PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES D

ACTS AND DOCUMENTS CONCERNING THE ORGANISATION OF THE COURT

FOURTH ADDENDUM TO No. 2

ELABORATION

OF THE

RULES OF COURT OF MARCH 11th, 1936

(Extracts from the Minutes of 1934, 1935, 1936
arranged according to the Articles of the Rules)

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INTRODUCTION

The history of the Rules of Court adopted by the Permanent Court of International Justice on March 11th, 1936, replacing those originally issued on March 24th, 1922, and subsequently revised or amended at various dates, has been briefly described in the following letter sent on March 21st, 1936, by M. Hammarskjöld, Registrar of the Court at that time, to the Secretary-General of the League of Nations requesting him to transmit the text of the new Rules to Members of the League:

[Translation.]

" The first Rules of Court were adopted on March 24th, 1922, at the so-called preliminary session with which the Court entered upon its activities. In 1925-1926 they were amplified and amended in the light of the experience gained, and a revised text came into force on July 31st, 1926. On September 7th, 1927, a provision was added under Heading 2—Advisory Procedure —of Chapter II.

" On September 25th, 1930, the Assembly adopted a number of resolutions designed to give effect, as far as was possible without modifying the Statute, to the amendments to that instrument set out in the Protocol of September 14th, 1929, which, contrary to expectations, had not come into force by September 1st, 1930. At the same time, the Assembly expressed the hope that, as had been suggested in the report of the Committee of Jurists adopted by the Council on September 12th, 1930, the Court would give consideration to the possibility of introducing new regulations, on the basis of Article 30 of the Statute then in force and pending the entry into force of the revised Statute, with regard to the sessions of the Court and the attendance of the judges. The Court thereupon proceeded to amend certain articles of its Rules. These amendments were adopted and entered into force on February 21st, 1931.

" Consideration of the Rules for the purpose of the above-mentioned partial revision led the Court to the conclusion that it would be desirable to undertake a ' general revision ' of that instrument at a later date. In preparation for this revision— which, as originally intended by the Court, was to be based upon the Statute as amended under the Protocol of September 14th, 1929—the Court, in May 1931, set up four Committees of its own members between which were divided, for study and report, the provisions of the Rules then in force, together with the as yet uncodified decisions constituting its practice. The Rapporteurs of each of these Committees, under the chairmanship of the President of the Court, formed a Co-ordination Commission whose task it was to combine the work of the four other Committees.

" The latter submitted their reports at the end of 1933 and the beginning of 1934. After a preliminary discussion of their conclusions, the Court decided, in the first place, that the work should be continued on the basis of the Statute then in force— that is to say, regardless of the 1929 amendments; and, in the second place, that consideration should first be given to such amendments as might be regarded as urgent. The Committees were instructed to submit supplementary reports on this new basis, and each of the judges was invited to comment upon their proposals; with this material in hand, the Co-ordination Commission was to prepare a draft to be used as the basis for subsequent discussions. It accordingly drew up a report accompanied by a draft text for the whole of the Rules.

" At a short session held in May 1934, the Court examined part of the report, and the texts relating thereto were given a first reading. The work was completed at the 1935 Ordinary Session, and on April 10th, 1935, the Court passed, at first reading, a new text for the whole of its Rules. It was understood that the second reading should take place before the end of the year.

" As, however, the Court was fully occupied with its judicial activities, circumstances made this impossible. In the meantime, in September 1935, the Assembly decided that, subject to certain conditions, the amendments to the Statute adopted in 1929 should come into force on February 1st, 1936. The conditions having been fulfilled, the Court, when it met on the date in question, was faced with the necessity for combining the second reading of the text with a new revision so as to bring the provisions read a first time into consonance with the revised Statute.

" The Rules adopted on March 11th, 1936, as a result of the preparatory work briefly described above, are designed: (1) to supplement the former Rules by incorporating, for the convenience of litigants, the Rules evolved from the practice of the Court since 1926; (2) to arrange the provisions of the Rules in a more logical order; (3) to bring them into consonance with the letter and spirit of the revised Statute and the relevant resolutions of the Assembly. With regard to the third point, it may be noted that, though Article 25, paragraph 2,[1] of the revised Statute empowers the Court to provide in its Rules that one or more judges, according to circumstances and in rotation, may be dispensed from sitting, the Court has, on consideration, not seen fit to avail itself of this possibility for the time being, though it reserves its right to do so if and when circumstances should require."

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[1] See D 2, A.3, pp. 513-514, 542 and 547, for discussion on this subject.

As had been done in the case of the preparation of the original Rules of 1922 and of the subsequent revisions and amendments, the Court decided that the Minutes of Meetings and Documents relating to the preparation of the new Rules should be published in a volume of the Court's " Series D. Acts and Documents concerning the Organisation of the Court — Third Addendum to No. 2 ". This volume was issued towards the end of 1936 [1].

Owing, however, to the fact that the preparation of the new Rules, including the preparatory work of the Committees set up in 1931, had extended over a period of five years and that the actual discussions of the Court had been spread over three years (1934-1936), the volume, which is very bulky and has been prepared chronologically, is unwieldy and somewhat difficult to consult. The suggestion was therefore made that, at a suitable opportunity, a more concise volume containing the relevant extracts from the discussions arranged under the respective articles of the Rules of March 11th, 1936, should be prepared, thus enabling a reader to follow the history of a given article through the various stages of the revision to its final adoption, without constant reference backwards or forwards and consultation of the indexes and annexes. This opportunity, thanks to the generosity of the Carnegie Endowment, which, in the present juncture, has provided funds to assist the Court to continue the preparation and printing of certain of its publications, has now occurred.

The present volume contains, arranged under the respective articles of the Rules of March 11th, 1936, the essential extracts from—or in some cases summaries of—the Minutes of the discussions of 1934, 1935 and 1936. Similarly, in order to relieve the reader of the necessity for constant reference to annexes, the text of the draft articles discussed or adopted at the various stages—when this had not been given in the Minutes—has been inserted whenever this has seemed necessary to enable the discussion readily to be followed. The text of the Rules in force prior to March 11th, 1936, and the actual text finally adopted on that date have not, however, been included, as the opportunity afforded by the issue of the present volume has been taken also to include in it a table which had been prepared showing the text of the various articles from 1922 to 1936, *with all changes made in the intervening period. For the text as it was prior to the revision of 1936* or the new text of March 11th, 1936, the reader can therefore either refer to this table or, of course, to Series D, No. 1, 2nd edition, 1931, for the Rules in force prior to March 11th, 1936, and to the 3rd or 4th editions of the same publication (1936 and 1940) for the Rules of March 11th, 1936.

It has not been thought necessary to include in this volume the numerous reports of the Committees or proposals and observations by Members of the Court contained in the annexes to Series D, Third Addendum to No. 2. Where this has appeared desirable for the understanding of the discussion, extracts from these annexes—such as texts proposed by Members of the Court or passages from the Co-ordination Committee's report—have, *inter alia*, been inserted or appended as footnotes. References to these annexes in the volume D 2, Third Addendum, have, however, when necessary been included in order to enable a reader who so desires to refer to them in that volume. Similarly, page references to the Minutes in the same volume have been appended as footnotes to the passages included in this volume.

One lacuna in the preparation of the Rules of March 11th, 1936, should be mentioned: the Drafting Committee formed in 1935 to put provisions adopted in first reading into final shape presented no written or oral report; consequently, no detailed explanation was given of certain changes made by this Committee in texts adopted by the Court. References to this point will be found, *e.g.*, on pp. 145 and 330 of this volume.

Finally, it seemed desirable to give some explanation of the new plan of the Rules adopted which was discussed on various occasions during the course of the revision. Sometimes this discussion took place apart from any article—so that it could not well be included under the head of a particular article—and sometimes in connection with an article, where it seemed somewhat out of place under the system adopted in this volume. An Explanatory Note is therefore appended to this Introduction giving a brief account of the development of the plan adopted and including summaries of the principal discussions on the subject.

March 1943.

J. López Oliván,
Registrar of the Court.

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[1] The discussions and documents concerning the preparation of the Rules of 1922 and their subsequent revision or amendment in 1926 and 1931 are printed in Series D, No. 2, Series D, No. 2—Addendum and Series D, No. 2—Second Addendum of the publications of the Court. Particulars concerning the provision added in 1927 under Heading 2—Advisory Procedure—of Chapter II, are printed in Series E, No. 4.

EXPLANATORY NOTE REGARDING THE PLAN AND ARRANGEMENT OF THE RULES OF MARCH 11TH, 1936.

The grouping together under the respective articles of the relevant extracts from the minutes of the meetings having resulted in the omission of a number of general discussions on the plan of the Rules, the intention of this note is to explain, with reference to these discussions, the main changes in the arrangement of the Rules which were made in the course of the revision resulting in the adoption of the Rules of March 11th, 1936. It will also help the reader to understand the numerous changes in the numbering of articles which occur at various stages of the revision. In the earlier stages more particularly, it will be noticed that a number of draft articles bear numbers such as 4 *bis*, 4 *ter* or 32 *bis*. These provisional numbers point either to completely new draft articles proposed by the Co-ordination Commission or by one of the Committees or by an individual judge, or to the expansion and division into two or more articles of some existing article. In the case of Article 66 of the old Rules, its various paragraphs were replaced by separate articles in the Co-ordination Commission's draft. This explains the references, prior to the rearrangement of the Rules, to Articles 66, 66 (2), 66 (3), 66 (4) [1], 66 (5) as separate articles. Articles 66 (6) (appeals) and 66 (7) (proceedings before the Special Chambers) of the Co-ordination Commission's draft were, however, completely new articles.

On March 26th, 1935, the President circulated a note [2] pointing out that it was impossible to avoid renumbering the articles of the Rules owing to decisions already taken to change the position of certain articles and the adoption of a number of new ones. He said also that the Drafting Committee had been struck by the somewhat illogical order in which subjects were dealt with. Accordingly, two plans were submitted to the Court: A and B. On March 29th, a discussion [3] took place on the President's note, and the Court chose plan A. On the same date, the text of the draft Rules as provisionally adopted up to that date was circulated to judges, arranged according to this plan, which was as follows:

Plan of the Revised Rules.

Heading I.

CONSTITUTION AND WORKING OF THE COURT.

Section 1.

Judges and Assessors (Articles 1-8).
The Presidency (Articles 9-13).
The Registry (Articles 14-23).
The Special Chambers and the Chamber for Summary Procedure (Articles 24-26).

Section 2.

Working of the Court (Articles 27-31).

Heading II.

PROCEDURE BEFORE THE COURT.

Section 1.

General Provisions (Article 32).

Section 2.

Institution of Proceedings (Articles 33-39).
Written Proceedings (Articles 40-45).
Oral Proceedings (Articles 46-60).

Section 3.

Interim Measures of Protection (Article 61).
Objections (Article 62).
Counter-claims (Article 63).
Intervention (Articles 64-66).
Requests for the Revision or Interpretation of a Judgment (Articles 67-70).
Appeals to the Court (Article 71).
Friendly Settlement and Abandonment of Proceedings (Articles 72-73).

Section 4.

Proceedings before the Special Chambers and the Chamber for Summary Procedure (Articles 74-77).

Section 5.

Procedure in connection with Advisory Opinions (Articles 78-81).

Heading III.

JUDGMENTS AND ADVISORY OPINIONS AND THEIR PUBLICATION (Articles 82-88).

On April 3rd, 1935, the Court decided, as proposed by the Drafting Committee, to place the articles concerning the Registry following those concerning the Presidency [4] and rejected a proposal by a member of the Court to place the articles concerning the Chambers before those concerning the Presidency [5].

On April 4th, a discussion took place on the arrangement of the articles of " Heading II: Procedure before the Court ", reserving for the time being the position of Article 32 (31 of the Rules of March 11th, 1936) which gave rise to some discussion—some members advocating its removal to the end of the Heading, others its retention at the beginning and others again its inclusion in a group of " general provisions ". The Court decided that Heading II should commence with the articles concerning the institution of proceedings. It was also decided to adopt the Drafting Committee's suggestion to divide the Headings into sections each bearing a title and that there should be separate groups of articles for the institution of proceedings, the conduct of the case, the written proceedings and the oral proceedings. The position of Article 32 remained, however, reserved [6].

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[1] Subsequently deleted, see pp. 256 and 330 of this volume.
[2] See D 2, A. 3, p. 927.
[3] For full discussion see D 2, A. 3, p. 417.
[4] See under Article 14, p. 41 of this volume.
[5] See D 2, A. 3, p. 423.
[6] *Ibid.*, p. 427.

On April 5th, the arrangement of the articles concerning the oral proceedings was discussed [1]. A member of the Court remarked that the articles relating to the hearing came almost at the end of the section and wished Article 48 concerning new documents to be moved to the place occupied by Article 58 (translations) and the latter to be put in the position of Article 48.

It was replied by another judge that Article 48 essentially belonged to the group of articles concerning evidence which the Court had wished to include in the oral proceedings section and could not be moved as suggested. It was remarked that the section was headed " Oral proceedings "—a wider conception than " Pleadings " and also covered oral evidence.

The judge who had made the suggestion said that, in his view, Article 48 was not concerned with the nature of the evidence to be presented during oral proceedings. The President pointed out that Article 48 covered the production of documents in general. He considered that the adoption of the proposal would destroy the system which the Drafting Committee had sought to introduce and which formed a whole.

Upon a vote being taken, the Court rejected the proposal and the President said that the arrangement proposed by the Drafting Committee was adopted.

On April 8th, 1935,[2] the President submitted a new plan having regard as far as possible to the decisions taken by the Court during the examination of the Drafting Committee's text.

On this occasion, it was stated that Article 32 had been intentionally placed at the beginning of Heading II and separate from any section because it was to be regarded as a general rule applying to everything in that Heading. The plan presented was as follows:

Heading I.

Section 1. [No change.]

Section 2.

WORKING OF THE COURT.

Sessions (Articles 27-30).
Deliberations (Article 31).

Heading II.

PROCEDURE BEFORE THE COURT IN CONTENTIOUS Cases (Article 32).

Section 1.

GENERAL RULES.

Institution of Proceedings (Articles 33-37).
Orders for the Conduct of the Case (Articles 38-39).
Written Proceedings (Articles 40-45).
Oral Proceedings (Articles 46-60).

Section 2.

Special Rules (formerly Section 3). [No change.]

On April 9th, 1935, a further discussion took place on the arrangement of the articles. [3] According to the plan submitted, the articles concerning judgments and advisory opinions (82 to 85 and 86—74 to 77 of the Rules of March 11th, 1936, and an article corresponding to Articles 84 and 85 of the Rules of March 11th, 1936, and Article 67 of the revised Statute) were combined under Heading IV, together with Article 87 (Article 22 of the Rules of March 11th, 1936) and Article 88 (Article 75 of the old Rules—deleted: see below). The question was discussed whether the articles relating to judgments should be under a separate heading (as in the plan considered) on in Heading II. In the latter case, they would come under the operation of Article 32 (31 of Rules of March 11th, 1936) providing for the proposal by the parties of agreed modifications in the Court's procedure. It was observed that it was scarcely admissible that suggestions by the parties should be allowed to affect the form and contents of judgments. On the other hand, it was pointed out that these articles naturally belonged under the heading " Contentious Procedure ". It was also remarked that it would be a mistake to group together provisions relating to judgments and advisory opinions. Such a method would create the impression that the Court wished to emphasise the similarity of the two procedures.

To overcome the difficulty regarding the possible influence of Article 32, it was suggested that the wording of that article should limit its scope to certain sections of Heading II.

The Court decided: (1) that Articles 82 to 85 relating to judgments should be added to Heading II, and Article 86 relating to advisory opinions to Heading III; (2) that Article 32 should begin with the words: "The Rules contained in Sections 1, 2, . . . of this Heading " (instead of " The Rules contained under this Heading "). The actual sections mentioned were subsequently altered as the result of a readjustment. The question of the position of the remaining two articles in the Heading IV was considered on April 10th, 1935.[4] It had been proposed by the Second Committee and the Co-ordination Commission that Article 88 (75 of the old Rules) should be deleted [5] and it was stated that the article had never in practice been applied owing to the fact that, under the system adopted by the Court, there was not one original text of a judgment, etc., but

[1] For full discussion, see D 2, A. 3, p. 435.
[2] See D 2, A. 3, p. 438.
[3] For full discussion, see D 2, A. 3, p. 451.
[4] For full discussions, see D 2, A. 3, p. 457.
[5] See D 2, A. 3, p. 881.

several, one of which was at The Hague and the others at Geneva or at the capitals of the States parties to the case. It would therefore be somewhat difficult to insert any correction in all the original copies. Various members of the Court seemed to interpret the article somewhat differently and, upon a vote being taken on the adoption of the article, it was rejected and the President declared it deleted.

Following the deletion of Article 88 it was decided to transfer Article 87 (old Article 65) to the part of the Rules headed " Registry " where it became No. 22, the former Article 22 of the draft being combined with Article 21.

At the same meeting, [1] the plan presented on April 8th, 1935, with the amendments made on April 9th, 1935, was further discussed. It was observed that Heading II outlined the various stages of a contentious case from the submission of the application or special agreement to judgment, giving the " general " rules and the " special " rules which might have to be applied. In this connection, the question was raised whether certain of the special rules (requests for revision or interpretation and appeals) should not logically be grouped, together with procedure before the Special Chambers, as special procedures and should follow the Section " Judgments ". The Court decided that the articles relating to requests for revision or interpretation should be placed in a section after the Section " Judgments ", but maintained the articles relating to appeals in the Section " Special Rules " and the Section concerning the special chambers before that concerning judgments. The question of the position of Article 32 was again raised, but it was pointed out that, if it were placed in a section, it could no longer possess the general character given it by the plan.

As a result of the decisions taken, the text as adopted in first reading was arranged according to the following plan (which differs only slightly in detail from that finally adopted for the Rules of March 11th, 1936):

Heading I.

[No change.]

Heading II.

CONTENTIOUS PROCEDURE.

Article 32.

Section 1. — Procedure before the Full Court: General Rules.
[No change.]

Section 2. — Procedure before the Full Court: Occasional Rules.
Articles 61-66. [No change.]
Appeals to the Court (Article 67).
Friendly Settlement and Abandonment of Proceedings (Articles 68-69).

Section 3. — Proceedings before the Special Chambers and the Chamber for Summary Procedure (Articles 70-73).

Section 4. — Judgments (Articles 74-77).

Section 5. — Requests for the Revision or Interpretation of a Judgment (Articles 78-81).

Heading III.

PROCEDURE IN CONNECTION WITH ADVISORY OPINIONS (Articles 82-86).

Owing to the entry into force of the revised Statute on February 1st, 1936, a number of articles had to be deleted altogether, while others were replaced or modified and this involved further adjustments in the numbering. Articles 2 and 4 were split up and rearranged in order to fill the gap left by the deletion of old Article 3 concerning deputy-judges (see under Articles 2, 3 and 4); Article 26 of the draft in first reading (Article 16 of the old Rules) also concerning deputy-judges, was deleted (see under Article 24, p. 53); the old Article 27 (adopted unchanged in first reading) was replaced by Articles 25, 26 and 27, the combination of Articles 24 and 25 of the draft in first reading (see under Article 24, p. 53) and the deletion of Article 26 enabled this to be done without affecting the preceding or subsequent articles. Articles 83 and 84 of the draft in first reading, corresponding to Articles 72 and 73 of the old Rules, were also deleted as their terms had been embodied in the revised Statute (see under Article 83, p. 347); while a final change proposed and made on March 10th, 1936,[2] after the second reading—namely, the transfer of Article 28 (to become Article 46)—gave rise to a last-minute change in the numbering of all Articles from 29 to 45.

On February 8th, 1936, a discussion took place on a proposal that the articles concerning the Chambers should come before those concerning the Registry. It was observed in this connection that the abandonment of the old numbering imposed additional labour not only on judges but also on those who would appear before the Court. On the other hand, it was pointed out that the chief reason why the articles concerning the Registry had been placed before those concerning the Chambers was that the Court comprised three essential elements: the judges, the Presidency and the Registry. The Chambers were not an essential part of the organisation. It was decided by vote to maintain the decision already taken—namely, that the articles concerning the Registry should be placed before those concerning the Chambers. [3]

On March 4th,[4] in connection with the articles concerning advisory opinions, the title of Heading III (Procedure in con-

[1] See D 2, A. 3, p. 459.
[2] See under Article 46, p. 159.
[3] For full discussion, see D 2, A. 3, p. 508.
[4] *Ibid.*, p. 699.

nection with Advisory Opinions) was criticised on the ground that it was doubtful if some of the articles in the Heading really came under the head of procedure. It was observed that the title in the Statute (Chapter IV) was " Advisory Opinions ". The President said that the question of headings was included in the terms of reference of the Drafting Committee. The title was subsequently amended in the sense indicated.

At the meeting on March 10th, 1936, the President, on behalf of the Drafting Committee,[1] presented, together with the text as adopted in second reading, a verbal report proposing further changes in the plan of Heading II: the number of sections was reduced to four by combining in one section all articles relating to procedure before the full Court. This became Section 1 of Heading II and was subdivided into two groups: " I—General Rules " and " II—Occasional Rules ". The sub-heading " Orders for the Conduct of the Case " in Section 1, which had been criticised,[2] was replaced by " Preliminary Measures ". These changes were approved, together with the above-mentioned transfer of Article 28, and embodied in the text finally adopted.[3]

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[1] For full discussion, see D 2, A. 3, p. 708.

[2] See under Article 37, pp. 120-122.

[3] The following lists: (*a*) of articles and paragraphs deleted from the old Rules, and (*b*) new articles and paragraphs added to the Rules of March 11th, 1936, may prove useful for reference:

(a) *Articles and Paragraphs deleted from the Old Rules.*

(The Articles or paragraphs marked with an asterisk have been discarded for reasons not connected with the coming into force of the revised Statute.)

Numbering of the old Rules

Article 2 (3).
" 3.
" 14 (1)* (suppression of the last part of this paragraph which referred to the judges being able to express their preference for election to one of the special Chambers).
(2) suppressed as a result of an addition to (1).
" 15 (2) (*cf.* Article 31 of the revised Statute).
" 16.
" 23 (suppressed and replaced by the present Article 20).
" 27 (1).
(2).
(3).
(4), sub-paragraph 2.
(5), sub-paragraph 1 (*cf.* revised Statute, Article 23 (2)).
" 28 (3) and (4).
" 35 (1), sub-paragraph 4*.
" 58 (2)*.
" 66 (4)*.
" 72 (*cf.* Article 65 of the revised Statute).
" 73 (*cf.* Article 66 of the revised Statute).
" 75 *.

(b) *New Articles and Paragraphs added to the Rules of March 11th, 1936.*

(Where the whole of the article is new, it is printed in heavy type.)

Article 3 (1).
" 13 (2) and (3).
" 20 (2) and (3).
" 25 (1), (2) and (3).
" 28 (2).
" 32 (1) and (3).
Article 33.
Article 35 (4).
" 37 (1), (2) and (3).
" 40 (2), (3), (4) and (6).
" 43 (3).
Article 45.
Article 47 (2).
Article 48.
Article 49 (2).
Article 52.
Article 53 (3).
" 57 (1).
" 58 (3).
" 61 (1), (3) second sentence, (4), (5), (7) and (9).
" 62 (5).
" 63 (*cf.* old Article 40, paragraph 2, No. 4, to which this article corresponds).
" 65 (1) and (3).
" 66 (2) and (3).
Article 67.
Article 69.
Article 71 (4).
" 72 (1).
Article 82.
Article 86 (" Final Provision ").

ABBREVIATIONS

The following abbreviations have been used in footnotes to indicate references to the Court's publications:

A 1, A 2, etc.	=	Series A, No. 1, No. 2, etc. (Collection of Judgments and Orders).
B 1, B 2, etc.	=	Series B, No. 1, No. 2, etc. (Collection of Advisory Opinions).
A/B 40, A/B 41, etc.	=	Series A/B, fascicule No. 40, No. 41, etc. (Collection of Judgments, Advisory Opinions and Orders; in 1931, the two series A and B were amalgamated into one series A/B and the first number of the new series was No. 40).
C 1, C 2, etc.	=	Series C, No. 1, No. 2, etc. (Pleadings, Oral Statements and Documents in Cases before the Court).
D 1	=	Series D, No. 1 (Acts and Documents concerning the origin of the Court—Statute, Rules of Court and other Constitutional Documents, Rules or Regulations).
D 2, D 2, A., D 2, A. 2,	D 2, A. 3 respectively =	Series D, No. 2, Series D, Addendum to No. 2, Series D, Second Addendum to No. 2, and Series D, Third Addendum to No. 2 (Preparation of the Rules and Their Revision or Amendment: Minutes of Discussions, Preparatory Work and Annexed Documents).
D 6	=	Series D, No. 6 (Collection of Texts governing the Jurisdiction of the Court (4th Edition, January 31st, 1932)).
E 1, E 2, etc.	=	Series E, No. 1, No. 2, etc. (Annual Reports).

* As stated in the Introduction, it has not been thought necessary to reproduce under each article either the text of the Rule in question in force prior to March 11th, 1936, or the text finally adopted on that date by the Court. For these texts, the reader is referred either to the Table (pp. 366-415) setting out the text of the various articles from 1922 to 1936, with all changes made in 1926, 1927 and 1931, or to Series D, No. 1, 2nd Edition, 1931, for the Rules as amended in 1931 and in force prior to March 11th, 1936, and to the 3rd or 4th Edition (1936 and 1940) of the same publication, for the Rules which came into force on that date.

Elaboration of the Rules of Court of March 11th, 1936

(Extracts from the Minutes of 1934, 1935, 1936
arranged according to the Articles of the Rules)

THE REVISION OF THE RULES

PREAMBLE

10.III.36 *.

The PRESIDENT drew attention to the new plan of the revised Rules prepared by the Drafting Committee.

. . . . . .

The draft of the revised Rules began with a " Preamble " and ended with a " Final provision ". Although the Court had not yet expressed an opinion on the first, they would probably agree as to the necessity for a preamble. Again, since the revised Rules were to replace the existing Rules, they must contain a final provision to that effect.

The President read the text of the Preamble in which the Drafting Committee had thought it right to insert a reference to the coming into force of the revised Statute, which had made the new edition of the Rules necessary. He drew attention to the terms of the final provisions in which the Court would have to insert the date of the coming into force of the new Rules.

. . . . . .

The PRESIDENT declared the Preamble [1] adopted.

ARTICLE 1 *(Article 1 of the old Rules).*

TERM OF OFFICE OF MEMBERS OF THE COURT

2.III.35 **.

The PRESIDENT, in opening the discussion on Articles 1 to 28 of the Rules, drew attention to the amendments to these Articles recommended by the Co-ordination Commission in its report [1].

He then read the existing text of Article 1 [2], adding that the proposed change in this text was a mere correction. The expression " subject to the provisions of Article 14 of the Statute " might convey the erroneous impression that the provision made in Article 14 of the Statute was the rule and not merely an exception, and so the Co-ordination Commission proposed to say:

> " Except in the case of a judge elected under Article 14 of the Statute, the term of office of a judge or deputy-judge shall commence on January 1st of the year following his election."

The President added that the correction seemed particularly necessary as regards the English text.

Baron ROLIN-JAEQUEMYNS asked whether it would not suffice to amend the English text in regard to this point; the two versions of the French text appeared to have the same meaning.

The PRESIDENT observed that no substantial objection to the text proposed by the Co-ordination Commission had been raised and that in any case no one opposed the correction of the English text. As regards the French text, the Drafting Committee would once more consider the precise import of the expression " *sous réserve* ".

The REGISTRAR recalled that he had suggested in the notes made by him in 1933 [3] the desirability of inserting in Article 1 a provision fixing the date on which a judge elected to fill a vacancy should take up his duties; in accordance with the practice followed, he had suggested the first day of the month following his election. This proposal had not, however, been adopted by the Second Commission [2].

The PRESIDENT pointed out that the Second Commission, basing itself on the terms of Article 14 of the Statute, had held that the person elected was, from all points of view, a judge of the Court as soon as he was elected. The question might be of importance from the point of view of the working of the Court. If a judge were elected at the beginning of a month and if an important case were begun before the end of the same month, it would be difficult to prevent the newly elected judge from sitting until the first day of the next month. And if he could sit, he would, of course, be entitled to receive his salary. It had therefore seemed better not to amend the Rules.

The REGISTRAR said that the important point was not to confirm the practice according to which a judge took up his duties on the first day of the month following his election, but to have a rule of some sort. If it were preferred that a judge should take up his appointment on the day on which he accepted his election, the Registrar had no objection.

Baron ROLIN-JAEQUEMYNS drew attention to Article 20 of the Statute and Article 5 of the Rules. Could a judge be said to have " entered upon his duties " before he had made his solemn declaration ?

Jonkheer VAN EYSINGA thought it would be illogical to make a judge elected at the beginning of a month, for instance, by an extraordinary Assembly, wait until the first of the following month before receiving the salary to which he was entitled. The question to be decided was when precisely his duties commenced. In regard to this point, they must be guided by the Statute. According to Article 10, " those candidates who obtain an absolute majority of votes . . . shall be considered as elected ".

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* D 2, A. 3, pp. 709-710.

** *Ibid.*, pp. 378-381.

[1] *Ibid.*, pp. 862-864.

[2] " *Article 1.* — Subject to the provisions of Article 14 of the Statute, the term of office of judges and deputy-judges shall commence on January 1st of the year following their election."

[3] See D 2, A. 3, p. 859, note 2.

[1] See Rules of 11.III.36.

[2] See D 2, A. 3, p 760.

Accordingly, as soon as a majority in the Assembly and the Council had voted for a certain person, that person was elected a judge. Acceptance of election was really only a formality, which moreover was not mentioned in the Statute. The date of his election was in law the date on which a judge entered upon his duties, and as from which, amongst other things, the salary mentioned in Article 32 of the Statute should be paid to him. Jonkheer van Eysinga saw no objection to the inclusion of a provision to this effect in the Rules.

M. GUERRERO, Vice-President, thought the best thing would be to say nothing in the Rules and to keep to the present practice. But, if it were desired to include a provision of some kind, the most logical and fairest rule would be to lay down that a judge should receive his salary as from the date on which he accepted election. To fix the date for the commencement of his salary as the first of the month following his election was a solution devoid of any basis. To fix it as the day on which a judge made his solemn declaration would be inconsistent with the fact that he was at the Court's disposal as soon as elected.

The REGISTRAR said that the existing practice and the suggestion which he had made were both based on the principle applied in the administration of the League of Nations according to which salaries were, as a rule, payable at the end of each month for the month just elapsed [1]. He admitted, however, that this principle, which was merely applied as an administrative regulation, was not immutable if, in a particular case, there were good reasons for modifying it.

On the other hand, the argument used by Jonkheer van Eysinga seemed also to apply in the case of a new election of the whole Court; in that case also, the date of entry upon their duties was not laid down in the Statute but only in Article 1 of the Rules.

Jonkheer VAN EYSINGA explained that he had had in mind only the case of judges elected under Article 14 of the Statute.

M. ANZILOTTI, from a practical standpoint, supported the Vice-President's proposal that nothing should be included in the Rules concerning the point; for a newly elected judge might himself wish the commencing date for the payment of his salary to be postponed in order not to be obliged at once to proceed to The Hague. Why render impossible arrangements of this kind which might be most useful and could do no harm ?

Legally speaking, it seemed correct to say that a judge's duties began on the day of his election—that was to say, of course, in the case of the filling of a vacancy; acceptance was merely a formality pending which the effect of election was suspended, but once acceptance was given it acted retrospectively.

The PRESIDENT, who thought that the proper place for a rule fixing the date as from which the salaries of judges should be payable was in a resolution or the financial regulations of the League of Nations rather than in the Rules of Court, would also prefer to leave the matter to be settled by practice.

Count ROSTWOROWSKI thought that, if the Court held that practice was not entirely in accordance with the rights of judges, it could modify it without putting anything in the Rules.

[1] *Cf.* Staff Regulations, Article 27, paragraph 1.

The PRESIDENT took a vote on the following question:

" Does the Court decide to include in the Rules a provision as to the moment at which a judge elected under Article 14 of the Statute enters upon his duties ? "

By five votes to four, the Court answered the question in the affirmative.

