resolution entitled 'Development of a Twenty-Year Programme for Achieving Peace through the United Nations', adopted by the General Assembly at its 368th plenary meeting on 31 January 1952.²

"This resolution requests the appropriate organs of the United Nations to give consideration to those portions of the Secretary-General's memorandum on this subject with which they are particularly

* Paras. 6—9 concerned the confirmation of Mr. Hudson's resignation as special rapporteur on the question of nationality, including statelessness.

¹ *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*, para. 89. Also in *Yearbook of the International Law Commission, 1951*, vol. II, p. 140.

² See *Official Records of the General Assembly, Sixth Session, Resolutions, Resolution 608 (VI)*.

concerned, and to inform the General Assembly, at its seventh regular session, through the Secretary General, of any progress achieved through such consideration.

"I also enclose a copy of my report to the sixth session of the General Assembly and the text of the memorandum referred to in the resolution, to which your attention was drawn in my letter of 12 December 1950, in particular to point 10, concerning the active and systematic use of all the powers of the Charter and all the machinery of the United Nations to speed up the development of international law towards an eventual enforceable world law for a universal world society."

He accordingly suggested that the Commission request the General Rapporteur to include in his draft report covering the work of the present session a passage dealing with that question.

It was so agreed.

Representation at the General Assembly

12. Mr. LIANG (Secretary to the Commission) recalled that the Commission had decided, at its first session, "that it would be represented, for purposes of consultation, by its Chairman during the fourth regular session of the General Assembly."³ In view of the Commission's decision, the Secretariat had always made special provision in the budget for the expenses of such consultation. During the past two years, however, the Chairman had not attended the General Assembly and had not, indeed, been requested by the Commission to do so. He suggested that the Commission should consider whether it wished to be represented, for purposes of consultation, by its Chairman during the seventh regular session of the General Assembly.

13. Mr. CÓRDOVA said he believed it to be most desirable that the Commission should be represented at the General Assembly by its Chairman. Several members of the Commission sat on the Sixth Committee of the General Assembly but they sat as representatives of their governments and therefore could not defend the Commission's decisions.

14. Mr. SPIROPOULOS said that his experience in attempting to defend the Commission's decisions in the Sixth Committee of the General Assembly led him to endorse Mr. Córdova's view most warmly. There was no doubt that one member of the Commission, not attending as a government representative, ought to be given the task of defending the Commission's decisions in the Sixth Committee, and provided he was willing, that task was best undertaken by the Chairman of the Commission.

³ *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)* para. 41. Also in *Yearbook of the International Law Commission, 1949*, p. 284.

15. Mr. SCELLE agreed with the views expressed by Mr. Córdova and Mr. Spiropoulos.

16. Mr. HSU asked whether the Chairman would in fact be able to attend the seventh session of the General Assembly. If so, he ought to do so, not perhaps so much to defend the Commission as to provide any necessary additional information which was not to be found in its report.

17. Mr. CÓRDOVA said that, as the question had been raised, he wished to point out how difficult it was for any member of the Commission, appointed in his personal capacity as an expert, to sit on the Sixth Committee as a representative of his government. If his government disagreed with the Commission's decisions, he must dissociate himself from those decisions. If he personally disagreed with the Commission's decisions, his position was no less difficult. In either case a queer impression was produced. For those reasons the Commission should recommend that none of its members be asked to sit on the Sixth Committee as government representatives.

18. Mr. SPIROPOULOS felt that Mr. Córdova's proposal was as undesirable as it was unnecessary. The authority of the members of the Commission should not be derived solely from the classroom. Moreover, when the Sixth Committee considered the International Law Commission's report — which, he pointed out, was only part of its work — there was nothing unusual in the fact that members of the Committee who were also members of the International Law Commission should speak against the Commission's decisions for the following reasons ; first, they were not expressing their own views but the views of their governments, and secondly, there was no reason why even their own views should coincide with those of the Commission, whose decisions were taken not unanimously, but by a majority vote.

19. Mr. el-KHOURI, on a point of order, observed that the question raised by Mr. Córdova was not on the Commission's agenda, which was already sufficiently full to absorb all the time at its disposal.

20. The CHAIRMAN agreed that the Commission had only to decide whether to take a similar decision to that contained in paragraph 41 of its report on its first session.

21. With regard to the point raised by Mr. Hsu, he regretted that owing to his other commitments he was not in a position to give an assurance that he would be able to attend the General Assembly, even if the Commission wished him to do so, although he would of course make every effort to comply with the Commission's wishes.

22. Mr. SPIROPOULOS said that, if the Chairman was unable to attend, then the First Vice-Chairman, or failing him the Second Vice-Chairman, might be able to attend instead.

23. Mr. CÓRDOVA suggested that, if the Chairman

was unable to attend, the Commission could be represented by its general rapporteur.

It was decided by 9 votes to none with 2 abstentions that the Commission should, if possible, be represented, for purposes of consultation, by its Chairman at the seventh regular session of the General Assembly.

Arbitral procedure (item 2 of the agenda) (A/CN. 4/L.35) (resumed from the 177th meeting)

CONSIDERATION OF THE DRAFT COMMENTS SUBMITTED BY THE SPECIAL RAPPORTEUR (resumed)

24. The CHAIRMAN invited the Commission to resume consideration of the comment on the articles in the Draft on Arbitral Procedure (A/CN.4/L.35).⁴

Comment on article 20 [28]⁵

First paragraph

25. Mr. HUDSON considered it undesirable to state that the Commission had accepted anything virtually without discussion. Moreover, the power of the tribunal to give judgment by default was not self-evident. He accordingly proposed that the first sentence of the first paragraph of the comment on article 19 be amended to read as follows :

“The power of the tribunal to give judgment by default was accepted by the Commission on analogy with article 53 of the Statute of the International Court of Justice.”

26. The second sentence of the paragraph, as at present worded, was redundant.

27. Mr. SCELLE did not think it was sufficient to say that the power of the tribunal to give judgment by default had been accepted on analogy with article 53 of the Statute of the International Court of Justice. The extension to arbitration procedure of the scope of application of that principle did represent definite progress.

28. Mr. LAUTERPACHT felt it was hardly worthwhile merely to say that the power of the tribunal to give judgment by default had been accepted on analogy with a provision of the Statute of the International Court of Justice.

Mr. Hudson's amendment to the first sentence of the first paragraph was adopted by 5 votes to 3 with 2 abstentions.

⁴ Mincographed document only. It was incorporated, with drafting changes, in the “Report” of the Commission as Chapter II (see vol. II of the present publication). Drafting changes are given in the present summary records.

⁵ Corresponds to article 19 in document A/CN.4/L.35. The comment read as follows :

“The power of the tribunal to give judgment by default was accepted by the Commission virtually without discussion and as being self-evident. This again is proof of the continuous progress of arbitration procedure.

“The purpose of paragraph 2 is merely to put the tribunal on its guard against any hasty decision.”

29. Mr. YEPES thought that, in view of the adoption of Mr. Hudson's amendment, the second sentence no longer made sense ; he proposed that it be deleted.

30. Mr. LIANG (Secretary to the Commission) suggested that it be amended to read :

"The adoption of this provision would represent a step forward in the law of arbitral procedure."

31. Mr. HUDSON said that the wording suggested by the Secretary would be acceptable to him.

32. The CHAIRMAN pointed out that he must first put to the vote Mr. Yepes' proposal that the second sentence as at present worded be deleted.

Mr. Yepes' proposal was adopted by 6 votes to 3 with 3 abstentions.

The amendment suggested by the Secretary was adopted by 7 votes to 2 with 2 abstentions.

Second paragraph

33. Mr. HUDSON suggested that the second paragraph be deleted.

34. Mr. LAUTERPACHT said that he could agree to Mr. Hudson's suggestion, but if the paragraph were to be retained, it might be re-worded as follows :

"The purpose of this article is to ensure that no decisive importance would be attached by the tribunal to the fact of default and that the award must be based on a full examination of the jurisdiction of the tribunal and of the merits of the case."

35. Mr. SCELLE felt that the wording suggested by Mr. Lauterpacht added nothing of substance to the wording he himself had proposed. It went without saying that the tribunal must be satisfied that it had jurisdiction and that the claim was well-founded in fact and in law, and the only purpose of paragraph 2 which he could conceive was the one he had stated in the second paragraph of the comment.

36. Mr. FRANÇOIS said that he could not agree with Mr. Scelle, since in some systems of law the judge's rôle was so passive that he was bound, in such cases, to give an award in favour of the claimant without considering whether the claim was well-founded.

37. Mr. YEPES said that he would vote against the wording suggested by Mr. Lauterpacht, which was more cumbersome than that proposed by Mr. Scelle without adding anything of substance to it.

The wording suggested by Mr. Lauterpacht for the second paragraph was adopted by 4 votes to 1 with 4 abstentions.

38. Mr. LAUTERPACHT suggested that the sentence just adopted and the one adopted just previously at the suggestion of the Secretary be transposed.

Mr. Lauterpacht's suggestion was adopted by 5 votes to none with 4 abstentions.

Comment on articles 21 and 22 [16, 17 and 18]⁶

First paragraph

39. Mr. LIANG (Secretary to the Commission) recalled that the Commission had decided to combine articles 20 and 21.⁷ The first sentence of the comment might, therefore, be amended to read simply :

"These two articles form a complete whole," instead of "These three articles form a complete whole and could have been combined in one".

It was so agreed.

40. Mr. HUDSON observed, in connexion with the third sentence, that the words "in particular with a view to adopting some other method of settlement" added something which was not in the article. He suggested their deletion.

41. Mr. LAUTERPACHT pointed out that the words were intended only as an example. He saw no objection to them.

Mr. Hudson's suggestion was rejected by 4 votes to 3 with 1 abstention.

42. Mr. HUDSON said that he failed to understand the meaning of the reference in the last sentence to article 9 (a).

43. Mr. SCELLE said that its meaning was perfectly clear to him, but if the Commission wished to delete it, he would not object.

44. Also with reference to the last sentence, Mr. LAUTERPACHT asked whether the special rapporteur was sure that there did exist the difference indicated between arbitration and proceedings in a court of law.

45. Mr. SCELLE said that the difference was that the parties could not withdraw a case before a court of law with a view to submitting it to some other method of settlement.

46. Mr. LAUTERPACHT pointed out that they could withdraw it with a view to submitting it to arbitration.

47. Mr. HUDSON said that, in order to shorten the discussion, he would propose deletion of the whole of the last sentence.

Mr. Hudson's proposal was adopted by 7 votes to none.

Second paragraph

48. Mr. HUDSON proposed the deletion of the fourth sentence. He could not agree that the tribunal should be called upon to verify the "legality" of the settlement.

49. Mr. CÓRDOVA considered it important to enable the parties to reach a settlement. All that remained for the tribunal was to give it the authority of *res judicata*.

⁶ Correspond to articles 20, 21 and 22 in document A/CN. 4/L.35.

⁷ See summary record of the 174th meeting, paras. 38—40.

50. Mr. LAUTERPACHT wondered whether the purport of the third sentence would be clear if the fourth were deleted.

51. Mr. SCELLE said it was vital to prevent the tribunal from being compelled to sanction a settlement that was contrary to international law or devoid of content.

52. Mr. KERNO (Assistant Secretary-General) said that if Mr. Hudson's proposal were accepted, the fifth sentence would also have to be deleted.

53. Mr. LAUTERPACHT considered that the fourth sentence should be maintained since it was inadmissible that the tribunal should give binding force to a settlement reached under duress.

54. Mr. HUDSON said he was unable to understand the meaning of the words "the legality and effective scope".

55. Mr. LAUTERPACHT agreed that the expression "effective scope" was somewhat obscure. The meaning of the word "legality" on the other hand was perfectly clear; it was essential that the settlement should not be contrary to international law and should not violate treaty obligations which one of the parties might have with a third party. In order to meet Mr. Hudson's point, he would propose the deletion of the words "and effective scope" and the addition of the words "reached by the parties" at the end of the sentence.

Mr. Hudson's proposal for the deletion of the fourth sentence was rejected by 5 votes to 4 with 1 abstention.

56. Mr. HUDSON said that, as his proposal had been rejected, he would support Mr. Lauterpacht's amendment.

4 votes were cast in favour of Mr. Lauterpacht's amendment, and 4 against with 1 abstention; it was accordingly rejected.

57. Mr. YEPES proposed the addition of the words "an illegal or" after the words "to give binding force to" in the fifth sentence.

Mr. Yepes' amendment was adopted by 5 votes to 1 with 4 abstentions.

Comment on article 23 [31]

First paragraph

58. Mr. LAUTERPACHT said that there was some inconsistency in the first paragraph. Article 9 contained no provision concerning the extension of the time-limit by the parties.

59. Mr. HUDSON suggested that Mr. Lauterpacht's point would be met by placing a fullstop after the word "parties" and substituting for the word "and" which followed it immediately, the word "It".

It was so agreed.

Second paragraph

60. Mr. HUDSON proposed the deletion of the word

"actually" before the word "variance" in the second sentence. He also proposed the deletion of the fourth and fifth sentences, since it was undesirable to draw attention to differences of opinion between the Commission and its special rapporteur.

61. Mr. SCELLE agreed to the deletion of the fourth and fifth sentences; he had intended to propose that himself.

62. Mr. LAUTERPACHT proposed the deletion of the third sentence, which seemed to imply a criticism of the solution adopted by the Commission.

63. Mr. HSU observed, with regard to the second sentence, that there was some contradiction between the purpose of article 12, paragraph 2, and that of article 23, inasmuch as the former was designed to eliminate the possibility of a finding of *non liquet*, whereas the provisions of the latter would enable the tribunal to refrain from rendering its award. There were grave objections to allowing such an inconsistency in the draft and the Commission might be well-advised to reconsider the substance of article 23.

64. Mr. LAUTERPACHT said that certain members of the Standing Drafting Committee had had misgivings about the second paragraph. It was the view of the special rapporteur however—and that was the force of the word "actually" in the second sentence—that while there was a contradiction in spirit between article 12, paragraph 2 and article 23, there was not in form.

65. Mr. YEPES said he could not support Mr. Lauterpacht's proposal for the deletion of the third sentence, since it contained a useful warning to parties of a possible contingency.

66. Mr. LAUTERPACHT, supported by Mr. HSU, pointed out that retention of the third sentence would not secure the result desired by Mr. Yepes.

It was agreed to delete the word "actually" in the second sentence and the third, fourth, and fifth sentences in their entirety.⁸

Comment on article 24 [32]

67. Mr. HUDSON pointed out that the requirements laid down in article 24 did not have to be complied with in order to make the award legal. Either then the comment should end at the words "in the matter", or the latter part should be amended by substituting the words "the necessary content and form of the award" for the words "the requirements as to content and form necessary to make the award legal".

⁸ These three sentences read as follows:

*In practice, however, this provision may result in maintenance of the *status quo ante* and the continuance of the dispute which it was intended to settle by recourse to arbitration. The rapporteur suggested that in such a case the parties should be permitted to depart from the provisions of the *compromis*. The Commission decided that they should not."*

68. Mr. KERNO (Assistant Secretary-General) suggested that the French text was perfectly satisfactory. It was only necessary to find the English equivalent for the expression "*un acte authentique*".

69. The CHAIRMAN suggested that the words "to make the award legal" be replaced by the words "to establish the authenticity of the award".

70. Mr. SCELLE said that the second amendment suggested by Mr. Hudson would render the comment entirely useless. Some explanation had to be given of the reasons for the requirements laid down in article 24.

71. Mr. LAUTERPACHT said he could not support the first of Mr. Hudson's suggested amendments since he regarded the latter part of the comment as important. He therefore proposed the substitution of the words "the essential requirements as to the content and form of the award" for the words "the requirements as to content and form necessary to make the award legal".

72. Mr. HUDSON and Mr. SCELLE accepted Mr. Lauterpacht's amendment.

Mr. Lauterpacht's amendment was adopted.

Comment on article 25 [34]

73. Mr. HUDSON said that it was not for the Commission to declare that some particular provision confirmed the traditional practice of the International Court. He accordingly proposed the substitution of the words "is in accord with" for the word "confirms".

Mr. Hudson's amendment was accepted.

Comment on article 26

74. Mr. SCELLE withdrew the last sentence which read "This is contradictory".

*Comment on article 27 [35] **

First paragraph

75. Mr. SCELLE withdrew the second sentence.

76. Mr. FRANÇOIS pointed out that the first paragraph required modification as a result of the amendment to article 27 adopted during the second reading.¹⁰

* The comment read as follows:

"The Commission thought it necessary to specify that the award is binding from the very day on which it is rendered and to repeat that it must be carried out in good faith and, it would seem, forthwith. The latter conclusion, however, appears to be at variance with Article 32 (see below).

"The Commission did not decide the question of the extent of the authority of *res judicata* when the dispute entails interpretation of a multilateral treaty. On this point, the Commission did not go so far as the 1907 Convention for the Pacific Settlement of International Disputes. It appears that in implicitly deciding in favour of the relative authority of the award, the Commission was only considering the case of a dispute between two States alone."

¹⁰ See summary record of the 174th meeting, paras. 52—56.

77. Mr. SCELLE proposed that Mr. François' point be met by the substitution of the words "when it is rendered" for the words "from the day on which it is rendered" and by the deletion of the words "it would seem".

It was so agreed.

78. Mr. HUDSON proposed the substitution of the word "assert" for the word "repeat", since no previous mention had been made of that matter.

It was so agreed.

Second paragraph

79. Mr. HUDSON proposed the deletion of the paragraph; it seemed unnecessary to refer to a question on which the Commission had taken no decision.

80. Mr. LAUTERPACHT supported Mr. Hudson's proposal.

81. Mr. SCELLE said it would be wrong for the Commission to present the draft to governments without explaining why it had not dealt with one of the most important issues connected with arbitration.

82. Mr. YEPES endorsed the special rapporteur's view. It would be remembered that, during the first reading of the draft, he had submitted a draft article on intervention.

83. Mr. LIANG (Secretary to the Commission) said that if the paragraph were retained, some amendment of the second sentence in the English text would be necessary in order to explain the meaning of the expression "the relative authority of the award".

84. Mr. SCELLE explained that the authority of an award was absolute when applicable to all possible parties to a dispute.

85. Mr. LAUTERPACHT said that it had not been immediately apparent to him that the paragraph dealt with the question of intervention. After the explanation by the special rapporteur he now felt that it should be retained with some explanatory words of introduction. As at present drafted it was not clear what the paragraph was about: he would submit an amended draft.

Mr. Hudson's proposal for the deletion of the second paragraph was rejected by 4 votes to 3, with 2 abstentions.

86. Mr. YEPES proposed the deletion of the words "in implicitly deciding in favour of the relative authority of the award", in the second sentence.

87. The CHAIRMAN ruled that further discussion on the second paragraph be deferred until Mr. Lauterpacht had submitted the text of his amendment in writing.

Comment on article 28 [37]

First paragraph

88. Mr. LAUTERPACHT considered the first sentence misleading, since article 28 was concerned with the

interpretation of the award. He accordingly proposed the substitution of the word " incidentally " for the word " again ".

It was so agreed.

89. Mr. HUDSON proposed the deletion of the word " automatically " in the second sentence ; that expression went too far.

90. The CHAIRMAN said that he would vote in favour of Mr. Hudson's proposal unless, as an alternative, the word " automatically " were replaced by the words " ipso facto ".

91. Mr. YEPES opposed Mr. Hudson's proposal.

4 votes were cast in favour of Mr. Hudson's proposal and 4 against, with 4 abstentions ; it was accordingly rejected.

92. Mr. SCELLE proposed that reference to the Standing Drafting Committee in the third sentence be eliminated by the deletion of the words " referred this article to the Drafting Committee to be put into final form, and the Committee " after the words " The Commission ".

It was so agreed.

93. Mr. YEPES said that the reference to article 3 was unnecessary ; he proposed the deletion of the words " it was impossible to apply article 3 of the preliminary draft, which involved too much delay for completion of the proceedings within a reasonable time ".

94. Mr. HUDSON proposed the substitution of the words " it was necessary to provide for recourse to the International Court of Justice, unless the parties should agree otherwise " for the words " it was impossible to apply . . . hence the recourse to the International Court of Justice ".

95. Mr. LAUTERPACHT suggested that Mr. Hudson's amendment went no further than to repeat the provisions of article 28.

96. Mr. YEPES proposed the deletion from Mr. Hudson's amendment of the words " unless the parties should agree otherwise ".

97. Mr. SCELLE said he could accept Mr. Hudson's amendment as amended by Mr. Yepes. He had only referred to article 3 of the preliminary draft because it contained provisions on the constitution of the tribunal.

98. The CHAIRMAN thought that, if Mr. Yepes' amendment were accepted, there was a danger of inconsistency between article 28 and its comment.

Mr. Yepes' amendment to Mr. Hudson's text was rejected by 6 votes to 2, with 1 abstention.

Mr. Hudson's amendment was adopted.

The meeting rose at 6.10 p.m.

180th MEETING

Tuesday, 5 August 1952, at 9.45 a.m.

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

Chairman : Mr. Ricardo J. ALFARO

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35, A/CN.4/L.36, A/CN.4/L.37) (*continued*)

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

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

Comment on article 29 [30, 39 and 40]²

First paragraph

2. Mr. HUDSON suggested that the word " strongly " be deleted from the first sentence.

It was so agreed.

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

² The first three paragraphs of the comment read as follows :

" With regard to the validity of the award and " remedies " for its shortcomings, the Commission was strongly in favour of allowing the award to be revised or an application to be made for its annulment (cassation), but deliberately ruled out appeals on the grounds of misapplication of the law. The Commission accordingly followed the traditional practice by which an arbitral award is final, subject, however, to the

3. Mr. HSU suggested that, in that case, the word "deliberately" be also deleted.

It was so agreed.

4. Mr. HUDSON suggested that, in the English text of the second sentence, the word "accordingly" be either deleted or replaced by the word "thus".

It was agreed that the word "accordingly" should be replaced by the word "thus" in the English text.

5. Mr. LIANG, Secretary to the Commission, suggested that, in order to bring the English text of the second sentence into line with the French, the words "by which an arbitral award is final" be replaced by the words "that an arbitral award should be final".

It was so agreed.

6. Mr. HUDSON suggested that the assertion "— a recent conquest made by jurisdictional arbitration over diplomatic arbitration" was open to question and should be deleted.

It was so agreed.

7. Mr. LAUTERPACHT pointed out that the whole of the first paragraph applied to article 30 as well as to article 29. He suggested therefore that the first clause be amended to read simply :

"With regard to the remedies against the award."

It was so agreed.

Second paragraph

8. Mr. LAUTERPACHT suggested that the words "Application for" be deleted from the English text.

It was so agreed.

9. Mr. HUDSON suggested that the words "was accepted as self-evident by practically all the members of the Commission" be replaced by the words "was considered essential by the Commission".

It was so agreed.

10. Mr. SCELLE pointed out that the reference to article 9 (g) should now be to article 9 (h).

11. Mr. HUDSON suggested that the whole of the second sentence be deleted. As it read it was incorrect ;

possibility of its revision or annulment — a recent conquest made by jurisdictional arbitration over diplomatic arbitration.

"Application for revision, as laid down in Article 61 of the Statute of the International Court of Justice, was accepted as self-evident by practically all the members of the Commission. It was decided not even to allow the parties the option of ruling out the possibility of this in the *compromis* (see Article 9(g)).

"The definition of "new fact", which by now has become classic, has been inserted in Article 29. It implies that the judgment cannot become final — or rather that there really is no judgment — unless account is taken of the principle of law contained in the English dictum: "Nothing is settled until it is settled right". The Commission was anxious, however, that the time-limit for revision should be very short (six months), even though the new fact might only come to light after the expiry of this period."

article 9 (h) did in fact give the parties the option of ruling out the possibility of revision in the *compromis*.

12. Mr. LAUTERPACHT presumed that the special rapporteur attached importance to that sentence, and would wish it to be retained. He too considered that it should be retained, though he felt that the words "It was decided" were perhaps too strong; the drafting could be improved in certain other respects too.

13. Mr. YEPES agreed that the second sentence should be retained, as it concerned one of the fundamental points of the whole draft. It was quite clear from the summary records that the Commission had been of the view that the parties should not have the option of ruling out the possibility of revision.

14. After some discussion, Mr. LAUTERPACHT proposed that the second sentence be amended to read as follows :

"The sense of the Commission was that, with regard to both revision and annulment of the award, the provisions of the draft on the subject are of such importance as to prevent the parties from excluding recourse to these remedies, notwithstanding the discretion which article 9 (h) leaves to them in the matter of the procedure of revision and annulment."

15. Mr. HUDSON said that he would vote against Mr. Lauterpacht's proposal, which, in his view, did not correspond with the texts the Commission had adopted.

Mr. Lauterpacht's proposal was adopted by 6 votes to 1 with 3 abstentions.

Third paragraph

16. Mr. HUDSON proposed the deletion of the second sentence, which he regarded as an inaccurate statement.

17. Mr. LAUTERPACHT agreed that the second sentence was controversial. In his view a judgment was final as soon as it had been rendered, although the question of its finality could be subsequently re-opened. The words "or rather that there really is no judgment" were also a possible source of confusion. He supported the proposal that the sentence be deleted.

18. Mr. SCELLE said that he had no objection to the deletion. For all who were familiar with the concept of arbitration, the principle laid down in article 29 was self-evident.

It was agreed to delete the second sentence of the third paragraph.

Fourth paragraph

19. Mr. SCELLE and Mr. HUDSON suggested the deletion at the end of the paragraph of the words "rather than to the procedure laid down in article 3 of the preliminary draft, which was much too lengthy".

It was so agreed.

Fifth paragraph³

20. Mr. HUDSON said that he was by no means sure that paragraph 3 of article 29 really left the tribunal the option of combining the two essential stages of the revision procedure.

21. Mr. SCELLE said that it was not entirely clear from the summary records what had been the Commission's intention on that point. He would be perfectly prepared to accept the opposite interpretation of paragraph 3 to that which he had placed on it. It was indeed contrary to French procedure that the two stages should be combined. The simplest way out of the difficulty would be to delete the fifth paragraph of the comment.

22. Mr. LAUTERPACHT observed that the effect of its deletion would be to leave the question of interpretation open. There was however no great disadvantage in that course.

It was agreed to delete the fifth paragraph.

*Comment on article 30 [42]**First paragraph⁴*

23. Mr. SCELLE proposed that the first paragraph be deleted as unnecessary.

24. Mr. YEPES thought it was important to note that the Commission had accepted the principle of applications for annulment. He proposed, therefore, that the first paragraph be replaced by the following text :

"The Commission accepted the principle of applications for annulment, although this principle is hardly compatible with the practice of diplomatic arbitration."

25. Mr. LAUTERPACHT said that he could not support Mr. Yepes' proposal, because he did not think there was any agreement on what was meant by the term "diplomatic arbitration". In his view arbitration had been largely judicial in nature since the beginning of the nineteenth century.

26. Mr. LIANG (Secretary to the Commission) suggested that the text proposed by Mr. Yepes would only have been necessary if the Commission had based its draft on the principles of diplomatic arbitration.

27. Mr. ZOUREK pointed out that the term "diplomatic arbitration" was defined neither in the

articles themselves, nor in the comments, nor, indeed, in any of the special rapporteur's reports. He personally agreed that diplomatic arbitration, as he understood the term, had gone out with the Middle Ages. Under present arbitration law, all arbitration rested on the basis of the existing law.

28. Mr. KOZHEVNIKOV felt that the distinction between diplomatic arbitration and judicial arbitration was somewhat artificial. It was not to be found either in the Charter of the United Nations or in any international convention. He accordingly agreed that use of the term "diplomatic arbitration" was inappropriate.