The PRESIDENT asked the Court to consider what the clause to be included in the Rules, in accordance with the vote just taken, should contain.

M. SCHÜCKING thought that the answer depended on whether the appointment of a judge was an exercise of unilateral authority or a contract. If it were held to be the latter, obviously the material date was the date on which a judge accepted election. If, on the other hand, it were held to be an exercise of authority, even though a judge's consent were asked, the date of election was the sole material date. Nevertheless, the Court could apply either of these views, because in practice the dates of election and acceptance would almost coincide. At all events, one of these dates should be taken.

M. GUERRERO, Vice-President, thought that in this matter the Court ought rather to adopt the contract theory and to fix the date on which a judge accepted election and thus placed himself at the disposal of the Court as the date on which the material advantages attaching to a judge's office should commence.

M. NEGULESCO, having regard to Article 20 of the Statute, considered that the date of taking up his appointment should coincide with the date on which a judge made his solemn declaration. Incidentally, that was the date as from which the incompatibilities of functions specified in the Statute became applicable to him.

M. GUERRERO, Vice-President, was afraid that the criterion suggested by M. Negulesco might involve an injustice; for there might be a considerable interval between the date of election and that on which a judge made his solemn declaration, if in the meantime there were no session. Upon accepting election, however, a judge was compelled to abandon his professional occupations; he should therefore also receive his salary.

M. ANZILOTTI observed that, as a rule, candidates for a judgeship would have stated beforehand that they would accept election.

M. SCHÜCKING pointed out how important it was from the point of view of the work of the Court that newly elected judges should enjoy their privileges and immunities from the date on which they accepted election or even from the actual date of election.

The PRESIDENT took a vote on the following question:

" Does the Court decide, in the case of a judge elected under Article 14 of the Statute, to take the date of his election as the date on which his term of office begins ? "

By six votes to two, with one abstention, the Court answered the question in the affirmative.

The PRESIDENT noted that the preparation of a draft embodying the decision taken was left to the Drafting Committee.

3.IV.35. *First Reading.*

Article 1 was adopted in first reading in the form proposed by the Drafting Committee. The text was as follows:

" The term of office of judges and deputy-judges shall begin to run on January 1st of the year following

their election, except in the case of an election under Article 14 of the Statute, in which case the term of office shall begin on the date of election."

3.11.36 *.

Second Reading.

The PRESIDENT invited the Court to begin a detailed examination of the articles of the Rules as adopted in first reading, and at the same time to consider the amendments necessitated by the coming into force of the revised Statute.

Members of the Court had received the document which contained the text of the Rules as adopted in first reading with, in pencil, the changes considered necessary by the President, in this connection.

In Article 1, the only change consisted in the deletion of the words " judges and deputy-judges " and the substitution for them of the words " members of the Court ". The revised Statute used the term " members of the Court " when referring to the judges elected by the Council and Assembly, and the word " judges " when referring both to these judges and to judges *ad hoc*.

Baron ROLIN-JAEQUEMYNS observed that the revised Statute seemed to employ the expressions " members of the Court " and " judges " indifferently.

M. FROMAGEOT wondered whether there would be any great objection to putting in Article 1 of the revised Rules: " *Les juges, membres de la Cour* ".

Jonkheer VON EYSINGA remarked that this question of terminology had been explained in a note to the 1935 minutes (p. 29 of this volume).

M. ANZILOTTI thought that paragraph 4 of Article 32 of the Statute, which said that " judges appointed under Article 31, other than members of the Court . . . ", might be cited in support of M. Fromageot's suggestion. There was a distinction between judges members of the Court and judges who were not members of the Court.

The PRESIDENT pointed out that, according to the revised Statute, a judge appointed under Article 31 to sit in a Chamber might be a member of the Court.

M. FROMAGEOT found nothing in M. Politis' report on the revised Statute [1] which attached any special importance to this question of terminology. If the revised Statute had meant to make an important distinction between the two expressions, some mention of the fact would certainly have been made.

The REGISTRAR pointed out that M. Politis' report was an oral one, made from somewhat brief notes. Some trace of a discussion on the subject was, however, to be found in the minutes of the Committee of Jurists of March 1929 [2].

M. NEGULESCO thought that the expression " judges members of the Court " was not in conformity with the Statute, which used the terms " judges " and " members of the Court ". The former term might be employed, either in a wider sense to indicate elected judges and judges *ad hoc*, or in a narrower sense, referring only to judges elected. In the latter case, it was equivalent to the term " members of the Court ".

M. GUERRERO, Vice-President, thought that the best thing to do would be to adopt the expression suggested by M. Fromageot and, when referring only to the fifteen elected judges, to say: " Judges members of the Court ".

Count ROSTWOROWSKI thought that, in the heading of the section: " Section 1. Constitution of the Court—Judges and Assessors ", the use of the word " judges " was justified, as it covered all categories. But in Article 1 of the Rules, the purpose of which was to specify when the term of office of elected judges began to run, they should say clearly that judges members of the Court were referred to. He therefore supported M. Fromageot's proposal.

M. URRUTIA observed that, as the object of Article 1 of the Rules was to fix the moment at which the term of office of elected judges began to run, it sufficed to say " members of the Court "; as regards other judges, there was no need to lay down when their term of office began; in the case of each judge *ad hoc* it would of course begin when he was called upon to take his seat.

The PRESIDENT was afraid that, by bringing into the Rules the modification proposed by M. Fromageot, the Court would be establishing a difference between the terminology of the Statute and that of the Rules; the expression " judges members of the Court " was nowhere to be found in the Statute. The expression used was always: " members of the Court ".

The PRESIDENT proposed that the Court should vote on the following question:

> " Does the Court decide to employ the expression ' judges members of the Court ' throughout in the Rules, instead of the expression ' members of the Court ' used in the draft text ? "

Jonkheer VAN EYSINGA wished first to make an observation: the expression " judges members of the Court " did not occur in the Statute. Furthermore, that expression gave the impression that there were judges who were not members of the Court and who were, so to speak, on an inferior footing, whereas on the contrary the elected judges had always made judges *ad hoc* feel that they were on a footing of absolute equality.

Baron ROLIN-JAEQUEMYNS would feel some difficulty in voting on the question as formulated by the President; it would be necessary to consider in turn each of the other articles in connection with which the same question arose.

The PRESIDENT, in view of Baron Rolin-Jaequemyns' remarks, submitted the following question:

> " Does the Court decide to employ in Article 1 of the Rules the expression ' judges members of the Court ', instead of the expression ' members of the Court ' used in the draft text ? "

By six votes to four, the Court answered the question in the negative.

The PRESIDENT observed that, at the first reading of this article, a question of principle had been decided by the adoption of the provision to the effect that the term of office of a judge elected under Article 14 of the Statute would begin on the date of election. Did the Court adopt this principle in second reading ?

M. NAGAOKA wished to know whether this provision had retrospective effect: in point of fact, a person did not definitely become a judge on the date of his election. The Secretary-General asked the person elected whether he accepted his election, and it was the date of acceptance which should be regarded as the first day on

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* D 2, A. 3, pp. 468-470.

[1] See E 6, pp. 92-98.

[2] See, for instance, p. 53 *in fine* of those minutes (League of Nations document C.166.M.66.1929.V).

which the person in question was entitled to call himself a judge of the Court. Was the meaning of the wording proposed for Article 1 of the Rules that membership of the Court was made retrospective to the date of election ?

The PRESIDENT said that that would be so if the candidate accepted his election.

The REGISTRAR observed that another consideration, which had not been particularly stressed at the first reading, assumed fresh importance now that the revised Statute had come into force: the question of incompatibility of functions. If a judge's functions began on the date of his election, he must that same day relinquish all his previous activities, including any functions such as a directorship of a commercial or other company, etc. Was that possible ? If the Court maintained the wording of Article 1 of the revised Rules, should they not, for practical reasons, have another article allowing a judge, on election, a period within which to relinquish his previous functions, in accordance with Article 16 of the revised Statute ?

M. FROMAGEOT considered that that was a question for a judge's conscience. It rested with him to do what he had to do as soon as was practically possible. A formal rule, allowing a shorter or longer period, might sometimes give rise to disadvantages which it was desirable to avoid.

The PRESIDENT also thought it would be very difficult to conform to a time-limit in such matters.

There being no further observations, the President noted that the Court maintained the decision of principle arrived at in March 1935 and that it adopted Article 1 of the revised Rules in second reading.[1]

Final Adoption.

Article 1 was finally *adopted* on 10.III.36.

ARTICLE 2 *(Article 2 of the old Rules).*

ORDER OF PRECEDENCE FOR MEMBERS OF THE COURT AND FOR JUDGES " AD HOC "

Note. — When this article was discussed in first reading, it contained four paragraphs; but, as a result of the entry into force of the Revised Statute, part of paragraph 1 and the whole of paragraph 3 were suppressed and paragraph 2 was later embodied in paragraph 1; thus, for the second reading, this article contained only two paragraphs.

2.III.35 *.

The existing text of paragraph 1 of this article was as follows:

> " Judges and deputy-judges elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over judges and deputy-judges elected at a subsequent session. Judges and deputy-judges elected during the same session shall take precedence according to age. Judges shall take precedence over deputy-judges."

No amendment having been proposed by the Co-ordination Commission, paragraph 1 of Article 2 was adopted without observation.

The PRESIDENT read the existing text of paragraph 2 of Article 2:

> " National judges chosen from outside the Court, under the terms of Article 31 of the Statute, shall take precedence after deputy-judges in order of age."

The Co-ordination Commission proposed to delete the word " national ", in order to leave it open to a State to choose as a judge *ad hoc* a person who was not one of its nationals. The President recalled that, at the previous discussions on this question [1], the Court had decided not to prejudge it in any direction.

There being no observations, the deletion of the word " national ", proposed by the Co-ordination Commission, was approved. Paragraph 2, as thus amended, was adopted.

The PRESIDENT read the existing text of paragraph 3 of Article 2:

> " The list of deputy-judges shall be prepared in accordance with these principles."

The Co-ordination Commission having proposed no changes, this paragraph was adopted without observation.

The PRESIDENT read paragraph 4 of the existing text:

> " The Vice-President shall take his seat on the right of the President. The other members of the Court shall take their seats on the left and right of the President in the order laid down above."

The Co-ordination Commission having proposed no change, this paragraph was adopted without observation.

3.IV.35.* *First Reading.*

Numbering of Paragraphs.

With regard to Article 2, the PRESIDENT observed that the Court must decide the question of the numbering of the paragraphs of articles containing more than one paragraph. He recalled in this connection the proposal of the Co-ordination Commission that paragraphs should be numbered [2]. The Drafting Committee had carried out this proposal.

There being no objections, the PRESIDENT declared that the proposal of the Drafting Committee was adopted.

There being no observations in regard to Article 2, the PRESIDENT declared the Article adopted in first reading.

3.II.36.**

The PRESIDENT opened the discussion on Article 2.[3] In the revised draft, paragraph 1, the words " members

* D 2, A. 3, pp. 381-382.

[1] *Cf.* discussion on Article 31 of the Statute, pp. 357-360.

* D 2, A. 3, p. 421.

** *Ibid.*, pp. 470-475.

[1] Text adopted in second reading was the same as the final text of 11.III.36.

[2] D 2, A. 3, p. 861, col. 2.

[3] Text for second reading—*i.e.*, text adopted in first reading with amendments considered necessary by the President in view of the entry into force of the Revised Statute:

" *Article 2.* 1. — Members of the Court elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over members elected at a subsequent session. Members elected during the same session shall take precedence according to age.

" 2 [subsequently included in paragraph 1]. — Judges chosen under the terms of Article 31 of the Statute of the Court from outside the

of the Court " had been inserted and the last sentence had been deleted. The third paragraph had been deleted.

A discussion [1] ensued concerning the dividing up of Articles 2 and 4 in order to fill the gap left by the deletion of the old Article 3 necessitated by the revision of the Statute.

In the course of this discussion, a number of proposals were made which gave rise to observations concerning the meaning of certain expressions used in the French and English texts of the old Article 2. After pointing out that three different expressions had been used in the French text which appeared to have the same meaning, M. GUERRERO, Vice-President, proposed that the expression " *prendre place* " should be used throughout.

The PRESIDENT drew the Court's attention to the English text, which used the same expression " take precedence " three times, whereas the French text used three different expressions. The inference was that the French text attributed the same meaning to these three expressions. The whole question was to ascertain which was the best French expression of these three: " *ont le rang* ", " *prennent place avant* " and " *ont la préséance* ".

M. GUERRERO, Vice-President, again pressed for the use of the expression " *prendre place* ".

M. FROMAGEOT accepted the Vice-President's proposal, the meaning of which was made clear by the word " *avant* " which occurred later on.

Jonkheer VAN EYSINGA insisted upon the distinction which must be made between precedence, an abstract conception, dealt with in paragraph 1, and seating, a practical question dealt with in paragraph 4.

The PRESIDENT thought that, if the French expression " *prennent place avant* " had the same meaning as the English expression " take precedence ", the Court should adopt that phrase.

M. URRUTIA observed that the old terminology of the Rules had hitherto given rise to no difficulty. Would it not therefore be best to leave it alone ?

The PRESIDENT said that the question had come up owing to the necessity for filling the gap left by the dropping of Article 3, as a result of the coming into force of the revised Statute. He took the opinion of the Court on the following question:

> " Does the Court wish to substitute the phrase ' *prennent place* ' for the phrase ' *prennent séance* ' in line 3 of paragraph 1 of Article 2 ? "

By seven votes to three, the Court answered the question in the affirmative.

M. GUERRERO, Vice-President, having asked that the words " *ont le rang* " in line 6 should be replaced by " *prennent place* ", the PRESIDENT took a vote on the following question:

> " Does the Court wish to substitute the words ' *prennent place* ' for the words ' *ont le rang* ' in line 6 of paragraph 1 of Article 2 ? "

By eight votes to two, the Court answered the question in the affirmative.

The PRESIDENT said that, as a result of the votes taken, paragraph 1 of Article 2 would run as follows:

> " Members of the Court elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over members elected at a subsequent session. Members elected during the same session shall take precedence according to age."

There being no objections, the President would regard this text as adopted.

With regard to paragraph 4, which referred only to public sittings, the word " *siéger* " seemed to be correct.

M. GUERRERO, Vice-President, was of the same opinion. The only change to be made in this paragraph was that they should say " the other members of the Court " instead of " the other judges ".

The PRESIDENT said that paragraph 4 would then run as follows:

> " The Vice-President shall take his seat on the right of the President. The other members of the Court shall take their seats on the left and right of the President in the order laid down above."

There being no objections, the President considered this text adopted.

The PRESIDENT then put the following question to the Court:

> " Does the Court decide that paragraph 4 of Article 2 shall become paragraph 2 of that Article ? "

M. ANZILOTTI would vote in the affirmative provided that the present paragraph 2 were transferred to another article.

By eight votes to one, with one abstention, the Court answered the question in the affirmative.

M. NAGAOKA formally proposed that the first two paragraphs of Article 4 should form Article 3, and that paragraph 3 of Article 4 and paragraph 2 of Article 2 should form Article 4.

The PRESIDENT put the following question to the Court:

> " Does the Court decide that paragraph 2 of Article 2 should be placed after Article 4 ? "

By seven votes to three, the Court answered the question in the affirmative.

The PRESIDENT, summing up, stated that Article 2 would consist of the old paragraphs 1 and 4; Article 3 would consist of the first two paragraphs of the present Article 4, and Article 4 would be composed of the present paragraph 3 of that Article and paragraph 2 of Article 2.

. . . . . .

Before adjourning the sitting, he proposed that, in the English text of paragraph 2 of Article 2, the word " terms " should be replaced by " provisions ".

This was agreed to.

6.11.36.*

Second Reading. Discussed under Article 4, Paragraph 2.[1]

The PRESIDENT said that, on reading the first four articles in the form resulting from the work of the last few days, he

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Court shall take precedence after the other judges in order of age.

" 3. [Deleted.]

" 4 [subsequently becomes paragraph 2]. — The Vice-President shall take his seat on the right of the President. The other judges shall take their seats on the left and right of the President in the order laid down above."

[1] For full text of this discussion, see D 2, A. 3, pp. 470-475.

* D 2, A. 3, pp. 493-495.

[1] *I.e.*, paragraph 2 of Article 2, adopted in first reading, transferred to Article 4.

had received the impression that the proposed second paragraph of Article 4 would be better placed as the last sentence of the first paragraph of Article 2. That paragraph would then run as follows:

> " Members of the Court elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over members elected at a subsequent session. Members elected during the same session shall take precedence according to age. Judges chosen under the provisions of Article 31 of the Statute from outside the Court shall take precedence after the other judges in order of age."

In this way, all questions of precedence would be grouped together.

Jonkheer VAN EYSINGA said that, if this suggestion were adopted, he would withdraw the proposal which he had handed in.[1] He observed, however, that, if paragraph 2 of Article 4 were embodied in paragraph 1 of Article 2, paragraph 2 of Article 2 would have to be amended as follows:

> " The Vice-President shall take his seat on the right of the President. The other *judges* shall take their seats on the left and right of the President in the order laid down above."

The expression " other judges " would also cover the judges *ad hoc*.

The PRESIDENT asked if there were any objection to the proposal.

M. ANZILOTTI wished simply to observe that, if this proposal were adopted, Article 2 of the Rules would deal with the precedence of judges whose character was only explained in the next article.

M. NAGAOKA wondered whether, if paragraph 2 of Article 4 were transferred to paragraph 1 of Article 2, the words " judges chosen from outside the Court " should not be replaced by " judges referred to in Article 3 ".

The PRESIDENT first of all took the opinion of the Court on the following question:

> " Does the Court decide to transfer the contents of paragraph 2 of Article 4 to the end of paragraph 1 of Article 2, subject to verbal modifications ? "

By six votes to four, the Court answered the question in the affirmative.

The PRESIDENT then put the following question to the Court:

> " Does the Court decide to replace the words ' chosen under the provisions of Article 31 of the Statute of the Court from outside the Court ' by the words ' referred to in Article 3 of the present Rules ' ? "

Jonkheer VAN EYSINGA observed that, in all provisions relating to judges *ad hoc*, there was always a reference to Article 31 of the Statute.

Baron ROLIN-JAEQUEMYNS thought that in any case the word " chosen " should be replaced by " selected " and the words " from outside the Court " deleted.

M. NAGAOKA could not accept the suggestion of Jonkheer van Eysinga. If there was merely a reference to Article 31 of the Statute, a reader would be compelled to undertake a certain amount of research. It would be simpler to refer him to Article 3 of the Rules themselves.

M. GUERRERO, Vice-President, suggested the phrase: " judges selected in accordance with the following article ".

Jonkheer VAN EYSINGA pointed out that the Rules were framed in pursuance of the Statute and must therefore contain references to the articles of the Statute in a large number of articles.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to replace the words ' selected under the provisions of Article 31 of the Statute of the Court ' by the words ' selected in accordance with the following article of the present Rules ' ? "

M. FROMAGEOT did not want the words " from outside the Court " to be deleted. These words informed the reader that the judges referred to did not normally belong to the Court.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to maintain the words ' from outside the Court ' ? "

By six votes to three, with one abstention, the Court answered the question in the affirmative.

The PRESIDENT then repeated the question which he had already put to meet M. Nagaoka's wish:

> " Does the Court decide to replace the words ' selected under the provisions of Article 31 of the Statute of the Court from outside the Court ' by the words ' selected in accordance with the following article of the present Rules from outside the Court ' ? "

M. ANZILOTTI said that he would vote in favour of the change, but solely with reference to the particular case. He would by no means agree to a general deletion of references to the articles of the Statute.

The PRESIDENT asked the Court to answer the question which he had just put.

Five votes were cast in the affirmative and five in the negative.

The PRESIDENT, recalling his habitual practice in sittings devoted to the revision of the Rules—namely, that when votes were equally divided he gave his casting vote in favour of the maintenance of the *status quo*, holding that there must be a true majority in order to change it—declared that the words " selected under the provisions of Article 31 of the Statute from outside the Court " would be maintained.

Jonkheer VAN EYSINGA proposed that in paragraph 2 the words " members of the Court " should be replaced by " the other judges ".

There being no objections, the PRESIDENT declared this proposal adopted. He went on to say that, as a result of the votes taken, Article 2 of the Rules now ran as follows:

> " *Article 2.* 1.—Members of the Court elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over members elected at a subsequent session. Members elected during the same session shall take precedence according to age. Judges selected under the provisions of Article 31 of the Statute of the Court from outside the Court shall take precedence after the other judges in order of age.
>
> " 2.—The Vice-President shall take his seat on the right of the President. The other judges shall take their seats on the left and right of the President in the order laid down above."

Article 2 was adopted in second reading.

[1] Annex 13, D 2, A. 3, p. 981.

10.III.36.*

Final Adoption.

The PRESIDENT said that the Drafting Committee had omitted the word " respectively ".

Previously there had been two categories of judges: judges and deputy-judges; now there was only one category: " members of the Court ", so that the word " respectively " was superfluous.

In the English text, the expression " judges nominated " (instead of " judges selected ") had been adopted as corresponding to the French " *les juges désignés* ".

Further, the French: " *en vertu des dispositions de* " had been rendered by " under ".

Article 2 as thus amended was finally *adopted.*

ARTICLE 3 *(New Paragraph together with Article 4, Paragraphs 2 and 3, of the old Rules).*

JUDGES " AD HOC ": NOMINATION

17.V.34 and 18.V.34.

See under Article 31 of the Statute (question of interpretation), pp. 358-359, for references to draft articles 4 *bis* and 4 *ter* of the Rules (subsequently Article 3) on 17.V.34 and 18.V.34 during discussion regarding that article.

18.V.34.**

Discussed under Articles 4 bis *and 4* ter.

The text of these draft articles, which had been submitted by M. Fromageot as 30 *bis* and 30 *ter* but were presented by the Co-ordination Commission as 4 *bis* and 4 *ter*, was as follows [1]:

> " *4 bis.* 1.—Any Government which is a party to a case and which considers that it is entitled, under Article 31 of the Statute, to appoint a judge to sit in that case, shall notify the Court as soon as possible and in any case before the commencement of any oral proceedings. This notification shall indicate the name of the person whom the Government intends to appoint from amongst those persons who fulfil the conditions laid down by Article 31 of the Statute.
>
> " 2.—Copies of the notification shall be sent, in accordance with Article 42 of the present Rules, to the other Governments concerned in the proceedings; the latter shall be entitled to submit any written or verbal observations on the subject.
>
> " 3.—It shall rest with the Court to decide whether the notification and proposed appointment satisfy the conditions laid down by Article 31 of the Statute. Nevertheless, the Court shall only overrule the proposed appointment by means of an order made after hearing the parties. In such case, the order shall be made at latest before the commencement of any further oral proceedings.
>
> " 4 *ter.*—If several parties to a case each claim to appoint a judge under Article 31 of the Statute, the Court shall decide whether any of them are in the same interest and, if so, shall fix a period within which they may by common agreement appoint a single judge fulfilling the conditions laid down by that article. If, at the expiration of this time, these parties have not notified the Court of their choice, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute."

The Co-ordination Commission's report contained the following comment:

> " With regard to Article 4 *bis*, it should be observed that, in accordance with the practice of the Court, it provides for a time-limit expiring on the date of the commencement of the oral proceedings for the appointment by the parties of judges under Article 31 of the Statute. . . . In the opinion of the Co-ordination Commission, the article enables the Court, either *proprio motu* or at the instance of a party other than that making the nomination, to examine the question whether a nomination already made is in conformity with the provisions of Article 31 of the Statute.
>
> " In the view of the Commission, the article leaves open the question whether a party whose original nomination has been rejected by the Court would be entitled to make another. The rule to the effect that the order overruling a proposed appointment must be made within the time-limit fixed for the appointment itself does not preclude this possibility, since the Court can always postpone the date for the commencement of the oral proceedings.
>
> " The author of the proposals which the Commission has provisionally inserted as Articles 4 *bis* and 4 *ter* above recommended that these articles should constitute Articles 30 *bis* and 30 *ter*. The Commission also had before it another proposal to the effect that the substance of these articles shall be inserted after Article 35. The Commission, however, provisionally adopting a third view to the effect that these articles—which, it has been said, do not concern questions of procedure but questions concerning the organisation of the Court—should be embodied in Article 4 or placed immediately following it, has adopted the solution indicated above."

The PRESIDENT invited the Court to consider the texts embodied in the Co-ordination Commission's report as Articles 4 *bis* and 4 *ter*.

These two articles represented two proposals made by M. Fromageot, who suggested that the first paragraph of Article 4 should be left under that article, but that the other paragraphs should be transferred and placed after Article 30 of the draft Rules which they were at present examining.

Baron ROLIN-JAEQUEMYNS asked whether the Court would not consider paragraph 1 of Article 4.

The PRESIDENT recalled that the Court had decided not to touch Articles 1 to 28 of the Rules.[1] They were now discussing Articles 4 *bis* and 4 *ter* because M. Fromageot had proposed that these two amendments should be placed as new articles after Article 30.

Baron ROLIN-JAEQUEMYNS had gathered that the Court was inclined to recognise in its Rules, as a general principle,

* D 2, A. 3, p. 714.
** *Ibid.*, pp. 31-34.
[1] *Ibid.*, pp. 862-863 and 914.

[1] This (provisional) decision was taken in 1934 because these rules had been amended as recently as 1931 and because they would in any case be affected when the revised Statute came into force (D 2, A. 3, p. 11).

that a State not " represented " upon it might appoint a judge *ad hoc* who was not of its nationality. But if Article 4, paragraph 1, were retained, this would be forbidden. He, for his part, would have been inclined to delete the words " of their nationality " in Article 4, paragraph 1, of the existing Rules.

The PRESIDENT, after explaining the origin of the discussion, said that, if judges now wished the Court to consider paragraph 1 of Article 4, he was prepared to make a proposal to that effect to the Court.

Baron ROLIN-JAEQUEMYNS referred to the proposal he had made in the annex to his letter of April 20th (Appendix 5 *a* to the Co-ordination Commission's report): [1]

> "*Article 4.* — I agree with the additions proposed in regard to the appointment of judges by the parties, under Article 31 of the Statute. It would, however, seem desirable in this connection to delete, in paragraph 1 and in the last paragraph, the words to the effect that a judge *ad hoc* should be of the nationality of the respective parties or, if there are several parties in the same interest, of one of them. There is, in fact, nothing to this effect in the Statute."

The PRESIDENT thought it would be best now to continue the discussion of Articles 4 *bis* and 4 *ter* and to return to Baron Rolin-Jaequemyns' proposal regarding paragraph 1 of Article 4 later on. For if Articles 4 *bis* and 4 *ter* were adopted, this would no doubt involve the deletion of paragraphs 2 and 3 of Article 4 and their transfer to another place in the Rules; there would then only remain paragraph 1 of Article 4, and if Baron Rolin-Jaequemyns thought that that paragraph should be amended, then would be the time to make a proposal to that effect.

The President next referred to the text of Article 4 *bis* (see above).

M. ANZILOTTI gathered that the words " (written or) verbal observations " in paragraph 2 meant oral observations made at the hearing. But he wondered if the text was sufficiently clear.

The PRESIDENT thought that that was what was meant by M. Fromageot, the author of the text.

He added that, when considering the text of the article on the previous day, the Co-ordination Commission had appreciated that the proposed text presupposed some action on the part of the Court, *inter alia* the issue of an order, before the appointment became definitive. But could the Court base its order simply on the expression of an intention ?

M. FROMAGEOT observed that the Court could of course reject the claim of a Government to appoint a judge *ad hoc;* it was this claim and not an intention which was referred to. But if the word " intends " was not satisfactory, they could simply say: "Any Government which is a party to a case . . . the name of the person in question."

Similarly, paragraph 3 could be drafted as follows:

> " It shall rest with the Court to decide whether the notification and appointment above mentioned satisfy the conditions laid down by Article 31 of the Statute . . ."

M. SCHÜCKING, with particular reference to the expression: " whom the Government intends to appoint ", in paragraph 1, observed that fresh obligations incumbent on Governments could not be laid down by way of the Court's Rules. States were entitled to appoint a judge *ad hoc*, but they were not under an obligation to inform the Court that they intended to appoint a certain person. There were also difficulties of a practical nature: for instance, after notice of an intention to appoint a certain person had been given and the Court had declared *ex officio* that there was no objection to that person, the latter did not automatically become a judge *ad hoc;* the Government concerned would still have to make the formal appointment.

M. FROMAGEOT saw no objection to the deletion of the last words of paragraph 1 and to saying: " the name of the person appointed ", or to drafting the beginning of paragraph 3 as follows: " It shall rest with the Court to decide whether the notification and appointment above mentioned . . ."

M. SCHÜCKING also observed that paragraph 2 made it possible for the other parties to criticise an appointment already made. But no time-limit was fixed for the exercise of this right. Such criticism might therefore be presented when the oral proceedings had begun; M. Schücking wondered whether this would not give rise to difficulties. It would be better that any objections should be presented before the beginning of the oral proceedings.

M. GUERRERO, Vice-President, raised the question whether the order overruling the appointment of a judge *ad hoc* could be made without the judge *ad hoc* being present in the Court. There was a certain amount of objection to the Court's making an order in his absence rejecting a right which might be of vital importance to the party concerned. Finally, M. Guerrero thought that it should be laid down that, if observations were presented by the other parties, the Court should be at once convened. When should the Court be convened ? This should be stated in the text. No doubt it should be before the beginning of the oral proceedings, so as to avoid repetition.

The PRESIDENT also wished to observe that it would be necessary to add a few words to the first paragraph to cover the case of advisory opinions, for instance: ". . . pursuant to Article 31 of the Statute *or Article 73* ter *of the Rules of Court* . . .". For it was only in the Rules that the organic right to appoint a judge *ad hoc* in an advisory case was to be found.

M. ANZILOTTI pointed out that, if they were to follow this suggestion, they should begin by amending the first line: " Any Government which is a party to a case. . . ."

M. Anzilotti thought, however, that it would be better to stick to the present method and to regulate contentious procedure and advisory procedure separately. But that was a general question which it was better not to raise at this point. As regards the substance, M. Anzilotti accepted the basic idea of the proposed article, which was as follows: it was for the Government concerned to appoint its judge *ad hoc;* it was for the other parties to dispute this appointment if they wished; and it was for the Court to decide any dispute arising. But the method which had been proposed for carrying out this idea was open to criticism. As regards this, M. Anzilotti agreed with what had been said by M. Schücking and the Vice-President. He added that a Government might prefer to present its observations orally at the commencement of the hearing on the merits. This would bring them to the beginning of the oral proceedings, and the question of the admission of the judge *ad hoc* would still be undecided.

[1] D 2, A. 3, p. 908.

M. GUERRERO, Vice-President, in order to meet the observation made by M. Anzilotti, suggested that they should say at the end of paragraph 2: " any written observations *before the commencement of the oral proceedings* ".

M. ADATCI recalled that the Vice-President had referred to the question of the presence of a judge *ad hoc* at the deliberation upon this question. Was his presence necessary ?

M. GUERRERO, Vice-President, thought that, since the question was whether the party had a right to have a judge *ad hoc*, it seemed necessary to allow it to be represented in the Court.

The PRESIDENT thought that to allow it to be represented in the Court would prejudge the question to be decided.

In the Customs Union case, which was, he thought, the only one in which this question had arisen, the Court had given its decision without judges *ad hoc* being present.

The REGISTRAR suggested that Article 18 of the Statute, as construed by the Court in Article 6 of the Rules, might perhaps afford a useful precedent.

M. GUERRERO, Vice-President, pointed out that the question did not concern the qualifications of a judge, but solely the right of a party to have a judge *ad hoc*.

M. ANZILOTTI wondered whether they might not add, after the addition proposed by M. Guerrero at the end of paragraph 2, the words: " within times to be fixed by the Court or by the President ".

The REGISTRAR drew attention to a difficulty which would arise if—as was possible—the appointment of a judge *ad hoc* was only made immediately before the beginning of the oral proceedings.

19.V.34.*

Articles 4 bis and 4 ter.

The PRESIDENT recalled that, at the meeting on the previous day, it had been agreed that the Co-ordination Commission should draft a new Article 4 *bis* embodying the alterations suggested at that meeting. The Commission had not, however, had time to go into this question with the necessary care, and he therefore proposed that the Court should proceed with the discussion, starting with Article 32.