29. Mr. SCELLE observed that in a number of comparatively recent cases of so-called arbitration, the Casablanca dispute between France and Germany in 1908 for example, the element of diplomatic settlement had been preponderant. The distinction between diplomatic arbitration and judicial arbitration had been clearly stated by Politis. He still felt, however, that it was preferable to delete the whole of the first paragraph.

30. Mr. YEPES said that, although to his mind the question was clear, he realized that the Commission had not time to discuss it. He therefore withdrew his amendment.

It was agreed that the first paragraph be deleted.

Second and third paragraphs⁵

31. Mr. LAUTERPACHT proposed that the second and third sentences of the second paragraph be deleted as unnecessary.

32. The third paragraph was misleading. The Commission had refrained from listing any other grounds for annulment in order to avoid distracting attention from the three it had listed. He proposed, therefore, that the third paragraph be amended to read as follows :

"It was considered that other causes of annulment, such as the nullity of the *compromis*, were not of sufficient importance to necessitate express inclusion in the draft."

33. Mr. HUDSON agreed that the second and third sentences of the second paragraph should be deleted.

34. He would propose, however, that the third paragraph be not amended but deleted altogether, since it had no bearing on the text.

³ The fifth paragraph read as follows :

"Paragraph 3 indicates the two essential stages of the revision procedure, but leaves the tribunal the option of including in one and the same award the judgment as to admissibility and the judgment on the substance of the case."

⁴ The first paragraph read as follows :

"Just as the Commission declined to allow appeals although some of its members took a contrary view, it would seem to have been a concern for formal and traditional logic which induced it to accept the principle of applications for annulment, a principle hardly compatible with the practice of diplomatic arbitration."

⁵ These paragraphs read as follows :

"The Commission recognized only three causes justifying annulment: action *ultra vires*, corruption on the part of an arbitrator, and violation of a fundamental rule of procedure. Moreover, it carefully refrained from trying to define what these various grounds of annulment might cover — and rightly so, since in the preliminary draft, only the question of procedure is involved. Hence the judges are left complete latitude in regard to the decision."

"It may be noted that the Commission purposely excluded from the grounds for annulment the possibility of the *compromis* being declared null and void."

35. Mr. YEPES pointed out that, if the second and third sentences of the second paragraph were deleted, the first must be deleted too, since it merely repeated the text of the article. Consequently, before the Commission voted on the deletion of those two sentences, he wished to draw its attention to the likely effect on public opinion of there being no comment on one of the most important articles in the whole draft.

The proposal to delete the second and third sentences of the second paragraph was adopted by 6 votes to 3, with 2 abstentions.

36. In answer to Mr. YEPES, the CHAIRMAN pointed out that, if Mr. Lauterpacht's amendment to the third paragraph were adopted, his text could quite appropriately be preceded by the first sentence of the second paragraph. He must, however, first put to the vote Mr. Hudson's proposal that the third paragraph be deleted.

Mr. Hudson's proposal was rejected by 7 votes to 2, with 2 abstentions.

37. The CHAIRMAN said that he would next put to the vote Mr. Lauterpacht's amendment to the third paragraph.

38. Mr. SCELLE pointed out that the question of the nullity of the *compromis*, referred to in Mr. Lauterpacht's amendment, had not been discussed by the Commission, for the very good reason that it was a general question bound up with the law of treaties.

39. Mr. CÓRDOVA felt that Mr. Lauterpacht's amendment implied that the only reason for excluding nullity of the *compromis* as a ground for annulling the award was the one stated. In his view, that was not so.

40. Mr. LAUTERPACHT said that several earlier drafts on arbitral procedure had provided for annullment of the award on the grounds of nullity of the *compromis*. The only reason why the Commission had not so provided was in fact the reason he had given.

41. Mr. HUDSON said he thought it most unlikely that a State would challenge the validity of the *compromis* after the whole procedure had been followed and the award rendered against it.

42. Mr. SCELLE recalled that it was an essential feature of the whole draft that the importance of the *compromis* should be limited. There was no reason why nullity of the *compromis* should affect the subsequent procedure at all.

43. Mr. LAUTERPACHT said that, as his amendment appeared to be giving rise to a lengthy discussion, he would withdraw it.

44. Mr. HSU expressed his regret that Mr. Lauterpacht had withdrawn his amendment, and sponsored it himself.

The amendment was rejected by 4 votes to 3, with 3 abstentions.

45. The CHAIRMAN observed that, as both Mr. Hudson's proposal and Mr. Lauterpacht's amendment had been rejected, the third paragraph remained as it stood.

46. Mr. KERNO (Assistant Secretary-General) pointed out that there was nothing in rule 130 of the rules of procedure of the General Assembly to preclude the Commission from rejecting a text when put to the vote as a whole after parts of it had been approved.

47. Mr. CÓRDOVA said he was opposed to the third paragraph because it implied that the tribunal was empowered to declare the *compromis* null and void.

48. Mr. SCELLE agreed with Mr. CÓRDOVA and felt that his point might be met if the third paragraph were redrafted in such a way as to indicate that the Commission did not include nullity of the *compromis* among the grounds for annulment. If some such wording found no favour it would be best to delete the whole paragraph.

49. Mr. LIANG (Secretary to the Commission) referred Mr. CÓRDOVA to the second sentence in the second paragraph and suggested that his objections to the third paragraph were unfounded.

50. Mr. KERNO (Assistant Secretary-General) suggested that the real obstacle to Mr. CÓRDOVA's inability to accept the third paragraph was the use of the word "declared".

51. The CHAIRMAN suggested the following wording for the third paragraph :

*"It may be noted that the Commission excluded from the grounds for annulment the nullity of the *compromis*."*

52. Mr. LAUTERPACHT doubted whether such a text would serve any useful purpose. On the other hand the omission of any comment at all on article 30 would be a grave defect since that article offered a solution to a problem which had been troubling governments and international lawyers for a whole generation. In comparison the question of the nullity of the *compromis* was of very minor importance.

The Chairman's suggested wording for the third paragraph was accepted.

53. Mr. YEPES said it was inadmissible that the Commission should submit article 30 without any comment. He therefore proposed that the second paragraph be replaced by the following text :

*"The Commission recognized only three causes justifying annulment: action *ultra vires*, corruption on the part of an arbitrator and violation of a fundamental rule of procedure. However, since the draft deals solely with arbitral procedure, the Commission did not attempt to define what these various grounds of annulment might cover. Hence the judges are left complete latitude in regard to the decision to be taken."*

54. Mr. LAUTERPACHT suggested that the second sentence in Mr. YEPES' amendment was unnecessary; the three grounds for annulment listed in article 30 did not require definition.

55. Mr. SCELLE said that Mr. YEPES was right in drawing attention to the fact that the draft related to procedure only; it was for the tribunal to decide on the substance of a claim for annulment.

56. Mr. ZOUREK suggested that all that needed to be made clear in the comment on article 30 was whether the grounds enumerated in it were exhaustive or not. It would be remembered that the Commission had agreed that the parties were free to provide in the *compromis* for other grounds for annulment.

Mr. YEPES' amendment to the second paragraph was adopted by 5 votes to 1, with 4 abstentions.

57. Mr. ZOUREK pointed out that several members of the Commission had voted against Mr. Hudson's proposal for the deletion of the third paragraph in the hope that a more satisfactory text would be evolved. As that hope had been disappointed he moved the reconsideration of the third paragraph.

Mr. Zourek's motion was carried.

58. Mr. ZOUREK proposed the deletion of the third paragraph.

59. Mr. LAUTERPACHT said he was opposed to the third paragraph because, as at present worded, it was misleading.

60. Mr. SCELLE supported Mr. Zourek's proposal on the ground that the substance of the third paragraph was already covered in Mr. YEPES' text adopted to replace the second paragraph.

Mr. Zourek's proposal for the deletion of the third paragraph was adopted.

Comment on articles 31 and 32 [43 and 44]⁶

61. Mr. SCELLE said he wished to withdraw the

⁶ The comment read as follows:

"These two articles might equally be fused into one."

"The Commission decided in favour of making the period for the application by either party for annulment of the award a short one (60 days).

"The discussions made it clear that the parties would at all times be free, provided they were in agreement, not to proceed with the execution of the award. Obviously it would be out of place for the litigants to set aside a judgment rendered by their judges; but there is no reason why they should not agree to refrain from applying it.

"The Commission felt that the application for annulment should stay execution, unless otherwise decided by the International Court of Justice, the judicial body designated to deal with the application (cf. Article 61 of the Statute of the International Court of Justice, which adopts the contrary procedure). By this decision either of the parties can stay execution of the award, possibly for a long time, and it may appear to conflict with article 27. The obligation under article 32 to set up a new tribunal, and if necessary to make use for this purpose of article 3 of the preliminary draft, would make it possible for the party losing the case to stay execution of the award indefinitely, unless the Court takes appropriate action."

comment on articles 31 and 32 in favour of the following text:

"The Commission decided in favour of making the period for application by either party for annulment of the award a very short one. But it decided that this very short period should apply only to the grounds of annulment stated in sub-paragraphs (a) and (c) of article 30. Consequently, no time-limit is prescribed for an application for annulment on the ground of corruption on the part of an arbitrator.

"The discussions made it clear that the parties would at all times be free, provided they were in agreement, not to proceed with the execution of the award."

His purpose was to explain the Commission's decision concerning the scope of article 31, paragraph 2, taken after Mr. Lauterpacht had pointed out that corruption of a member of the tribunal might become apparent much later than sixty days after the rendering of the award.

62. He had purposely not commented on article 31, paragraph 3, because many members had felt that provision to be an unfortunate one.

63. Article 32 did not call for comment.

The special rapporteur's new text for the comment on articles 31 and 32 was accepted.

Introduction to the Draft on Arbitral Procedure

64. The CHAIRMAN invited the Commission to take up the introduction to the Draft on Arbitral Procedure. In document A/CN.4/L.35, paragraphs 1 to 4 dealt with purely procedural matters whereas paragraphs 5 to 13 contained a commentary on the scope and purpose of the draft.⁷ The Commission had before it two texts (A/CN.4/L.36 and A/CN.4/L.37)⁸ submitted by Mr. Lauterpacht and Mr. Scelle to replace the latter paragraphs.

65. Mr. KOZHEVNIKOV wondered whether it was appropriate for the introduction to deal with certain general matters already referred to in the detailed comments on individual articles. The introduction should be confined to a brief factual account of the Commission's work on arbitral procedure. He did not, however, intend to make a formal proposal in that sense.

66. The CHAIRMAN stated that the introduction formed part of the commentary on the draft. He pointed out that paragraphs 1-4 were to be found in document A/CN.4/L.35.

⁷ For text of the introduction in document A/CN.4/L.35, see summary record of the 175th meeting, footnote to para. 14.

⁸ Mimeographed documents only. Document A/CN.4/L.36 was issued in English only. Document A/CN.4/L.37 was issued in French only. They were almost identical and were incorporated, with drafting changes, in the "Report" of the Commission as paras. 15-24 of Chapter II (see vol. II of the present publication). Drafting changes are given in the present summary records.

*Paragraphs 1-3 [11-13] **

No observations.

Paragraph 4 [14]

67. Mr. el-KHOURI said that paragraph 4 rightly referred to the "secondary preliminary draft on arbitral procedure" presented by the special rapporteur. But the adjective "preliminary" should not be used to describe the draft adopted by the Commission, since governments could not be expected to submit definitive comments on a preliminary draft.

68. Mr. KOZHEVNIKOV disagreed. As the special rapporteur had indicated on several occasions, the present draft did not represent a final text. It should therefore be described as "this preliminary draft" throughout the report.

69. Mr. LIANG (Secretary to the Commission) said that according to article 21 of the Commission's Statute it transmitted "drafts", not "preliminary drafts", to governments for their comments. Mr. el-Khouri's argument was therefore well-founded.

70. Mr. ZOUREK asked how it would be possible to distinguish between the text adopted by the Commission at its present session and the final one adopted after consideration of comments by governments.

71. The CHAIRMAN pointed out that any danger of confusion between the different drafts was obviated by the explanation to be found in the final sentence of paragraph 4.

72. Mr. SCELLE considered that the Commission ought to adhere to the terminology of its Statute.

It was so agreed.

Introductory discussion on paragraphs 5 to 14 [15-24]

73. Mr. LAUTERPACHT said that his proposed alternative text (A/CN.4/L.36) for paragraphs 5 to 14 required some verbal amendments.

74. Paragraph 5 should refer to article 20, not article 24, of the Commission's Statute.

75. In paragraph 12, the word "some" should be inserted after the words "as well as in".

76. In paragraph 14, the words "governing authority" should be replaced by the words "increasing activity".

77. Mr. SCELLE said that he had accepted Mr. Lauterpacht's text almost in its entirety. The text (A/CN.4/L.37) issued under his own name departed from it only in paragraphs 8 and 11.

78. He accepted paragraph 14 in Mr. Lauterpacht's text, which had not been prepared in time for insertion in his own.

79. The CHAIRMAN proposed that the Commission examine the two texts before it, paragraph by paragraph.

Paragraph 5 [15]

No observations.

Paragraph 6 [16]

80. Mr. LIANG (Secretary to the Commission) noted a slight discrepancy between the two texts in the third sentence, where Mr. Scelle had omitted the word "essentially".

81. Mr. SCELLE said he had done so in order to attenuate Mr. Lauterpacht's text. Indeed he would have preferred to omit all mention of provisions *de lege ferenda*, since he considered that none of the provisions in the draft were new. All had been borrowed from existing texts.

82. Mr. HUDSON proposed that paragraphs 5, 6, 9 and 10 in Mr. Lauterpacht's text (15, 16, 19 and 20 in the "Report") be accepted without further discussion, since the special rapporteur seemed in general agreement with them.

Mr. Hudson's proposal was adopted by 9 votes to none with 2 abstentions.

Paragraph 7 [17]

83. Mr. ZOUREK proposed the insertion of the words "and by arbitrators of their own choice" after the words "in accordance with law", since that was the second distinctive feature of arbitration.

84. Mr. SCELLE drew the attention of Mr. Zourek to the provisions of article 3, according to which in certain circumstances members of the tribunal were not designated by the parties.

85. Mr. ZOUREK pointed out that that was a remedy to be applied only in extreme cases. The provisions of article 3 did not invalidate his argument.

86. Mr. SCELLE said that, if Mr. Zourek's amendment were adopted, the words "subject to article 3" would have to be added to it.

87. Mr. ZOUREK pointed out that such an addition would be quite inappropriate; the first sentence of paragraph 7 referred to the general practice of arbitration.

88. Mr. SCELLE observed that the purpose of paragraph 7 was to draw a distinction between arbitration and conciliation, not to define arbitration.

89. Mr. LAUTERPACHT said he would not support Mr. Zourek's amendment, which detracted from the argument and purpose of paragraph 7.

3 votes were cast in favour of Mr. Zourek's amendment and 3 against, with 4 abstentions; it was accordingly rejected.

* The number within brackets indicates the paragraph number in the "Report".

Paragraph 8 [18]

90. Mr. SCELLE said that though there was no fundamental difference between the two texts of paragraph 8, he could not accept the wording of Mr. Lauterpacht's, which was neither explicit nor sufficiently authoritative.⁹

91. The paragraph dealt with three essential issues. First, that the obligation to arbitrate did not necessarily derive from the *compromis* but was often anterior to it; second, the question of arbitrability and third, the choice of arbitrators. He wished all three issues to be placed in sharp relief.

92. He was prepared to meet an objection raised by Mr. HUDSON to the expression "nudum pactum" by substituting for it the word "pacte".

93. Mr. LAUTERPACHT said that he had tried to eliminate the speculative and authoritative elements in Mr. Scelle's text, which he was reluctant to accept owing to the way in which the points had been elaborated. He wondered, for example, how the expression "*le lien juridique liant les parties résultait souvent d'un engagement arbitral pur et simple*" could be conveyed in English.

The meeting rose at 1.10 p.m.

⁹ Para. 8 of Mr. Lauterpacht's text (A/CN.4/L.36) read as follows :

"8. On the other hand, it has been considered that, in the light of experience, it is necessary to adopt provisions for rendering the undertaking to arbitrate—and the arbitral procedure in general—as effective as possible. Thus in the past the efficacy of the undertaking to arbitrate has often been impaired as the result of the absence of legal machinery for determining whether a particular dispute is covered by the treaty of arbitration or in consequence of the inability of the parties to agree on the terms of the *compromis* or the constitution of the tribunal. The Articles of the first two Chapters of the present draft are intended to meet difficulties of this nature."

181st MEETING

Wednesday, 6 August 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35, A/CN.4/L.36, A/CN.4/L.37, A/CN.4/L.39) (continued)

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

INTRODUCTION TO THE DRAFT ON ARBITRAL PROCEDURE (continued)

Paragraph 8 [18] (continued)

2. Mr. LAUTERPACHT reminded the Commission that Mr. Scelle had declared his readiness to amend the second sentence of his alternative text (A/CN.4/L.37), by substituting the word "pacte" for the words "nudum pactum". Thus amended, however, the sentence would make very little sense. He hoped the special rapporteur would agree to withdraw it.

3. Mr. HUDSON agreed that the second sentence in Mr. Scelle's text should be deleted, but the remainder had the advantage of being more detailed and explanatory than Mr. Lauterpacht's alternative text (A/CN.4/L.36).¹

4. Mr. SCELLE withdrew the second sentence in paragraph 8 of his text.²

Paragraph 8 of Mr. Scelle's text as amended was adopted by 7 votes to 2.

Paragraph 11 [21]

5. Mr. SCELLE said that there were no substantial differences between the two alternative texts for paragraph 11. He had accepted the last sentence of Mr. Lauterpacht's text, though with some hesitation since it dealt with a matter which the Commission had only considered very superficially.

Mr. Scelle's text for paragraph 11 was adopted by 7 votes to none with 2 abstentions.

* The number within brackets refers to the paragraph number in the "Report".

¹ See summary record of the 180th meeting, footnote to para. 90.

² This sentence read as follows: "Elle a considéré que le lien juridique liant les parties résultait souvent d'un engagement arbitral pur et simple, et que le compromis n'était parfois que la conséquence de ce 'nudum pactum'."

Proposal by Mr. Zourek of two new paragraphs (A/CN.4/L.39) to replace paragraphs 12 and 13 [22 and 23] of the introduction (A/CN.4/L.35)

6. Mr. ZOUREK pointed out that neither of the two alternative texts before the Commission (A/CN.4/L.36 and A/CN.4/L.37) mentioned the two concepts of arbitration, a matter which had been dealt with in the original text of paragraph 12. In order that the report might be both complete and objective, he considered it essential to indicate that there had been two trends of opinion in the Commission. That was all the more important because the commentary did not reflect the differences of view which had emerged during the discussions. To remedy that deficiency he proposed the inclusion in the introduction of two new paragraphs which might conveniently be inserted between paragraphs 5 and 6. The text read as follows :

"As was to be expected, two currents of opinion have arisen in the Commission :

"The first follows the concept of arbitration corresponding to contemporary international law, according to which the sole basis of international arbitration is the agreement of States, which are only amenable to jurisdiction when, and insofar as, they have so agreed. This concept is based on long-standing international practice and follows from numerous international treaties, in particular The Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. According to this view, international arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law, and is an international institution having the following characteristics :

(a) the voluntary nature of arbitration,

(b) the choice of arbitrators by the parties to the dispute,

(c) the determination by the parties of the rules of law to be applied.

"The second concept, which might be called that of judicial arbitration, tends to assimilate arbitral tribunals to true courts of law, by making them as independent as possible of the will of the parties. This is obviously calculated considerably to restrict action by governments, their influence on arbitral procedure and the importance of the *compromis*, in favour of the arbitral tribunal, whose powers become considerably wider than in previous practice.

"The majority of the Commission supported the second view. Hence the present text prescribes compulsory recourse to the International Court of Justice in all cases where the arbitrability of the dispute is contested by the parties and provides for compulsory constitution of the arbitral tribunal even if agreement cannot be reached on the *compromis*. This is also the reason why the text makes frequent provision for recourse to the International Court of

Justice when the parties are in disagreement and why it rejects the practice of *non liquet*".³

7. Mr. LAUTERPACHT said he could not support Mr. Zourek's proposal because it was based on the inaccurate contention that the Commission had accepted a new concept of arbitration. Surely the whole draft was based on recognition of the three elements which Mr. Zourek claimed were characteristic of diplomatic arbitration. In fact, they were the characteristics of judicial arbitration. The only innovation contained in the draft was that, in cases of deadlock between the parties, it provided machinery for rendering the existing obligation to arbitrate as efficacious as possible.

8. Mr. SCELLE said that it was less easy for him to criticize Mr. Zourek's text because its content had been dealt with in the original text of paragraph 12 (A/CN.4/L.35).⁴ He had decided to exclude that topic from his second text because of its somewhat controversial tinge. The draft articles accepted by the Commission represented a compromise between two trends of opinion which had inevitably arisen in the Commission, but in his opinion there was no need to mention that in the introduction. The Sixth Committee of the General Assembly was composed of persons who were fully competent to choose between the two.

9. Mr. KOZHEVNIKOV supported Mr. Zourek's proposal, which would amplify the introduction and increase its objectivity. It would give readers of the report a more accurate idea of what had taken place in the Commission.

10. Mr. HUDSON agreed with the aim of Mr. Zourek's amendment, since it was necessary to state in plain words the nature of the two trends implicit in the draft. He could not accept, however, the first sentence of the second paragraph, which seemed to go too far. It would be preferable to substitute the words "to some extent independent" for the words "as independent as possible".

11. Mr. YEPES also considered that some mention should be made in the introduction of the two concepts of arbitration.

12. Mr. FRANÇOIS said he could not accept Mr. Zourek's text as at present formulated, since it could not be claimed that the three characteristics of arbitration listed in the first paragraph were confined to diplomatic arbitration.

13. Mr. ZOUREK disagreed with Mr. François. If the present draft were accepted and took the form of an international convention, arbitration would lose some of its essential features and assume the character of obligatory jurisdiction, somewhat on the lines of that exercised by the International Court of Justice by virtue of the Optional Clause.

14. Mr. SCELLE said that, as Mr. Zourek's proposal had given rise to sharp differences of opinion, he would

³ This proposal was later issued as doc. A/CN.4/L.39.

⁴ See text in summary record of the 175th meeting, footnote to para. 14.

re-introduce paragraph 12 of his original text (A/CN.4/L.35)⁵ amended by the deletion of the second, third and fourth sentences of the second paragraph, beginning: "This principle of so-called diplomatic arbitration" . . . and ending: "as a source of law", since they implied a criticism of diplomatic arbitration.

15. The text as thus amended expressed no preference for either of the two concepts of arbitration. If it were not accepted he would be forced to vote against Mr. Zourek's proposal on the ground that it failed to recognize the advance made in recent years in the practice of arbitration.

16. Mr. LAUTERPACHT said that another criticism of Mr. Zourek's proposal was that it seemed to imply a contradiction between traditional and judicial arbitration. In his (Mr. Lauterpacht's) opinion, however, the only difference between the two was, that possibly the traditional concept of arbitration was based on the view that there must be agreement between the parties at *every stage* of the dispute in order to make the obligation to arbitrate effective. The Commission had rejected that view.

He then submitted an alternative text for that of Mr. Zourek.

The text read as follows :

"Two currents of opinion were represented in the Commission : the first follows the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, is based on the necessity of provision being made for the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking".

17. Mr. SCELLE and Mr. FRANÇOIS accepted Mr. Lauterpacht's text.

18. The CHAIRMAN considered that the Commission had agreed not to refer in the report to the two concepts of arbitration, since they could not be precisely defined and had certain purely academic features. However, there was nothing to prevent the Commission from reconsidering the matter.

19. Mr. HUDSON said that he had no recollection of the Commission having reached any such decision.

20. Mr. KOZHEVNIKOV suggested that the original text of paragraph 12 might be amplified by Mr. Zourek's proposal.

21. Mr. SCELLE thought it would be difficult to evolve a harmonious whole out of the original text of paragraph 12 and Mr. Zourek's proposal. He would prefer the Commission to adopt Mr. Lauterpacht's new text,

which brought out clearly that the whole draft was designed to place the obligation to arbitrate above the will of the parties. Not only did it reflect more accurately than paragraph 12 the discussions and decisions of the Commission but also it was more subtle and achieved finer shades of meaning. Nothing in it could be regarded as controversial.

22. Mr. KERNO (Assistant Secretary General) wondered whether Mr. Zourek might be prepared to withdraw his proposal in favour of Mr. Lauterpacht's text. If not, perhaps it might be possible to agree on a compromise text.

23. Mr. el-KHOURI supported Mr. Lauterpacht's text.

24. Mr. YEPES moved that the Commission first decide the question whether or not mention should be made in the introduction of the two concepts of arbitration.

The question was decided in the affirmative by 6 votes to none with 3 abstentions.

25. The CHAIRMAN ruled that further discussion on Mr. Zourek's proposal and Mr. Lauterpacht's text be deferred until the latter had been circulated.

Paragraph 12 [22]

26. Mr. SCELLE said that he had accepted Mr. Lauterpacht's text for paragraph 12.

Mr. Lauterpacht's text was adopted by 8 votes to 2.

Paragraph 13 [23]

27. Mr. SCELLE said that he had accepted Mr. Lauterpacht's text for paragraph 13.

28. Mr. HUDSON, referring to the second sentence, said he doubted whether "most" of the provisions of the draft were qualified by the recognition of the admissibility of alternative solutions agreed upon by the parties. He proposed that the word "many" be substituted for the word "most".

29. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Hudson's amendment conformed entirely with Mr. Scelle's text for that sentence.

Paragraph 13, as amended, was adopted by 8 votes to none, with 2 abstentions.