M. GUERRERO, Vice-President, recalled that there were certain questions raised by Article 4 *bis* upon which the Court had not given the Co-ordination Commission the instructions necessary to enable it to prepare a text. In particular, there was the question whether the Court could decide to refuse a State the right to appoint a judge *ad hoc* in the absence of a judge *ad hoc* nominated by the said State.

He would be glad if the other members of the Court would give their views on this question before the Co-ordination Commission prepared their new text for Article 4 *bis*.

The PRESIDENT said that the solution of this question would entail certain preliminary researches, for instance, in regard to the practice followed at Geneva in applying Article 4 of the Covenant. It would therefore be best to adjourn the further discussion of this point.

He proposed that they should simply decide that the Co-ordination Commission should not draft any text of Articles 4 *bis* and 4 *ter* till the Court had first given its decision upon the question raised by the Vice-President.

* D 2, A. 3, p. 35.

31.V.34.*

Discussed under Article 4, Paragraphs 2 and 3.

The PRESIDENT said there was one question on which the Court had not yet decided. At the beginning of the session, the Court had agreed not to touch Articles 1 to 28.[1] But the Co-ordination Commission's report had contained two Articles—4 *bis* and 4 *ter*—corresponding to paragraphs 2 and 3 of the existing Article 4, with a note to the effect that a member of the Court proposed that they should be transferred to the part of the Rules relating to procedure. If the Court decided to transfer them, it could discuss these texts immediately.

The President felt that he should first consult the Court on the question of transferring Articles 4 *bis* and 4 *ter* to the chapter on procedure; for, unless it was decided to transfer these articles, the Court could not deal with them.

M. ANZILOTTI asked why it had been proposed to transfer the articles. Were they not concerned with the organisation and composition of the Court ?

The PRESIDENT said that the reason in favour of transferring them was that they unquestionably contained matters relating to procedure.

M. FROMAGEOT said that one part of the existing Article 4 related solely to the composition of the Court. This was the first paragraph, worded as follows:

> " In a case in which one or more parties are entitled to choose a judge *ad hoc* of their own nationality, the full Court may sit with a number of judges exceeding the number of regular judges fixed by the Statute."

On the other hand, though the subsequent paragraphs also dealt, in certain respects, with the Court's composition, it could not be denied that they also dealt with a question of procedure.

M. ADATCI was nevertheless of opinion that, in this case, the organic aspect dominated the procedural aspect.

M. SCHÜCKING thought that the question could be regarded both from the standpoint of organisation and from that of procedure. However, as this was a question which must, in any case, be reconsidered when the revised Statute came into force; he would advise the Court not to touch it, at this time.

The PRESIDENT asked if any member of the Court opposed this view.

M. FROMAGEOT said he would not press his proposal. M. Adatci had said quite rightly that, in this case, the question of the Court's composition dominated that of procedure. He saw no objection to leaving the matter to be settled subsequently by the Court.

The PRESIDENT noted that the Court desired, for the moment, that any discussion on Article 4 should be postponed.

Count ROSTWOROWSKI asked whether the votes recorded by the Court would retain any part of their force in future discussions on Articles 4 *bis* and 4 *ter*.

The PRESIDENT considered that these decisions, being recorded in the minutes, were definitely established. But that need not prevent members of the Court modifying their opinions later on.

* D 2, A. 3, pp. 139-140.
[1] *Ibid.*, p. 11.

20.II.35.

See under Article 61, p. 239, for a reference to Article 4 *bis* (Article 3 of Rules in force) during discussion of Article 57 (Article 61 of Rules in force).

28.II.1935.*

Discussed under Article 4.

The PRESIDENT said that there was one article in the first section of the Rules which would probably require careful consideration—namely, *Article 4*, which concerned the appointment of judges *ad hoc*. That article should be revised in order to bring it into harmony with the change in the Court's practice which had taken place in 1931, and also with the recently adopted rules concerning interim measures of protection.[1]

2.III.35.**

Discussed under Article 4 bis.

Paragraph 1 of Article 4 *bis* proposed by the Co-ordination Commission.[2]

The PRESIDENT said that the object of this clause was to enable the Government concerned to announce its intention to select a judge *ad hoc* and to provoke a decision by the Court in regard to such intention, so as to avoid the possibility of the Government's selecting a particular person and of the selection made not being approved by the Court. In accordance with the practice adopted by the Court in 1931, the proposed text leaves the initiative to the parties, but at the same time it provides them with an assurance that any objections will be raised before the appointment is definitely made.

Baron ROLIN-JAEQUEMYNS was afraid that the proposed clause would be likely to lengthen proceedings. Under the existing Rules, there was no need for the Court to wait until the parties approached it; it could hasten proceedings by itself taking the initiative. It would therefore be better to keep to the present system.

The PRESIDENT pointed out that the existing Rules made no reference to the procedure to be followed in regard to the appointment of judges *ad hoc*, except in a case where there were several parties in the same interest.

M. ANZILOTTI thought that the existing Rules left the Court entirely free to adopt whatever course it thought proper, whereas, if the proposed clause were adopted, it would be committed to the procedure therein laid down.

From a practical point of view, M. Anzilotti wanted to know whether the procedure introduced in 1931 had given rise to difficulties. In theory there were reasons in favour of both systems—of the one from the point of view of the composition of the Court, and of the other from the point of view of the rights of parties.

The REGISTRAR replied that, until 1931, the Court, when necessary, had informed the party concerned that it was entitled under Article 31 of the Statute to appoint a judge *ad hoc*, subject to a decision of the Court with regard to the qualifications of the judge chosen. In 1931, the Court had decided to leave the initiative to parties[3]; but at the same time it had been appreciated that a sudden change from the previous practice, unless at the same time a new provision were inserted in the Rules, would be likely to mislead parties.[1] For if they did not receive the usual

* D 2, A. 3, p. 370.

** *Ibid.*, pp. 383-391.

[1] *Cf.* meeting of 20.II.35, p. 239.

[2] See meeting of 18.V.34, p. 9, for text of this paragraph.

[3] On July 17th. — *Cf.* C 53, p. 691 (doc. 10 *in fine*), pp. 728 (doc. 76) *et sqq.*; compare C 54, p. 434 (doc. 11, Feb. 1931), with C 56, p. 433 (doc. 32, June 1931), and p. 434 (doc. 434, July 17th, 1931); see also C 57, p. 414 (doc. 31, Nov. 1931).

[1] Extracts from the minutes of July 16th and 17th, 1931:

22nd Session, first sitting, July 16th, 1931:

" (c) *Question as to the possible appointment of judges* ad hoc *in the case.*

" The PRESIDENT, in indicating the reasons why he wished to put this question before the Court, said that in the first place it had to be considered whether the question of the possible appointment of judges *ad hoc* was to be regarded as a point affecting the composition of the Court, a question which the Court could, in accordance with practice, decide without hearing the representatives of the interested Governments. In the next place, it had to be decided whether in the present case they were dealing with an ' existing ' dispute in accordance with the terms of Article 71 of the Rules. Lastly, the Court, for the purpose of applying Article 71, paragraph 2, of the Rules and Article 31 of the Statute, must decide whether, in the present case, there were Governments acting in the same interest, and, if so, which they were.

" Personally, he considered that the Court should decide these questions *ex officio*. . . .

" The REGISTRAR, at the request of Baron ROLIN-JAEQUEMYNS, informed the Court as to the practice followed in regard to communications to parties concerning their right under Article 31 of the Statute. . . .

" Sir CECIL HURST considered that the Court should not decide *ex officio* and without hearing the parties in regard to a right which the Statute and Rules might or might not reserve to parties and interested Governments. . . .

" With regard to the question of procedure, M. ANZILOTTI pointed out that the matter was not exclusively one for the parties, but that, since the composition of the Court was concerned, the Court could not disinterest itself from the question. . . .

" M. ALTAMIRA thought that the Court should give its opinion *ex officio* without hearing the parties.

" The PRESIDENT having put to the vote the question whether, before deciding, the Court should hear the interested parties, a discussion took place on the following points:

" (1) The difficulties that would ensue if, after a negative decision by the Court, the parties were to express a wish to appoint judges *ad hoc*;

" (2) Whether the Court could end its discussion without coming to any conclusion, notwithstanding the previous practice, according to which the parties could expect a communication to be sent to them automatically;

" (3) The possibility of unofficially informing the parties of the views of the Court or of the fact that the Court had decided not to deal with the question unless officially brought before it;

" (4) Lastly, the time within which a request for permission to appoint a judge *ad hoc* might validly be addressed to the Court.

" After this exchange of views, the Court decided to postpone to the next meeting its decision on the points discussed. . . ."

22nd Session, second sitting, July 17th, 1931:

" *Question regarding the possible appointment of judges* ad hoc (continued).

" The PRESIDENT hoped that the Court, after thorough reflection following the discussion at the previous meeting, would be able to arrive at a conclusion. He hoped that a solution would be found which would give satisfaction to the various views put forward, avoid any loss of time and meet any contingency which might arise. . . .

" M. ANZILOTTI thought that if the Court were to come to a negative decision on the point under discussion, that would be incompatible with Article 31 of the Statute. Moreover, in his view, it was essential at the present time not to prejudice so important a question. Would it not be better to say that the Court would not take a decision pending receipt of a request to that effect from the interested Governments ?

" M. GUERRERO, Vice-President, proposed that the Court should decide as follows: ' In the absence of any request affecting its composition, the Court has considered how it should be composed for the purposes of the present case and gives the following *provisional* decision. . . .'

" Thus the question would remain open, and if one of the parties submitted a request, it could be examined by the Court; otherwise the provisional decision would become final.

notification, they might think that the Court considered that they were not entitled to appoint a judge *ad hoc*. That was why the Court had decided to adopt a middle course: in each case, the parties were to be informed that the Court had modified its practice and that, if a party considered itself entitled to appoint a judge *ad hoc*, it must take the initiative without awaiting a communication from the Court.

Thanks to the adoption of this method, everything had gone smoothly. It could not, however, be said that the system of leaving the initiative entirely to parties had been tried.

The PRESIDENT, who saw great advantages in applying a method according to which a party could, in the first place, simply indicate an intention before making a definite appointment, was in favour of the Co-ordination Commission's proposal. The new provision in the Rules would have precisely the same effect as the letter which, since 1931, the Registrar had sent to parties; and that letter would cease to be necessary.

M. URRUTIA thought the proposed amendment was desirable because, under Article 31 of the Statute, the initiative should be taken by the parties.

M. ANZILOTTI was afraid that the new system would have the effect of needlessly prolonging the procedure.

M. GUERRERO, Vice-President, thought that, as it would be to the interest of any State to give the notice in question as soon as possible, the new system would be unlikely to give rise to difficulty. It was, moreover, necessary to tell parties that it was for them to take the initiative and not the Court. For it would be a more delicate matter for the Court to give its final decision regarding the participation in a case of a judge *ad hoc* if the Court itself had taken the initiative than if the first step had been taken by the party concerned. M. Guerrero therefore was in favour of the Co-ordination Commission's text.

M. NEGULESCO also considered that this clause would prove useful, and not only in contentious cases but also in the case of advisory opinions upon an existing dispute.

Jonkheer VAN EYSINGA thought that, if a dispute necessitating legal argument arose regarding the right to appoint a judge *ad hoc*, the argument on the preliminary point could always be joined to the argument on the merits of the case. The danger of delay was not, therefore, very great, especially as in most cases there would be no dispute, because dubious points would have been removed beforehand by means of unofficial soundings.

" M. NEGULESCO asked what text entitled the Court to come to an immediate decision on the question before it. Doubtless, Article 71, paragraph 2, of the Rules said: ' In case of doubt the Court shall decide.' This expression referred to the article as a whole, which in turn referred to Article 31 of the Statute; incidentally, the word ' contestation ' simply meant ' doubt '; it was thus translated in the English text. . . .

" So far, it was therefore difficult for the Court to give a decision, there being as yet no ' doubt ' as contemplated by paragraph 4.

" M. Negulesco was tempted to agree with the Vice-President's opinion with a slight modification, since he considered it a delicate matter for the Court provisionally to raise a question on its own initiative. Would it not be preferable to tell the parties that the Court, exercising its powers under Article 30 of the Statute, had interpreted Article 31 of the Statute and considered that the right of the parties under Article 31, paragraph 2, could only be exercised before the hearing began. . . . ?

" M. URRUTIA felt some doubt as to whether the Court could on its own initiative decide in advance to exclude any given State's option to exercise a right conferred on it by the Statute.

" M. Guerrero's suggestion in this connection seemed to him a good one. The Court would abstain from sending any invitation to the States, leaving the interested parties to act on their own initiative. The advantage of leaving the question open would be still further enhanced since a decision of the Court would undoubtedly create a precedent.

" Baron ROLIN-JAEQUEMYNS stated that MM. Guerrero, Negulesco and Urrutia all agreed upon one point—viz., that the Court should not give any final decision.

" He himself could not agree entirely with any of these three proposals. He preferred the Vice-President's proposal as modified by M. Urrutia: the Court should declare that since it had not been seized with the question it would give no decision. Perhaps the parties could be given to understand by means of a quite unofficial communication from the Registrar that a request coming from them after the hearing began would give rise to a situation of the greatest delicacy. . . .

" Sir CECIL HURST stated that for him the decisive factor was that the Court was a Court of Justice, and that it could not decide the question now before it without having heard the parties concerned.

" M. VAN EYSINGA stated that, according to the interview which took place at Geneva between the Registrar and the representatives of the interested Governments, the Legal Adviser of the Austrian Foreign Office asked whether they were concerned in this case with an ' existing dispute '. The Registrar rightly answered that he did not wish to commit himself, since in the last resort that was a matter for the Court alone to decide. Doubtless Austria is now awaiting the Court's decision. The latter, in view of the close proximity of the opening hearing, had to come to a definite decision.

" M. FROMAGEOT asked M. van Eysinga whether he thought that the Court had to come to a formal decision which would be officially communicated to the Ministers of the Governments concerned, or whether, adopting the methods of the States concerned, it could content itself with giving them an unofficial idea of the trend of the present discussion.

" M. VAN EYSINGA signified his agreement with the second course suggested by M. Fromageot.

" Baron ROLIN-JAEQUEMYNS proposed the following resolution:

> " A. ' The Court, after examining the application of Article 31 of its Statute and Article 71 of its Rules to the question of the advisory opinion on the Austro-German Customs régime, decides that there is no occasion for it to pronounce upon this question unless officially requested to do so.'

" In deference to a remark by Sir Cecil Hurst, he added the following clause:

> " B. ' The Court instructs the Registrar to communicate the above Resolution to the parties.'

" The PRESIDENT took a vote on text A, which was adopted. . . .

" Baron Rolin-Jaequemyns' text B was then voted upon, and adopted. . . .

" 6. — *Case concerning the treatment of Polish nationals, etc., in the territory of Danzig. Appointment of a judge* ad hoc *for Danzig.*

" The REGISTRAR, after having, at the request of the President, indicated the position in regard to this question, drew the special attention of the Court to the letters exchanged between the President of the Senate of the Free City and the Registrar (June 19th and 26th, 1931).

" M. ANZILOTTI considered that this case undeniably concerned an existing dispute; but the time seemed to have come to raise the question whether the Court should continue to apply the practice hitherto followed or should take the opportunity of changing it: in other words, should it draw the attention of the Free City to its right to appoint a judge *ad hoc* or await a request from Danzig to that effect ?

" Sir CECIL HURST suggested that, in order to make the transition less sudden, the Court should instruct the Registrar to write to the President of the Senate informing him that the question had been carefully considered by the Court and that the Free City of Danzig might, without awaiting an invitation to do so, exercise the right reserved to it by Article 31 of the Statute.

" After a discussion, it was decided that the Registrar should send to the President of the Senate a letter indicating, with reference to the exchange of letters already mentioned by him, that, should the Senate desire to appoint a judge *ad hoc*, the exercise of this right by the Senate without awaiting an invitation would not encounter any objection on the part of the Court. . . ."

The REGISTRAR asked whether that was really the idea of the proposed article. Was it not the idea that the unofficial soundings which formed part of the present practice would be replaced by the written notification provided for by the new article, and that there would be a preliminary procedure in regard to this notification and a decision given before the final appointment was made ?

The PRESIDENT considered that unofficial soundings could never be entirely eliminated, but that it was possible to avoid making them essential as they were under the existing system.

Count ROSTWOROWSKI gathered that Article 4 *bis* was not intended to apply in the case of opinions upon a question. Would it not be a good thing clearly to say so in the text ?

The PRESIDENT thought that the proposed text covered all contingencies. If, when an opinion was asked for upon a " question ", a Government held that it was a case of an opinion on an existing dispute and claimed the right to appoint a judge *ad hoc,* Article 4 *bis* enabled the Court, in the interests of that Government itself, to prevent such appointment before it was definitely made.

Baron ROLIN-JAEQUEMYNS thought that this would be more easily achieved by means of the existing system, which enabled Governments to learn the views of the Court beforehand.

The REGISTRAR observed that Articles 4 *bis* and 4 *ter* were drafts proposed by M. Fromageot which had been discussed at length in May 1934.[1] On that occasion, a considerable number of amendments had been considered, some of which had been accepted by M. Fromageot; and one of these amendments would, for instance, meet Count Rostworowski's point.[2]

The PRESIDENT considered that the Court should vote on paragraph 1 of Article 4 *bis* as proposed by the Co-ordination Commission, and that the Drafting Committee should be left to introduce any amendments of wording contemplated in May 1934,[1] in so far as they did not affect the substance of the paragraph; if there were a substantial amendment it should be referred to the Court.

M. ANZILOTTI gathered that, if the Co-ordination Commission's proposal were rejected, things would be left as they were.

The PRESIDENT observed that Article 4 *bis* was a new provision, and that there was no corresponding rule in the existing Article 4. He asked the Court whether they adopted paragraph 1 of Article 4 *bis* as proposed by the Co-ordination Commission.

By seven votes to two, the Court adopted this paragraph.

The PRESIDENT asked the Court whether they would leave the Drafting Committee to examine the record of the sitting on May 18th, 1934, and to introduce into the text just adopted any amendments of wording which had been contemplated on that occasion, but to refer to the Court any amendments which appeared to affect the substance of the clause.

Agreed.

The PRESIDENT next turned to paragraph 2 of Article 4 *bis* proposed by the Co-ordination Commission. (See p. 9, meeting of 18.V.34.)

[1] See meeting of 18.V.34, pp. 9-11.
[2] See meeting of 18.V.34, p. 10.

The PRESIDENT asked the Court whether they adopted paragraph 2 of Article 4 *bis* proposed by the Co-ordination Commission and, noting that there was no opposition to this paragraph, turned to paragraph 3. (See p. 9.)

The REGISTRAR recalled that, at the session in May 1934, the Vice-President had raised the question whether the decision of the Court referred to in this paragraph could be taken in the absence of a judge *ad hoc* representing the Government concerned.[1] The reason why the Co-ordination Commission had felt that it could not submit a new text taking into account the discussion which had been held was because the Court had not decided this question.

M. GUERRERO, Vice-President, would prefer at present to add nothing to the text of the proposed paragraph. The question was a very complex one, which it might be better to leave open.

Count ROSTWOROWSKI thought that since, according to the terms of the paragraph, the appointment in question was only " contemplated ", the judge *ad hoc* in question could not take part in the Court's deliberation.

M. ANZILOTTI was not sure that the presence of the national judge, in the circumstances under consideration, was not essential; for the Court had now instituted a procedure in which the question whether the party interested in the appointment of a judge *ad hoc* did or did not possess a certain right—namely, the right to appoint him —was regarded and treated as a matter for contentious proceedings between the parties[2].

Jonkheer VAN EYSINGA took a different view. If the Court took the line proposed by the Co-ordination Commission, they must not hesitate to settle a question which was essential. Personally, he would have thought that the presence of a judge *ad hoc* would not be required when the Court was deciding the preliminary question whether a judge *ad hoc* should be allowed to sit in the main proceedings.

The PRESIDENT, in view of the variety of circumstances which might arise, thought it better not to prejudge the question and stated that paragraph 3 of Article 4 *bis* was adopted, on the understanding that the question raised by the Vice-President remained open.

The PRESIDENT, before concluding the discussion of Article 4 *bis*, wished to advert to the provisions recently adopted by the Court in connection with interim measures of protection and to recall the doubts which had been expressed as to whether these provisions and those proposed by the Co-ordination Commission for Article 4 *bis* were consistent[3]. He asked whether the Court considered that these provisions were reconcilable.

Jonkheer VAN EYSINGA foresaw no difficulty except in a case of intervention under Article 62 of the Statute, where the intervention was in the same interest as one of the original parties and where the provisions respecting the joinder of parties operated. The case of intervention under Article 63 of the Statute should also be considered, in which case there would probably be no occasion to appoint a judge *ad hoc.* The Court, however, could not of course go into every detail.

[1] See meeting of 19.V.34, p. 11.
[2] *Cf.* extracts cited in note 2 to meeting of 2.III.35, p. 12, second column; see also C.53, pp. 188-189, 201-209; A/B 41, p. 88.
[3] *Cf.* meeting of 20.II.35, p. 239.

The PRESIDENT gathered that the Court was agreed that the terms of Article 4 *bis* would not give rise to difficulties in the case of the indication of interim measures or in that of intervention.

M. ANZILOTTI and Baron ROLIN-JAEQUEMYNS made full reservations in regard to this point.

The PRESIDENT next read Article 4 *ter* proposed by the Co-ordination Commission. (See p. 9, meeting of 18.V.34.)

The REGISTRAR said that he had pointed out to the President the following difficulty: Article 4 *ter* envisaged a choice to be notified to the Court within a certain time, failing which the right would lapse, whereas Article 4 *bis* provided for notice of a mere intention which might or might not be followed by a definite appointment. Was there any sufficient reason for treating parties in the same interest so differently from a single party entitled to appoint a judge *ad hoc* ?

Jonkheer VAN EYSINGA said that he had understood that, when there were two States in the same interest, Article 4 *bis* would first be applied in order to establish whether, in principle, they were entitled to appoint judges *ad hoc*. Only if this point were decided in the affirmative would Article 4 *ter* come into play. The two were not alternatives, but should be applied successively.

M. ANZILOTTI gathered that the States concerned would first of all give notice that they intended to appoint a judge *ad hoc*, in accordance with Article 4 *bis*. These notifications would be communicated to other parties, who might submit observations before the Court could give its decision. That would be the moment when the Court would declare that the States in question were in the same interest and must accordingly appoint a single judge. The Court would therefore invite them to agree between themselves. Next, the States would inform the Court of their choice, and this would be communicated to the other parties, who once again might present observations before the Court gave its final decision. M. Anzilotti thought this system was very complicated.

M. GUERRERO, Vice-President, suggested that this difficulty might be overcome by beginning Article 4 *ter* with the words: " Without prejudice to the provisions of the preceding article..."

In reality, there were two distinct processes. First, each interested party gave notice of its wish to have a judge *ad hoc* and the Court decided whether it possessed this right; secondly, the Court decided whether these parties were in the same interest and, if so, they had to agree upon the choice of a single judge *ad hoc*. The first process was covered by Article 4 *bis*, and the second by Article 4 *ter*.

M. NEGULESCO agreed with this view of the matter. The Court must first decide which States were entitled to a judge *ad hoc*, without reference to the question of joinder of parties. Then, when there were several parties, it must consider whether they were in the same interest. Article 4 *ter* must be so worded as to make it clear that there were two successive processes and that the procedure specified in Article 4 *ter* would not be incorporated in that provided for in Article 4 *bis*.

The PRESIDENT asked the Court whether they agreed to the insertion, at the beginning of the Co-ordination Commission's Article 4 *ter*, of the words: " Without prejudice to the provisions of the preceding article..."

M. ANZILOTTI preferred the existing text.

Jonkheer VAN EYSINGA, though he realised the complexity of the question, said that he would vote for the insertion of these words.

The PRESIDENT suggested that the difficulty might be partially overcome by transferring Article 4 *ter* to Article 4 *bis*, of which it would become the fourth paragraph.

M. GUERRERO, Vice-President, would prefer to keep the two articles separate, because the question dealt with in Article 4 *ter* was different from that dealt with in Article 4 *bis*.

M. NEGULESCO still considered the wording obscure and would therefore have to abstain from voting.

The PRESIDENT took a vote on the proposal to add the words " Without prejudice to the provisions of the preceding article..." at the beginning of Article 4 *ter*.

By six votes to one, with two abstentions, the Court adopted this proposal.

Count ROSTWOROWSKI observed that there was a difference between Article 4 *bis* and Article 4 *ter* as just adopted, consisting in the use of the words " their choice " in Article 4 *ter* and " intends " in Article 4 *bis*. Would it not be better, for the sake of consistency, to say in Article 4 *ter*: " if ... the parties have not notified the Court of their intention..." ? This would make it clear that the choice was no more definitive in Article 4 *ter* that in Article 4 *bis*; the Court must be able in either case to say that the judge whose appointments was contemplated did not fulfil the conditions laid down in Article 31 of the Statute. The word " choice " therefore in Article 4 *ter* seemed too definitive.

Jonkheer VAN EYSINGA was afraid that the connection between Article 4 *bis* and Article 4 *ter* would lead to complications which should be eliminated; and, on reflection, he was not sure that the addition to Article 4 *ter* which had just been approved was altogether satisfactory. Would it not be possible to prescribe that Governments which considered themselves entitled to appoint a judge *ad hoc* must not only inform the Court of this fact, but also and at the same time announce the fact that they were acting in the same interest as others ?

The REGISTRAR observed that States would as far as possible avoid the admission that they were acting together, in order not to reduce their chances of each obtaining a judge *ad hoc*. It would more likely be the other side which would object on the ground that they were in the same interest.

Baron ROLIN-JAEQUEMYNS would be in favour of combining Article 4 *ter* with Article 4 *bis*, and making it the second paragraph of the latter article, as suggested by the President. But perhaps the vote taken upon the Vice-President's proposal made it impossible to do that.

M. GUERRERO, Vice-President, observing that, notwithstanding the decisions taken, some uncertainty appeared still to prevail, thought it would be better to adjourn the discussion so as to enable judges to submit amendments to the provisions which the Court had just approved but which it did not perhaps regard as definitely adopted.

The PRESIDENT said that in any case the Court had not taken a decision with regard to Articles 4 *bis* and 4 *ter* as a whole, and adjourned the discussion until the next meeting.

4.III.35 *.

Discussed under Articles 4 bis and 4 ter.

The PRESIDENT observed that the Court had provisionally adopted Article 4 *bis*, and also Article 4 *ter*, in the form proposed by the Co-ordination Commission [1]. However, the discussion had created an impression that the Court was not entirely satisfied with the text. The President had accordingly prepared a new draft.

At the same time, M. Negulesco, who wished to retain the text of paragraphs 1 and 2 of Article 4 *bis*, as submitted by the Co-ordination Commission, had proposed to suppress paragraph 3 of that text and Article 4 *ter*, and to replace them by paragraphs 3 to 5 of the following draft:

" *Article 4* bis. — 1. [see text on page 9, meeting of 18.V.34].

" 2. [See text on p. 9.]

" 3. In the event of a dispute regarding the right of a party to appoint a judge under Article 31 of the Statute, it shall rest with the Court to consider the point and to decide by means of an order made after hearing the parties.

" 4. If the Court, after having decided which of the parties are entitled to appoint a judge under Article 31 of the Statute, finds that several parties to the case are in the same interest, it shall fix a period within which they may by common agreement appoint a single judge fulfilling the conditions laid down by that article. If, at the expiration of this time, these parties have not notified the Court of their choice, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute.

" 5. When the Court has adopted a decision in accordance with the provisions of paragraphs 3 and 4, it shall consider whether the persons designated by their Governments fulfil the conditions laid down in Article 31 of the Statute."

The President's text was worded as follows:

" *Article 4* bis. — Any State which is a party to a case and which considers that it is entitled, under Article 31 of the Statute, to appoint a judge to sit in that case, shall notify the Court as soon as possible and at all events before the opening of the oral proceedings. In accordance with Article 42 of the Rules, this notification shall be communicated to the other parties, who may inform the Court of their views.

" If any doubt or dispute should arise, the decision shall rest with the Court, if necessary after hearing the parties.

" *Article 4* ter. — Should paragraph 4 of Article 31 of the Statute apply, the Court shall fix a period within which the parties in the same interest may, by common agreement, select a deputy-judge of the nationality of one of the parties; or, should there be none, a judge chosen in accordance with the principles of the above-mentioned article.

" If at the expiration of the time-limit, these parties have not notified the Court of their selection or choice, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute."

M. NEGULESCO said that the text he had proposed legislated for the possibility of a dispute arising as to the actual right of the parties to appoint a judge *ad hoc*. In that case, in his opinion, the Court would have to decide, to begin with, which of the parties were entitled to appoint a national judge; secondly, it would have to consider whether several of the parties were in the same interest; if the Court answered that question in the affirmative, it would have to decide, in the third place, whether the judge in question fulfilled the conditions required by the Statute.

M. GUERRERO, Vice-President, proposed that the opening words of paragraph 3 of M. Negulesco's text should read as follows: " In case of *a doubt or* a dispute arising...", for the Court must also decide, *proprio motu*, whether a party had a right to appoint a judge. M. Guerrero was further of opinion that the first part of the text submitted by the President, and paragraphs 2 to 5 of M. Negulesco's text, might be combined. All the cases in which the Court had to take a decision would thus be covered.

The PRESIDENT explained the new text which he had proposed for Article 4 *bis*. The first sentence was identical —except for some verbal differences—with the text already adopted by the Court. For instance, he had thought it better to say " Any State..." instead of " Any Government...", since the parties before the Court were described in the Statute as " States ". Similarly, the new text said: " before the opening of the oral proceedings ", instead of: " before the opening of any oral proceedings ". The period intended was that of the opening of the oral proceedings after the end of the written proceedings; but the words " any oral proceedings " were so wide that they might be held to cover some special oral debate—relating, for instance, to the indication of interim measures of protection—anterior to the filing of the documents of the written proceedings concerning the merits.

The second sentence of paragraph 1 of the new text corresponded to No. 2 of the Co-ordination Commission's text; the wording had, however, been modified in order to show that the provision was an application of the general rule of procedure according to which any document emanating from one party must be communicated to the other party. Again, the more detailed text of the Co-ordination Commission had been replaced by the expression: " who may inform the Court of their views "; that expression showed that the communication in question was not bound to be in any particular form, and was indeed of an optional character.

As regards the second paragraph of the new text, the President explained that its object was to enable the Court to choose the simplest and most suitable method, according to the circumstances of each case. Finally, as regards the new text proposed for Article 4 *ter*, it corresponded to paragraph 2 of Article 4 of the existing Rules, but it simplified the text by giving a reference to paragraph 4 of Article 31 of the Statute.

M. SCHÜCKING thought that the President's text was simpler than that proposed by M. Negulesco, and he therefore preferred it. M. Negulesco's formula was, no doubt, logical; but it went too much into detail as regards the procedure it proposed, owing to the distinction which it drew between two separate and obligatory operations, which were combined in the President's text.

Baron ROLIN-JAEQUEMYNS thought that the Court should decide first on paragraph 1 of Article 4 *bis*, in the form proposed by the President. Then, as regards the

* D 2, A. 3, pp. 391-395.

[1] See meeting of 18.V.34, pp. 9-10, and 2.III.35, pp. 14-15.

second paragraph, the Court should make its choice between M. Negulesco's text and the shorter text of the President.

M. ANZILOTTI said that, at the previous meeting, he had not concealed his preference for the existing Rule. However, as the Court had decided otherwise, he was prepared to vote for the President's text, which was clear and simple, and retained, in part, the flexibility of the existing system. As regards the wording, M. Anzilotti, referring to the new Article 4 *ter*, in which the case of a deputy-judge was expressly dealt with, proposed, in Article 4 *bis*, in place of "appoint", to say "select or choose", those being the words employed in Article 31 of the Statute.

The PRESIDENT agreed to this amendment.