Paragraph 14⁶

30. Mr. SCELLE said that he accepted Mr. Lauterpacht's text for paragraph 14.

⁶ Paragraph 14 of document A/CN.4/L.36 read as follows :

"14. The Commission deems it at present premature to express an opinion as to the various methods contemplated in Articles 17 and 23 of the Statute, for giving formal sanction to the final draft which may emerge from the deliberations of the Commission and the General Assembly. Yet it believes that the adoption of the draft code of arbitral procedure is bound to be of usefulness. Such approval need not, in the first instance, assume the form of a convention. Even if approved through some less formal text or procedure, the draft — which is based both on past practice and the

⁵ *Ibid.*

31. Mr. HUDSON proposed the deletion of paragraph 14. It was altogether premature at the present stage to express any opinion as to the final form which the draft would take.
32. Mr. KOZHEVNIKOV agreed with Mr. Hudson. Paragraph 14 was entirely inappropriate in the introduction. Even if it were possible to endorse such an evaluation of the work done, it was neither timely nor proper for the Commission to do so. Furthermore, as the Commission was aware, he regarded the draft as marking a retrogression rather than an advance.
33. Mr. SCELLE contended that such a paragraph would be useful, since the Commission should not remain indifferent to the fate of its work. The introduction should close on a hopeful note, and it was fitting for the Commission to declare now that the draft represented an advance in international law.
34. Mr. LIANG (Secretary to the Commission) suggested that it was necessary to substantiate the argument in paragraph 14 that the adoption of the draft was bound to be useful. Again, the text might be modified in order to avoid confusion between the present and final drafts on arbitral procedure. That could be done by the substitution of the word "a" for the word "the" before the words "draft code", and the insertion of the words "along the lines of this document" after the words "arbitral procedure" in the second sentence.
35. Mr. FRANÇOIS said that he had no objections to the substance of paragraph 14. The view stated in the third sentence was perhaps too modest. The decisions of the Commission itself had a certain weight even if they did not result in the adoption of an international convention. However, he did not believe that the inclusion of such a paragraph in the introduction was opportune at the present stage in the Commission's work. To express enthusiasm for the results so far achieved would be premature. That could only be done when the work had been completed.
36. Mr. LAUTERPACHT observed that no one had raised substantial objections to paragraph 14, except Mr. Kozhevnikov and Mr. Hudson, who had dissociated themselves from the draft as a whole. The purpose of the paragraph was to place the subject in historical perspective and to record that the Commission had not merely produced a repetition of existing international instruments.
37. He accepted the Secretary's amendments to the second sentence, and also proposed the insertion of the word "eventual" before the word "adoption" in the same sentence.
-
- lessons to be derived from it — may be of distinct utility as affording a guide for the drafting and interpretation of instruments creating the obligation to have recourse to arbitration. In conjunction with the governing authority and authority of the International Court of Justice, some such codification and development of the law of arbitral procedure is bound to serve the cause of international justice."
38. In order to meet Mr. François' objection to the third paragraph, he proposed that the opening of the fourth sentence be redrafted to read: "Whether approved or not by some less, etc.".
39. Mr. SCELLE, replying to Mr. François, said that paragraph 14 struck a note of optimism but certainly not of enthusiasm. It was surely not inappropriate for the Commission to express a hope that the draft would be useful.
40. Mr. KERNO (Assistant Secretary-General) said that it would be premature to adopt paragraph 14 in its present form. The Commission could not at present decide what was to be recommended to the General Assembly.
41. Mr. FRANÇOIS said that, as the report was to be circulated to Governments for comment, it was hardly fitting for the Commission to express the view that the draft it contained was bound to be useful.
42. Mr. ZOUREK considered that it would be presumptuous for the Commission to put forward any opinion on the value of a draft which was essentially provisional and would have to be reconsidered in the light of comments by governments.
43. Mr. el-KHOURI felt that there was little point in paragraph 14, since the General Assembly was not going to examine the present draft. Governments should be left to form their own views on it.
44. Mr. LAUTERPACHT felt that paragraph 14 was of little value unless it was generally approved by the Commission. In the circumstances, therefore, he would withdraw it, if Mr. Scelle agreed. He would, however, point out to Mr. François that he did not think it was presumptuous for the Commission to ask governments to devote the necessary time to examining the draft articles it had prepared and to state at the same time that, in its view, the adoption of a code of arbitral procedure would be useful.
45. Mr. SCELLE agreed with Mr. Lauterpacht that paragraph 14 would only serve a useful purpose if it reflected the general view of the Commission. In the circumstances he agreed, albeit regretfully, that it should be withdrawn.

Proposal by Mr. Zourek of two new paragraphs (A/CN.4/L.39) to replace paragraphs 12 and 13 of the Introduction (A/CN.4/L.35) (resumed from paragraph 25 above)

46. The CHAIRMAN drew attention to the texts proposed by Mr. Zourek (A/CN.4/L.39) and Mr. Lauterpacht.⁷ Mr. Zourek had now withdrawn the third sentence of the first paragraph of his proposal and agreed to amend the words "as independent as possible", in the fourth sentence, to read "very largely independent".

⁷ See paras. 6 and 16 above.

47. He asked whether Mr. Zourek and Mr. Lauterpacht had been able to agree on a joint text.

48. Mr. LAUTERPACHT replied in the negative.

49. Mr. ZOUREK said that there was a fundamental difference between his text and that proposed by Mr. Lauterpacht. Mr. Lauterpacht appeared to take the view that both currents of opinion reflected existing international law. He (Mr. Zourek) could not agree. It seemed clear to him that existing international law did not provide, for example, for compulsory recourse to the International Court of Justice in all cases where the arbitral nature of the dispute was contested, for compulsory constitution of the arbitral tribunal in the event of there being no agreement on the *compromis*, or for interim measures of protection other than at the request of the parties. As the special rapporteur himself had often stressed, many of the provisions contained in the draft articles were *de lege ferenda*, and could only be binding on States which accepted them.

50. Mr. el-KHOURI agreed that it was impossible to combine the texts proposed by Mr. Zourek and Mr. Lauterpacht. The former's views were basically opposed to the concept underlying the whole draft. For that reason he would vote in favour of Mr. Lauterpacht's text.

51. Mr. KOZHEVNIKOV also agreed that the two texts could not be reconciled. One of the two currents of opinion which had been represented in the Commission was in accordance with existing international law, the other one against it. His own views were based on existing international law, and he believed that it would be wrong for the Commission to depart from it.

52. The CHAIRMAN put Mr. Zourek's proposal, as amended, to the vote.

Mr. Zourek's proposal was rejected by 7 votes to 3, with 1 abstention.

53. The CHAIRMAN then put Mr. Lauterpacht's proposal to the vote.

Mr. Lauterpacht's proposal was adopted by 8 votes to 2, with 1 abstention.⁸

54. The CHAIRMAN indicated that the Commission had completed its consideration of the comments and the introduction contained in document A/CN.4/L.35. He would next put the comments and introduction, as amended, to the vote as a whole.

The comments and introduction, as amended, were adopted by 8 votes to 2, with 1 abstention.

REQUEST BY MR. HUDSON FOR INSERTION OF FOOTNOTE IN THE COMMISSION'S REPORT TO THE GENERAL ASSEMBLY

55. Mr. HUDSON asked the Commission's permission to append, at an appropriate place in the Commission's

Report to the General Assembly covering the present session, a footnote reading as follows:

"In explanation of his vote against the adoption of this draft as a whole, Mr. Hudson stated that he was unable to accept many of its provisions, in particular those envisaging limitations on the freedom of the parties resorting to arbitration."

56. At the request of Mr. HSU and Mr. FRANÇOIS, Mr. LIANG (Secretary to the Commission) read out the relevant parts of the summary record of the Commission's discussion of a similar request at its previous session,⁹ from which it appeared that Mr. François had expressed the hope that "the Commission would decide, from that day on, it would no longer accept detailed explanations, but merely a statement to the effect that for the reasons given in the summary records, one member was opposed to the adoption of a particular passage in the report". The Assistant Secretary-General had suggested that a standard formula might be used, reading as follows: "Mr. X. voted against this passage in the Report, for the reasons given in the summary record of the... meeting, page...". Mr. François' proposal had finally been adopted by 7 votes to 5.

57. The CHAIRMAN observed that the Commission must accordingly consider Mr. Hudson's request in the light of that decision.

58. Mr. LAUTERPACHT pointed out that the wording of Mr. Hudson's request did in effect contain an explanation of his grounds for opposing the draft. It contained a controversial argument to which the majority had no opportunity to reply. The inference which Mr. Hudson clearly meant to be drawn was that the draft, in his view, placed undue restrictions on the parties' freedom of action.

59. Mr. HUDSON said that he agreed that footnotes indicating individual members' dissent from the Commission's decisions should not contain explanations of their reasons. He had been careful not to include any such explanations in the wording he had proposed, and he submitted that what he said did not amount to an explanation.

60. Mr. el-KHOURI proposed that Mr. Hudson's request be granted, but that in order to avoid the difficulties to which such requests gave rise, the Commission should decide that no requests for the inclusion of footnotes expressing the attitude of individual members be granted in future.

61. Mr. KOZHEVNIKOV submitted that the meaning of the decision taken by the Commission at the previous session was not clear. It should therefore re-consider the whole question of principle involved. It was his view that any member of the Commission had the right to request insertion in the Commission's report to the General Assembly of any brief footnotes, explaining his views, which he desired.

⁸ This proposal became para. 24 in the "Report".

⁹ See summary record of the 128th meeting, paras. 31—56.

62. The CHAIRMAN said there was no doubt that the Commission was bound, for the present, by the decision it had taken at the previous session. If the Commission wished to adopt another rule for the future, as proposed by Mr. el-Khoury, that question would have to be considered later. He then put to the vote the question whether the Commission should grant Mr. Hudson's request.

The question was decided in the affirmative by 4 votes to 3, with 2 abstentions.

63. Mr. YEPES, explaining his vote, recalled that at the previous session he had expressed the view that members of the Commission should be allowed a certain latitude in explaining their attitudes in footnotes to the Commission's reports. His view had not been supported by any other member of the Commission. In those circumstances he had not felt called upon to vote either for or against Mr. Hudson's request.

64. Mr. el-KHOURI said that he had voted in favour of granting Mr. Hudson's request, but that he intended to propose that no footnotes be allowed in future.

65. The CHAIRMAN, speaking as a member of the Commission, said that he had voted against Mr. Hudson's request since he did not consider it acceptable under the terms of the decision taken at the previous session.

66. Mr. SPIROPOULOS said that he had not been present when the vote was taken. He wished, however, briefly to express his opinion. He recalled that at the previous session he had requested permission to include a brief statement of his views in the Report. His request had not met with favour, and he had been obliged to withdraw it. He did not think it was consistent, therefore, for the Commission to accept similar requests.

67. Mr. FRANÇOIS felt that those who had voted in favour of granting Mr. Hudson's request had done so not because they considered it to be in accordance with the decision taken at the previous session, but only because they wished to depart from that decision, either in the particular case under consideration, or as a general rule.

68. The CHAIRMAN recalled that he had clearly indicated before the vote that the Commission was bound by its previous decision.

69. Mr. LAUTERPACHT said that he had abstained because he had understood that the vote was on the question whether Mr. Hudson's request should be granted by way of an exception to the rule established by the Commission at its previous session. If he had understood that the vote was on the question whether the text proposed by Mr. Hudson was in accordance with that rule, he would have voted against, since he thought it was obvious that it was not.

70. Mr. KOZHEVNIKOV said that he had voted in favour of the principle which he had already stated.

71. Mr. HUDSON said that, in view of the discussion to which his request had given rise, he would withdraw it in favour of the following :

"Mr. Hudson wished to state that he had voted against the adoption of this draft as a whole."

His only object had been to protect himself against the charge that he was opposed to all the provisions in the draft. He was opposed to some, and in favour of others. In particular, he was opposed to many of those which restricted the liberty of the parties having recourse to arbitration ; he was not, however, opposed to them all.

Mr. Hudson's new request was granted unanimously.¹⁰

QUESTION OF THE INSERTION OF FOOTNOTES IN THE REPORT OF THE COMMISSION

72. The CHAIRMAN invited comment on Mr. el-Khoury's proposal that in future no requests for the insertion in the Commission's reports to the General Assembly of footnotes indicating the attitude of individual members of the Commission should be granted.

73. Mr. KOZHEVNIKOV said that he also intended to request the inclusion of a footnote in the Commission's report indicating his attitude on the draft. Would adoption of Mr. el-Khoury's proposal prevent him from doing so or did it refer only to future sessions ?

74. Mr. KERNO (Assistant Secretary-General) said that it seemed only fair to apply the same rule to all members of the Commission. As Mr. Hudson's request had been granted, Mr. el-Khoury's proposal could surely relate only to future sessions.

75. The CHAIRMAN agreed.

76. Mr. HUDSON said that he was firmly opposed to Mr. el-Khoury's proposal. Individual members of the Commission should be permitted to indicate what provisions they objected to, so as to avoid being saddled with the responsibility for something with which they did not agree.

77. Mr. SPIROPOULOS felt that there was much to be said on both sides in the question. He recalled that at the first session he had supported Mr. Koretsky's request for insertion of a footnote indicating his attitude, as he regarded it was the legitimate right of all members of the Commission. After discussion, the Commission had acceded to Mr. Koretsky's request, but the right had been subsequently abused. For that reason, and in order to avoid the lengthy discussions to which such requests seemed inevitably to give rise, he (Mr. Spiropoulos) now agreed with Mr. el-Khoury that no such footnotes should be permitted in future. The attitude of individual members of the Commission could be ascertained from the summary records.

¹⁰ Footnote 4 in the "Report".

78. Mr. FRANÇOIS drew Mr. Spiropoulos' attention to the fact that the summary records did not normally show how individual members of the Commission voted.

79. The CHAIRMAN pointed out that, if any member particularly wished it to be recorded how he or some other member of the Commission had voted on a question, he could always request a roll-call vote.

80. Mr. ZOUREK said that he also intended to request the insertion of a footnote indicating his attitude. He had therefore been about to ask the same question as Mr. Kozhevnikov. If the Assistant Secretary-General's view was accepted, he was satisfied.

81. On the question of principle, he felt that it would be inadmissible that an individual member of the Commission should not be able to request insertion in the Commission's report of, at the very least, a bare indication that he disagreed with the Commission's decision on a matter of importance. The Commission could always refuse individual requests if it felt that the right was being abused, but it surely could not deprive members of that right altogether.

82. Mr. LAUTERPACHT agreed with Mr. Hudson that members of the Commission should be able to protect themselves against being saddled with responsibility for a text with which they did not agree. He did not see how there could be any possibility of that right being abused, so long as explanations were not permitted.

83. Mr. HSU feared that Mr. el-Khoury's proposal was too restrictive. He agreed with Mr. Lauterpacht that the existing rule, established at the previous session, was sufficient to prevent abuse.

84. Mr. el-Khoury said that his main desire was to avoid weakening the Commission's reports in the eyes of governments and the General Assembly. It was common knowledge to all who read the Commission's reports that its decisions were not necessarily unanimous; that was surely sufficient to give individual members the protection they desired. He did not agree that the rule established at the previous session made abuse impossible.

85. Mr. KOZHEVNIKOV said that he could not support Mr. el-Khoury's proposal, which appeared to be based on a desire to conceal the true facts from public opinion.

Mr. el-Khoury's proposal was rejected by 5 votes to 3, with 1 abstention.

86. The CHAIRMAN noted that the Commission would therefore continue to be bound by the rule it had established at the previous session.

Nationality, including, statelessness (item 6 of the agenda)

87. The CHAIRMAN said that, in pursuance of the Commission's decision to accept Mr. Hudson's

resignation as special rapporteur on nationality, including statelessness, he had drafted the following letter:

"Dear Judge Hudson,

"On the occasion of your resignation from the position of special rapporteur on Nationality including Statelessness, which the Commission accepted on 4 August 1952, may I, on behalf of the Commission, express the most sincere regret that your present state of health should have made such a step necessary.