Jonkheer VAN EYSINGA thought, like M. Schücking, that M. Negulesco's text suffered from the disadvantage, as compared with that of the President, that it not only allowed for disputes, but seemed almost to invite them. A case that had occurred to him, among others, was that of a State, not having one of its nationals on the Bench of the Court, which cited another State before the Court, and at the same time requested the indication of interim measures and notified the selection of its judge *ad hoc*. It would seem almost impossible for the latter to be present at the proceedings in connection with interim measures.

In regard to the wording of the text, Jonkheer van Eysinga proposed to say, instead of "Any State, party to a case...", "A party...".

The PRESIDENT accepted this amendment.

Jonkheer VAN EYSINGA also pointed out that it did not seem clear from the President's text at what moment the Court would declare that it saw no objection to a party's choice of a judge *ad hoc*, or at what moment another party, desirous of offering observations on the appointment of a judge *ad hoc* by the first-named party, was to do so. In this connection, he recalled the solution proposed in the supplementary report of the Second Committee—namely, that a certain period of time would be indicated.

Finally, Jonkheer van Eysinga suggested that it might be advisable to combine Article 4, which the Court had adopted on March 2nd [1], and Article 4 *bis* and 4 *ter* proposed by the President, in a single article.

M. NEGULESCO said that his object had been to get rid of the faulty wording of the first paragraph of Article 4 *ter*, and make Articles 4 *bis* and 4 *ter* as clear as possible. As the wording suggested by the President achieved the object he had in view, he would support that proposal, which he found quite satisfactory.

M. URRUTIA asked to be informed whether, according to the practice of the Court, the parties first notified their intention to appoint a judge *ad hoc*, and subsequently the name of the person selected.

The REGISTRAR said that, according to the existing practice, the official notification was preceded by semi-official conversations [2] in the course of which any difficulties were eliminated. As a rule, the notification made by the parties mentioned both the intention to appoint a judge *ad hoc* and the name of the person who was to be appointed [3].

M. URRUTIA asked if it could not be made clear in the text that the person selected or chosen, in accordance with Article 31 of the Statute, must be specified.

[1] See meeting of 2.III.35, pp. 27-28.

[2] *Cf.* for instance C 67, pp. 4081 (Nos. 12 and 13), 4082 (No. 16), 4085 (No. 22).

[3] See *ibid.*, p. 4087 (Nos. 25 and 27).

The PRESIDENT said that the Court would take note of M. Urrutia's suggestion, and would ask the Drafting Committee to bear it in mind.

The President gathered that the Court was disposed to accept the proposal he had made. He wished, however, to point out that, in the Registrar's opinion—with which he did not however agree—the text of the new article would not cover the case in which there were parties in the same interest, when one of them had already one of its nationals on the Bench of the Court. The Drafting Committee would look into that point.

Jonkheer VAN EYSINGA thought that the Registrar was right. The point in question was made clear in the article at present in force, and he would see no objection to purely and simply retaining paragraph 2 of Article 4 of the existing Rules. But that was a question which the Drafting Committee could examine.

M. GUERRERO, Vice-President, thought it was clear that the Court was prepared to adopt the President's proposal. The best plan would be to vote upon it, and instruct the Drafting Committee to give it its final form.

The PRESIDENT wished first to be sure that the Court adopted the suggestion to replace the words "before the opening of any oral proceedings" by "before the opening of the oral proceedings", as this involved a change in a text which had already been approved [1].

This was agreed to.

He therefore noted that the new text which he had submitted would take the place of Articles 4 *bis* and 4 *ter* adopted on March 2nd, and that it was referred to the Drafting Committee.

7.III.35.

See under Article 83, p. 347, for a reference to Articles 4 *bis* and 4 *ter* (Article 3 of Rules in force) during discussion of Article 72 *bis* (Article 83 of Rules in force).

3.IV.35 *.

Discussed under Article 4 [2].

The PRESIDENT opened the discussion on *paragraph 1* of Article 4.

There being no observations, the paragraph was adopted.

The PRESIDENT opened the discussion on *paragraph 2* of Article 4.

* D 2, A. 3, pp. 421-422.

[1] See meeting of 2.III.35, p. 14.

[2] Draft text proposed by the Drafting Committee (29.III.35):

"*Article 4.* — 1. [new] Any State which considers that it is entitled, under Article 31 of the Statute, to select or choose a judge, shall notify the Court as soon as possible and in any case before the opening of the oral proceedings. This notification shall be communicated to the other parties, and they may submit their views to the Court.

"2. [new] If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties.

"3. [old paragraph 2] If the Court is satisfied, in accordance with Article 31 of the Statute, that there are several parties in the same interest and that none of them has a judge of its nationality upon the Bench, it shall fix a period within which these parties acting in concert may select a deputy-judge of the nationality of one of them, or should there be none, a judge chosen in accordance with the principles of the above-mentioned article. If at the expiration of the time-limit no notification of this selection or choice has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute.

"4. [old paragraph 1] When one or more parties are entitled to choose a judge under the conditions laid down by Article 31 of the Statute, the full Court may sit with a number of judges exceeding the number of regular judges fixed by the Statute."

M. ANZILOTTI saw no reason for making a separate paragraph of this provision; it seemed to him to be the natural consequence of the first paragraph.

The PRESIDENT pointed out that the first paragraph of Article 4 referred to the case where a party itself took the initiative and informed the Court that it wished to have a judge *ad hoc*; the second paragraph was wider and also covered the case where the Court made such an appointment *proprio motu*. If the two paragraphs were combined, it might be inferred that their scope was the same.

The REGISTRAR added that, unlike similar clauses in other articles [1], paragraph 2 provided for a special procedure (hearing of the parties).

M. ANZILOTTI, realising that his proposal involved an important question of principle, withdrew it.

M. NEGULESCO re-submitted M. Anzilotti's proposal in his own name, whereupon the PRESIDENT took a vote on the following question:

> " Does the Court decide to combine paragraphs 1 and 2 of Article 4 in the form proposed by the Drafting Committee ? "

By seven votes to three, with one abstention, the Court answered the question in the affirmative.

The PRESIDENT opened the discussion on *paragraph 3* of Article 4, which, in view of the decision just taken, became paragraph 2.

M. SCHÜCKING pointed to an apparent contradiction between the text of this paragraph and that of paragraph 1: under paragraph 1, it was for a party to take the initiative in regard to the appointment of a judge *ad hoc*; but, according to paragraph 3 (now paragraph 2), if the Court found that two States, parties to a case, were entitled to have a judge *ad hoc*, these two States were to be invited by the Court to appoint one. This contradiction could be removed by adding a few words to the paragraph under consideration.

M. ANZILOTTI gathered that the meaning was that the first part of the procedure—that dealt with in paragraph 1 of Article 4—would already be completed before the procedure dealt with in paragraph 3 (now paragraph 2) came into play.

The PRESIDENT noted M. Schücking's criticism and said that the Drafting Committee, when the time came for the second reading of the revised Rules, would submit to the Court a proposal for the insertion of some words designed to avoid any apparent contradiction.

M. GUERRERO, Vice-President, suggested that a phrase to the following effect might serve the purpose: " If the Court, *after having taken the decision referred to above*, satisfies itself..."

The PRESIDENT noted this suggestion.

Jonkheer VAN EYSINGA, in connection with the same paragraph, observed that Article 31 of the Statute differentiated between deputy-judges, who were selected *(désignés)* as judges *ad hoc*, and other judges *ad hoc*, who were chosen *(choisis)*. He proposed that the passage "... may select a deputy-judge of the nationality of one of them, or should there be none, a judge chosen in accordance with the principles of the above-mentioned Article " should be replaced by " ... may select a deputy-judge of the nationality of one of them or, should there be none, choose a judge in accordance with the principles of the above-mentioned article ".

The PRESIDENT took a vote on the following question:

> " Does the Court decide to substitute the words ' choose a judge in accordance with the principles of the above-mentioned article ' for the words ' a judge chosen in accordance with the principles of the above-mentioned article ' in paragraph 2 of Article 4 ? "

By nine votes to two, the Court answered in the affirmative.

(These paragraphs were adopted in first reading together with paragraph 4 (now the only paragraph of the present Article 4) as Article 4. For adoption of paragraph 4, see p. 28, meeting of 3.IV.35.)

3.II.36.

See under Article 2, p. 7, for the discussion of the question of the arrangement of the paragraphs in Articles 2, 3 and 4.

At the same meeting *, the PRESIDENT invited the Court to examine the old Article 4. He explained the modifications proposed in the text as adopted in first reading.[1]

M. FROMAGEOT thought that there was at all events an apparent discrepancy between paragraph 1 and paragraph 2. According to paragraph 1, a State which considered that it was entitled to select a judge *ad hoc* must say so before the opening of the oral proceedings, but no period was prescribed within which this must be done. According to paragraph 2, on the other hand, the Court fixed a time-limit for the selection.

The PRESIDENT explained that paragraph 2 presupposed that a judge *ad hoc* had already been selected, but that subsequently the Court found that several parties were in the same interest.

M. ANZILOTTI recalled that this question had been discussed at length in 1935 [2] and that the wording in the text had been the only one upon which it had been possible to agree.

The PRESIDENT postponed consideration of this question until the next sitting.

4.II.36.**

Article 3 (old Article 4).

The PRESIDENT recalled that, at the previous sitting, they had left off at Article 4, the first two paragraphs of which were now to become Article 3.

M. Fromageot had pointed to a certain discrepancy be-

[1] *Cf.* Article 31, paragraph 4, of the Statute; Article 71, paragraph 2, of the Rules then in force.

* D 2, A. 3, pp. 474-475.

** D 2, A.3, pp. 475-483.

[1] The text as modified was as follows:

" 1 [new]. — Any State which considers that it is entitled under Article 31 of the Statute of the Court to select a judge shall notify the Court as soon as possible, and in any case before the opening of the oral proceedings. This notification shall be communicated to the other parties, who may submit their views to the Court. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties.

" 2 [old paragraphs 2 and 3]. — If the Court is satisfied in accordance with Article 31 of the Statute that there are several parties in the same interest and that none of them has a judge of its nationality upon the bench, it shall fix a period within which these parties, acting in concert, may select a judge in accordance with the principles of the above-mentioned article. If, at the expiration of this time-limit, no notification of their selection has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute."

3. See paragraph 4 (old paragraph 1) in footnote 2, p. 17, second column.

[2] See meeting of 2.III.35, pp. 12 *et sqq.*

tween these two paragraphs [1]. In the 1935 minutes would be found some remarks on the same point by M. Schücking [2].

The President had also been struck by the necessity for removing the apparent contradiction referred to. He proposed therefore, in agreement with M. Fromageot, an amendment which fulfilled this purpose and at the same time made some verbal corrections in the French text. This amended text was as follows:

[*Translation.*]

" Paragraph 2. — If, on receipt of one or more notifications under the terms of the preceding paragraph, the Court finds that there are several parties in the same interest and that none of them has a judge of its nationality upon the Bench, the Court, applying Article 31, paragraph 5, of the Statute, shall fix a period within which these parties, acting in concert, may select a judge in accordance with the provisions of the above-mentioned article. If, at the expiration of this time-limit, no notification of their selection has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute."

Jonkheer VAN EYSINGA observed that the Court now had before it one of the questions which had been reserved for the second reading and need therefore have no scruples in taking it up.

A lacuna had been apparent in the original text of Article 3, which the President and M. Fromageot had sought to make good. He was not altogether sure that their draft had completely succeeded in this.

The procedure began indeed with the notification by a party of its wish to have a judge *ad hoc*. If this notification resulted in objections, the Court had to give a decision; but it might happen that the notification gave rise to no objections.

Paragraph 1 of the new Article 3 provided for only one of these eventualities: that in which the notification gave rise to objections.

The amendment of the President and M. Fromageot said that the Court, having found that there were several parties in the same interest, fixed a period within which they might select a judge *ad hoc*. But in reality the Court could only fix this period, immediately upon receipt of the notification, if no difficulty were raised; otherwise it would have first to give a decision and then fix the period.

Jonkheer van Eysinga accordingly proposed the following draft:

" If, on receipt of one or more notifications under the terms of the preceding paragraph, and after having either satisfied itself that they do not afford ground for doubts or objections, or given its decision upon such doubts or objections, the Court is satisfied that there are several parties in the same interest . . .", etc.

Count ROSTWOROWSKI understood Jonkheer van Eysinga's intention but the detail of his amendment made the text very unwieldy. Would it not be possible to satisfy everyone by saying:

" If the Court is satisfied, *par ailleurs*, that there are several parties in the same interest . . ." ?

M. FROMAGEOT suggested another wording, which would perhaps better meet Jonkheer van Eysinga's point:

" If, on receipt of one or more notifications under the terms of the preceding paragraph, *and after any difficulties in connection therewith have been settled*, the Court is satisfied. . . ."

Jonkheer VAN EYSINGA said that M. Fromageot's wording fully satisfied him.

The PRESIDENT feared that it would hardly be possible to render the words " *par ailleurs* " in English.

He put the following question to the Court:

" Does the Court decide to add the words ' and after any difficulties in connection therewith have been settled ' after the words ' preceding paragraph ' in line 2 of the amendment ? "

By six votes to four, the Court answered the question in the negative.

The PRESIDENT considered that in paragraph 2 of Article 3 it would be better to place the reference to Article 31 after the words " acting in concert, they may . . ."; it would then read:

" . . . the Court shall fix a period within which, acting in concert, they may, *applying paragraph 5 of Article 31 of the Statute*, select a judge. . . .".

The PRESIDENT took the opinion of the Court on the amended text of paragraph 2 submitted by M. Fromageot and himself, with the change which he had just read.

As no observations were made, he regarded it as adopted.

(This constituted adoption of paragraph 2 in second reading.)

M. NEGULESCO observed that paragraph 1 of the new Article 3 was as follows:

" Any State which considers that it is entitled under Article 31 of the Statute of the Court to select a judge shall notify the Court as soon as possible and in any case before the opening of the oral proceedings."

On the other hand, the text just adopted by the Court for paragraph 2 ended with the following sentence:

" If, at the expiration of this time-limit, no notification of their selection has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute."

Should not a similar provision be added to the end of the first paragraph ? Such a provision might run as follows:

" If, upon the opening of the oral proceedings, no notification has been made, the State concerned shall be regarded as having renounced the right conferred upon it by Article 31 of the Statute."

M. FROMAGEOT suggested the following text, to meet M. Negulesco:

" Any State which considers that it is entitled to select a judge shall notify the Court as soon as possible and in any case, *on pain of forfeiture of its right*, before the opening of the oral proceedings."

Jonkheer VAN EYSINGA wondered whether this addition was necessary. Would not the fixing of a time-limit suffice ?

M. NEGULESCO observed that the same idea governed both paragraphs of Article 3. Moreover, the selection of a judge *ad hoc* was a question of the greatest importance to the Court itself. It was most important for the Court to know what its composition would be for the oral proceedings.

M. FROMAGEOT did not think it necessary to specify

[1] See meeting of 3.11.36 above.
[2] See p. 18.

expressly that the right would be forfeited; that was implicit in the existing text.

Baron ROLIN-JAEQUEMYNS thought it would be better to make no provision regarding forfeiture of the right in either of the paragraphs. The Court had very little experience behind it, and accordingly it would be better to allow the Court to act as seemed equitable and not to tie its hands.

M. NEGULESCO thought that the Court was in agreement: in principle, the right would be forfeited, but in exceptional cases the principle might not be applied.

The PRESIDENT noted that all members of the Court were agreed on this point.

M. GUERRERO, Vice-President, wondered whether the wording of paragraph 1 was sufficiently clear as regards the notification to be made to the Court. Was simply notice of intention to select a judge to be given, or was the actual selection to be notified also? According to the wording of paragraph 1, a State which considered itself entitled to have a judge *ad hoc* had merely to notify the fact.

M. FROMAGEOT recalled that this question had already been considered [1] and that, for practical reasons, the Court had thought it better not to oblige a party to select its judge *ad hoc* forthwith.

M. GUERRERO, Vice-President, thought that, since the Rules fixed a time-limit for the notification of the wish to have a judge *ad hoc*, another time-limit should be fixed for the selection of this judge, as soon as the Court's decision in regard to the first notification had been given.

The PRESIDENT recalled that the terms of the first paragraph had been adopted after lengthy discussion in 1935 [2]. In reality, in most cases no decision was given by the Court upon receipt of a notification of intention to appoint a judge: it was not therefore possible to fix a time-limit for the selection of the judge.

M. GUERRERO, Vice-President, thought that, when a State had notified the Court of its intention to have a judge *ad hoc*, the Court sent it a communication notifying it that it might proceed to appoint a judge. It was this communication which should be regarded as a decision taken by the Court.

M. URRUTIA recalled (p. 17) that he had raised this question during the first reading; he had done so having regard to Article 31 of the (original) Statute, which was very definite in regard to this point:

> " If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality if there be one."

The Statute therefore provided for the selection of a judge, and not merely for the giving of notice of an intention to make use of a right. The principle should be that the selection must be known to the Court before the opening of the oral proceedings. The Court must indeed be able to satisfy itself that the person selected possessed the necessary qualifications to be a judge. Again, it must be possible for the other parties concerned, if need be, to challenge this judge [3].

[1] Meeting of 2.III.35, pp. 12 *et sqq.*
[2] Meeting of 4.III.35, p. 17.
[3] *Cf.* "*Statut et Règlement de la Cour permanente de Justice internationale — Eléments d'interprétation,*" p. 136.

M. GUERRERO, Vice-President, emphasised that the question who was chosen as judge *ad hoc* was indeed one of great importance to the other parties concerned. It would therefore be better, as soon as the Court's decision was given, to fix a time-limit for the appointment of the judge *ad hoc*.

M. FROMAGEOT recalled that in May 1934 [1] the Co-ordination Commission had proposed that the notification should contain the name of the person whom the State concerned intended to appoint; the Court, however, had rejected the proposal.

M. GUERRERO, Vice-President, thought that he recollected that the question which had then been discussed was whether a State should, when giving notice of its intention, also indicate the person chosen by it. The Court had held that there were weighty reasons against compelling it to make so hasty a choice. The question now under discussion was quite a different one.

Count ROSTWOROWSKI recalled that the proposed text already said: " Any State . . . shall notify the Court as soon as possible "; to satisfy M. Guerrero they might add: " . . . and, if its right is recognised, designate the person selected as judge before the opening of the oral proceedings ". Thus there would be two obligations: to give notice as soon as possible, without fixing a date, and to designate the judge *ad hoc* before the opening of the oral proceedings.

The PRESIDENT observed that, with the amendment suggested by the Vice-President and Count Rostworowski, it would be impossible for the Court to decide as to a State's right to appoint a judge *ad hoc* without the entry of a personal element into the question; for its decision, which presupposed the hearing of the parties, would only be given after the opening of the oral proceedings, when the person selected would be already known. And what the Court wanted above all was to eliminate any personal element.

Baron ROLIN-JAEQUEMYNS wanted to know when the Court considered that the oral proceedings opened: was argument upon a preliminary point such as the appointment of a judge *ad hoc* regarded as the opening of the oral proceedings? In Baron Rolin-Jaequemyns' view, the pleadings in regard to the merits of a case constituted the opening of the oral proceedings. If that were so, the President's objection did not seem to have much force.

Jonkheer VAN EYSINGA was doubtful whether the Court ought to adopt the course suggested by the Vice-President. It would have unavoidably to make a distinction between notification of an intention to appoint a judge *ad hoc* and the selection of that judge. M. Fromageot had just recalled that this question had been discussed at length at the first reading, and that the Court had ultimately decided not to make this distinction.

Moreover, in practice these questions had always been satisfactorily settled, as appeared from the Registrar's observations (p. 17 of this volume) in 1935. Finally, a State which wished to have a judge *ad hoc* on the Bench always made haste to select one; so that it was unnecessary to fix a time-limit for the purpose.

In conclusion, Jonkheer van Eysinga said that he did not think it was a good thing to depart too widely from the texts adopted at the first reading.

M. NEGULESCO thought that paragraph 1 of Article 3 was

[1] Meeting of 18.V.34, pp. 9 *et sqq.*

incomplete. It referred only to the notification of an intention to appoint a judge *ad hoc*. There remained, however, the question of the selection of the individual. The article in its present form made no reference to this point. The Statute did not differentiate between the notification of an intention and the selection of the individual; in his view, the selection of the individual constituted the exercise of the right to appoint a judge *ad hoc*.

The PRESIDENT recalled that the difficulty arose from the fact that, since 1931, the Court left parties to take the initiative in regard to the appointment of a judge *ad hoc*.

M. NEGULESCO was afraid that, by adopting the proposed text, the Court would be instituting a very complicated system. He agreed with M. Urrutia, the Vice-President and Count Rostworowski that it would be simpler to oblige a party to designate the person who was to represent it on the Bench before the opening of the oral proceedings.

M. ANZILOTTI said that, if it had been a matter of some municipal law of procedure, he would agree with the Vice-President and M. Negulesco. But it must not be forgotten that the Court was in a very special position from the standpoint of procedure. In all cases which came before it, matters of procedure would always be considered and arranged between the Registrar and the States concerned, who remained in constant touch; accordingly, nearly all the questions which arose in regard to them would be settled in the manner best suited to each particular case.

M. GUERRERO, Vice-President, thought that it would suffice in the Rules to leave it to the President to inform the party concerned of the period within which a judge *ad hoc* must be selected. In the case of a distant country, the President would allow a period of sufficient length to make it possible for the judge to reach The Hague.

M. ANZILOTTI considered that such power could be inferred from the article in its present form.

Baron ROLIN-JAEQUEMYNS thought that the Court must necessarily be informed of the name of the judge *ad hoc* before the opening of the oral proceedings. Since they were now making rules regarding the exercise of the right to appoint a judge *ad hoc*, might they not at the same time indicate a certain time-limit for the appointment of such a judge? Of course, the two things should not be done simultaneously. Discussion regarding the right of a State would always precede discussion regarding the person chosen. The Court, however, before it met, must know who was going to sit as judge *ad hoc*.

M. ANZILOTTI said that hitherto this had always been the case.

The REGISTRAR confirmed that this had always been the case in the past. It was, however, to be feared that difficulties might now arise as a result of the introduction of paragraph 1 of Article 3, for that paragraph really constituted an innovation as compared with previous practice. If, however, they were, in regard to this point, to revert to the old Rules which did not contain this clause, no doubt all would go smoothly as heretofore.

M. ANZILOTTI asked whether the practice established by this paragraph 1 had not already been interpreted or modified, in that, though a State was not expressly notified that it was entitled to appoint a national judge, its attention was at all events drawn to the possibility of its appointing one.

The REGISTRAR pointed out that paragraph 1 did not confirm existing practice. The practice until 1931 had been that the Court if necessary informed a party that it was entitled to appoint a judge *ad hoc*. Since 1931, the practice had been to say to parties: "Until 1931 the practice of the Court was such and such; it no longer follows this practice, it ests therefore with you, the interested party, to decide for yourself whether or not you consider that you are entitled to appoint a judge *ad hoc*.[1]" But this new practice also would be modified by the proposed clause, which provided for a special procedure.

M. GUERRERO, Vice-President, proposed the following addition to Article 3, supposing that it were left as it was:

> "In all cases where it decides to allow a national judge to sit, the President shall, if necessary, fix a time-limit within which the judge must be selected."

If a party designated its judge when notifying its intention, it would be unnecessary to fix a time-limit; that was the reason for the words "if necessary". A time-limit would only be required if notice of intention to appoint a judge were given without designating the person selected.

The PRESIDENT pointed out that in most cases there was no decision by the Court. Generally speaking, a State which was a party to a case made enquiries of the Registrar.[2] If the case was clear, the Registrar replied that the State was entitled to appoint a judge *ad hoc;* only if there were any doubt was the decision reserved for the Court.

The REGISTRAR confirmed that this had been the practice hitherto. He thought, however, that it would be changed by the new text.

M. GUERRERO, Vice-President, agreed that the proposed article would indeed effect a complete change. Henceforward, if a State considered that it was entitled to appoint a judge *ad hoc*, it would notify the Court of its intention to do so; the Court must communicate this notification to the other States concerned. The Court would always have to reply: if there were no objections, the Court would reply to the interested party that it might proceed to select its national judge and must do so by a certain date; if objections were raised, then there would have to be a decision by the Court after hearing the interested parties. Under the system established by Article 3, therefore, there would always have to be a decision. It would not, of course, always be a decision of the Court; when there were no objections, it would rest simply with the President or Registrar to inform the interested party that it might proceed to select its judge.

Baron ROLIN-JAEQUEMYNS considered that the Court might very well maintain the existing practice. In that case, however, paragraph 1 of the new Article 3 must be deleted.

On the other hand, if it was desired to specify in detail the method of appointment of a judge *ad hoc*, it would be necessary to provide not only for notification of intention but also for the actual selection of a judge within a certain limit of time.

The REGISTRAR wondered whether a simple way of overcoming the difficulty would not be to provide for a time-limit for the presentation of observations by the other parties. The following might be added at the end of the first paragraph:

> "This notification shall be communicated to the other parties . . . views to the Court *within a time-limit to be fixed by it.*"

[1] See, for instance, C 73, p. 1375, doc. No. 9.
[2] See, for instance, C 76, pp. 212 *et sqq.*, doc. Nos. 22 and 23.

With this addition, if at the expiration of the time-limit fixed no objection had been lodged, and if by the same date no doubt had been raised by the Court, the position would be clear and the party could be informed that it was entitled to appoint a judge.

The PRESIDENT observed that this modification did not dispose of the question of the time-limit for making the appointment.

The REGISTRAR thought that that question was implicitly settled, because the Court would of course fix the time-limit for any observations by parties in such a way that the interested party would be able, if its claim were admitted, to appoint its judge in due time before the opening of the oral proceedings.

The PRESIDENT said that at the moment the Court had before it, for paragraph 1, two texts, the first of which was as follows:

> " Any State which considers that it is entitled under Article 31 of the Statute of the Court to select a judge, shall notify the Court as soon as possible. This notification, *and, if the right is recognised, the actual selection, shall be communicated to the Court before the opening of the oral proceedings. These communications shall be transmitted* to the other parties who may submit their views to the Court."

The second draft was as follows:

> " Any State which considers that it is entitled under Article 31 of the Statute of the Court to select a judge shall notify the Court as soon as possible and in any case *in sufficient time to enable the selection, if the right is recognised, to be made* before the opening of the oral proceedings. This notification shall be communicated to the other parties who may submit their views to the Court."

Then, M. Guerrero proposed the addition of the following paragraph:

> " In all cases where it is decided to allow a national judge to sit, the President shall if necessary fix a time-limit within which the judge must be selected."

Finally, the Registrar proposed the addition of the following words to the last sentence:

> " . . . . views to the Court *within a time-limit to be fixed by it* ".

The President personally would be in favour of maintaining the existing text of the first paragraph of Article 3.

Baron ROLIN-JAEQUEMYNS in that case would prefer to go back to the text of the old Rules and to stick to the practice which had been established, because if they now made a new text, it must be complete and must also cover the designation of the person who was to sit as judge *ad hoc*.

M. NAGAOKA pointed out that paragraph 1 of the new Article 3 said: " . . . under Article 31 of the Statute. . . ." But this paragraph of the Rules applied only to the normal procedure. Since the revised Statute—in paragraph 4 of Article 31—also dealt with summary procedure, it would perhaps be more correct to say here: " . . . under paragraphs 2 and 3 of Article 31 . . . ."; for there would not always be oral proceedings in summary procedure. Article 72, paragraph 3, of the revised Rules as adopted in first reading said: " If the Chamber [of Summary Procedure] considers that the documents of the written proceedings do not furnish adequate information, it may call upon the parties to supply oral explanations. . . . "

Jonkheer VAN EYSINGA observed that, if a case came before the Chamber for Summary Procedure, the Court would certainly be able to adapt its Rules satisfactorily to this kind of procedure. It seemed impossible now to review all articles of the Rules simply from the point of view of summary procedure, which would always necessitate some degree of adaptation.

Count ROSTWOROWSKI thought that, instead of altering the text of paragraph 1 of Article 3 of the Rules, they could perhaps meet M. Nagaoka's point by simply making a reservation respecting paragraph 4 of Article 31.

M. NAGAOKA thought that, from a practical standpoint, it would be better to make rules for the appointment of a judge *ad hoc* in summary procedure.

The PRESIDENT considered that the modification proposed by M. Nagaoka might be left until the Court had decided upon the new form which Article 3 of the Rules should take; for the actual wording which would meet M. Nagaoka's point would depend upon which of the various texts proposed for Article 3 of the Rules was selected by the Court.

M. NAGAOKA would be content with the addition of the words " under paragraphs 2 and 3 of Article 31 ".

The PRESIDENT observed that it was time that the Court adjourned. Members of the Court would receive the texts of the proposals concerning paragraph 1 of Article 3, submitted in the course of the meeting, and that of the amendment proposed by M. Nagaoka. A decision could therefore be reached at the next sitting.

5.II.36.*

Article 3 (old Article 4). — *Second Reading.*

The PRESIDENT recalled that the text of all the amendments proposed on the previous day to Article 3 (old Article 4) had been distributed.[1] Personally, he was bound to confess that none of them completely satisfied him. The important point clearly was to find a text which would satisfy all members of the Court, whilst making as little change as possible in the text adopted in first reading.

The President said that he had had a conversation with M. Fromageot, the upshot of which he would now ask the latter to give.

M. FROMAGEOT observed that the first point to be decided by the Court was whether it was necessary that the text of Article 3 should mention not only notification of the intention of a State to avail itself of the right conferred upon it by Article 31 of the Statute, but also notification of the name of the person whom it wished to appoint as judge *ad hoc*. The present text mentioned only notification of a State's intention to avail itself of the right given it by Article 31. If the Court thought it desirable to mention notification of the name of the judge *ad hoc*, the present text would have to be amplified. That—it would appear—was the first point, whatever wording were adopted, to be decided by the Court.

The PRESIDENT recalled that, at the previous meeting, he had opposed the idea of requiring that the name of the person designated should be given together with notice of the intention to appoint a judge *ad hoc*. He thought,

* D 2, A. 3, pp. 483-492.

[1] See meeting of 4.II.36, pp. 18-22.

however, that the majority of members of the Court did not share his view: most of the amendments submitted provided for inclusion of the name of the judge *ad hoc* in the communication announcing intention to appoint one. He therefore did not wish to press his opinion.

M. FROMAGEOT observed that there were two possible methods with regard to the communication of the name of the judge: The first method, which had been adopted by the Co-ordination Commission, was that the name of the judge *ad hoc* should be given in the notification of intention to appoint one. The other method would be to lay down that there must first be notification of an intention to appoint a judge *ad hoc* and, subsequently, after the lapse of a certain time, a second notification giving the name of the person selected.

M. Fromageot also recalled that the reason why the stipulation in the text proposed by the Co-ordination Commission regarding the giving of the name of the person selected had been dropped from the text adopted in first reading was not one of merits, but a desire to reconcile two somewhat divergent proposals.[1]

At the present moment, the Court had before it two questions: Did it wish to revert to the text proposed by the Co-ordination Commission, which provided for the designation of the judge by name ? And, secondly, was this designation to be made together with the notification of intention to profit by the terms of Article 31 of the Statute or at a later date ?

Count ROSTWOROWSKI pointed out that the Statute spoke of the selection of a person, whereas Article 3, in the form at present proposed, referred only to notification of intention. That constituted to some extent a discrepancy between the Rules and the Statute which should not be allowed to subsist.

Count Rostworowski also wished to remind the Court that the Registrar had drawn their attention to the fact that the text of Article 3 might give rise to serious difficulties. For instance, if they said that the name of the person selected might be notified before the opening of the oral proceedings, a party might regard itself as authorised to postpone such notification until just before the opening of the oral proceedings. But, as Baron Rolin-Jaequemyns had already observed, that was too late. It would therefore be better to lay down rules both for the notification of intention and for the designation of the person by name. Accordingly, it would be necessary to add something regarding the designation of the judge by name and providing for a time-limit within which this must be done. It would suffice to say that notice of intention must be given as soon as possible; but for the designation of the person by name, the Rules must lay down more or less precisely a time-limit within which a party must exercise its rights.

As regards the question whether the name of the person selected should be communicated together with the notice of intention or whether the name should be notified separately, it would be better to leave the parties a free hand; but the designation of the judge by name must not be made too late.

One of the amendments contained the following useful suggestion: ". . . in any case, *in sufficient time* . . .". The inclusion of these words would be desirable because they did not lay down too rigid a rule and left the degree of latitude necessary for any conversations which might take place with the party concerned.

[1] Meeting of 4.III.35, pp. 16-17.

The PRESIDENT referred to the following phrase, which had formed part of Article 4 *bis*:[1]

> " This notification shall indicate, from among those persons who fulfil the conditions laid down by Article 31 of the Statute, the name of the person whom the Government intends to appoint."

He observed that this text had been accepted by the Second Committee,[2] then by the Co-ordination Commission, and subsequently by the Court itself on March 2nd, 1935,[3] but it had disappeared from the text adopted as a compromise by the Court on March 4th, 1935. The sentence would meet the views of certain judges, and the President wondered whether there was really any advantage in separating the two notifications. It must be remembered that, if a State which was a party to a case before the Court wished to employ dilatory methods, the fact that the Rules provided for two successive notifications might lead to difficulties.

If the sentence which he had just read were adopted, it might be added to the text adopted in first reading [4].

M. GUERRERO, Vice-President, wished first of all to decide the question whether the Court thought it desirable to fix a time-limit for the designation of the national judge. Most members of the Court seemed to think that the absence of any provision on this point constituted a gap.

The President was prepared to agree that a party should, in its notification of intention, also designate the person whom it wished to appoint as national judge. But when the Court has considered this question, it had held that this might give rise to certain difficulties, in particular that the person designated would be in a delicate position because the Court might subsequently decide that the State in question was not entitled to have a national judge. That had been the chief reason which had led the Court to consider that it would be better not to compel a State to designate its national judge before knowing whether the Court held that it was entitled to have one [5].

Like Count Rostworowski, M. Guerrero wished a State to be free either simply to give notice of its intention to appoint a national judge and to await the Court's decision before actually doing so, or else to designate the person selected at the same time as it gave notice of its intention.

M. FROMAGEOT drew attention to the complicated points of procedure which a party might raise under the system of two separate notifications, either of which might give ground for an objection and might involve oral proceedings. If, on the other hand, there were only one notification, which would announce the intention to appoint a judge *ad hoc*, and at the same time indicate his name, there would only have to be one set of oral proceedings, in case of any objection.

Count ROSTWOROWSKI considered that the drawback pointed out by M. Fromageot was unavoidable: it was always possible that an objection might be lodged as to a State's right to have a judge, and another objection as to the person chosen as judge.

M. ANZILOTTI, after mature reflection on the various texts submitted, had come to the conclusion that it was most desirable to avoid changing anything and—save for verbal alterations necessary to bring them into harmony with the revised Statute—to retain paragraphs 2 and 3

[1] See p. 9, meeting of 18.V.34.
[2] D 2, A. 3, p. 760.
[3] Meeting of 2.III.35, p. 14.
[4] See p. 18.
[5] Meeting of 4.III.35, pp. 16-17.

of Article 4 of the Rules in force [1]. That article had the advantage of leaving the Court the greatest possible latitude, and it had functioned for several years without any difficulties.

If, however, the Court maintained the Article 4 adopted in first reading (new Article 3), with the proposed changes, there was a definite inconsistency between the first and second paragraphs. Paragraph 1, in the form now proposed, was based on the novel conception that it was for the parties to take the initiative in the appointment of judges *ad hoc*. From this standpoint, it was quite reasonable to provide for notification of an intention to appoint a judge *ad hoc*, for this notification to be communicated to the other parties and for the submission of observations by the latter, etc.

On the other hand, in paragraph 2, which concerned the case where there was *more than one party in the same interest*—perhaps the more important case—it was the old idea which continued to prevail: namely, that any question affecting the Court's composition should be decided direct by the Court itself. The Court, without requiring to hear the parties, fixed the period within which the States which it considered as being in the same interest must select their judge by mutual agreement. M. Anzilotti was not expressing any opinion on the value of the one and the other systems; but he could not see how the parties could be allowed to argue the question whether a State was entitled to appoint a judge *ad hoc*, or the qualifications of the person selected as a judge *ad hoc* and yet, at the same time, should be refused leave to submit arguments as to whether two, or several, States were in the same interest. And yet that appeared to be the idea resulting from a comparison between the first and second paragraphs.

Jonkheer VAN EYSINGA, upon reflection, had come to the same conclusion as M. Anzilotti. Theoretically, there was an omission in the Article 4 in force, because it made no reference to the normal case where a State wanted to have a judge *ad hoc*, but only to the case where there were several States in the same interest. Nevertheless, this omission had enabled those responsible for the working of the Court in practice to deal with the question of judges *ad hoc* in a manner which had given rise to no difficulty. Why then alter the Rules ?

M. FROMAGEOT recalled that the Court had come to the conclusion that the right of States to avail themselves of Article 31 of the Statute was one of which the Court could not deprive them. Was it desirable to go back upon the decision thus taken by the Court and adopted in first reading ?

With regard to the objection raised by M. Anzilotti to the effect that there was an inconsistency between paragraph 1 and paragraph 2, he had two observations to make. First, the text of paragraph 2, as adopted on February 4th last, [2] provided that the Court went into the question whether or not there were several parties in the same interest after it had received the notifications provided for in paragraph 1. Secondly, as it was difficult for the Court to decide this question without hearing the parties, there was no reason why they should not expressly say that the Court would hear the parties in regard to this point if any objection were raised.

M. NEGULESCO was not in favour of retaining the text of the Rules in force. He thought that the revision of the existing Rules had been undertaken in order to embody in them the practice of the Court. If they were to revert to the old text of Article 4, the result would be that parties would still be in a state of uncertainty how to proceed. For a Court of Justice, it was essential to let parties know that they had to take a certain step within a certain time. If, in the future, the Court received a large number of cases, it would be most desirable to simplify the procedure and not to complicate it by the silence of the Rules on certain points. That was why the Court should adopt a text for Article 3 indicating that the party concerned must take the initiative.

Baron ROLIN-JAEQUEMYNS, like M. Negulesco, thought it quite right that the Court should endeavour to adopt a more complete text for this article. But if they failed to find one, they would have to fall back on the old practice, which had not worked badly. Without committing himself *a priori*, he thought it would be deplorable in any case to confuse the two questions of the right of a party to be represented and of the choice of a judge. There was certainly no advantage in altering the existing system if the result were to be that these two questions were to be linked together.

M. GUERRERO, Vice-President, considered that the principal question was when was the person to sit in the Court to be designated: was it to be when the notification provided for in paragraph 1 was sent, or at some later moment ? The best thing might be to leave some latitude to the Governments concerned. Perhaps this result could be achieved by adding the following:

> " The person chosen to sit as judge *ad hoc* shall be indicated either when the notification provided for in the preceding paragraph is made or by a date to be fixed by the President."

M. FROMAGEOT said that this text did not make it clear when possible objections might be raised. In order to meet the Vice-President's point of view, he proposed the following text:

> " Any State which considers that it is entitled, under Article 31 of the Statute, to select a judge shall notify the Court as soon as possible and, if no objection is lodged, shall notify the name of the person selected at latest before the opening of the oral proceedings, unless otherwise ordered by the President. These notifications shall be communicated to the other parties, and they may submit their views to the Court. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties."

M. Fromageot said that the notification of intention and likewise the notification of the person's name would be addressed to the Court and communicated to the other parties, as they were received. The parties would then, like the Court itself, have every opportunity of lodging objections respecting them.

M. GUERRERO, Vice-President, proposed that the first paragraph of the draft [1] should be retained and that it should be followed by another paragraph on the lines of the text which he had submitted to the Court. That text allowed a Government either to designate its judge *ad hoc* when notifying its intention to appoint one, or to designate him later, when the Court had decided whether the Govern-

[1] *I.e.* paragraph 3 of text in note 2, second column, p. 17.
[2] P. 19.

[1] *I.e.*, of the text adopted in first reading " with modifications ", see p. 18, footnote 1, second column.

ment in question was entitled to have a judge *ad hoc*; as it was not desirable that a party should be free to notify its selection when it thought fit, the President of the Court would fix a time-limit, having regard to the various circumstances of the case, for instance the distance of a State from the seat of the Court.

The REGISTRAR asked whether, in the light of the discussion, the best solution would not be simply to codify practice; the following paragraph would do this:

> "Any State which considers that it is entitled, under Article 31 of the Statute of the Court, to select a judge shall notify the Court as soon as possible and in any case *by the date fixed for the filing of the first document of the written proceedings.*"

There would then be no reference to the possibility of doubt or objection; that was outside the scope of practice and was not of direct interest to a party; moreover, that matter was regulated in the Statute in so far as was necessary.

M. ANZILOTTI wondered whether the Vice-President's text would not have the effect of leaving the choice of the person entirely to a State, with no possibility of objection, once its right had been recognised.

M. GUERRERO, Vice-President, in order to meet this objection, proposed, in agreement with Count Rostworowski, to insert the addition he had proposed after the words "opening of the oral proceedings" and to follow it with the words "these notifications shall be communicated'".

The PRESIDENT considered that the Registrar's suggestion had the advantage of being entirely in accordance with practice. But it gave no information to a party as to the method to be followed, if it desired to exercise its right to lodge an objection. The text proposed by the Vice-President, on the other hand, did supply this information.

The President read the amended text proposed by the Vice-President:

> "Any State which considers that it is entitled, under Article 31 of the Statute of the Court, to select a judge shall notify the Court as soon as possible and in any case before the opening of the oral proceedings. The name of the person chosen to sit as judge shall be indicated either when the above notification is made or within a period fixed by the President. These notifications shall be communicated to the other parties, which may submit their views to the Court. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties."

M. ANZILOTTI observed that this text seemed to say that the two notifications might be communicated at the same moment. In that case, both the right to appoint a judge and the question of the person chosen would be discussed. Further, the text provided that the President was to fix a time-limit for the notification of the name of the person selected as judge. Seeing that the parties were entitled to make their notifications up to the opening of the oral procedure, was it to be understood that the fixing of a time-limit by the President would result in postponing the commencement of the above-mentioned procedure?

Jonkheer VAN EYSINGA pointed out that the text said that the notification of intention was to be made as soon as possible, and in any case before the opening of the oral proceedings. The State in question, however, was entitled to wait until just before the opening of the oral proceedings before making this notification. As regards notification of the name of the person chosen, that might be made either together with the first notification—*i.e.* up to the opening of the oral proceedings—or by the date fixed by the President. Did that mean that the President could fix a time-limit extending beyond the opening of the oral proceedings?

The PRESIDENT considered that, if a party waited until the last day before making the first notification, the President would not fix another time-limit.

He recalled that M. Nagaoka had pointed out at the last meeting that in some cases—*i.e.*, in cases brought before the Chamber for Summary Procedure—there were no oral proceedings. To meet M. Nagaoka's point, M. Fromageot had proposed the following text:

> ". . . at latest before the opening of the oral proceedings, *unless otherwise ordered by the President*".

M. GUERRERO, Vice-President, observed that, in the circumstances contemplated by Jonkheer van Eysinga, it would be the duty of the President to postpone the opening of the oral proceedings. However, in order to try to meet Jonkheer van Eysinga's views, the text might perhaps be modified as follows:

> "Any State which considers that it is entitled . . . to select a judge shall notify the Court *in sufficient time* before the opening of the oral proceedings."

The PRESIDENT would prefer to keep the words "as soon as possible".

M. ANZILOTTI asked whether the Registrar would have any objection to the addition to his text, after the words "before the opening of the oral proceedings", of the following phrase: "or by some other date to be fixed by the President". That would meet M. Nagaoka's objection.

The REGISTRAR said that he saw no objection to adding some words to the following effect: "or, if there be none, by a date to be fixed by the President".

M. ANZILOTTI having asked whether the practice was that notice of intention must be given by the date fixed for the filing of the first Memorial by each party, the REGISTRAR said that, when parties got into touch with the Registry, they always asked at what moment they should appoint their judge *ad hoc*, assuming that their right to have one was admitted. The answer given was that the latest possible moment was the opening of the oral proceedings; but it was added that it was desirable that the judge appointed should be able to follow the whole of the proceedings from the outset and that, in these circumstances, the intention of the State should be known before the filing of the first document of the written proceedings [1].

Baron ROLIN-JAEQUEMYNS considered, in agreement with the Vice-President's view, that regard should be had to Jonkheer van Eysinga's remark and that they should say that the notification should be made "in sufficient time before the opening of the oral proceedings on the merits".

M. FROMAGEOT was afraid that this would not dispose of M. Nagaoka's objection: what would happen in cases where there were no oral proceedings?

M. ANZILOTTI proposed the following wording:

> ". . . in sufficient time before the opening of the oral proceedings on the merits or, if there are none, by a date to be fixed by the President".

[1] See for instance C 67, p. 4083.

He would be in favour of the Registrar's text with this phrase added.

Baron ROLIN-JAEQUEMYNS observed that it would be better if the President could order the selection of the judge to be made, for instance, at least fifteen days before the date fixed for the hearing.

M. ANZILOTTI considered that, according to the Vice-President's text, the President would have the right to fix a time-limit expiring *after* the opening of the oral proceedings.

The PRESIDENT did not think that that was the intention. If complications arose, the President could always order an adjournment for some days.

Count ROSTWOROWSKI recalled that the text proposed by the Vice-President laid down that the notification of intention must be made before the opening of the oral proceedings. The Registrar had suggested another wording: " within the time-limit fixed for the filing by the party concerned of its first Memorial ". This wording certainly corresponded to the idea expressed by the words " as soon as possible ". It also had the advantage of disposing of all the objections raised to a time-limit coinciding with the opening of the oral proceedings. Lastly, the time-limit thus fixed corresponded with the Court's practice.

The PRESIDENT said that the suggestion really amounted to replacing " the opening of the oral proceedings " in the Vice-President's text by " the filing of the first document of the written proceedings ".

The REGISTRAR observed that M. Guerrero's text raised a technical point. According to this text, the President would in certain circumstances fix a time-limit. The President had just pointed out that this might under certain conditions involve an adjournment. But under Article 28 of the Rules it was the Court that granted adjournments. Was there not a danger of an inconsistency here ?

Jonkheer VAN EYSINGA thought that the difficulty arose rather from Article 47 of the revised Rules, which also provided for a decision of the Court.

The PRESIDENT thought it would suffice to avoid using the word " adjournment ".

Another technical point, however, arose: would the fixing of a time-limit by the President require an order, or would it simply be a question of a letter ? Probably the latter would suffice.

M. NAGAOKA observed that the Statute laid down that all parties were entitled to appoint a national judge. Accordingly, it was a right which they might or might not use as they saw fit. Now, the proposed text began with the words: " Any State which considers that it is entitled to appoint a judge . . . must notify . . . ", etc. It therefore imposed a general obligation. Would it not be better to say: " Any State which considers that it should exercise the right . . . " ?

The PRESIDENT proposed to meet M. Nagaoka's point by substituting in the French text " *exercer* " for " *avoir* ".

He thought it could be considered that, in regard to paragraph 1 of Article 3, the only texts now before the Court were the one proposed by the Vice-President and the Registrar's suggestion. He read the Vice-President's text in the form resulting from the discussion:

> " Any State which considers that it is entitled, under Article 31 of the Statute, to select a judge shall notify the Court as soon as possible and in any case in sufficient time before the opening of the oral proceedings, unless otherwise ordered by the President. The name of the person chosen to sit as judge shall be indicated either together with the notification above mentioned, or within a time-limit fixed by the President. These notifications shall be communicated to the other parties, which may submit their views to the Court. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties."

M. FROMAGEOT explained that the phrase " unless otherwise ordered by the President ", which had been added, should refer not to the first notification (of intention), but to the selection of the person.

The PRESIDENT recalled that its purpose was to meet the objection raised by M. Nagaoka in connection with cases when there were no oral proceedings. He recalled that Count Rostworowski had proposed to substitute for the words " before the opening of the oral proceedings " the words: " within the time-limit fixed for the filing by it of its first document of the written proceedings ", and that, if this wording were adopted, M. Nagaoka's objection would disappear.

M. ANZILOTTI remarked that the first document of the written proceedings here referred to might be the Counter-Memorial, in a case where a judge *ad hoc* was to be appointed by the respondent party.

M. NEGULESCO would have some hesitation in accepting this wording. In matters of procedure, care must be taken always to keep the parties on an equal footing. The proposed wording would present at all events an apparent inequality. One party would have the duty to appoint its judge *ad hoc* by a given date; it would be possible for the other to appoint its judge later.

The PRESIDENT proposed that they should say:

> " . . . within the time-limit fixed for the filing of the *first* document of the written proceedings ".

The REGISTRAR pointed out that it was impossible to compel a respondent, who might be unwilling to enter an appearance, to appoint his judge by the date fixed for the filing of the applicant's Memorial. The proposed text would force him to commit himself by that date, whereas the Statute (Article 53) left him quite free until the expiration of the time allowed for the filing of the Counter-Memorial.

M. NEGULESCO observed that many jurists considered that the application formed part of the written proceedings,[1] and it was impossible to compel a State to appoint its judge at the time that the application was filed.

The PRESIDENT recalled that, according to the terminology of the Statute and Rules, the application did not form part of the written proceedings.

M. NAGAOKA observed that, in summary procedure, the Counter-Memorial marked the end of the written proceedings.[2]

The PRESIDENT submitted the following question to the Court:

> " Does the Court decide to adopt the following text for paragraph 1 of Article 3 of the Rules:
>
> " ' Any State which considers that it is entitled under Article 31 of the Statute of the Court to select

[1] *Cf.* meeting of 26.II.35, p. 282.

[2] Article 72 of the text adopted in first reading, see p. 305, meeting of 9.IV.35.

a judge shall notify the Court within the time-limit fixed for the filing of the Counter-Memorial. The name of the person chosen to sit as judge shall be indicated, either with the notification above mentioned or within a time-limit fixed by the President. These notifications shall be communicated to the other parties, which may submit their views to the Court. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties'."

M. NAGAOKA would vote in favour of this text if " Counter-Memorial " were replaced by " Memorial ".

M. ANZILOTTI emphasised that, as the Registrar had observed, under the Statute a State was at liberty to default by not presenting its first document of the written proceedings—*i.e.*, the Counter-Memorial.[1] But the proposed wording would compel it to define its attitude before the time fixed for the filing of that document.

The PRESIDENT took the opinion of the Court on the text which he had just read, substituting " Memorial " for " Counter-Memorial ".

The Court, by seven votes to three, approved this text.

The PRESIDENT reverted to the question raised by M. Nagaoka.

In the first line of this text, should they say: " Any State which considers that it is entitled " or " Any State which intends to exercise the right " ?

M. FROMAGEOT having suggested the insertion, after the words " which considers that it is entitled ", of the words " and intends to exercise the right ", the PRESIDENT took the opinion of the Court on the following question:

" Does the Court decide to add the words 'and intends to exercise its right' to the first line of the text just adopted ? "

By six votes to two, the Court answered the question in the affirmative.

Paragraph 2 having been adopted on 4.II.36 (see p. 19), the whole article was adopted in second reading with the following text:

" *Article 3.*

" 1. Any State which considers that it possesses and which intends to exercise the right to nominate a judge under Article 31 of the Statute shall so notify the Court by the date fixed for the filing of the Memorial. The name of the person chosen to sit as judge shall be indicated, either with the notification above mentioned, or within a period to be fixed by the President. These notifications shall be communicated to the other parties, which may submit their views to the Court. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties.

" 2. If, on receipt of one or more notifications under the terms of the preceding paragraph, the Court finds that there are several parties in the same interest and that none of them has a judge of its nationality upon the Bench, it shall fix a period within which these parties, acting in concert, may, applying Article 31, paragraph 5, of the Statute, nominate a judge in accordance with the terms of that article. If, at the expiration of this time-limit, no notification of a nomination by them has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute."

24.II.36.

See under Article 49, p. 192, for a reference to Article 3 during discussion of Article 49.

4.III.36.

See under Article 83, p. 348, for a reference to Article 3 during the discussion of Article 83.

10.III.36. *

Final Adoption.

In paragraph 1, the Drafting Committee had made an amendment consisting in the insertion of the words " within a period also to be fixed by the President ".

The Committee had thought this addition necessary in order to ensure that there would be no check in the proceedings because the parties had not submitted their views.

The addition was approved.

In the first sentence of paragraph 2, as adopted by the Court, there were two references to Article 31 of the Statute. The Committee had considered that one of these could be dispensed with and that the wording might thus be simplified. It had amended the wording accordingly.

Jonkheer VAN EYSINGA, in the reference to Article 31 of the Statute, proposed the deletion of the words " *de la Cour* ", which, moreover, did not appear in the English text; it had been agreed that the expression " Statute of the Court " should only be used once in each article, and it had already been used in paragraph 1 of Article 3.

It was decided accordingly.

Count ROSTWOROWSKI observed that in the English text the words " of the Court " did not even appear in paragraph 1; the words used were simply " under Article 31 of the Statute ".

The PRESIDENT said that there was an omission and that the expression " Statute of the Court " should be inserted.

Article 3 as thus amended was finally *adopted*.

ARTICLE 4 *(Article 4, Paragraph 1 of the old Rules).*

COMPOSITION OF THE COURT SITTING WITH JUDGES *ad hoc*

18.V.34 and 31.V.34.

See under Article 3, pp. 10, 11 and 12, for references to Article 4 in connection with the discussion of the draft Articles 4 *bis* and 4 *ter* (Article 3 of Rules in force).

2.III.35.**

The PRESIDENT observed that the Co-ordination Commission proposed that the present Article 4 should be divided into three articles, the first of which would cor-

[1] See: Article 53 of the Statute; meeting of 23.II.35, p. 321 of this volume; D 2, pp. 201 and 214; D 2, A., p. 91.

* D 2, A. 3, pp. 714-715.

** *Ibid.*, pp. 382-383.

respond to the first paragraph of the existing text, which was as follows:

> " In a case in which one or more parties are entitled to choose a judge *ad hoc* of their nationality, the full Court may sit with a number of judges exceeding the number of regular judges fixed by the Statute."

For this text, the Co-ordination Commission proposed to substitute the following: [1]

> " *Article 4.*—In a case in which one or more parties are entitled to choose a judge under the conditions laid down by Article 31 of the Statute, the full Court may sit with a number of judges exceeding the number of regular judges fixed by the Statute."

The time had now come for the Court to decide whether they wished still to leave open the question of the right of a State to appoint a non-national as judge *ad hoc* or whether that question should be settled. [2] The changes proposed by the Co-ordination Commission in Article 4 as well as those in Articles 2 and 3 were framed so as to avoid prejudging that question.

There being no observations, the PRESIDENT construed the Court's silence as indicating that members wished the question still to be left open.

He then opened the discussion on the substance of Article 4.

Article 4, in the form proposed by the Co-ordination Commission, was adopted.

3.IV.35.*

First Reading as Article 4, paragraph 4.

The PRESIDENT opened the discussion on paragraph 4 of Article 4, which reproduced the text of paragraph 1 of Article 4 of the Rules then in force.

There being no objection to the order of the paragraphs which had been modified by the Drafting Committee, the PRESIDENT declared Article 4, as now amended, adopted in first reading. [3]

> [*Note.*—For the discussion concerning the division of the text of the draft of Article 4 adopted in 1935 between Articles 3 and 4 in consequence of the deletion of the old Article 3 upon the entry into force of the revised Statute, see Article 2, pp. 6-8 of this text.]

6.II.36.**

Second Reading.

The PRESIDENT invited the Court to begin its examination of Article 4 (paragraph 3 of Article 4 of text adopted in first reading).

Article 4, Paragraph 1.

Jonkheer VAN EYSINGA observed that the Rules, when citing the Statute, always used the words " the Statute of the Court ", unless the phrase occurred two or three times in the same article, when, except the first time, they simply said: " the Statute ". As the old paragraph 3 of Article 4 had become paragraph 1, it should now run as follows:

> " . . . under the conditions laid down by Article 31 of the Statute of the Court, the latter may sit . . . ", etc.

M. FROMAGEOT observed that this wording dropped the word " full ".

Count ROSTWOROWSKI considered that " the Court " always meant the full Court.

M. ANZILOTTI pointed out that the expression " full Court " was here used in contradistinction to a " Chamber ".

Baron ROLIN-JAEQUEMYNS also considered that the word " full " was required and wished the existing wording to be maintained.

The PRESIDENT gathered that that was the general feeling of the Court and asked Jonkheer van Eysinga whether he maintained his proposal.

Jonkheer VAN EYSINGA said that he was willing to withdraw it.

The PRESIDENT said that, in that case, he would consider the paragraph as adopted in second reading.

> *Text adopted*: " When one or more parties are entitled to nominate a judge under Article 31 of the Statute, the full Court may sit with a number of judges exceeding the number of members of the Court fixed by the Statute." (The second paragraph was transferred to Article 2: see p. 8.)

11.II.36.

For references to Article 4 during the discussion on the draft of paragraph 1 of Article 25 (Article 24, paragraph 5, of the text finally adopted) see Article 24, meeting of 11.II.36, pp. 52-53 of this text.

Final Adoption.

Article 4 was finally *adopted* unchanged on 10.III.36.

ARTICLE 5 *(Article 5 of the old Rules).*

SOLEMN DECLARATION OF JUDGES

4.III.35.***

The PRESIDENT invited the Court to examine Article 5 of the Rules, the existing text of which was as follows:

> " Before entering upon his duties, each member of the Court or judge summoned to complete the Court, under the terms of Article 31 of the Statute, shall make the following solemn declaration in accordance with Article 20 of the Statute:
>
> " ' I solemnly declare that I will exercise all my powers and duties as a judge honourably and faithfully, impartially and conscientiously.'
>
> " A special public sitting of the Court may, if necessary, be convened for this purpose.
>
> " At the public inaugural sitting held after a new election of the whole Court, the required declaration shall be made first by the President, secondly by the Vice-President, and then by the remaining judges in the order laid down in Article 2."

* D 2, A. 3, p. 422.
** *Ibid.*, pp. 492-493.
*** *Ibid.*, pp. 395-400.
[1] *Ibid.*, p. 862; *cf.* also pp. 10-11 of this volume.
[2] *Cf.* discussion on Article 31 of the Statute, pp. 357-360.
[3] For adoption of the preceding paragraphs, see p. 18, under Article 3.

The Co-ordination Commission had suggested certain amendments. It proposed, to begin with, that the first paragraph should be worded as follows:

> " 1. The declaration to be made by every judge, in accordance with Article 20 of the Statute, shall be worded as follows:
>
> " ' I solemnly declare . . . conscientiously.' "

This wording took count of the fact that the word " judge " covered all persons having seats on the Bench in a given case: regular judges, deputy-judges or judges appointed under Article 31 of the Statute. The word " judge " had, indeed, been inserted in other clauses of the Rules for the same reason.

M. SCHÜCKING was in favour of replacing the expression " member of the Court " by the word " judge ".

Baron ROLIN-JAEQUEMYNS asked whether, having regard to the wording used in Article 20 of the Statute: " Every member of the Court shall, before taking up his duties . . .", it would not be preferable to retain the text of the existing Article 5.

The PRESIDENT thought that there was some advantage in using the word " judge " in place of " member of the Court ". For example, as Article 13 of the Statute laid down that " the members of the Court shall be elected for nine years ", it did not appear certain that the term " member of the Court " covered judges *ad hoc*. On the other hand, having regard to Article 31 of the Statute, it was beyond dispute that the term " judge " covered all persons sitting on the Bench of the Court.

Baron ROLIN-JAEQUEMYNS feared that any change in Article 5 of the Rules, the text of which gave rise to no difficulty, might be misinterpreted in an undesirable sense.

M. GUERRERO, Vice-President, agreed with Baron Rolin-Jaequemyns. As the text which the Co-ordination Commission proposed for Article 5 was not designed to effect any change in the article, it would seem better to be content with Article 5 of the existing Rules.

The PRESIDENT said that the Co-ordination Commission had wished to avoid the expression " member of the Court ", because in some of the clauses of the Statute that expression had not a sufficiently wide meaning. Article 5 of the Rules, as at present worded, appeared to draw a distinction between the members of the Court and the judges *ad hoc*.

Jonkheer VAN EYSINGA believed that, in some of the other articles which it had revised, the Court had already adopted the term " judge " as covering all cases.[1]

The REGISTRAR mentioned the new Article 31 (30 of Rules of 11. III. 36), adopted in May 1934, as an example.[1]

M. URRUTIA thought that the Court should avoid adopting in the Rules a terminology other than that employed in the Statute. Article 20 of the Statute spoke of " every member of the Court . . .". It would therefore be better to leave Article 5 of the Rules as at present worded.

The PRESIDENT invited the Court to vote upon the following question:

> " Does the Court adopt Article 5, paragraph 1, of the Rules in the form proposed by the Co-ordination Commission ? "

By five votes against four, the Court answered the question in the negative.

M. ANZILOTTI said that the only reason why he had voted against the Co-ordination Commission's text was that he was opposed to making a change if there was no good reason for it. Apart from that reason, he saw no objection to the text proposed by the Commission.

The PRESIDENT noted that the text proposed by the Co-ordination Commission for paragraph 1 of Article 5 of the Rules had been rejected.

For paragraph 2, the Co-ordination Commission had proposed the following text:

> " 2. This declaration shall be made at the first public sitting at which the judge in question is present after his appointment."

This, he said, was a clause proposed by the Co-ordination Commission, and not corresponding to any provision of the existing text.

M. GUERRERO, Vice-President, observed that, as the Court had decided to retain the first paragraph of Article 5, as at present worded, there was no reason for the proposed paragraph 2.

Baron ROLIN-JAEQUEMYNS considered that, apart from

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[1] See p. 75. — In the course of the preparatory work, the terminology of the revised Statute (and of the existing Statute—of 1920) was analysed as follows:

" It seems clear that the term ' members of the Court ', under the system of the revised Statute, only covers titular judges (in the Statute of 1920, it also no doubt covered deputy-judges).

" Decisive proof of the correctness of this view is to be found in Article 3 of the revised Statute: ' The Court shall consist of fifteen members.' If judges *ad hoc* could be included in this term, the number of members could not be limited to fifteen.

" Moreover, under Article 4 of the revised Statute, the ' members of the Court ' are elected by the Assembly and by the Council; and judges *ad hoc* are nominated in an entirely different way.

" Again, according to Article 13 of the revised Statute, ' the members of the Court ' are elected for nine years, which is not the case as regards judges *ad hoc*; and in the event of the resignation of a ' member of the Court ', such resignation is to be notified to the Secretary-General, a provision which cannot apply to judges *ad hoc*.

" Finally, it is certain that, in Articles 16, 17, paragraph 1, and 24, paragraph 1, the expression ' member of the Court ' can only mean titular judges.

" As regards Articles 17, paragraph 2, 20 and 24, paragraph 2, judges *ad hoc* are included in the expression ' members of the Court ' in virtue of a special provision—namely, Article 31, last paragraph. The modification undergone by Article 31, last paragraph, at the revision of 1929 is particularly significant from the point of view under consideration.

" Article 19, of course, does not apply *de plano*, but only by analogy, to judges *ad hoc*. As regards Article 18, its application to the latter is precluded by the second paragraph which has no meaning in relation to judges *ad hoc* who are not replaced according to the procedure laid down in Article 14 of the revised Statute. Similarly, if judges *ad hoc* were included in the ' members of the Court ' referred to in Article 23 of the Statute, they would be endowed with rights and burdened with obligations, both of which would be excessive.

" To complete this analysis, it is certain that the ' members of the Court ' who receive ' an annual salary ' or ' pensions ' under Article 32 of the revised Statute, do not include judges *ad hoc*. This provision, moreover, furnishes the key to this question of terminology when it refers to ' judges appointed under Article 31 ' of the Statute, ' other than members of the Court . . .'. ' Judges ' is the term which covers judges *ad hoc*; this is borne out by the wording of Article 31 itself (paragraphs 4 and 6); paragraph 4 makes this particularly clear by contrasting ' members of the Court of the nationality of the parties concerned ' with ' judges specially appointed by the parties '.