"As you will recall, the Commission had been most reluctant to lose the benefit of your learning and ability as special rapporteur and had expressed the earnest hope that you would reconsider your position and find it possible, by readjusting your many undertakings, to carry on the task which you had been requested to assume. The Commission accepted your resignation only when you persisted in the desire to be relieved. It has done so with the utmost regret.

"The Commission deeply appreciates the valuable contributions which you have made on the subject of nationality including statelessness and hopes that you will soon be restored to full health.

"With warm regards,

"I am,

"Yours sincerely."

The draft prepared by the Chairman was approved.

The meeting rose at 1.10 p.m.

182nd MEETING

Thursday, 7 August 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Filling of a casual vacancy in the Commission

1. The CHAIRMAN said that the Commission had to consider the question of filling the casual vacancy caused by the resignation of Sir Benegal Rau. He had received a communication from the Indian Chargé d'Affaires in Berne, presenting the candidature of Mr. Radhabinod Pal, and asking the Commission to give sympathetic consideration to filling the vacancy at its present session, so that the new member could take part in the Commission's work at its fifth session, instead of postponing any action until the membership of the whole Commission was renewed by the General Assembly. The Indian Chargé d'Affaires in Berne had also enclosed a *curriculum vitae* of Mr. Pal, which he proceeded to read out, copies of which would be made available to the members of the Commission.

2. He believed that the Commission should first decide the question of principle, whether it wished to elect Sir Benegal Rau's successor at the present session.

3. Mr. KOZHEVNIKOV believed that the information which the Chairman had given the Commission enabled it to proceed to the election forthwith.

4. Mr. el-KHOURI agreed. The fact that Sir Benegal Rau had been unable to attend the last three sessions of the Commission made it doubly desirable that a representative of the Indian legal system should attend the fifth session. He supported Mr. Pal's candidature.

5. Mr. FRANÇOIS said that all the information concerning Mr. Pal which had come to his ears encouraged him to support his candidature also.

6. Mr. CÓRDOVA and Mr. ZOUREK agreed that the Commission should proceed to the election forthwith and said that they too would vote in favour of Mr. Pal.

7. Mr. HUDSON said that, even assuming that his qualifications were outstanding, he doubted whether a new member of the Commission would be able to make a useful contribution at the next session, given the present stage of the Commission's work. For that reason and for reasons of expense, he doubted the necessity of filling the vacancy before the term of office of the present members expired.

8. Mr. el-KHOURI felt that article 10 of the Commission's Statute left it no choice but to fill a casual vacancy, provided it could find a suitable candidate.

9. Mr. KOZHEVNIKOV expressed his entire agreement with Mr. el-KHOURI. He was sure that, if Mr. Pal were elected, he would make a useful contribution to the Commission's work at its next session.

10. Mr. LAUTERPACHT agreed that the Commission now had the necessary facts at its disposal to enable it to proceed to the election forthwith.

11. Mr. YEPES said that Mr. Pal's *curriculum vitae* showed clearly enough that he would make an excellent choice.

12. Mr. HSU moved that the vote be adjourned until the opening of the following meeting, in order to enable members to consider further Mr. Pal's *curriculum vitae*, which he understood was to be distributed to them.

13. Mr. LAUTERPACHT said that he did not think the Commission should refuse any member's request for more time for consideration. He would therefore vote in favour of the motion for adjournment.

The motion for adjournment was adopted by 7 votes to 4.

Arbitral procedure (item 2 of the agenda)
(resumed from the 181st meeting)**REQUESTS BY MR. ZOUREK AND MR. KOZHEVNIKOV FOR INSERTION OF FOOTNOTES IN THE COMMISSION'S REPORT TO THE GENERAL ASSEMBLY**

14. Mr. ZOUREK requested that the following footnote be inserted at an appropriate place in the Commission's Report to the General Assembly covering the present session :

"Mr. Zourek said that he had voted against the draft articles on arbitral procedure in their entirety and against the comment because, for reasons which he had explained in the course of the discussion (see in particular the summary records of the 140th, 147th, 149th, 151st and 177th meetings), he could not accept the new concept of arbitration as it emerged from the essential provisions of the draft in question."

15. Mr. LAUTERPACHT and Mr. FRANÇOIS felt that, in order to bring the text proposed by Mr. Zourek into conformity with the rule established at the previous session, the reference to the fact that Mr. Zourek "could not accept the new concept of arbitration as it emerged from the essential provisions of the draft" must be deleted.

16. Mr. HUDSON said that, in his view, the text proposed by Mr. Zourek was in conformity with the rule established at the previous session and should be accepted without change. That rule, however, unduly restricted members of the Commission, and should, he suggested, be reconsidered.

17. Mr. YEPES agreed that Mr. Zourek's proposal was in conformity with the rule established at the previous session.

18. Mr. SPIROPOULOS said that, although he had some sympathy with Mr. Zourek's request, he must point out that the terms in which it was couched were very similar to those of the initial request made by Mr. Hudson at the previous meeting. The outcome of the lengthy discussion on that request had been perfectly clear; Mr. Hudson had felt obliged to replace his proposal by another, confined to the statement that he had voted against the draft as a whole.

19. As he (Mr. Spiropoulos) had stated during that discussion, the difficulties which inevitably arose out of members' requests for the inclusion of footnotes explaining their attitude, together with the constant danger that the practice would be abused, convinced him that in future no such requests should be entertained. Even if a member did not wish to request a roll-call vote, he could always explain his vote, and his explanation would appear in the summary records. The position of individual members was therefore fully safeguarded without any footnotes.

20. Under the rule established at the previous session, Mr. Zourek's proposal would, however, be acceptable if the clause quoted by Mr. Lauterpacht were omitted.

21. Mr. ZOUREK said that, as he had tried to point out at the previous meeting, the least that was required, if the report was to reflect the true facts accurately, was that individual members of the Commission should be permitted to indicate their disagreement with the majority on questions of capital importance and, very briefly, the reasons which they gave for disagreeing. The practice of explaining one's vote was itself open to abuse, and was time-consuming. Moreover, the summary records were not read by all who read the report.

22. Mr. KERNO (Assistant Secretary-General) said that his sole concern was that the Commission should accord the same treatment to all its members. In the circumstances he felt that it must either request Mr. Zourek to amend his proposal in the manner suggested by Mr. Lauterpacht, or, if it accepted Mr. Zourek's proposal as it stood, permit Mr. Hudson to re-introduce his original proposal.

23. Mr. FRANÇOIS thought the Commission had been in general agreement that any new rule, if adopted, should relate to future sessions only. For the present session, therefore, the Commission was bound by the rule established at the previous session.

24. The CHAIRMAN, speaking as a member of the Commission, recalled that the question of footnotes indicating the attitude of individual members had given rise to difficulties ever since the Commission's first session. That alone was an argument against the practice. Moreover, the need for an account of all that led up to the Commission's decisions, including the attitude of individual members, was met by the summary records. There was no possibility of condensing the views of all the individual members in the report itself. Thus the practice of permitting some members to include footnotes containing explanations

of the reasons why they had voted against the Commission's decisions necessarily entailed some unfairness towards others who did not request the inclusion of such footnotes. If members who opposed the Commission's decisions were permitted to explain why they had done so, there seemed no good reason why those who supported them should not be permitted to do the same.

25. A comparison had been drawn with the dissenting opinions permitted under the Statute of the International Court of Justice. There was, however, a great difference between the Commission, which was a technical body, and the International Court of Justice, or any other court of justice, whose decisions affected the rights and positions of the parties to a dispute. The Commission's decisions had no binding force in themselves; they had to be approved by the governments represented in the General Assembly.

26. For all those reasons he had voted in favour of Mr. el-Khoury's proposal that no footnotes indicating the attitude of individual members of the Commission should be permitted in future. That proposal had been rejected, however, and he was agreeable to the Commission continuing to be guided by the rule established at the previous session, which appeared to him to meet fully the legitimate desire of individual members of the Commission for protection against being saddled with responsibility for views with which they did not agree, in that it did not prevent them from referring to the passages in the summary records where their reasons for opposing such texts were stated. As could be seen, however, even that rule appeared to give rise to difficulties. Those difficulties had already arisen in the case of Mr. Zourek's request, and they would arise again in the case of Mr. Kozhevnikov's request, which was for the insertion of the following passage in a footnote to the Commission's report:

"Mr. F. I. Kozhevnikov said that the reason why he had voted against the preliminary draft on arbitral procedure in its entirety was that it was quite inadmissible from the point of view of modern international law, since it was contrary to the fundamental principles of free choice and independence of the parties in drawing up the arbitration procedure and it introduced an unlawful principle concerning the possibility of interference by the International Court of Justice. Hence he had also voted against the comments on the preliminary draft in question."

27. Mr. LAUTERPACHT, speaking on a point of order, submitted that what the Chairman had said as a member of the Commission was itself out of order. The Commission was not at present considering the question of principle. It could only do so if Mr. Hudson, who had suggested that the Commission reconsider the rule established at the previous session, made a formal motion to that effect, and the motion were adopted.

28. Mr. HUDSON moved that the Commission reconsider the rule established at the previous session.

29. Mr. el-KHOURI supported the motion, because he

considered that the present practice could result in misleading readers of the report.

30. Mr. KOZHEVNIKOV said that, in view of the Chairman's statement on the question of principle, he considered it essential to restate his own views on that question. He was also concerned at the implications in the statement by Mr. Spiropoulos, whom, as general rapporteur, it would have been reasonable to expect to be in favour of conveying in the report an accurate reflection of what had happened in the Commission rather than of concealing the true facts from public opinion or from governments.

31. The CHAIRMAN put to the vote the motion that the Commission reconsider the rule established at the previous session.

The motion was rejected by 6 votes to 5.

32. Mr. KOZHEVNIKOV recalled that the rule established at the previous session was that the Commission "would no longer accept *detailed explanations*". He did not think there was any disagreement on that point. Neither his proposal nor Mr. Zourek's, nor indeed that which Mr. Hudson had first submitted at the previous meeting, contained detailed explanations.

33. Mr. LAUTERPACHT said that the rule established at the previous session was perfectly clear.¹ It only permitted a reference to the relevant summary records. Even a brief explanation, such as that contained in Mr. Zourek's proposal, could contain a statement which was not acceptable to the majority of the Commission. The majority of the Commission did not agree that the draft articles were based on a new concept of arbitration; they considered that, in its most essential provisions, it was based on the established principles of arbitration.

34. Mr. KOZHEVNIKOV said that another thing which was surely perfectly clear was that the minority should enjoy the elementary right to express their views. Dictatorship of the majority was contrary to the fundamental principles of democracy.

35. Mr. FRANCOIS felt that the point raised by Mr. Kozhevnikov was irrelevant. If the minority was permitted to explain its views, the majority must be permitted to reply. The minority would then wish to present a rejoinder, and so on *ad infinitum*.

36. Mr. YEPES said that, for the considerations which he had advanced at the previous meeting, as well as at the previous session, he would vote in favour of Mr. Zourek's request. It was a principle of scientific liberty, recognized in all scientific bodies, that an individual member should be permitted to state, as briefly as possible, why he was opposed to the decisions of the majority. The adoption of such a practice by the Commission would enhance, rather than diminish, the

authority of its reports as works of scientific integrity. It could not be claimed that the views of individual members were adequately reflected in the summary records.

37. In reply to Mr. François he would point out that the majority's views were contained in the body of the report. There could be no question of their replying to the views of the minority as expressed in a few brief footnotes.

38. Mr. el-KHOURI said that no one was questioning the right of any member to hold whatever views he wished or to have them expressed in the summary records. A member had no right however, to insist on their inclusion in the report.

39. Mr. KOZHEVNIKOV said that he was in complete disagreement with Mr. el-Khouri. All members of the Commission had a right to express their views in the report, particularly when those views bore on fundamental matters. He was surprised that the right should be disputed in a body of international lawyers.

40. Mr. CÓRDOVA said that the analogy with the International Court of Justice was misleading for another reason, apart from that given by Mr. Alfaro. The deliberations of the judges of the Court were secret so that, if publication of dissenting opinions were prohibited, the minority would be saddled with the responsibility for the decisions of the majority. The Commission's discussions were not secret and were recorded in the summary records.

41. Some members appeared to have overlooked the fact that the report did not state merely the views of the majority. It often indicated the arguments advanced against a course of action taken by the Commission as well as those advanced in favour of it.

42. In the absence of further comment, the CHAIRMAN put Mr. Zourek's request to the vote, pointing out that the Commission had only to decide whether that request was in accordance with the rule established at the previous session, since that rule was still in force.

Mr. Zourek's request was rejected by 7 votes to 4.

43. Mr. YEPES explained that he had voted in favour of granting Mr. Zourek's request since he believed in scientific liberty. He would vote similarly in favour of inserting the text proposed by Mr. Kozhevnikov, although he believed that the report itself completely refuted all the arguments that text contained. For that very reason its inclusion could not harm the Commission.

44. The CHAIRMAN then put Mr. Kozhevnikov's request to the vote, after repeating the same remarks as he had made with regard to Mr. Zourek's.

Mr. Kozhevnikov's request was rejected by 7 votes to 4.

45. Mr. KOZHEVNIKOV said that he wished to place on record that the rejection of his request was, in his view, a flagrant denial of a fundamental right belonging

¹ See summary record of the 128th meeting, paras. 32 and 56.

to all members of the Commission and a direct violation of the Commission's Statute.

46. Mr. el-KHOURI said that he had voted against both requests because he was opposed in principle to the inclusion of footnotes indicating the attitude of individual members of the Commission, and because the texts proposed were not in conformity with the rule established at the previous session, which clearly banned any explanations, however brief.