" It is true, on the other hand, that Article 32 of the Statute provides for regulations to be made by the Assembly regarding ' the conditions under which . . . members of the Court . . . shall have their travelling expenses refunded ' and that the regulations adopted by the Assembly in this connection on September 14th, 1929, also cover judges *ad hoc*. It is, however, also true that these regulations treat them quite differently from ' members of the Court '. For instance, the latter, but not the former, are entitled also to the repayment of travelling expenses for ' one near relative '." [Note by the Registrar.]

some additional indications, which were not without use, paragraph 4 of the existing article corresponded to the second paragraph proposed by the Co-ordination Commission.

M. ANZILOTTI gathered that paragraph 2, as proposed by the Co-ordination Commission, constituted a recognition of the existing practice, which was that the judges *ad hoc* were supplied with the documents of the written proceedings and took part in the preliminary deliberation before making their declaration, which they did at the first public sitting. The only question which now arose was whether or not it was desirable to confirm by a clause in the Rules this practice, which had grown up alongside the latter. That was how he regarded the proposal of the Co-ordination Commission.

Count ROSTWOROWSKI observed that the text of paragraph 1 of the existing Article 5, which the Court wished to retain, contained the expression: "Before entering upon his duties, each member of the Court. . . ." He wondered how far the maintenance of this expression was compatible with the practice which enabled every judge not only to receive the documents of the written procedure, but even to take part in the meetings which preceded the first public sitting devoted to a given case.

M. ANZILOTTI considered that, having regard to the terms of Article 20 of the Statute, no change would result if this expression were deleted.

The REGISTRAR observed that the Court's practice had undergone a continuous evolution. During the first few years, it had been much stricter than it was now. At the outset the Court—though it had perhaps not always been entirely consistent—had not allowed judges *ad hoc* to take part in its discussions before they had made their solemn declaration. But in 1931, in the resolution concerning practice,[1] the Court introduced the preliminary deliberation, preceding the public sittings, as a general rule; it was that step which had, practically speaking, made it necessary for the judges *ad hoc* to sit on the Bench before they had made their solemn declaration. Thus, the present practice had arisen, and it was this new practice which the Co-ordination Commission's proposal sought to embody in Article 5.

Baron ROLIN-JAEQUEMYNS thought that a judge might quite well receive some written documents and even take part in a meeting of the Court before making his solemn declaration at a public sitting; however, in such a case he must not be regarded as officially present.

Jonkheer VAN EYSINGA thought that, if the Court desired to abide strictly by the terms of Article 20 of the Statute, Article 5 of the Rules in its existing form was sufficient; but in that case there would be nothing to justify the new practice of the Court.

M. GUERRERO, Vice-President, thought that, if Article 20 of the Statute really meant that a judge *ad hoc* could not take any part in the work of the Court so long as he had not made a solemn declaration, it was manifest that the first paragraph of the existing Article 5 was not adequate. However, it had been applied in a different sense, with satisfactory results. In these circumstances, the article proposed by the Co-ordination Commission was preferable to the existing text. For these reasons, and in the light of the Court's practice, he wished to modify the opinion he had formerly expressed, and to say that it did not appear that the Court should maintain the first paragraph of the existing Article 5.

M. SCHÜCKING was of opinion that the necessity, under Article 42 of the Rules,[1] for communicating the documents of the written procedure, as they became available, to the judges *ad hoc*, made it impossible to place a strict construction upon Article 20 of the Statute.

Count ROSTWOROWSKI observed that the situation in which the Court found itself was that it had been interpreting Article 20 of the Statute in a manner inspired by a sentiment of justice and a desire to maintain perfect equality between the parties, so far as possible. It could not now retreat from that position and introduce a stricter practice.

Baron ROLIN-JAEQUEMYNS thought that there was no need to change the existing Rules. The Court had established a practice in this matter, and it would suffice to maintain it.

The PRESIDENT observed that the existing Rule did not accord with a strict application of the Statute, and that the Court's practice was not in accordance either with the Statute or the Rules. It was for that reason that the Second Committee[2] had proposed to modify the Rule, in order to bring it into line with the Court's practice.

M. GUERRERO, Vice-President, while approving the practice that had grown up, did not consider that hitherto there had been a sufficient basis for it in the Statute or in the Rules. The Co-ordination Commission had endeavoured to provide this legal basis for the participation of a national judge in the work of the Court, even before he had made his solemn declaration. It was a just and desirable step.

In these circumstances, he suggested that it might be wise to reconsider the decision that had been taken at the beginning of the meeting.

M. NEGULESCO agreed with what M. Guerrero had said and asked that the discussion should be re-opened on the first paragraph of Article 5 of the Co-ordination Commission's text.

The PRESIDENT asked the Court to say whether it desired to re-open the discussion on the question decided at its last vote.

The Court answered this question in the affirmative by six votes, three members abstaining.

The PRESIDENT asked the Court to vote on paragraph 1 of Article 5 as proposed by the Co-ordination Commission.

M. ANZILOTTI said he would vote for the retention of the existing text. The omission of the words "Before entering upon his duties" would effect no change in the legal position, which was governed by Article 20 of the Statute.

The PRESIDENT recalled that the Co-ordination Commission's report had said that:[3]

> "After examining Article 20 of the Statute, the Commission has come to the conclusion that this clause does not prevent judges *ad hoc* from taking part in discussions in the Court preceding the public sittings in the case for which they are appointed, notwithstanding the fact that their solemn declaration is not made until the first public sitting."

[1] D 2, A. 2, p. 300.

[1] See p. 147 for text adopted on 1. VI. 34.
[2] D 2, A. 3, p. 761.
[3] *Ibid.*, p. 863.

SOCIÉTÉ DES NATIONS LEAGUE OF NATIONS

With the compliments of

the Registrar of the

Permanent Court of International Justice.

Geneva, July 1943.

The President then put the text to the vote, and the Court adopted the first paragraph of Article 5, as proposed by the Co-ordination Commission, by six votes to three.

The PRESIDENT observed that the second paragraph of Article 5, as proposed by the Co-ordination Commission, was worded as follows:

> " This declaration shall be made at the first public sitting at which the judge in question is present after his appointment."

It was in connection with this paragraph that the question at what moment the judge *ad hoc* should make his solemn declaration would have to be discussed.

M. ANZILOTTI said that he would vote against the new text, because he thought it better not to introduce into the Rules a clause which was debateable. It would be preferable to rely on the Court's practice.

The PRESIDENT asked the Court to vote upon the second paragraph of Article 5, as proposed by the Co-ordination Commission.

The paragraph was adopted by six votes to three.

The PRESIDENT passed on to paragraph 3 of Article 5 as proposed by the Co-ordination Commission. He recalled that the existing article of the Rules laid down, in paragraph 2:

> " A special public sitting of the Court may, if necessary, be convened for this purpose."

The Co-ordination Commission had now proposed the following text, which would form the third paragraph:

> " A special public sitting of the Court may be convened for this purpose."

He put paragraph 3 of the text proposed by the Co-ordination Commission to the vote.

The Court unanimously adopted this paragraph. (This paragraph was combined with the second paragraph for the text adopted in first reading.)

The PRESIDENT observed that the Co-ordination Commission proposed to omit the third and last paragraph of Article 5, as at present in force, namely:

> " At the public inaugural sitting held after a new election of the whole Court, the required declaration shall be made first by the President, secondly by the Vice-President, and then by the remaining judges in the order laid down in Article 2." (The words " of the present Rules " were added after " Article 2 " for the text adopted in first reading.)

The President then read the statement of reasons in the Co-ordination Commission's report: [1]

> " The Commission considers that the new wording proposed for the last paragraph does not prevent the Court from holding a public sitting, after a new election of the whole Court, on which occasion the newly elected judges would make their solemn declarations, in conformity with the precedents of 1922 [2] and 1931. [3] "

Baron ROLIN-JAEQUEMYNS pointed out that, under paragraph 3 of the Article 5 which had just been adopted, a special public sitting might be called for the making of solemn declarations. The former paragraph 3 had therefore become superfluous.

Jonkheer VAN EYSINGA pointed out that the paragraph which it was proposed to omit contained a clause, dealing with the order in which the solemn declarations were to be made, which was lacking in the new Article 5.

M. GUERRERO, Vice-President, did not think anything would be gained by the omission of this paragraph, which contained a useful provision.

Count ROSTWOROWSKI was also in favour of retaining the paragraph, which, he said, confirmed the view that a judge entered upon his duties before the public sitting at which he made his solemn declaration.

The PRESIDENT put to the vote the question of the retention of the last paragraph of the existing Article 5.

By seven votes to two, the Court decided to retain the paragraph.

3.IV.35. *

First Reading.

Paragraphs 1 and 2 of Article 5 were adopted without observation.

In paragraph 3, an amendment affecting the French text only was adopted.

There being no further observations, the PRESIDENT declared Article 5 adopted in first reading with this amendment.[1]

6.II.36.**

Second Reading.

Paragraph 1.

Adopted.

Paragraph 2.

M. FROMAGEOT considered that the words " *dont il s'agit* " (in question) were superfluous. The phrase " the first public sitting of the Court at which the judge is present after his appointment " was perfectly clear without these words.

He thought the sentence might run:

> " . . . at which the judge is present after his nomination *or election*."

The PRESIDENT said that M. Fromageot proposed that paragraph 2 of Article 5 should run as follows:

> " This declaration shall be made at the first public sitting of the Court at which the judge is present after his election or nomination. A special public sitting of the Court may be convened for this purpose."

There being no objections, this text was considered adopted.

Paragraph 3.

Adopted.

The article was adopted in second reading.

. . . . . .

The PRESIDENT, upon a suggestion by the Registrar, drew attention to a doubt which might arise in connection with paragraph 2 of Article 5, which had been previously adopted by the Court. That article said that judges must make their solemn declaration at " *la première audience publique de la Cour . . .* ". But it had just been said that when there was no argument, etc., at a public sitting, it was not a hearing (*audience*). The result of this might be that, in a case where there were no oral proceedings,

[1] D 2, A. 3, p. 863.
[2] D 2, p. 45.
[3] E 7, p. 278.

* D 2, A. 3, p. 423.
** *Ibid.*, pp. 495, 500.
[1] For text adopted, see meeting of 4.III.35 above.

a judge *ad hoc* might have to wait until the delivery of judgment before making his declaration.

M. FROMAGEOT observed that it was also provided in the same paragraph 2 of Article 5 that " a special public sitting of the Court may be convened for this purpose ".

The REGISTRAR pointed out that the difficulty which he foresaw arose from the fact that the text laid down the general rule that solemn declarations must be made " at the first *audience publique* at which a judge was present ". This rule, however, could hardly ever be applied, if the principle that a judge should make his declaration " before taking up his duties " was to be observed. The Court would thus be obliged either to convert the exception—the convening of a special public sitting—into the rule, or to extend the possibility of a judge *ad hoc* sitting before making his solemn declaration to a degree hardly compatible with the principle of the Statute referred to.

M. GUERRERO, Vice-President, in order to avoid these difficulties, proposed that the expression " *séance publique* " should be used in paragraph 2 of Article 5 instead of " *audience publique* ", and that the final phrase: " A special public sitting of the Court may be convened for this purpose " should be deleted.

Baron ROLIN-JAEQUEMYNS thought it would be better to keep Article 5, paragraph 2, as it was—*i.e.*, to provide for the convening of a special public sitting for the declaration of a judge *ad hoc*.

M. GUERRERO, Vice-President, thought that, as soon as new members were elected, a public sitting should be held in order that they might make their solemn declaration before entering upon their duties, even if there were no case before the Court.

10.III.36.*

Final Adoption.

The PRESIDENT said that there had been no change in paragraph 1 of Article 5.

In paragraph 2, the Drafting Committee had replaced the word " *audience* " by " *séance* ", in view of the discussion which had taken place at a previous meeting [1] when it had been observed that the declaration would be made at a public sitting but that this sitting would not necessarily be a hearing *(audience)*.

In the English text the word " sitting " had been used, which corresponded better to " *séance* " than " meeting ".

At the end of paragraph 2, the Committee had also made a slight change, saying: " *en vue de cette déclaration, la Cour* peut tenir *une séance publique spéciale* ", instead of " *la Cour* peut être *convoquée* ". To make it correspond to the new French text, the English text had been amended to read: " A special public sitting of the Court may *be held*. . . ."

Lastly, in paragraph 3, in the English text, the word " next " had been substituted for " secondly ".

The PRESIDENT declared article 5 as a whole finally *adopted* with these amendments.

ARTICLE 6 *(Article 6 of the old Rules).*

APPLICATION OF ARTICLE 18 OF THE STATUTE

First Reading of Articles 6, 7 and 8.

No changes having been proposed in these articles, they were voted upon together in first reading and were adopted unchanged on 3.IV.35.

6.II.36.*

Article 6. — Second Reading.

M. URRUTIA observed that the draft article which the Court was about to examine [1] said that Article 18 of the Statute was to be applied when a member of the Court was " *mis en cause* ". But Article 18 was also applicable—*e.g.*, in the case of a judge permanently prevented from sitting by ill-health. Article 6, which seemed to imply a sort of trial, was scarcely applicable to a case of this kind.

Accordingly, M. Urrutia proposed simply to say:

> " For the purpose of applying Article 18 of the Statute of the Court, the President, or if necessary, the Vice-President, shall convene the members of the Court. If the members present are unanimously agreed, the Registrar shall issue the notification prescribed in the above-mentioned article."

M. FROMAGEOT feared that M. Urrutia was attributing to the words " *mis en cause* " a technical meaning which they did not possess.

The PRESIDENT remarked that the English text used the word " affected ". He considered, moreover, that the question of the application of Article 18 of the Statute was a very delicate one and would prefer not to touch the wording of Article 6 of the Rules.

The PRESIDENT declared Article 6 adopted in second reading.

10.III.36.

Article 6. — Final Adoption.

The Drafting Committee proposed no change in the French text, and in the English text they had simply substituted the word " unanimous " for " unanimously agreed ".

Article 6, as thus amended, was finally *adopted*.

ARTICLE 7 *(Article 7 and Article 35, Paragraph 3, sub-paragraph 2, of the old Rules).*

TECHNICAL ASSESSORS: APPOINTMENT

3.IV.35.

See under Article 6 above for adoption of Article 7 unchanged in first reading on 3.IV.35.

6.II.36.**

Second Reading.[2]

Paragraph 1.

Adopted without observations.

* D 2, A. 3, pp. 495-496.

[1] The text of the article was as follows:

" For the purpose of applying Article 18 of the Statute of the Court, the President, or if necessary the Vice-President, shall convene the members of the Court. The member affected shall be allowed to furnish explanations. When he has done so, the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimously agreed, the Registrar shall issue the notification prescribed in the above-mentioned article."

* D 2, A. 3, p. 715.

** *Ibid.*, pp. 496-497.

[1] See meeting of 4.III.36, p. 349.

[2] The text under consideration was that of the old Rules unchanged.

Paragraph 2.

The PRESIDENT said that he had been unable to find either in the Statute or the Rules any provision empowering a Chamber to appoint assessors. For instance, neither in Articles 26 nor 27 of the Statute was there any provision for the withdrawal of the right of appointment from the Court.

M. ANZILOTTI pointed out, however, that under these articles of the Statute, " The technical assessors shall be chosen in each case in accordance with the rules of procedure under Article 30 ", and under that Article: " The Court shall frame rules for regulating its procedure." The Court had undoubtedly relied on this provision when it had laid down in the Rules that assessors in a case before a Chamber would be chosen by the Chamber itself.

The PRESIDENT had no wish to withdraw from the Chambers the right to choose their assessors. He remarked, however, that there was a shortcoming here in the relevant texts.

Jonkheer VAN EYSINGA observed that, according to the records of the preparation of the Rules, [1] the second paragraph of Article 7 expressed the principle of the autonomy of the Chambers, a principle which had been recognised by the Court ever since 1922.

The PRESIDENT still felt some doubts. For instance, under Article 8 assessors had to make their solemn declaration before the Court.

The REGISTRAR pointed out that, under Article 70 of the revised Rules, the rules for procedure before the full Court were automatically applicable to procedure before the Chambers; again, the third paragraph [2] of Article 71 conferred the powers of the President of the Court upon the President of the Chamber as soon as the Chamber was assembled.

These two provisions would seem to remove any difficulty and perhaps even render paragraph 2 of Article 7 superfluous. In any case, there was no inconsistency between that provision and the other provisions of the Rules.

The PRESIDENT left the question to the decision of the Court; he had simply wished to draw their attention to what had appeared to be an omission in the Rules.

The REGISTRAR desired to call attention to a technical point: the second paragraph of Article 7 spoke of the " Special Chamber ". But Articles 26 and 27 of the revised Statute provided that: " Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph " of each of these articles. Accordingly, the possibility of having technical assessors was not confined to the full Court and the Special Chambers; in certain cases the Chamber for Summary Procedure could also have them. Article 7 could be brought into harmony with the revised Statute simply by deleting the word " Special "; for, according to the terminology of the Rules, a distinction was drawn between " Special Chambers " and " Chamber for Summary Procedure ".

There being no objection to the deletion of the word " Special " in paragraph 2 of Article 7, the PRESIDENT declared the deletion of this word approved.

The President also declared Article 7 as a whole adopted by the Court, in second reading.

6.II.36.

See under Article 8, p. 35, for discussion of Article 7 in connection with Article 8.

[1] See D 2, p. 36.

[2] Paragraph 4 of the Rules now in force.

6.II.36.*

M. NEGULESCO wished to revert to Article 7. In the first paragraph, after the words " The President shall take steps to obtain all information which might be helpful to the Court ", they might with advantage add " or the Special Chamber ". Since paragraph 2 of Article 7 drew a distinction between the Court and the Special Chambers, the two paragraphs of that article must be brought into harmony.

The REGISTRAR wondered whether it would not be better to insert the word " full " in paragraph 2 of Article 7 and leave the word " Court " in the first paragraph; for, otherwise, they would have also to correct the terminology throughout the remainder of the Rules.

M. ANZILOTTI suggested that the words " which might be helpful to the Court " in the first paragraph should be deleted.

There being no objection, the PRESIDENT noted that the Court was agreed to delete the words " which might be helpful to the Court " in paragraph 1 of Article 7.

Jonkheer VAN EYSINGA considered that it would be desirable, as suggested by the Registrar, to insert the word " full " before the word " Court " in the second line of paragraph 2 of Article 7.

M. ANZILOTTI agreed, because when the expressions " the Court of fifteen judges " and " the Chambers " were contrasted, the expression " full Court " must be used, for " the Court " could also mean the Court sitting as a Chamber.

The PRESIDENT noted that there were no objections to the suggestion to insert the word " full " before the word " Court " in line 2 of paragraph 2 of Article 7.

Baron ROLIN-JAEQUEMYNS wondered whether, in order to make it clear that it was not a matter of indifference whether the assessors were appointed by the full Court or by a Chamber, but that it would depend on circumstances which of them would make the appointments, it would not be well to add the words " as the case may be " after the words " either by the Court or . . . " in paragraph 2 of Article 7.

The PRESIDENT took a vote on Baron Rolin-Jaequemyns' proposal.

The proposal was adopted by eight votes to two.

The PRESIDENT said that he had voted against the proposal because he thought the change a superfluous one which might subsequently lend itself to interpretation.

He noted, moreover, that several amendments had been introduced into the text of Article 7, previously adopted by the Court, and that this article was now worded as follows:

> " 1. The President shall take steps to obtain all relevant information with a view to the selection of technical assessors in each case. With regard to the questions referred to in Article 26 of the Statute of the Court, he shall, in particular, consult the Governing Body of the International Labour Office.
>
> " 2. Assessors shall be appointed by an absolute majority of votes, either by the full Court, or by the Chamber which has to deal with the case in question, as the case may be."

* D 2, A. 3, pp. 499-500.

18.II.36.

See under Article 32, pp. 102 *et seq.*, for discussion of paragraph 3 of Article 7 as paragraph 4 of Article 33 (Article 32 of Rules in force).

[See also under Article 32, pp. 93-96, for discussion of old Article 35, paragraph 3, subsequently paragraph 4 of Article 33 and finally paragraph 3 of Article 7, in 1934 (on 24.V.34, 25.V.34, and 31.V.34).]

19.II.36. *

The PRESIDENT said that, as had been decided, he and some other members of the Court had prepared texts to give effect to the decisions in regard to paragraph 4 of Article 33.

The proposals made were as follows:

" 1. To delete paragraph 4 of Article 33 (Article 32 of Rules in force).[1]

" 2. To draft Article 7 as follows:

" ' 1. The President shall take steps to obtain all relevant information with a view to the selection of the technical assessors to be appointed in a case. For cases falling under Article 26 of the Statute of the Court, he shall in particular consult the Governing Body of the International Labour Office.

" ' 2. Assessors shall be appointed by an absolute majority of votes by the full Court or by the Chamber which has to deal with the case in question, as the case may be.

" ' 3. A request for technical assessors to be attached to the Court under Article 27, paragraph 2, of the Statute must at latest be submitted with the first document of the written proceedings. Such a request shall be complied with if the parties are in agreement. If the parties are not in agreement, the decision rests with the full Court or with the Chamber as the case may be.'

. . . . . .

" 3. To draft Article 71 as follows." [2]

The PRESIDENT explained that it was proposed to delete paragraph 4 of Article 33 and to add a paragraph 3 to Article 7; an alteration would also be made in Article 71 of the Rules. It would, however, be best not to discuss Article 71 until it was reached in the course of the examination of the Rules. In regard to Article 7, not only had the new paragraph 3 been added, but in paragraph 1 the words " appointed in a case " had been substituted for " in each case ".

A verbal amendment affecting the French text only was proposed and adopted.

The PRESIDENT noted that the Court adopted the third paragraph proposed for Article 7 with this amendment.

27.II.36.

See under Article 71, p. 299, for discussion of Article 7 in connection with Article 71.

10.III.36.*

There was no change in the French text of Article 7 and only purely verbal changes in the English text.

M. NAGAOKA, observing that paragraph 1 spoke of " technical assessors " and paragraph 2 simply of " assessors ", asked the reason for this difference.

M. FROMAGEOT explained that the assessors referred to in the first paragraph were technical assessors for the particular case. It was therefore unnecessary in paragraph 2, which was simply a complement of the first paragraph, in which the assessors had already been described as " technical ", to repeat the adjective.

M. NAGAOKA accepted M. Fromageot's explanation, but in view of it proposed to add the word " technical " to the title of Section 1 of Heading I, and to say: " Judges and technical assessors ".

Baron ROLIN-JAEQUEMYNS would prefer to delete the word " technical " in the third paragraph as in the second. As regards its insertion in the title, he thought that unnecessary, as the reference was explained in Article 7.

The PRESIDENT took the opinion of the Court on the question whether the word " technical " should be inserted in the title of Section 1.

Personally, he would vote against it, as he thought it preferable that the Court should make as few alterations as possible in the text adopted in second reading and referred to the Drafting Committee.

The Court, by eight votes to one, with one abstention, approved the addition of this word.

The PRESIDENT asked whether the Court desired to delete the word " technical " in the third paragraph of Article 7.

M. ANZILOTTI thought there was a shade of difference between paragraphs 1 and 2 and paragraph 3, which referred to Article 27 of the Statute and which, consequently, should perhaps reproduce the expression used in that article—*i.e.*, " technical assessors ".

M. NAGAOKA, in order to avoid any confusion, would be in favour of deleting the word.

By six votes to four, the Court decided to delete the word " technical " in the first line of the third paragraph of Article 7.

The PRESIDENT having read the English text of Article 7, Baron ROLIN-JAEQUEMYNS observed that this text and the French did not correspond. The French text said: "*Il consulte notamment . . .*", and the English simply: " He shall consult . . .", the word "*notamment*" not being translated (the words " in particular " having been deleted by the Drafting Committee).

The PRESIDENT explained that, whereas the French text, without the word "*notamment*", might convey limitative meaning, that construction could not be placed on the English text prepared by the Drafting Committee. That text did not preclude the consultation of other bodies besides the International Labour Organisation.

Article 7 was finally *adopted* with the amendment indicated above.

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* D 2, A. 3, pp. 581-582.

[1] See under Article 32, p. 103.

[2] See under Article 71, p. 299.

* D 2, A. 3, pp. 723-724.

ARTICLE 8 *(Article 8 of the old Rules).*

TECHNICAL ASSESSORS: SOLEMN DECLARATION

3.IV.35.

See under Article 6, p. 32, for adoption of Article 8 unchanged in first reading.

6.II.36.*

Second Reading.[1]

Baron ROLIN-JAEQUEMYNS asked whether, when the article said that " Assessors shall make the following solemn declaration at the first sitting of the Court at which they are present: . . .", this really meant a sitting of the full Court, so that an assessor could not make his declaration at a sitting of the Chamber in which he was to sit.

The PRESIDENT replied that it had just been argued that Article 70 of the Rules disposed of all such difficulties. The question here was really the same as in paragraph 1 of Article 7, according to which the President was to obtain all information helpful to the Court, no reference to the Chamber being made.

M. ANZILOTTI pointed out that the last paragraph of Article 71 of the revised Rules said:

> " As soon as the Chamber has met to go into the case submitted to it, the powers of the President of the Court in respect of the case shall be exercised by the President of the Chamber."

Until that moment, therefore, the President of the Court would, of course, prepare the case for the Chamber which was to be constituted later. There seemed, therefore, nothing objectionable in the wording of Article 7, paragraph 1.

The PRESIDENT remarked that, in paragraph 2 of Article 7, the word " Court " clearly meant the full Court.[2]

Baron ROLIN-JAEQUEMYNS would like the wording of Article 8 to be made more explicit.

M. FROMAGEOT thought they might say: " Assessors shall make the following solemn declaration before the Court." But was it necessary for the assessors to come before the Court to make this declaration if the Chamber was not yet constituted?

M. NAGAOKA wondered whether it would not be better to say: " Assessors shall make the following solemn declaration at the first sitting of the *Chamber.*" The Special Chambers and the Chamber for Summary Procedure had been created in order to simplify proceedings. The reason why the members of those Chambers were chosen beforehand was precisely to make it unnecessary that all members of the Court should have to be summoned to The Hague for cases which were to be dealt with by these Chambers.

M. ANZILOTTI recalled that it had been held that, in principle, a Chamber was the Court; that a sitting of a Chamber was a sitting of the Court meeting as a Chamber for Summary Procedure or as a Chamber for Labour Cases, etc. This followed quite clearly from Article 73 of the revised Rules[3] (former Article 70).

The PRESIDENT observed that, in paragraph 2 of Article 7 which had just been adopted, a distinction was made between " the Court " and " the Chambers ".

The REGISTRAR thought that there was a mistake of terminology in that paragraph. When adopting the revised Rules in first reading, the Court had decided that, wherever both the full Court and the Court sitting as a Chamber were meant, the word " Court " would be used; and that the expression " full Court " would be used when the Court with fifteen judges was meant and not the Chambers. To be logical, the word " full " should be inserted in paragraph 2 of Article 7.

Baron ROLIN-JAEQUEMYNS proposed that Article 8 should simply say:

> " Assessors shall make the following solemn declaration at the first sitting at which they are present. . . ."

There being no objections, the PRESIDENT declared Baron Rolin-Jaequemyns' proposal adopted.

M. ANZILOTTI thought that the Registrar's suggestion regarding paragraph 2 of Article 7 would dispose of at all events some of the President's doubts.

The PRESIDENT would be afraid of the Rules being so interpreted as to allow a judge to make his declaration before a Chamber. In his opinion, the full Court was also meant in Article 8, and not the full Court or the Court sitting as a Chamber, as the case might be.

M. ANZILOTTI observed that, according to the revised Statute, a judge *ad hoc* in the Chamber for Summary Procedure must be able to make his solemn declaration at the first sitting of the Chamber attended by him.

The PRESIDENT invited the Court to return to Article 8.

Jonkheer VAN EYSINGA recalled that one of the points reserved for the second reading was the question whether the phrase " *audience publique* " (public hearing) should be used in preference to " *séance publique* " (public sitting) (1935 Minutes, p. 457). In Article 5 " *audience publique* " was used, and in Article 8 " *séance publique* ". Perhaps it would be well in this connection to decide this point.

Baron ROLIN-JAEQUEMYNS in any case proposed that they should say " *audience* publique ".

The PRESIDENT noted that the Court wished to add the word " *publique* ".

After a further exchange of views, the Court decided to retain the word " *séance* " in the first line of Article 8, in preference to the word " *audience* ", because the word " *séance* " was wider than the word " *audience* "; for the word " *séance* " would cover " *audiences* ", whereas the word " *audience* " would not cover all " *séances* ".

Baron ROLIN-JAEQUEMYNS, being anxious to make it clear that assessors must make their declaration before entering upon their duties, proposed that Article 8 should be worded as follows:

> " Assessors, before entering upon their duties, shall make . . . declaration at a public sitting."

The words " at the first public sitting at which they are present " would be deleted.

The PRESIDENT noted that, if the Court agreed to the addition of the words " before entering upon their duties ", this would not prevent the practice which had been adopted in the case of the judges *ad hoc* [1] from being followed—namely, that before they had made their solemn declaration, the documents of the written proceedings were communi-

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* D 2, A. 3, pp. 497-500.

[1] The text under consideration was that of the old Rules unchanged.

[2] The word " full " was later inserted in paragraph 2 of Article 7, see p. 33.

[3] See meetings of 28.II and 9.IV.35, p. 314.

[1] See meeting of 4.III.35, pp. 29-30.

cated to them and they were allowed to attend preliminary discussions.

The PRESIDENT put the following question to the Court:

" Does the Court decide to add the words ' *before entering upon their duties, shall make . . . at a public sitting* . . .' in place of the words ' shall make . . . at the first public sitting of the Court at which they are present ', in paragraph 1 of Article 8 ? "

By eight votes to two, the Court answered the question in the affirmative.

. . . . . .

The PRESIDENT observed that Article 8 was now finally worded as follows:

" Assessors, before taking up their duties, shall make the following solemn declaration at a public sitting: . . ."

Adopted in second reading.

10.III.36.*

Final Adoption.

There were no changes in the French text. In the English text a mere alteration in the order of the wording was suggested.

Jonkheer VAN EYSINGA, referring to the discussion on Article 7, wondered whether the word " technical " should not be inserted in the solemn declaration.

The PRESIDENT asked whether the Court wished to add the word " technical " before the word " assessors " in the solemn declaration.

By six votes to four, the Court answered the question in the negative.

Article 8 was finally *adopted.*

ARTICLE 9 *(Article 9 of the old Rules).*

ELECTION OF THE PRESIDENT AND THE VICE-PRESIDENT

4.III.35.*

The first paragraph was worded as follows in the Co-ordination Commission's text: [1]

" The election of the President and the Vice-President shall take place in the last quarter of the last year of office of the retiring President and Vice-President. They enter upon their duties on January 1st of the following year."

Jonkheer VAN EYSINGA observed that the change proposed by the Co-ordination Commission consisted in the addition of the final sentence. Its object was to avoid any possible misunderstanding as to whether, in view of the last sentence of paragraph 2, the President and the Vice-President continued to hold office until February 1st, the date of the opening of the ordinary annual session.

The PRESIDENT put to the vote paragraph 1 with the addition proposed by the Co-ordination Commission.

This paragraph was unanimously adopted.

No amendments had been suggested to paragraph 2. It was worded as follows:

" After a new election of the whole Court, the election of the President and of the Vice-President shall take place at the commencement of the following session. The President and Vice-President elected in these circumstances shall take up their duties on the day of their election. They shall remain in office until the end of the second year after the year of their election."

No objection having been made, the President considered this paragraph as adopted.

Paragraph 3 was worded as follows:

" Should the President or the Vice-President cease to belong to the Court before the expiration of their normal term of office, an election shall be held for the purpose of appointing a substitute for the unexpired portion of their term of office."

This text did not differ from that of the Rules at present in force. As there was no opposition, the President considered it as adopted.

Paragraph 4 was worded as follows:

" The elections referred to in the present article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected."

The PRESIDENT asked if it would not be desirable to transfer this paragraph to another article or to make it into a separate provision, in order to show that it was a general rule, and that all the elections carried out by the Court took place by secret ballot. The President added, however, that the First Committee had not been in favour of that course.

M. GUERRERO, Vice-President, observed that the First Committee, whose terms of reference had only extended to certain specified articles, had not really been in a position to propose clauses of a general character. It was for that reason that they had not adopted that suggestion.

There being no objections, paragraph 4 of Article 9 and the article as a whole were regarded as adopted.

3.IV.35.