47. Mr. KOZHEVNIKOV said that although the majority of the Commission had rejected the simple request he had made, he hoped they would not also reject a request for inclusion of a footnote reading as follows :

"Mr. Kozhevnikov said that he had voted against the preliminary draft on arbitral procedure in its entirety and also against the comments."²

48. Mr. ZOUREK said that rejection of his request, which he had purposely worded merely as an expression of his own personal views, made it impossible for those views to be adequately reflected in the report and thus conflicted with a fundamental principle of scientific liberty. In order that the report should not give an incomplete and entirely inaccurate picture of the true situation, he requested insertion of the following text as a footnote :

"Mr. Zourek said that he had voted against the draft articles on arbitral procedure in their entirety and against the comment, for reasons which he had explained in the course of the discussion (see in particular the summary records of the 140th, 147th, 149th, 151st and 177th meetings)."³

Mr. Kozhevnikov's and Mr. Zourek's requests were granted unanimously.

Consideration of the draft report of the Commission covering the work of its fourth session A/CN.4/L.38 and Add. 1 to 5, A/CN.4/L.38/Corr. 1, A/CN.4/L.38/Add.2/Corr.1)

49. The CHAIRMAN invited the Commission to consider the draft report on the work of the session (A/CN.4/L.38 and Add.1-5, A/CN.4/L.38/Corr.1, A/CN.4/L.38/Add.2/Corr.1).

CHAPTER I : INTRODUCTION (A/CN.4/L.38 and Corr.1)⁴

Paragraph 9 [10] *

50. Mr. KOZHEVNIKOV proposed the deletion of paragraph 9 on the ground that the Commission could not claim to have made progress at the present session.

² Footnote 4 of the "Report".

³ *Ibid.*

⁴ Mimeographed document only. It was incorporated, with drafting changes, in the "Report" of the Commission as Chapter I (see vol. II of the present publication). Drafting changes are given in the present summary record.

* The number within brackets refers to the paragraph number in the "Report".

51. Mr. LIANG (Secretary to the Commission) observed that the use of the word "progress" in such a context did not imply any evaluation of the work done. However, in order to meet Mr. Kozhevnikov's point, the words "The progress in" might be deleted.

52. Mr. KOZHEVNIKOV accepted the Secretary's suggestion.

The Secretary's suggestion was adopted.

Proposal by Mr. el-Khoury for an additional paragraph

53. Mr. el-KHOURI said that chapter I must contain a paragraph stating that the Commission had taken note of General Assembly resolution 601 (VI) concerning the Commission's report on its third session.

54. Mr. SPIROPOULOS supported Mr. el-Khoury's proposal and said that a text in that sense would be submitted to the Commission at its next meeting.

On that understanding chapter I as amended was approved.

CHAPTER III : NATIONALITY, INCLUDING STATELESSNESS (A/CN.4/L.38/Add.2 and Corr.1)⁵

Paragraph 6 [30]

55. Mr. LAUTERPACHT said that the origin of the suggestion referred to in the third sentence was not clear. He therefore proposed the insertion of the words "by the special rapporteur" after the word "suggested".

It was so agreed.

Paragraph 7 [31]

56. Mr. HUDSON proposed the deletion of the second sentence and the consequential deletion of the first word in the third sentence.⁶

Mr. Hudson's amendment was adopted.

57. Mr. LAUTERPACHT said he was uncertain whether the third sentence was accurate, as he did not remember the Commission having decided that one or more draft conventions on the reduction of future statelessness were to be prepared for consideration at the next session.

58. He also wished to take the present opportunity to ask whether the Commission should not, at its next session, consider the possibility of amplifying the scope of its reports which, in their present form, gave a somewhat meagre account of what had taken place.

59. Mr. LIANG (Secretary to the Commission) said that the Commission's annual reports were prepared in

⁵ Mimeographed document only. It was incorporated, with drafting changes, in the "Report" of the Commission as Chapter IV (see vol. II of the present publication). Drafting changes are given in the present summary record.

⁶ The second sentence and the first word of the third sentence read as follows : "It did not present a draft of a convention on this topic, nor did it present any concrete proposals. Instead . . .".

their present form not in order to avoid technical difficulties but as a matter of policy. It was felt that unless the Commission had completed its work on a particular topic it should only submit to the General Assembly a very brief account of the progress made, in order to avoid the risk of tentative conclusions being discussed. The Commission's work was of such a character that only its final decisions and drafts ought to be made available to the general public.

60. Mr. SPIROPOULOS considered that that policy should be maintained.

61. Mr. LIANG (Secretary to the Commission) suggested that Mr. Lauterpacht's objections to the third sentence would be met if it were re-drafted to read :

“The Commission took the view that a draft convention on the elimination of statelessness and one or more draft conventions on the reduction of future statelessness should be prepared for consideration at its next session”.⁷

62. Mr. LAUTERPACHT said he would accept that text on the understanding that it conformed exactly with the decision taken by the Commission.

63. Mr. el-KHOURI asked that a footnote be appended to the fourth sentence, worded as follows :

“Mr. el-Khouri voted against the directives adopted by the Commission to guide the work of the special rapporteur”.⁸

He would not ask for the reasons for his opposition to be given in the footnote since they appeared in the summary records.

64. Mr. KOZHEVNIKOV said he would submit at the next meeting the text of a footnote indicating that he had voted against the decision taken by the Commission concerning the preparation of draft conventions on statelessness.

65. Mr. ZOUREK said that he also wished his opposition to that decision to be recorded.

Paragraph 9 [33]

66. Mr. KERNO (Assistant Secretary-General) supported the deletion of the words “for reasons of health” after the words “to be relieved”.

It was so agreed.

67. The CHAIRMAN put to the vote chapter III as amended, and subject to the insertion of footnotes explaining the attitude taken by Mr. el-Khouri, Mr. Kozhevnikov and Mr. Zourek to the Commission's decision on the draft conventions on statelessness.

Chapter III was approved by 7 votes to none with 3 abstentions.

⁷ Instead of “The Commission took the view that a draft convention on elimination of statelessness should be presented to it at its next session, and that one or more draft conventions on the reduction of future statelessness should also be prepared for consideration at its next session”.

⁸ See summary record of the 183rd meeting, para. 44.

CHAPTER IV : RÉGIME OF THE TERRITORIAL SEA (A/CN.4/L.38/Add.1)⁹

Paragraph 4 [38]

68. Mr. KOZHEVNIKOV said that paragraph 4 conveyed a somewhat erroneous impression of the way in which the Commission had dealt with the report on the régime of the territorial sea. It seemed to suggest that the Commission had studied certain questions whereas in fact there had been only a preliminary discussion. The Commission had not taken any decisions, but had merely put forward some tentative considerations.

69. Mr. SPIROPOULOS said that, although the Commission did in fact vote on certain points in the report, he would be prepared to meet Mr. Kozhevnikov's point by substituting the word “discussed” for the word “considered” and the words “expressed some tentative views” for the words “took some tentative decisions”.

The rapporteur's amendments were adopted.

70. Mr. YEPES proposed the insertion of the words “and the air space above it” after the word “subsoil”. Without that addition paragraph 4 would be incomplete.

71. Mr. KOZHEVNIKOV supported Mr. Yepes' amendment.

Mr. Yepes' amendment was adopted.

Paragraph 5 [39]

72. Mr. YEPES proposed the insertion of the words “in view of the fact that it was pre-eminently a technical question” after the words “it was decided”.

73. Mr. SPIROPOULOS said that Mr. Yepes' amendment was unnecessary and, furthermore, not altogether accurate, since governments were being asked to furnish information not only on technical matters.

74. Mr. YEPES withdrew his amendment.

75. Mr. ZOUREK proposed the addition of the words “and to furnish any observations they might think fit” at the end of the first sentence in paragraph 5. The intention of the Commission's decision would then be fully explained.

Mr. Zourek's amendment was adopted.

76. Mr. FRANÇOIS proposed the addition of a new sentence at the end of paragraph 5, to read :

“The Secretary-General is asked to provide for the necessary expenditure for any such consultation”.

Mr. François' amendment was adopted.

Chapter IV as amended was approved unanimously.

⁹ Mimeographed document only. It was incorporated, with drafting changes, in the “Report” as Chapter IV (see vol. II of the present publication). Drafting changes are given in the present summary record.

CHAPTER V : LAW OF TREATIES (A/CN.4/L.38/Add.5)¹⁰
Paragraph 2 [48]

77. Mr. KOZHEVNIKOV considered that the draft to be presented by the new special rapporteur on the law of treaties would have to be a preliminary draft, not a final draft as was stated in paragraph 2.

78. Mr. LIANG (Secretary to the Commission) pointed out that the second sentence was partly a quotation from paragraph 75 of the Commission's report on its third session (A/1858).

79. Mr. KOZHEVNIKOV said that, in the light of the Secretary's explanation, he would not make a formal proposal, but must maintain his view that it was inappropriate to speak of a final draft at the present stage.

Paragraph 3 [49]

80. Mr. HUDSON suggested the deletion of the words "for reasons of health" before the word "resigned".

It was so agreed.

Chapter V, as amended, was approved by 9 votes to none, with 1 abstention.

**CHAPTER VI : RÉGIME OF THE HIGH SEAS
(A/CN.4/L.38/Add.4)¹¹**

81. Mr. HUDSON proposed that the subject matter of chapters V and VI be transposed so that the régime of the high seas might be dealt with immediately after the régime of the territorial sea, which was a related subject.

It was so agreed.

Paragraph 5 [45]

82. Mr. LIANG, Secretary to the Commission, suggested that it was undesirable to indicate that the Commission had deferred consideration of the report on the régime of the high seas owing to lack of time.

It was agreed to delete the words "owing to the lack of time at its disposal".

83. Mr. KOZHEVNIKOV proposed the deletion of the second sentence. He failed to understand why any special mention should be made of the International Convention for the Unification of Certain Rules relative to Penal Jurisdiction in Matters of Collision on the High Seas and other Risks of Navigation.

84. Mr. FRANÇOIS said that that reference, which could be omitted, had only been made in order to indicate that the Commission was aware of the significance of the Convention.

85. Mr. SPIROPOULOS said that the request mentioned in the second sentence formed part of the Commission's decision. It need not be retained, however,

since other more important decisions had not been referred to in the draft report.

86. Mr. KOZHEVNIKOV said that his proposal had been prompted by that very consideration. Furthermore, the decision in question had been taken in a somewhat cursory manner after very brief discussion.

87. Mr. SPIROPOULOS said he would be prepared to withdraw the second sentence of paragraph 5.

88. Mr. el-KHOURI pointed out that deletion of the second sentence might convey the unfortunate impression that the Commission had given no instructions to the special rapporteur for proceeding with his work on the régime of the high seas.

Mr. Kozhevnikov's proposal for the deletion of the second sentence was adopted by 6 votes to 3, with 2 abstentions.

Chapter VI as amended was approved by 8 votes to none, with 1 abstention.

**CHAPTER VII : OTHER DECISIONS
(A/CN.4/L.38/Add.3)¹²**

Paragraph 3 [55]

89. Mr. el-KHOURI said he did not recall the Commission having taken any definite decision regarding the duration of the fifth session.

90. Mr. LIANG (Secretary to the Commission) said that in earlier years the Commission had decided in favour of sessions of twelve weeks, but the previous year the Advisory Committee on Administrative and Budgetary Questions had reduced the period to ten weeks.

91. Mr. SPIROPOULOS formally proposed that the fifth session last for twelve weeks.

92. Mr. el-KHOURI seconded the proposal.
Mr. Spiropoulos' proposal was adopted.

93. Mr. KOZHEVNIKOV asked that chapter VII be put to the vote paragraph by paragraph.

Paragraph 1 (52) was approved by 9 votes to 1, with 1 abstention.

Paragraph 2 (54) was approved by 8 votes to none, with 3 abstentions.

Paragraph 3 (55) was approved by 9 votes to none, with 2 abstentions.

Chapter VII as a whole was approved by 9 votes to none, with 2 abstentions.¹³

The meeting rose at 1.5 p.m.

¹⁰ *Ibid.* Chapter VI.

¹¹ *Ibid.* Chapter V.

¹² See summary record of the 183rd meeting, para. 57.

183rd MEETING*Friday, 8 August 1952, at 9.45 a.m.***CONTENTS**

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*Chairman : Mr. Ricardo J. ALFARO**Rapporteur : Mr. Jean SPIROPOULOS.**Present :*

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

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

**Filling of a casual vacancy in the Commission
(*resumed from the 182nd meeting*)**

1. Mr. LAUTERPACHT proposed the election of Dr. Radhabinod Pal.

2. Mr. HSU said that, having now examined the *curricula vitae* of the candidates on the list submitted by the Indian Government, he had decided to support the candidature of Dr. Radhabinod Pal who, although neither a professor of international law nor a man of affairs closely connected with diplomacy would, as an eminent jurist, be able to make a valuable contribution to the work of the Commission.

Dr. Radhabinod Pal was elected by 9 votes to 1.

3. The CHAIRMAN announced that the necessary communication would be sent to Dr. Pal, whose election would also be recorded in chapter 1 of the general report.

Nationality, including statelessness (item 6 of the agenda) (*resumed from the 181st meeting*)

4. Mr. YEPES proposed that two special rapporteurs be appointed, one to deal with the problem of nationality and the other with the problem of statelessness.

Although the two subjects were closely linked, they could conveniently be dealt with separately ; the former was certainly too vast in scope to be undertaken by one person.

5. Mr. CÓRDOVA suggested that it would be over-ambitious to envisage anything being done on the question of nationality in general at the present stage of the Commission's term. The special rapporteur would have to confine himself to preparing a report on statelessness, and that was a subject that could not be divided.

6. Mr. el-KHOURI considered that one special rapporteur should be appointed.

7. Mr. SPIROPOULOS suggested that, once elected, it was for the special rapporteur to indicate how much he would be in a position to undertake.

8. Mr. LAUTERPACHT asked whether the purpose of Mr. YEPES' proposal was that in principle there should be two rapporteurs on the subject of nationality, including statelessness, or whether it was that the Commission should immediately proceed to the election of two special rapporteurs.

9. Mr. YEPES said that the reply to both Mr. Lauterpacht's questions was in the affirmative.

Mr. YEPES' proposal was rejected by 5 votes to 1 with 5 abstentions.