Article 9 was adopted in first reading with the following text:

" 1. The President and the Vice-President shall be elected in the last quarter of the last year of office of the retiring President and Vice-President. They shall take up their duties on the following January 1st."

Paragraphs 2, 3 and 4 were adopted with the text given above (meeting of 4.III.35).

7.II.36.**

Second Reading.[1]

The PRESIDENT opened the discussion on Article 9 of the Rules.

Jonkheer VAN EYSINGA said that he had two drafting amendments to propose.

First, in regard to the passage at the end of paragraph 2 of the Article: " . . . They shall remain in office until

* D 2, A. 3, pp. 400-401.
[1] *Ibid.*, p. 863.

* D 2, A. 3, p. 724.
** D 2, A. 3, pp. 501-503.
[1] Text discussed was that adopted in first reading, except that the word " session " in the first sentence of paragraph 2 was replaced by " year ", in consequence of the entry into force of the revised Statute.

the end of the second year after the year of their election." These words referred to the President and Vice-President elected after a new election of the whole Court, and who could, of course, never hold office for three complete years; however, to avoid any misunderstanding, it would be better to say " until December 31st of the second year " in place of " until the end of the second year ".

M. FROMAGEOT thought that there might be objections to fixing December 31st as the date. In his view, the question was linked to that of the date on which the Court's judicial year began and ended. It would suffice, to meet the point raised by Jonkheer van Eysinga, to add the word " judicial " in the penultimate line of paragraph 2.

The PRESIDENT pointed out that Article 1 of the Rules, in the form that had been adopted,[1] laid down that " The term of office of members of the Court shall begin to run on January 1st of the year following their election . . .", a wording which appeared to support Jonkheer van Eysinga's proposal. On the other hand, he doubted whether the proposed change was sufficiently important to justify an alteration of the text.

Jonkheer VAN EYSINGA observed that a new phrase had been introduced into the first paragraph of Article 9: " They shall take up their duties on the following January 1st." As the Court had amended paragraph 1, it could make a corresponding alteration in paragraph 2. However, as it appeared that the Court considered the present text sufficiently clear, he would withdraw his proposal.

The PRESIDENT said that the interpretation placed upon the text by the Court would appear from the minutes.

He drew attention to a verbal correction to be made in the English text. In paragraph 3 of Article 9, the words occurred: " . . . *their* (normal) term of office ". This was wrong; it would be better to say " *his* term of office ".

The Court approved this change in the English text.

Jonkheer VAN EYSINGA said that his second amendment related to a word in the third paragraph, which read: " Should the President or the Vice-President cease to belong to the Court before the expiration of his normal term of office, an election shall be held for the purpose of appointing a *substitute (remplaçant)* for the unexpired portion of his term of office." The word " successor " seemed better here, especially as the word " successor " was used in the same connection in Article 11 of the Rules. The word " substitute " apparently meant a person who took the place of another because the latter was temporarily unable to attend. In this case, however, the President or Vice-President ceased to belong to the Court, so that it was really a successor who was appointed.

M. FROMAGEOT considered that there was only a slight shade of difference between the two terms; he preferred the existing text.

Baron ROLIN-JAEQUEMYNS thought that it would perhaps be better to word paragraph 3 of Article 9 as follows, on the lines of the old text of Article 11:[2] " . . . an election shall be held for the purpose of appointing a new President or a new Vice-President for the unexpired portion of his term of office ".

M. URRUTIA pointed out that Article 15 of the revised Statute, which in this respect followed the old Statute, used the term " *remplacement* " (replace) in a similar connection.[3]

[1] See pp. 5-6.
[2] D 1, p. 26.
[3] See Minutes of the Conference of 1929, p. 31.

Count ROSTWOROWSKI suggested that the word " substitute " *(remplaçant)* had been selected in order clearly to indicate that the new President or Vice-President would merely complete his predecessor's term of office; he would not be appointed for three years.

The PRESIDENT observed that paragraph 5 of Article 14 of the revised Rules, which was the corresponding paragraph regarding the Registrar, said: " Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Such election shall be for a term of seven years." This bore out the distinction drawn by Count Rostworowski.

The REGISTRAR said that the word " *remplaçant* " had been used in the French text of the first draft of the Rules submitted to the Court in 1922 as a basis for discussion.»[1] The English text of that draft, however, had contained the word " successor "; the Court had replaced the word " successor " by " substitute ".

M. URRUTIA saw no objection to replacing the word " substitute " by " successor ", especially as it seemed somewhat curious to use two different words in Article 9 and Article 11.

Baron ROLIN-JAEQUEMYNS thought that the important point was that a reader should understand clearly that it was a question of a substitute to perform the duties of President or of Vice-President, and not those of judge. They might say: " . . . for the purpose of appointing a successor *to fulfil his duties* as such for the unexpired portion of his term of office ".

M. GUERRERO, Vice-President, saw a difference in meaning between the word " substitute " and the word " successor ". In paragraph 3 of Article 9, it would be better to make it clear that it was not a case of a temporary replacement but of an election for the appointment of a successor.

M. NAGAOKA, in order to avoid any difficulty, would propose a simpler wording: " . . . an election shall be held for the purpose of appointing a new President for the unexpired portion of his term of office ".

The PRESIDENT put the following question to the Court:

> " Does the Court decide to replace the word ' substitute ' by the word ' successor ' in paragraph 3 of Article 9 ? "

By eight votes to one, with one abstention, the Court answered the question in the affirmative.

The PRESIDENT took a vote on the proposal to add, after the word " successor ", the words " to fulfil his duties as such ".

By nine votes to one, the Court rejected the proposal.

The PRESIDENT said that the Court had still to pronounce upon the proposal to word the end of paragraph 3 of Article 9 as follows:

> " . . . an election shall be held *for the purpose of appointing a new President* for the unexpired portion of his term of office."

M. ANZILOTTI suggested that the words " or Vice-President " should be added.

The PRESIDENT regretted that he must vote against the proposal; his reason was that he did not wish any modifications which were not absolutely necessary to be adopted by the Court in second reading.

[1] D 2, p. 253.

On being put to the vote, the proposal was rejected by six votes to four.

Baron ROLIN-JAEQUEMYNS, in paragraph 3 of Article 9, proposed that the word "*choisir*" should be replaced by "*désigner*".

This proposal, on being put to the vote, was adopted by five votes to three, with two abstentions.

M. NEGULESCO, in the fourth paragraph of Article 9, proposed to substitute "judge", or else "member of the Court", for the word "candidate".

The PRESIDENT put the following question to the Court:

"Does the Court decide to substitute the words 'member of the Court' for the word 'candidate' in paragraph 4 of Article 9?"

The Court, by eight votes to two, answered the question in the affirmative.[1]

The PRESIDENT declared Article 9 adopted in second reading, with the amendments resulting from the votes recorded.

10.III.36.

Article 9. — Final Adoption.

No change in the French text of Article 9 was proposed; there was one correction in paragraph 2 of the English text, the word "day" having been replaced by "date".

Article 9 as amended was finally *adopted*.

ARTICLE 10 *(Article 10 of the old Rules).*

DIRECTION OF THE WORK OF THE COURT BY THE PRESIDENT

First Reading.

The existing text of the article was adopted unchanged in first reading on 3.IV.35.

Second Reading.

The article was adopted in second reading on 7.II.36 with a minor change in the French text. The English text remaining as in D 1, 2nd edition, 1931.

19.II.36.

See under Article 37, pp. 122-123, for the discussion of Article 10 in connection with Article 38, paragraph 2 (Article 37 (2) of the Rules of 11.III.36).

Final Adoption.

Article 10 was *adopted* unchanged on 10.III.36.

ARTICLE 11 *(Article 11 of the old Rules).*

VICE-PRESIDENT TAKING THE PLACE OF THE PRESIDENT

4.III.35.*

For Article 11, the Co-ordination Commission had proposed the following text:

> "The Vice-President shall take the place of the President if the latter is unable to fulfil his duties. In the event of the President ceasing to hold office, the same rule shall apply until his successor has been appointed by the Court."

The Commission had, he said, adopted a form of words proposed by Baron Rolin-Jaequemyns,[1] which, it considered, had the advantage of greater clarity, though it did not affect the meaning of the text of the existing Rule.

The existing Rule was worded as follows:

> "The Vice-President shall take the place of the President, should the latter be unable to fulfil his duties, or, should he cease to hold office, until the new President has been appointed by the Court."

The PRESIDENT put the Co-ordination Commission's text to the vote, and it was unanimously adopted.

First and Second Readings and Final Adoption.

Article 11 was adopted in first reading on 3.IV.35. in second reading on 7.II.36 and finally on 10.III.36 with the text given above.

ARTICLE 12 *(Article 12 of the old Rules).*

DISCHARGE OF DUTIES OF PRESIDENT AND OF VICE-PRESIDENT

First Reading.

Article 12 had not been the subject of any proposed amendments and was adopted unchanged in first reading on 3.IV.35.

7.II.36.**

Second Reading.[2]

The PRESIDENT remarked that he had proposed to delete the words "either by the President himself or by the Vice-President", at the end of paragraph 1. Though the discharge of the duties of President must always be assured at the seat of the Court, it was impossible for these duties always to be performed either by the President or the Vice-President, for instance when the latter was one of the judges entitled to "long leave". Moreover, the case when neither the President nor the Vice-President were present at The Hague was adequately provided for by other provisions in the Rules.

Baron ROLIN-JAEQUEMYNS thought, on the contrary, that it was desirable that paragraph 1 of the Article should indicate the normal state of affairs.

* D 2, A. 3, p. 402.
** *Ibid.*, p. 504.
[1] *Ibid.*, p. 909.
[2] The text presented for second reading was that of the old Rules unamended.

[1] This amendment, presumably by an oversight, was not made in the English text of the article, which in the Rules in force still contains the word "candidate".

The PRESIDENT put the following question to the Court:

" Does the Court decide to delete the words ' either by the President or by the Vice-President ' in paragraph 1 of Article 12 ? "

Five votes were recorded in favour of the proposal and five against it.

The PRESIDENT said that, in accordance with his customary practice in debates on the revision of the Rules, he would declare the proposed amendment not to have been adopted.

Jonkheer VAN EYSINGA remarked that the word " judge " was used twice in the second and once in the third paragraph of Article 12. In view of the change made in Article 1 of the Rules, [1] he thought that this word should be replaced by " member of the Court ".

M. ANZILOTTI pointed out that, if they made this change in Article 12, they would also have to do so in Article 13 and probably in several other articles.

M. URRUTIA proposed in paragraph 2 to say: " . . . the duties of President are discharged by the oldest of the members of the Court who have been longest on the Bench ".

The PRESIDENT put the following question to the Court:

" Does the Court decide, in paragraph 2 of Article 12, to substitute the words ' members of the Court ' for the word ' judges ' ".

By six votes to two, with two abstentions, the Court answered the question in the affirmative.

The PRESIDENT asked whether Jonkheer van Eysinga made the same proposal in regard to the last paragraph of Article 12.

Jonkheer VAN EYSINGA replied that he did.

Baron ROLIN-JAEQUEMYNS would prefer to say:

" . . . the duties of President are discharged by the oldest member of the Court ".

The PRESIDENT declared the article adopted in second reading as thus amended.

Note. — For references to Article 12 during the discussion on Article 13, see Article 13, p. 40 of this text.

13.II.36.

See under Article 25, p. 63, for discussion of Article 12 in connection with draft Articles 26 and 27 (Article 25 of Rules in force).

10.III.36.

Final Adoption.

Article 12 was finally *adopted*, the only change made being the substitution of the future tense " shall be discharged " for the present tense " are discharged " in the English text of paragraphs 2 and 3.

ARTICLE 13 *(Article 13 of the old Rules with Two New Paragraphs).*

DISCHARGE OF THE DUTIES OF THE PRESIDENCY

4.III.35.*

The PRESIDENT observed, in regard to Article 13, that the first paragraph of the article proposed by the Co-ordination Commission was a reproduction of the existing Article 13, which was worded as follows:

" If the President is a national of one of the parties to a case brought before the Court, the functions of President pass in respect of that case to the Vice-President, or if he is similarly prevented from presiding, to the oldest among the judges who have been longest on the Bench and who is not for the same reason prevented from presiding."

The first paragraph of Article 13 was put to the vote and adopted unanimously.

The PRESIDENT said that paragraph 2, which was new, was a text proposed by the Co-ordination Commission; it was worded as follows:

" If, after a new election of the whole Court, the newly elected President sits, in accordance with Article 13 of the Statute, in order to finish a case which he had begun during his preceding term of office as judge, the duties of President for the case in question shall be discharged by the judge who presided when the suit was last under examination, unless the latter is unable to sit, in which case the former Vice-President, or the oldest among the judges who have been longest on the Bench, shall, in conformity with Article 12 of the present Rules, discharge the duties of President."

Jonkheer VAN EYSINGA observed that this proposal had in reality emanated from the First Committee, [1] whose Rapporteur had stated that it was desirable to legislate for the situation which had arisen in the Zones case. For that purpose, the Rapporteur had proposed the solution indicated in the new text, which appeared to him logical. In the same connection, the Rapporteur had found it necessary to propound and to resolve another question — namely, that which arose when, during a nine-years period, there was a case still unfinished, after a newly elected President had entered upon his duties. That was the case that had been provided for in the third paragraph.

The PRESIDENT put to the vote paragraph 2 of Article 13, as proposed by the Co-ordination Commission.

This text was unanimously adopted.

The PRESIDENT went on to paragraph 3 of Article 13 as proposed by the Co-ordination Commission; it was worded as follows:

" If, owing to the expiry of a President's period of office, a new President is elected, and if the Court sits after the end of the said period in order to finish a case which it had begun to examine during that period, the former President shall retain the functions of President in respect of that case. Should he be unable to fulfil his duties, his place shall be taken by the newly elected President."

M. ANZILOTTI gathered that, in the case envisaged, the former President would only be replaced by the newly elected President so long as the latter was not himself also unable to officiate—for instance, owing to his being a national of one of the States parties to the suit. However, he did not

* D 2, A. 3, pp. 402-403.

[1] Pp. 5-6.

[1] D 2, A. 3, p. 753.

think it necessary to have a separate clause to provide for that contingency.

The PRESIDENT put paragraph 3 of Article 13, as proposed by the Co-ordination Commission, to the vote; it was adopted *unanimously*, as was also Article 13 as a whole.

3.IV.35.*

First Reading.

Baron ROLIN-JAEQUEMYNS having asked, in connection with paragraph 2, whether, in the event of the President of the Court as formerly composed not being available, the functions of President should not pass to the new President, it was observed that the latter would not necessarily have belonged to the old Court.

The PRESIDENT declared Article 13 adopted in first reading.[1]

7.II.36.**

Second Reading.

The PRESIDENT recalled that he had proposed an amendment consisting in the deletion of the word " similarly " *(également)* in the first paragraph of the article. This word made the paragraph applicable only to a case where the Vice-President was prevented from acting because he was a national of one of the parties concerned. In reality, however, when the functions of President passed to the Vice-President, the latter, if unable to act, could hand them over to the senior of the remaining judges, no matter what was the reason for his inability to act.

M. GUERRERO, Vice-President, on the contrary thought that the only case contemplated by Article 13 was where the Vice-President could not discharge the duties of President because he was a national of one of the parties concerned in the case; other reasons for inability to do so were covered by paragraph 2 of Article 12.

M. ANZILOTTI thought that this interpretation of Article 13 was borne out by the last words of the paragraph: " and who is not for the same reason prevented from presiding ".

M. FROMAGEOT considered that, in order to make it quite clear that the text bore the meaning indicated by M. Guerrero, it should read: " *si celui-ci est, pour la même raison, également empêché* " (or if he is also for the same reason prevented . . .).

M. ANZILOTTI, upon reflection, pointed out that paragraph 2 of Article 12 was preceded by a paragraph relating to the discharge of the duties of President in general; this would cause paragraph 2 also to be read as of general application. On the other hand, Article 13 concerned the discharge of those duties in a particular case. It might therefore appear doubtful whether the case where the Vice-President was prevented from presiding in particular proceedings for a reason other than one of nationality was really covered by paragraph 2 of Article 12.

The PRESIDENT remarked that, if the Court were to adopt the amendment proposed by him, all doubts would disappear.

Jonkheer VAN EYSINGA admitted this, but pointed out that in that case the Rules would contain a provision dealing only with the inability of the President to preside by reason of nationality and not with that of the Vice-President or other judges.

Count ROSTWOROWSKI thought that paragraph 2 of Article 12 was general in its application and covered all circumstances—*i.e.*, the discharge of the functions of President of the Court as well as the work of the Court in general.

Article 13, on the other hand, referred to the case of inability to act as President by reason of nationality and applied to the President, the Vice-President and all members of the Court. This must, however, be clearly brought out in the text. That was why it would be better to say: " *si celui-ci est*, pour la même raison, *empêché* ".

The REGISTRAR recalled that the original text adopted in 1926[1] had used the word " *pareillement* ". This word had been replaced by " *également* " in 1931[2].

The PRESIDENT put the following question to the Court:

> " Does the Court decide to add the words ' *pour la même raison* '[3] after the word ' *empêché* ' in paragraph 1 of Article 13 ? "

By nine votes to one, the Court answered the question in the affirmative.

M. ANZILOTTI reverted to the question raised by the President. There was probably a lacuna in the texts.

M. GUERRERO, Vice-President, assumed that the President was ill: then the Vice-President should take his place. But the Vice-President was on leave. In that case, according to Article 12, the senior judge would replace both the President and the Vice-President.

The circumstances in Article 13 were not the same. Supposing there were a case between Great Britain and Salvador: the President was a British subject and the Vice-President was a national of Salvador. The President could not preside in this case, but he would continue to preside over the Court. The Vice-President could not preside in this case for the same reason. Accordingly, the senior member would have to preside over the proceedings.

M. ANZILOTTI thought that, if the Vice-President were absent, Article 13 would not be applicable, and that the circumstances were not covered by Article 12, because that article concerned only the functions of President in general and, in the circumstances envisaged, the President would continue to exercise those functions.

M. GUERRERO, Vice-President, considered that M. Anzilotti's point might be met by adding, after the words " *pour la même raison* ", the words " *ou pour toute autre cause* ".

Jonkheer VAN EYSINGA pointed out that, if this amendment were made, the end of the paragraph, where the words " *même empêchement* " occurred, would also have to be altered.

M. ANZILOTTI thought that the proposed amendment would introduce an extraneous element into Article 13. The point to be brought out was simply that the duties of President in a given case could never be discharged by a national of one of the parties concerned.

The PRESIDENT, in this connection, proposed the following draft:

> " If the President is a national of one of the parties to a case brought before the Court, he will hand over his functions as President in respect of that case. The same rule applies to the Vice-President or to any other member of the Court to whom the functions of President may pass."

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* D 2, A. 3, p. 423.
** *Ibid.*, pp. 505-507.
[1] For text see page 39, meeting of 4.III.35.

[1] D 2, A., p. 248.
[2] D 2, A. 2, p. 297.
[3] The English text containing the word " similarly " would not seem to be affected.

Jonkheer VAN EYSINGA suggested the following modification:

> " . . . The same rule applies to the Vice-President or to other members of the Court to whom the functions of President may successively pass."

The fact that the Vice-President must replace the President and that only if the former were prevented from doing so would the turn pass to the other judges, did not seem to him sufficiently clearly brought out in the President's draft.

M. ANZILOTTI would prefer the following wording to bring out this idea:

> " The same rule applies to the Vice-President or to any member of the Court to whom the functions of President may pass."

Baron ROLIN-JAEQUEMYNS wished to add the words " in this case " to make it quite clear that the paragraph was solely concerned with the functions of President in respect of a particular case.

M. ANZILOTTI observed that this point was made clear in the opening phrase, which governed the whole of the paragraph.

Jonkheer VAN EYSINGA was afraid that M. Anzilotti's proposal did not clearly bring out that, if the President had to hand over his functions, they passed, in the first place, to the Vice-President.

M. ANZILOTTI recalled that, according to Article 45 of the Statute, " The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President."

The PRESIDENT said that in that case paragraph 1 of Article 13 would run as follows:

> " If the President is a national of one of the parties to a case brought before the Court, he will hand over his functions as President in respect of that case. The same rule applies to the Vice-President or to any member of the Court to whom the functions of President may pass."

There being no objections, he declared this text adopted.

Paragraph 2.

Jonkheer VAN EYSINGA remarked that the word " judge " was used three times in this paragraph. Should it not, as before, be replaced by the expression " member of the Court " ?

The PRESIDENT considered that the expression " term of office as judge ", in line 5, might be retained. On the other hand, he proposed in the last line but one to delete the words " in conformity with Article 12 of the present Rules ".

It was decided accordingly.

Paragraph 2 of Article 13 would therefore run as follows:

> " If, after a new election of the whole Court, the newly elected President sits, in accordance with Article 13 of the Statute of the Court, in order to finish a case which he had begun during his preceding term of office as judge, the duties of President, for the case in question, shall be discharged by the member of the Court who presided when the case was last under examination, unless the latter is unable to sit, in which case the former Vice-President, or the oldest among the members of the Court who have been longest on the Bench, shall discharge the duties of President."

There being no opposition, the PRESIDENT declared this text adopted.

Paragraph 3.

There being no observations, the PRESIDENT declared this text adopted.[1]

The three paragraphs of Article 13 were thus adopted in second reading.

10.III.36.

Final Adoption.

Article 13 was finally *adopted* with only minor verbal changes in the text adopted in second reading.

ARTICLE 14 *(Article 17 of the old Rules).*

ELECTION OF THE REGISTRAR AND OF THE DEPUTY-REGISTRAR

First and Second Readings and Final Adoption.

On 3.IV.35, the article was adopted unchanged and without observation in first reading.[1] On this occasion, however, it was decided by a vote that the articles concerning the Registry should be placed following those concerning the Presidency, the old Article 17 thus becoming Article 14.[2]

On 8.II.36, Article 14 was adopted unchanged in second reading. The question was raised whether, in paragraph 5, which laid down what was to be done if the Registrar ceased to hold office before the expiration of his term, it should not be specified, as in the previous paragraph, that the successor's term of office would begin on January 1st of the year following that in which the election was held. It was held that this followed sufficiently clearly from paragraph 4.

On 10.III.36, Article 14 was finally *adopted* unchanged in the French text and with only an insignificant change in the English text.

ARTICLE 15 *(Article 18 of the old Rules).*

SOLEMN DECLARATION OF THE REGISTRAR AND OF THE DEPUTY-REGISTRAR

First and Second Readings and Final Adoption.

On 3.IV.35, the article was adopted unchanged in first reading with the number 15.[2]

On 8.II.36 it was adopted in second reading and on 10.III.36 it was finally *adopted* as Article 15 unchanged.

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[1] Two verbal corrections were, however, made in the English text as given in D 1, 2nd edition: In paragraph 4 the words " commencing on " were replaced by " reckoned from " and in paragraph 5, last line, the word " full " was deleted.

[2] See also Explanatory Note, p. VII.

[1] See meeting of 4.III.35, p. 39, for text of this paragraph.

[2] See above under Article 14, first reading.

ARTICLE 16 *(Article 19 of the old Rules).*

HOLIDAY OF THE REGISTRAR

4.III.35.*

Discussed as Article 19 (old Rules).

Articles 19 to 26. — Internal Regulations.

The PRESIDENT said that, in regard to Articles 19 to 26, it had been suggested [1] that their contents should be transferred to a set of Internal Regulations for the Court, separate from the Rules of Court properly so called.

Jonkheer VAN EYSINGA said that the Co-ordination Commission had examined the proposals on this subject which had been transmitted to it by the First Committee. In the Commission's report [2], the results of that examination were summed up as follows:

> "Some of the articles had been the subject of individual amendments proposed, in particular, by the First Committee. That Committee had also suggested transferring the contents of these articles to a set of 'Internal Regulations' which would be framed apart from the Rules of Court properly so called. In that connection, it had been proposed that a draft set of Internal Regulations should be drawn up immediately.
>
> "After discussing the matter, the Co-ordination Commission concluded that the drawing up of a second set of regulations of this kind would be a matter of serious difficulty and would require much time. For, though it might be relatively easy to trace a line of demarcation, as regards their subject-matter, between the provisions of the Rules of Court at present in force which deal with procedure properly so called and those which are rather of internal interest, it is much harder to determine whether there are not some among the latter which are so important that they ought to be included in the main set of Rules. Moreover, to add a set of Internal Regulations to the number of already existing constitutional texts and rules (Covenant, Statute, Rules of Court, Resolutions of the Assembly, Instructions for the Registry, Staff Regulations) might lead to some confusion."

M. GUERRERO, Vice-President, recalled that the First Committee had thought it desirable to distinguish between questions of mere procedure and those which concerned the internal functioning of the Registry, and that questions belonging to the latter category should rather be dealt with by regulations framed apart from the Rules contemplated in Article 30 of the Statute.

Count ROSTWOROWSKI was in favour of retaining Articles 19 to 26 in the present Rules of Court, leaving open the question of the creation of a set of Internal Regulations.

The PRESIDENT asked the Court whether it desired the creation of a set of Internal Regulations to which the appropriate clauses of Articles 19 to 26 of the existing Rules would be transferred.

The Court unanimously decided against the creation of a special set of Internal Regulations.

The PRESIDENT invited the Court to examine Articles 19 to 26 in succession.

* D 2, A. 3, pp. 403-404.
[1] *Ibid.*, p. 864, note.
[2] *Ibid.*, p. 864.

Article 19 (old Rules).

Article 19 was worded as follows:

> "The Registrar is entitled to two months' holiday in each year."

The PRESIDENT asked if it was desirable to maintain this article, seeing that, in 1931, the Court had abolished the article which fixed the length of the President's holiday.

It was unanimously agreed to maintain Article 19.

3.IV.35.

The article was adopted unchanged as Article 16 [1] in first reading.

8.II.36.*

Article 16 (old Article 19). Second Reading.

M. NEGULESCO pointed out that nowhere was there any mention of the Deputy-Registrar's obligations. The Registrar was obliged by the Statute to reside at The Hague; under the Rules, he was entitled to two months' leave. The Deputy-Registrar should have the same obligations and rights.

The PRESIDENT pointed out that the Registrar occupied a special position. By pressing the point, M. Negulesco might create difficulties.

The REGISTRAR explained that, under Article 32 of the Statute and the regulations based thereon, the Registrar belonged, from an administrative point of view, to a group which included members of the Court and the Registrar. This was so, for instance, in so far as concerned holidays and pensions on retirement—a situation which, incidentally, was not to the advantage of the Registrar.

The Deputy-Registrar, on the other hand, belonged to another group—that of officials of the League of Nations. This brought him under the Geneva leave regulations which, in his case, allowed thirty-six working days, plus any special leave granted by the Registrar; it also gave him pension rights much more advantageous than those of the Registrar, and a pension for his widow—a benefit which was not provided in the case of the Registrar. If—assuming that it were possible—it were to be provided in the Rules that the Deputy-Registrar should occupy a position analogous to that of the Registrar, he would have also to renounce these advantages.

The Registrar, in the last place, observed that, as regarded the residence of the Deputy-Registrar at The Hague, it had, in 1931, [2] been decided that this condition should be made in his contract, and not laid down by way of regulation.

The PRESIDENT did not think that the Statute allowed the position of the Deputy-Registrar to be regulated in the Rules of Court.

There being no further observation, the PRESIDENT declared Article 16 adopted, in second reading.

10.III.36.

Final Adoption.

Article 16 was finally *adopted* unchanged.

* D 2, A. 3, pp. 509-510.
[1] See under Article 14, first reading, p. 41.
[2] D 2, A. 2, p. 152.

ARTICLE 17 *(Article 20 of the old Rules).*

OFFICIALS OF THE REGISTRY

First and Second Readings and Final Adoption.

At the first reading of the article on 3.IV.35, it was adopted unchanged save for a minor alteration of the French text, but with the number 17 instead of 20.[1]

Article 17 was adopted in second reading on 8.II.36, and on 10.III.36 it was finally *adopted* unchanged.

ARTICLE 18 *(Article 21 of the old Rules).*

THE REGISTRY

First and Second Readings and Final Adoption.

At the first reading of the article on 3.IV.35, it was adopted unchanged but with the number 18 instead of 21.[1]

Article 18 was adopted in second reading on 8.II.36, and on 10.III.36 it was finally *adopted* unchanged.

ARTICLE 19 *(Article 22 of the old Rules).*

SUBSTITUTE TO ACT FOR THE REGISTRAR

At the first reading of the article on 3.IV.35, it was adopted unchanged,[2] save for a slight amendment of punctuation in the French text, but with the number 19 instead of 22.[1]

8.II.36.*

Article 19 (old Article 22). — Second Reading.

M. FROMAGEOT considered that a slight amendment would perhaps be desirable as a result of the coming into force of the revised Statute. Instead of

> " *La Cour ou*, si elle ne siège pas, *le Président* . . ."
>
> (The Court, or if it is not sitting, the President . . .),

it would be better to say:

> " *La Cour ou*, si elle ne se trouve pas réunie, *le Président* . . .",

for the Court might be *réunie* (assembled) without sitting—for instance, for some ceremony.

The PRESIDENT referred to the English text, and said that if the French text were modified in this way it might be difficult to find a corresponding English expression.

M. GUERRERO, Vice-President, thought that this paradoxical distinction between the Court's being in session and assembled *(réunie)* should be discontinued.

Would it not be better, in Article 19, to leave it to the President alone to make the appointment in question and to say: " On the proposal of the Registrar . . . case may be, the President shall appoint ", etc. ?

The question was purely an administrative one.

M. FROMAGEOT proposed the following wording: ". . . the Court, or, if necessary, the President . . .".

The REGISTRAR recalled that some years earlier the Court had rejected the solution proposed by M. Guerrero.[3] Having surrounded the election of the Registrar and of the Deputy-Registrar with elaborate precautions, the Court had considered that at all events some part of these precautions should, if possible, be extended to the choice of the person who was to act as substitute for them. But, of course, the Court could now modify this standpoint.

M. GUERRERO, Vice-President, pointed out that the substitute would only exercise his functions provisionally. There did not therefore seem any objection to leaving the choice to the President.

Jonkheer VAN EYSINGA would prefer the existing provision to be maintained. With regard to the general question raised by the words: " The Court or, if it is not sitting . . .", Jonkheer van Eysinga recalled that, under Article 23 of the revised Statute, the Court was always in session except during the judicial vacations. But he wondered whether, in case there should be no work at The Hague, something might not be added to the general rule fixing these vacations, enabling the Court to arrange for additional vacations.

M. URRUTIA, with regard to the latter point, considered that the intention of the revised Statute was that it should be possible to convene the Court at any moment for cases which were to come before it, but not that the judges must be assembled at The Hague throughout the whole year—except during the judicial vacations—even if there were no cases.

As regards Jonkheer van Eysinga's suggestion, M. Urrutia did not think that the Court could announce that it was in vacation—*e.g.*, because during a part of the year there was no work requiring the presence of the judges.

As regards the wording of Article 19, M. Urrutia accepted the Vice-President's proposal.

The PRESIDENT also considered the Vice-President's suggestion a good one because, of all members of the Court, the President was certainly in the best position to make a satisfactory temporary and provisional arrangement in the exceptional case dealt with by Article 19.

Apart from this particular question, the position of the Court, at times other than the vacations fixed by the Rules and when there were no cases to be dealt with, was a point which must be considered. Of course, having regard to the terms of the revised Statute, the logical arrangement would be to limit the powers of the President to the periods of the judicial vacations. Whereas, however, the authors of the revised Statute had proceeded on the assumption that in

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* D 2, A. 3, pp. 510-512.

[1] See under Article 14, first reading, p. 41.

[2] *I.e.*, with 1931 text.

[3] D 2, A., p. 41.

[1] See under Article 14, first reading, p. 41.

the future the Court would be continuously occupied with cases [1], the actual position was quite different. For that reason, it would be better not to adopt a provision in the Rules limiting these powers of the President to the periods of vacations and to retain the phrase " if the Court is not sitting ", which was used in the existing text of the Rules.

On the other hand, it seemed impossible to adopt the suggestion made by Jonkheer van Eysinga, and to have a system of quasi-vacations. It would be better to provide in the Rules for vacations of a reasonable length, it being understood that, during the rest of the year, the Court was always " *en fonctions* " (in session) and would assemble whenever there was a case to be dealt with.