10. Mr. SPIROPOULOS said that it was a delicate matter to choose between the suitability of various members of the Commission for appointment as special rapporteur on nationality, including statelessness. If he ventured to make a proposal, therefore, it was only because of his particular interest in the question, as general rapporteur, and because the Commission could not escape the task of electing a special rapporteur to succeed Mr. Hudson.

11. It was natural that the Commission should elect as special rapporteur on any subject one of its members who held the majority view on that subject rather than one who was known to dissent from it. He wished, therefore, to propose Mr. Córdova, who had always played a prominent part in the debates on nationality, including statelessness, and whose views thereon were in sympathy with those of the majority of the Commission.

12. Mr. el-KHOURI seconded, and Mr. YEPES supported, the nomination of Mr. Córdova.

13. Mr. KOZHEVNIKOV said that he would vote in favour of Mr. Córdova because of his legal and scientific qualifications, and not for the reason put forward by Mr. Spiropoulos. The Commission could not base the election on the assumption that it would never reach agreement on the subject and that there would continue to be "a majority view" and "a minority view".

14. Mr. ZOUREK also felt that it was inappropriate to speak of "a majority view" and "a minority view". Each question was decided in the light of the principles of international law and on its scientific merits, as each member of the Commission saw them; on no two was the vote the same.

15. Mr. CÓRDOVA said that he felt it was his duty to accept nomination, since it was the duty of every member of the Commission to serve it to the best of his ability. He was bound to state, however, that he did not think he could be elected as holding "the majority view". If he were elected he would wish always to retain his freedom to support either the view held by the majority or that held by the minority on any particular question.

Mr. Córdova was unanimously elected special rapporteur on nationality, including statelessness, to succeed Mr. Hudson.

16. Mr. CÓRDOVA expressed his gratitude to the Commission for the confidence it had shown in electing him. It had thereby placed him, however, in the difficult position of having to succeed Mr. Hudson, whose work on the subject of nationality, including statelessness, had been of outstanding value. He (Mr. Córdova) would have to rely heavily on the assistance of Mr. Kerno, whose services had been enrolled as expert on that subject, and of the Secretariat.

17. He asked for confirmation of his understanding that the Commission would not expect him to submit a report on nationality in general, but only on the problem of statelessness. A special rapporteur on the subject of nationality itself would presumably have to be elected at a subsequent session, when the membership of the Commission during its next five years' term of office was known.

18. Mr. el-KHOURI recalled that the resolution adopted by the Commission at its 160th meeting¹ had referred only to statelessness. It went without saying that Mr. Córdova would not be expected to submit a report on the subject of nationality in general.

19. The CHAIRMAN agreed. The Secretariat would record the election of Mr. Córdova in the general report.

20. Mr. KERNO (Assistant Secretary-General) said that he wished to take the present opportunity of expressing his gratitude to the Commission for the confidence it had placed in him in appointing him expert on the subject of nationality, including statelessness. He wished to assure the Commission that he would fulfil his duties to the best of his ability, under the general guidance of the Chairman of the Commission, and in close collaboration with Mr. Córdova and the Division for the Development and Codification of International Law.

¹ See summary record of the 160th meeting, paras. 32 and 45.

Consideration of the draft report of the Commission covering the work of its fourth session (A/CN.4/L.38 and Add. 1 to 6, A/CN.4/L.38/Corr. 1, A/CN.4/L.38/Add.2/Corr.1, A/CN.4/L.38/Add.3/Corr.1) (resumed from the 182nd meeting)

21. The CHAIRMAN invited the Commission to continue its consideration of the draft report on the work of the fourth session.

**CHAPTER II : ARBITRAL PROCEDURE
(A/CN.4/L.38/Add.6)²**

22. Mr. YEPES moved the adoption of chapter II of the report as a whole.

*Paragraph 8 [18] * of the introduction*

23. Mr. LAUTERPACHT proposed the deletion of the word "also" in the second sentence of paragraph 8 of the introduction, since it obscured the meaning.

It was so agreed.

Article 13

24. Mr. LAUTERPACHT drew attention to a discrepancy between the two texts of article 13. The English version should be brought in line with the French, since the latter corresponded to the decision taken by the Commission.

25. Mr. LIANG (Secretary to the Commission) suggested that the English text should be changed to: "In the absence of agreement between the parties".

It was so agreed.

Chapter II of the report as amended was approved by 7 votes to 3.

**CHAPTER III : NATIONALITY, INCLUDING STATELESSNESS
(A/CN.4/L.38/Add.2 and Corr. 1) (resumed from the 182nd meeting)**

Paragraph 7 [31]

26. Mr. ZOUREK said that, in accordance with his statement at the previous meeting, he had prepared the text for a footnote to paragraph 7; it read as follows:

"Mr. Zourek pointed out that he had voted for the proposal to request the special rapporteur to submit to the Commission at its next session a detailed report on the basis of which a decision could be taken as to the possibility of preparing a draft convention on the elimination or reduction of statelessness. That proposal having been rejected, he had voted against the general directions to the special rapporteur on the subject."

² Mimeographed document only. It was incorporated, with drafting changes, in the "Report" as Chapter II (see vol. II of the present publication). The drafting changes are given in the present summary record.

* The number within brackets refers to the paragraph number in the "Report".

27. Mr. KOZHEVNIKOV read out the text of his own footnote to the same paragraph, which ran as follows :

"Mr. Kozhevnikov said that he had voted against the general directions as an effective basis for the establishment of draft conventions for the elimination of statelessness and reduction of future statelessness."

28. The CHAIRMAN said that the Commission must decide whether those two footnotes to the general report were in accordance with the rule adopted at the previous session,³ on the proposal of Mr. François, to the effect that from that day on the Commission would no longer accept detailed explanations, but merely a statement to the effect that, for the reasons given in the summary records, a particular member was opposed to the adoption of a particular passage in the report.

29. Mr. LAUTERPACHT moved that the Commission decide that the footnotes submitted by Mr. Kozhevnikov and Mr. Zourek were in conformity with the above rule.

30. Mr. SPIROPOULOS said that it was highly distasteful to him to have to criticize Mr. Zourek's text, but he was bound to point out that it conflicted with the Commission's rule, inasmuch as it gave the reasons why its author had voted against a certain decision.

31. Mr. ZOUREK pointed out that he had said no more than what was already in the summary records. The footnote could hardly be more concise.

32. Mr. HSU agreed with Mr. Spiropoulos.

33. Mr. SPIROPOULOS withdrew his objection to Mr. Zourek's text.

34. Mr. HSU deplored the action of the general rapporteur. If he considered that Mr. Zourek's footnote conflicted with the rule adopted by the Commission, he should have stood by his opinion, since otherwise the authority of the rule would be undermined to such an extent as to render it a dead letter.

35. The discussion had confirmed his own belief in the wisdom of the view expressed earlier by Mr. el-Khoury that in the future no footnotes to general reports should be accepted.

36. Mr. LIANG (Secretary to the Commission) pointed out that a difficulty would arise if Mr. Zourek's footnote were accepted, since it referred to a proposal which was not mentioned in paragraph 7.

37. Mr. KOZHEVNIKOV proposed that Mr. Zourek's footnote be accepted without further discussion, since it fully conformed to the rule adopted by the Commission at the previous session.

38. Mr. LAUTERPACHT supported Mr. Kozhevnikov's proposal.

39. Mr. YEPES considered that there was nothing objectionable in Mr. Zourek's footnote, which could accordingly be accepted.

40. Mr. FRANÇOIS contended that Mr. Zourek's text was not in conformity with the rule adopted by the Commission, in that it gave the reasons why he had voted against the decision on the draft convention on statelessness.

41. Mr. SPIROPOULOS observed that, if Mr. Kozhevnikov and Mr. Zourek had framed their footnotes to chapter III in the same form as those to chapter II, no difficulty would have arisen.

42. Mr. CÓRDOVA asked whether Mr. Zourek would be prepared to withdraw his reference to the proposal rejected by the Commission, since it was not mentioned in paragraph 7 of chapter III.

43. Mr. ZOUREK observed that the Commission had voted on two separate matters. Without referring to both he could not make his point of view clear. It would be more appropriate to amplify the account given in paragraph 7 than to ask him to withdraw part of his text. He emphasized that his text did not contain any reference to the substantive reasons he had given for voting against the Commission's decision. It was strictly confined to a factual account of what had taken place.

44. Mr. el-KHOURI said that he wished the text of his footnote to paragraph 7 to read :

"Faris Bey el-Khoury declared that, for reasons indicated in the summary records of the Commission, he was opposed to these general directions."

45. His opposition to the decision taken by the Commission concerning the proposed draft conventions on statelessness had been far stronger than Mr. Zourek's and he therefore appealed to him to accept a similar formula for his own footnote.

46. The CHAIRMAN, speaking as a member of the Commission, said that he would vote in favour of Mr. el-Khoury's and Mr. Kozhevnikov's footnotes, but against that of Mr. Zourek which, in fact, gave a statement of reasons. The rule adopted by the Commission was perfectly clear and was obviously designed to prevent any statement of reasons however short.

47. Mr. LAUTERPACHT thought that, on an impartial interpretation of the rule adopted by the Commission, there was nothing in Mr. Zourek's text which could be regarded as a statement of reasons.

48. Mr. KERNO suggested that a very slight verbal amendment to Mr. Zourek's text might render it acceptable to most members of the Commission.

49. Mr. ZOUREK said that he was prepared to substitute the words "When that proposal was rejected he voted against the general directions to the special rapporteur on this subject" for the words "That proposal having been rejected, he had voted against the general directions to the special rapporteur on the subject."

50. Mr. KOZHEVNIKOV said he wished to make a

³ See summary record of the 128th meeting, para. 56.

drafting amendment to his footnote by deleting the word "future".

Mr. Kozhevnikov's footnote as amended was accepted unanimously.

Mr. el-Khoury's footnote was accepted unanimously.

Mr. Zourek's footnote as amended was accepted by 6 votes to 4 with 1 abstention.

51. Mr. SPIROPOULOS said that the Commission's rule on footnotes must be complied with as long as it remained in force. He was unable to understand how members could support footnotes which violated that rule on the plea that they must uphold the principle of freedom to express personal views.

52. Mr. CÓRDOVA agreed with the general rapporteur that any member preparing a footnote for submission to the Commission must examine it by reference to the Commission's rule, but unlike Mr. Spiropoulos, he considered that Mr. Zourek's text did comply with that rule.

53. Mr. LAUTERPACHT explained that, at the previous meeting, he had voted against the proposal that the Commission's rule be reconsidered only because there was too little time left for that at the present session. He believed, however, that to deprive members of the right to express dissent and give their reasons for it was both objectionable in principle and contrary to the dignity of the Commission. On the other hand, footnotes might lend themselves to abuse in the form of propaganda or self-advertisement. Some solution to the problem must be found.

54. Mr. KOZHEVNIKOV said that undoubtedly the Commission would have to re-examine the question of footnotes. He considered it a fundamental right of each member to declare his personal views, particularly on questions of substance.

55. Mr. YEPES said he had voted in favour of Mr. Zourek's text because all members had the right to explain the reasons for their vote. The Commission was always free to waive any of its own rules in a particular case.

56. Mr. el-KHOURI maintained that, until it was abrogated, a rule must be complied with. Accordingly, though he had himself opposed the Commission's decision concerning the draft conventions on statelessness, he had voted against Mr. Zourek's footnote because it violated the rule adopted by the Commission. He agreed with Mr. Lauterpacht that the Commission would have to tackle the whole problem of footnotes.

Chapter III of the report was approved.

CHAPTER VII : OTHER DECISIONS (A/CN.4/L.38/Add.3 and Corr.1)⁴ (*resumed from the 182nd meeting*)

57. The CHAIRMAN drew the attention of the Commission to the text (A/CN.4/L.38/Add.3/Corr.1) submitted by the general rapporteur in response to Mr. el-Khoury's proposal that a reference be made in the general report to the fact that the Commission had taken note of certain resolutions adopted at the sixth session of the General Assembly.

The general rapporteur's text was approved.

The draft report as a whole as amended was adopted by 9 votes to none with 2 abstentions, subject to the necessary editorial changes by the Secretariat.

Closure of the session

58. The CHAIRMAN indicated that the Commission had completed its work for the fourth session.

59. Mr. el-KHOURI said that he wished to express the Commission's gratitude to its Chairman for his devoted service in that office and for his wise and patient conduct of its deliberations throughout the 49 meetings that had been held.

60. Mr. YEPES said that he wished to associate himself cordially with the well-merited tribute to the Chairman.

61. Mr. LAUTERPACHT said that, as a newcomer to the Commission, he wished to associate himself with the tributes paid by two members of long standing to the Chairman's dignified and statesmanlike conduct of what he was sure all, in retrospect, would agree had been a most successful session.

62. Mr. HSU wished to add a personal tribute to the Chairman's conduct of the Commission's debates, which had been in accordance with the best traditions of democratic procedure.

63. Mr. KOZHEVNIKOV, Mr. ZOUREK and Mr. CÓRDOVA associated themselves with the tributes paid to the Chairman.

64. The CHAIRMAN said that he was deeply grateful for all the kind remarks which had been made. His sole aim had been to advance the Commission's work in accordance with the established rules and to apply those rules to all its members with strict impartiality. He had been greatly assisted in that task by the co-operation of all members of the Commission. On their behalf, he wished to express his appreciation of the contribution made by all members of the Secretariat to the work of the fourth session, which he then declared closed.

The meeting rose at 11.40 a.m.

⁴ Mimeographed document only. It was incorporated in the "Report" as para. 53.

INDEX

ABBREVIATIONS

- Art., Article.
Conv., Convention.
GA, General Assembly.
ICJ, International Court of Justice.
ILC, International Law Commission.
Res., Resolution.
-

Note. The numbers refer to the pages of Volume I of this publication, except those preceded by II, which refer to the pages of the Report of the International Law Commission to the General Assembly in Volume II.

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