Count ROSTWOROWSKI suggested that the expression " The Court, or in the absence of a quorum . . ." should be substituted for " The Court, or if it is not sitting . . .".

M. FROMAGEOT would agree to the Vice-President's proposal, or failing that, to the maintenance of the existing text.

Baron ROLIN-JAEQUEMYNS was disposed to accept the Vice-President's proposal because there might be cases of urgency in which the President should be able to give a decision himself, without being obliged to convene the Court in order to consult them.

M. NEGULESCO, on the contrary, thought that the words " if the Court is not sitting " should be retained in Article 19. For the rest, he concurred in what the President and M. Urrutia had said. Article 23 of the revised Statute provided that the Court " *reste toujours en fonctions* "; but to remain *en fonctions* (be in reunion) did not mean to sit *(siéger)*. Moreover, the Article must be read as a whole, and the last paragraph said: " members of the Court shall be bound . . . to hold themselves permanently at the disposal of the Court "; that meant they must be within a distance from the seat of the Court which would allow them to reach The Hague in a very brief time.

M. GUERRERO, Vice-President, said that of course Article 23 of the revised Statute had not been intended to leave the position as it was before the coming into force of the revised Statute. When it was said that the Court was to be permanently *en fonctions*, that meant that the members of the Court must be ready to do whatever was necessary to enable the Court to function at any time. Accordingly, it would be wrong, under the new régime, to use the words " if the Court is not sitting " in the Rules, unless the application of the phrase were limited to the judicial vacations.

The PRESIDENT took the opinion of the Court as to whether they accepted M. Guerrero's proposal to delete the first eight words (French text) in Article 19 of the Rules.

He noted that the amendment was accepted and that these words would be deleted in Article 19, which was adopted as thus amended.

The PRESIDENT considered that, with regard to the phrase " or if it is not sitting ", the Court might postpone consideration of the question until the expression occurred in another article.

The article was adopted in second reading with the following text:

> " On the proposal of the Registrar or Deputy-Registrar, as the case may be, the President shall appoint the official of the Registry who is to act as substitute for the Registrar in case both the Registrar and the Deputy-Registrar are unable to be present, or in case both appointments are vacant at the same time, until a successor to the Registrar has been appointed."

10.II.36.

See under Article 23, p. 48, for discussion of Article 19 in connection with Article 23.

10.III.36.

Final Adoption.

Article 19 was finally *adopted* with a change in the order of the wording, in order to make the text clearer.

ARTICLE 20 *(New Article; replaces Article 23 of the old Rules, deleted, and includes Article 28, Paragraph 1, of the old Rules).*

GENERAL LIST

4.III.35.*

Discussed as Article 23 (old Rules). — New Draft.

In reply to a question by the President, the REGISTRAR said that the existing Article 23 [2] had fallen into disuse owing to the introduction in 1931 of the General List of cases. Accordingly, the First Committee had proposed [3] to replace it by a new text which gave a definition of the General List, in conformity with the lines laid down for it by the Court in 1931.[4]

In answer to questions by the President, the Registrar added some explanations in regard to headings XVII to XIX of the proposed text.

M. URRUTIA, though having no objection to this text, suggested that it ought to be placed after Article 28, which provided for the creation of the General List, and the manner in which it was to be kept.

The PRESIDENT pointed out that, if the Court adopted the new text, it would be unable to alter the arrangement of the General List without amending the Rules.

The REGISTRAR observed that, in any case, it was impossible to alter the arrangement of the General List, as that might result in marring its continuity, which was, however, an essential requirement. Moreover, the heading " notes " made it possible to provide for any unforeseen contingencies. It offered a safety valve.

Several judges having expressed the opinion that the new article proposed ought, like the existing Article 23, to deal chiefly with the manner of keeping the registers, etc., Jonkheer VAN EYSINGA pointed out that that had not been the intention of the First Committee, which had wished to introduce a rule dealing with the General List, and at the same time to abrogate the provisions of the existing Article 23, that had ceased to be applicable.

The PRESIDENT, referring to M. Urrutia's remark in regard to the place in which the proposed clause should be inserted, suggested that the Court should allow the Drafting Committee to settle that question.

It was decided to do so.

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* D 2, A. 3, pp. 405, 406-407.

[1] See for instance: Committee of Jurists of 1929, Minutes, pp. 34, 112-113.

[2] D 1, 2nd edition, 1931.

[3] D 2, A. 3, p. 754

[4] E 7, pp. 275, 188.

The PRESIDENT asked the Court whether, subject to that reservation, it was disposed to adopt the new text of Article 23.

He declared that Article 23 was adopted, subject to changes of drafting.[1]

. . . . . .

Paragraph 1 of Article 20 discussed as Paragraph 1 of Article 28 (old Rules).

The PRESIDENT stated that, in view of the new text which had just been adopted for Article 23, it would probably be necessary to make some changes in the wording of Article 28. The only amendment that had actually been proposed related to paragraph 1.

The new wording that had been suggested by the Second Committee was as follows:[2]

> " The General List of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases shall be entered in the List and numbered successively according to *the year and* the date of the receipt of the document submitting the case to the Court."

The REGISTRAR said that the object of the amendment was to replace the consecutive numbering of the cases on the List by a system of annual numbering. However, having regard to the number of cases submitted to the Court and to their nature, he feared that some confusion might result.

The amendment in question was not adopted.

The first paragraph of Article 28 was maintained in its existing form.

3.IV.35.

Article 20. — First Reading.

The Court adopted this article in first reading with minor changes of wording and with the number 20 instead of 23.[3] The text adopted, which combines the First Committee's proposal for the replacement of the old Article 23 by a definition of the General List (see previous page, meeting of 4.III.35) with paragraph 1 of the old Article 28 (*idem*) was as follows:

> " 1 [paragraph 1 of Article 28 of old Rules]. The General List of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases shall be entered in the list and numbered successively according to the date of the receipt of the document bringing the case before the Court.
>
> " 2. The General List contains the following headings:
>
> I. Number in list.
> II. Short title.
> III. Date of registration.
> IV. Registration number.
> V. File number in the archives.
> VI. Nature of case.
> VII. Parties.
> VIII. Interventions.
> IX. Method of submission.
> X. Date of document instituting proceedings.
> XI. Time-limits for filing of documents in written proceedings.
> XII. Prolongation of time-limits, if any.
> XIII. Date of termination of written proceedings (date of entry in session list).[1]
> XIV. Postponements.
> XV. Date of beginning of the hearing (date of the first public sitting).
> XVI. Observations.
> XVII. References to earlier or subsequent cases.
> XVIII. Solution (nature and date).
> XIX. Removal from the list (nature and date).
> XX. References to publications of the Court relating to the case.
>
> " 3. The General List shall also contain a space for notes, if any, and also spaces for the inscription, above the initials of the President and of the Registrar, of the dates of the entry of the case, of its result or of its removal from the list, as the case may be."

8.II.36.*

Second Reading.

The PRESIDENT observed that the history of this article was referred to in the 1935 Minutes (p. 44 of this text).

Jonkheer VAN EYSINGA remarked that No. X in paragraph 2 spoke of the " date of document instituting proceedings ", whereas paragraph 1 spoke of " the date of the receipt of the document bringing the case before the Court ". Clearly the same document was meant in both paragraphs. Might not the wording in the first paragraph be replaced by: " the date of the document instituting proceedings " ?

The REGISTRAR said that the expression " the document bringing the case before the Court " had been inserted in the old Article 28 in order clearly to indicate that it also covered requests for advisory opinions from the Council.[2] When the Court, in 1931, had adopted the various headings of the General List,[3] it had considered that the expression " document instituting proceedings " also covered requests submitting cases for advisory opinion. In any case practice had developed in this sense.[4] There would therefore be no objection to using this expression also in paragraph 1 of Article 20.

On the other hand, a change in a heading of the General List would involve a good deal of trouble.

The PRESIDENT pointed out that, if the Court amended the wording of paragraph 1 of Article 20 simply because the same expression was not used as in No. X of the General List, it would have to make the same change everywhere.

M. ANZILOTTI did not consider that the wording used in No. X of the General List was appropriate to the case of requests for an advisory opinion.

M. FROMAGEOT thought that to describe a request from

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[1] See below for text adopted in first reading.
[2] *Cf.* D 2, A. 3, p. 762.
[3] See under Article 14, first reading, p. 41.

* D 2, A. 3, pp. 512-513.
[1] The reference to " entry in session list " was cut out prior to the second reading owing to the entry into force of the revised Statute.
[2] For the genesis of old Article 28, see D 2, A. 2, pp. 92-96, 104-106, 116-117, 124-125, 284, 289.
[3] D 2, A. 2, p. 125.
[4] See, for instance, E 11, p. 128.

the Council for an advisory opinion as a " document instituting proceedings " would be to give the request a significance which it did not possess.

The REGISTRAR pointed out that headings VI and IX of the List served to explain heading X, and thus the latter had never given rise to difficulty.

There being no further observations, the PRESIDENT declared paragraph 1 of Article 20 adopted as it stood.

Paragraphs 2 and 3 of Article 20 were adopted without observations, and the article as a whole was adopted in second reading.

10.III.36.

Final Adoption.

The Committee proposed no changes in the French text and only a change of tense in paragraph 2 of the English: " shall contain " instead of " contains ".

Article 20, as modified, was finally *adopted*.

ARTICLE 21

(This article is made up as follows: Paragraph 1 = Article 24 (1) old Rules), Paragraph 2 = Article 25 (old Rules), Paragraph 3 = Article 24 (2) (old Rules), Paragraph 4 = Article 43 (old Rules).

DUTIES OF THE REGISTRAR IN CONNECTION WITH COMMUNICATIONS AND REQUESTS FOR INFORMATION

29.V.34.*

Paragraph 4 of Article 21 discussed as Article 43 (old Rules).

The Court examined Article 43, which the Co-ordination Commission had proposed to word as follows:

> " In the case of a public sitting, the Registrar shall publish in the Press all necessary information as to the date and hour fixed."

The PRESIDENT observed that the Co-ordination Commission had not proposed any change in the English text. But, in the French text, they proposed to replace the words " *dans les journaux* " by the words " *dans la presse* ".

M. FROMAGEOT pointed out that the opening words of the article seemed to imply that a public sitting was an exceptional occurrence. It would be better to say, for example:

> " The Registrar shall publish in the Press all necessary information as to the date and hour fixed for public sittings."

As no objection was made, the PRESIDENT declared Article 43, as thus worded, to be adopted.

5.II.35.**

Paragraph 4 discussed as Article 43 (old Rules).

The PRESIDENT said that the Court at its next sitting would first take Article 43. That article had already been adopted. It would perhaps be better, however, to transfer it to the section of the Rules concerning the Registry rather than to place it in the chapter concerning oral proceedings. That would incidentally facilitate the numbering of the articles.

6.II.35.***

Paragraph 4 discussed as Article 43 (old Rules).

The PRESIDENT recalled that, at the 14th sitting of the session in May 1934, the Court had adopted the following text:

> " The Registrar shall publish in the Press all necessary information as to the dates and hours fixed for public sittings."

The President had already mentioned that, in his opinion, this provision should be transferred to Article 26. For, if placed in Article 43, the provision concerning the publication in the Press of notices of public sittings would only be in the part of the Rules relating to oral proceedings; but it would be better that this point should be dealt with by means of a provision so situated in the Rules as to make it clear that it covered not only public sittings devoted to hearings but also those held for the delivery of judgments and advisory opinions.

M. ANZILOTTI thought that Article 43 could easily be inserted as a third paragraph of Article 24, which, in fact, dealt with communications to be made by the Registrar to the Press.

The PRESIDENT noted that there was no objection to authorising the Drafting Committee to transfer Article 43 to Section D of Chapter I of the Rules.

4.III.35.**

Paragraphs 1 and 3 discussed as Article 24; Paragraph 2 discussed as Article 25.

Article 24 (old Rules).

The PRESIDENT observed that the existing text of this Article was worded as follows:

> " The Registrar shall be the channel for all communications to and from the Court.
>
> " The Registrar shall reply to any enquiries concerning its activities, including enquiries from the Press, subject, however, to the provisions of Article 42 of the present Rules and to the observance of professional secrecy."

He also recalled that the Court had decided, at the beginning of the present session, to transfer the contents of Article 43 of the Rules to this article.[1]

In reply to a question by M. Anzilotti in regard to the expediency of this transposition, the REGISTRAR thought that it was open to some objections. The publicity of hearings was an essential element of proceedings before the Court, and it was for that reason that the subject-matter of Article 43 had been inserted in the part of the Rules devoted to oral procedure. The question was, however, of minor importance.

* D 2, A. 3, p. 120.
** *Ibid.*, p. 178.
*** *Ibid.*, pp. 179-180.

* D 2, A. 3, pp. 405-406.
[1] See above.

The PRESIDENT put Article 24 to the vote. It was unanimously adopted in its existing text; it was also decided to insert in it the present Article 43 of the Rules.

Article 25 (old Rules).

The PRESIDENT passed on to Article 25, in which it was proposed by the First Committee to omit the words " if a request to that effect should be made " in the existing text. This change would bring the article into line with the Court's present practice, which was to give an official receipt for a document in all cases, even if the party did not ask for one.

As the omission of these words gave rise to no objection, the President declared that Article 25, as thus amended, was unanimously adopted.

3.IV.35.*

Article 21 [1]: Paragraphs 1, 3 and 4 adopted in First Reading.

In consequence of a suggestion made by Jonkheer VAN EYSINGA and supported by M. SCHÜCKING, to the effect that paragraph 3 [2] proposed by the Drafting Committee should be put back in the section concerning oral proceedings—*i.e.*, in Article 46 of the Drafting Committee's draft—a discussion took place in the course of which the President observed that, if placed in that article, the clause would not apply to public sittings held for the delivery of judgment.

In this connection, the Court's attention was drawn to the difference between Articles 46 and 58 of the Statute.

The PRESIDENT put the following question to the Court:

" Does the Court adopt Article 21 in the form proposed by the Drafting Committee ? "

By nine votes to two, the Court answered the question in the affirmative and the article was adopted in first reading with the following text:

" 1. The Registrar shall be the channel for all communications to and from the Court.

" 2. The Registrar shall, subject to the obligations of secrecy attaching to his official duties, reply to all enquiries concerning the work of the Court, including enquiries from the Press.

" 3 [former Article 43]. He shall publish in the Press all necessary information as to the date and hour fixed for public sittings."

Paragraph 2 adopted in First Reading as Article 22 (Article 25 of Old Rules).

Article 22 was adopted with the following text:

" The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document had been registered shall be given to the sender."

10.IV.35.*

Paragraph 2 of Article 21 discussed as Article 22.

The Court adopted the following arrangement: the present Article 22 [1] would be combined with Article 21, of which it would constitute paragraph 2; and paragraphs 2 and 3 of Article 21 of the draft would become paragraphs 3 and 4 of that article.

8.II.36.**

Article 21. — Second Reading.

M. FROMAGEOT made a suggestion regarding the French text of paragraph 1 which was adopted. No alteration in the English text was necessary.

Paragraphs 2 and 3 of Article 21 were adopted without observations.

The PRESIDENT suggested that paragraph 4 should begin with the words " The Registrar " instead of " He ", in order to bring that paragraph into line with the three preceding ones.

Paragraph 4 was adopted with this modification, and the article as a whole was adopted in second reading.

10.III.36.

Final Adoption.

Article 21 was finally *adopted* unchanged.

ARTICLE 22 *(Article 65 of the old Rules).*

PUBLICATION OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

23.II.35.**

Discussed as Article 65 (old Rules).

The PRESIDENT opened the discussion on Article 65. The existing text was as follows:

" A collection of the judgments, orders and advisory opinions of the Court shall be printed and published under the responsibility of the Registrar."

The Co-ordination Commission proposed the following text:

" A collection of the judgments and advisory opinions of the Court, as also of such orders as the Court, or the President if the Court is not sitting, may decide to include therein, shall be printed and published under the responsibility of the Registrar."

The President explained that there were certain orders in regard to procedure which it was unnecessary to include in this collection. This applied, for instance, to an order made by the Court for the hearing of an expert.

M. GUERRERO, Vice-President, thought that the Co-ordination Commission's idea was a good one. Though sometimes orders contained points of law which made it desirable to publish them, others would be of no interest to the public.

The REGISTRAR, in order to prevent a possible misunder-

* D 2, A. 3, p. 424.
** *Ibid.*, pp. 328-329.
[1] Article 24 has now become Article 21; see under Article 14, first reading, p. 41.
[2] Paragraph 3 in this context is paragraph 4 of the text in force as from 11.III.36.

* D 2, A. 3, p. 459.
** *Ibid.*, p. 513.
[1] *I.e.*, Article 22 of the draft as adopted on 3.IV.35.

standing, explained that all orders without exception were made public. The only question was whether they should or should not be published in the special collection, Series A/B. Those not included therein were published as annexes to the volumes of Series C.

M. FROMAGEOT would prefer that the existing Article 65 of the Rules should be left unchanged.

The PRESIDENT gathered that the draft proposed for Article 65 by the Co-ordination Commission could be considered as adopted.

10.IV.35.*

Adopted in First Reading as Article 87.

Article 87 was adopted without discussion (for text see above, meeting of 23.II.35).

Transfer of Article 87 of the draft (First Reading), which corresponds to Article 65 (old Rules), to Article 22 of the Rules in force.

At the same meeting, Jonkheer VAN EYSINGA suggested that, in view of the suppression of Article 88, Article 87 should be transferred to the part of the Rules headed: " The Registry ".

The Court adopted the following arrangement:

Article 87 would be transferred to the Section entitled: " The Registry ", where it would constitute Article 22. The present Article 22 would be combined with Article 21.

10.II.36.*

Article 22. — Second Reading.

The PRESIDENT pointed out that, in the text which had been circulated containing the amendments considered necessary as a consequence of the coming into force of the revised Statute, the words " or the President, if the Court is not sitting " had been deleted. He asked the Registrar to give the reason.

The REGISTRAR said that the omission of these words had been proposed because the question dealt with in the article was not an urgent one; as the Court would, in principle, be always in session, there was no reason for conferring these special powers upon the President; the omission of the words made it possible to dispense with the phrase " if the Court is not sitting ", which was always a cause of difficulty.

The PRESIDENT said that the reason which had convinced him, personally, was the existence of the Publications Committee [1] to which the Court could delegate its powers, in that sphere.

As no observations were offered, the PRESIDENT noted that the text of Article 22 was adopted in second reading, subject to the omission of the words " or the President, if the Court is not sitting ". Text adopted:

> " A collection of the judgments and advisory opinions of the Court, as also of such orders as the Court may decide to include therein, shall be printed and published under the responsibility of the Registrar."

10.III.36.

Article 22 was finally *adopted* unchanged.

ARTICLE 23 *(Article 26 of the old Rules).*

RESPONSIBILITY OF THE REGISTRAR FOR THE WORKING OF THE REGISTRY

First Reading.

On 3.IV.35 the old Article 26 was adopted in first reading in its existing form [1] save for a minor amendment. The article was also numbered 23. [2] On 10.IV.35, however, a further slight modification of the first paragraph was adopted on the proposal of the Drafting Committee and the article was accordingly adopted with the following text:

> " 1. The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. He or the Deputy-Registrar, as the case may be, shall be present at all meetings of the full Court, as also at those of the Special Chambers and of the Chamber for Summary Procedure; the Registrar may, however, be represented at meetings of the Chambers by an official appointed by him with the approval of the Court. The Registrar shall be responsible for drawing up the minutes of the meetings.
>
> " 2. He shall further undertake all duties which may be laid upon him by the present Rules.
>
> " 3. The duties of the Registry shall be set forth in detail in a list of instructions submitted by the Registrar to the President and approved by him."

10.II.36.**

Second Reading.

The PRESIDENT declared the discussion open on paragraph 1. He drew attention, at the Registrar's suggestion, to the penultimate sentence of that paragraph, giving the Court the right to approve the selection of the official appointed to replace the Registrar or the Deputy-Registrar, in the case referred to; the result of this provision was that the paragraph was hardly in conformity with Article 19, as adopted a few days previously by the Court[2], for in that article an analogous right was conferred on the President alone.

The REGISTRAR added that he had also mentioned to the President that he was not sure whether the amendment that had been introduced in Article 19 was consistent with Article 31, paragraph 2,[3] of the Rules, which laid down that no person other than the Registrar or the Deputy-Registrar might be admitted to the Court's deliberations, except by virtue of a special decision of the Court.

Count ROSTWOROWSKI thought that Article 19 was based on the assumption that the Court was not convened; whereas, in the case dealt with in Article 23, the Court, or the Chamber, was convened.

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* D 2, A. 3, pp. 457 and 459.
[1] 1931 Rules.
[2] See under Article 14, p. 41.

* D 2, A. 3, p. 514.
** D 2, A. 3, pp. 514-517.
[1] E 7, p. 296.
[2] See p. 44.
[3] Article 30 of Rules in force.

The REGISTRAR observed that Article 19 was drawn in very wide terms, and applied equally whether the Court was sitting or not sitting. In the former case, the person appointed by the President on the proposal of the Registrar would also have to assist the Court during its deliberations; that was the contingency specially provided for in Article 23, in the case of the Chambers. It seemed rather incongruous that, according to Article 19, the Court was not required to approve the choice of the official appointed to replace the Registrar or the Deputy-Registrar at the sittings of the full Court, whereas, according to Article 23, the Court had to approve the choice of the official who would attend the sittings of a Chamber.

M. GUERRERO, Vice-President, thought that it might be best to omit the clause in article 23 referring to the replacement of the Registrar or the Deputy-Registrar at the sittings of a Special Chamber; for the terms of Article 19 were general enough to cover all cases.

Baron ROLIN-JAEQUEMYNS considered that the case dealt with in Article 23 was not the same as that dealt with in Article 19. The latter article provided that, if both the Registrar and the Deputy-Registrar were unable to be present, the President would, on the proposal of the Registrar, appoint a substitute to discharge the duties of the Registrar temporarily. Article 23, on the other hand, dealt with the case in which both the Registrar and the Deputy-Registrar, though present and able to discharge their duties, were prevented from attending the sitting of a Chamber.

Jonkheer VAN EYSINGA said he had understood Article 23 in the same sense as Baron Rolin-Jaequemyns: it might happen that the Registrar, though present in the Peace Palace, might wish, owing to pressure of work, to be replaced by a substitute at a sitting of a Chamber. That was quite a different contingency from the one dealt with in Article 19.

Count ROSTWOROWSKI thought that, if M. Guerrero's suggestion were adopted, it would be the President who, in the special case provided for in Article 23, would appoint the substitute for the Registrar or the Deputy-Registrar, without requiring the approval of the Court. He believed it would be best to leave paragraph 1 of Article 23 as it stood.

Baron ROLIN-JAEQUEMYNS said that, in that case, the Court's approval would be needed for the appointment of a temporary substitute for the Registrar at a sitting of a Chamber, but its approval would not be needed for the appointment of such a substitute at a sitting of the full Court. That was the difficulty which the Registrar had originally pointed out.

M. GUERRERO, Vice-President, maintained his original proposal. In his view, it would be an anomaly that, when the Registrar and the Deputy-Registrar were simultaneously prevented from attending a sitting, the appointment of an official to replace them in the discharge of their duties should be made by the President, whereas, under Article 23, the Registrar—or the Deputy-Registrar—would appoint the official who was to replace him at the sitting of a Chamber. This anomaly would be obviated by omitting the last part of the penultimate sentence of Article 23.

The REGISTRAR considered that the first part of Article 19 and the last part of Article 23 were merely two different wordings which sought to express the same idea. The appointment of a substitute official by the Court, on the proposal of the Registrar, was not very different from the appointment of such an official by the Registrar subject to the Court's approval.

M. ANZILOTTI believed that the object of Article 23 was to enable the Registrar to facilitate the discharge of his work by authorising him to have himself replaced at a sitting of a Chamber by an official of the Registry, even though he were not actually unable to attend the sitting himself. However, it seemed fitting, in that case, that the full Court, or the Chamber, should decide as to the expediency of its being assisted by a particular official of the Registry.

M. FROMAGEOT believed that both the Vice-President's observation and the consideration advanced by M. Anzilotti would find satisfaction if Article 23 were framed so as to provide for the appointment being made by the Court on the proposal of the Registrar; the passage might be worded: ". . . he may, however, be represented at meetings of the latter by the official appointed by the Court on the proposal of the Registrar ".

The PRESIDENT observed that there were several proposals before the Court; first, that of the Vice-President to omit the words; then that of the Registrar; next, the proposal to leave the text as it stood; and finally, M. Fromageot's amendment.

He asked the Court to vote first on the Vice-President's proposal:

> " Does the Court decide to omit, in line 6 of Article 23, the words: ' The Registrar may, however, be represented at meetings of the Chambers by an official appointed by him with the approval of the Court ' ? "

By seven votes against three, the Court answered this question in the affirmative.

The PRESIDENT observed that the sentence in question would accordingly disappear from Article 23, so that there was no need to put the other proposals to the vote.

M. NAGAOKA proposed, as a result of the decision which the Court had just taken, and in order to avoid any possible misunderstanding, to add the following words in the first paragraph of Article 23: " subject to the provisions of Article 19 ". He made this suggestion because he had observed that Article 19 was interpreted in two different ways.

Jonkheer VAN EYSINGA said it was quite possible to omit from Article 23 the words which the Court had just decided to delete, but it was not possible to bring that article, by means of a reservation, within the ambit of Article 19, which was concerned with a very different situation.

The PRESIDENT said that the only question remaining to be decided was that raised by M. Nagaoka's proposal to add the words: " subject to the provisions of Article 19 ". Was this addition necessary ? In point of fact, the official appointed to replace the Registrar, in application of Article 19, became the Registrar for the purposes of applying Article 23.

M. GUERRERO, Vice-President, thought that the word " unable " (to be present), in Article 19, covered all cases of inability to be present, no matter for what reason. That explained how Article 19 was applicable to the case envisaged in Article 23.

M. NAGAOKA agreed with that interpretation; that was what he had wished to bring out by his amendment to Article 23.

The PRESIDENT said that he, personally, would vote against the addition proposed by M. Nagaoka because it did not accord with the general idea of the article, the sole purpose of which, in reality, was to define the Registrar's duties.

He put the following question to the Court:

" Does the Court decide to add the words ' subject to the provisions of Article 19 ' to the first paragraph of Article 23 ? (These words would come—in the English text—immediately before the words ' he, or the Deputy-Registrar ' in the third line of the paragraph.) "

Five votes were given in favour of the proposal, and five votes against it.

The PRESIDENT said that he would give his casting vote against the addition that had been proposed.

As no other remarks were offered, he declared that paragraph 1 of Article 23 was worded as follows:

" The Registrar shall be responsible for the archives, the accounts, and all administrative work. He shall have the custody of the seals and stamps of the Court. He, or the Deputy-Registrar, as the case may be, shall be present at all meetings of the full Court, and at those of the Special Chambers and of the Chamber for Summary Procedure. The Registrar shall be responsible for drawing up the minutes of the meetings."

Paragraph 2.

The PRESIDENT opened the discussion on paragraph 2 of Article 23.

M. NAGAOKA asked if it was necessary to retain this paragraph. It was a matter of course that the Registrar should carry out the duties laid upon him by the Rules.

The REGISTRAR said that, so far as he remembered [1], the idea had been that, if this clause were not inserted, the Registrar's duties might seem to be confined to the points specified in paragraph 1.

The PRESIDENT declared that paragraph 2 was adopted.

Paragraph 3.

Paragraph 3 of Article 23 was adopted without observation, and Article 23 as a whole was adopted in second reading.

10.III.36.*

Final Adoption.

The PRESIDENT said that in the French text of Article 23, in the third line of paragraph 1, the Committee proposed to delete the words " *le cas échéant* " (as the case may be), and to say: " *Le Greffier ou le Greffier adjoint assiste à toutes les séances plénières de la Cour* " (The Registrar or the Deputy-Registrar shall be present at all sittings of the full Court).

Then, at the beginning of paragraph 2, the words " *de plus* " were replaced by " *en outre* " (in addition).

In the English text, the word " sitting " was substituted for " meeting ".

Article 23, as thus amended, was finally *adopted.*

ARTICLE 24 *(Article 14 of the old Rules with Article 15, Paragraph 1, old Rules).*

CHAMBERS OF THE COURT: ELECTION OF MEMBERS AND COMPOSITION OF THE CHAMBERS

First Reading.

On 4.III.35 the old Articles 14, 15 and 16 were approved unchanged and, on 3.IV.35 these articles were adopted in first reading with slight modifications and numbered 24, 25 and 26 in consequence of the transfer of the articles concerning the Registry to follow those concerning the Presidency. [1] The text adopted was as follows:

" THE SPECIAL CHAMBERS AND THE CHAMBER FOR SUMMARY PROCEDURE

" *Article 24.*

" 1. The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute of the Court shall be appointed at a meeting of the full Court by secret ballot and by an absolute majority of votes, regard being had for the purpose of this appointment to any preference expressed by the judges so far as the provisions of Article 9 of the Statute permit.

" 2. The substitutes mentioned in Articles 26 and 27 of the Statute shall be appointed in the same manner. Two judges shall also be chosen to replace any member of the Chamber for Summary Procedure who may be unable to sit.

" 3. The election shall take place in the last quarter of the year and the period of appointment of the members elected shall commence on January 1st of the following year.

" 4. Nevertheless, after a new election of the whole Court, the election shall take place at the beginning of the following session. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election.

" 5. The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member, and of which the President of the Court is not a member.

" *Article 25.*

" 1. The Special Chambers referred to in Articles 26 and 27 of the Statute of the Court may not sit with a greater number than five judges.

" 2. Except as provided in the second paragraph of the preceding article, the composition of the Chamber for Summary Procedure may not be altered."

Article 26 is not reproduced.[2]

10.II.36.**

THE SPECIAL CHAMBERS AND THE CHAMBER FOR SUMMARY PROCEDURE

Article 24. [3] — *Second Reading.*

The PRESIDENT asked, in regard to the wording of this

[1] See under Article 14, first reading, p. 41. A proposal to place these articles before those concerning the Presidency was rejected at the same meeting on 3.IV.35 (see D 2, A. 3, p. 423).

* D 2, A. 3, pp. 725-726.

** D 2, A. 3, pp. 517-519.

[1] See D 2, p. 257 (under Article 17).

[2] This article, which concerned deputy-judges, was suppressed as a result of the coming into force of the revised Statute.

[3] Text discussed was that adopted in first reading with modifications: See D 2, A. 3, Annex 1, p. 973.

heading, whether the Court had not deleted the word " special " in other places.

The REGISTRAR thought that the system adopted had been to omit the word " special " in passages relating at the same time to the Transit and Labour Chambers and to the Chamber for Summary Procedure, in order to avoid giving an incorrect impression that the Transit and Labour Chambers were alone indicated, whereas, in point of fact, all three Chambers were referred to. That was the case, for instance, in paragraph 2 of Article 7.[1]

M. ANZILOTTI drew attention to the wording of Article 28 of the revised Statute: " The *Special* Chambers provided for in Articles 26 and 27 . . ."

M. FROMAGEOT considered that the word " Chambers " alone was insufficient in this case, and needed to be qualified in some way. It ought to be supplemented, either by a reference to the articles in virtue of which the Chambers were constituted or else by some adjective.

The PRESIDENT declared that the heading preceding Article 24 was retained as it stood.

Paragraph 1.

M. NAGAOKA proposed to omit paragraph 2 of Article 24, and to insert the words " including substitutes " after the word " members ", in paragraph 1.

The PRESIDENT said that, from a drafting point of view, it would be better to say: " The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute, including substitute members, shall be appointed . . ."

M. GUERRERO, Vice-President, suggested that it might be better to omit all mention of the substitutes. As Articles 26, 27 and 29 were cited, the substitute judges were already included.

Baron ROLIN-JAEQUEMYNS thought that there would have been no objection to omitting the substitutes, if they had not been already mentioned in the old article; the change might give rise to an incorrect interpretation.

Count ROSTWOROWSKI proposed to say: " and also the substitutes."

Baron ROLIN-JAEQUEMYNS asked to be informed as to the significance of the reservation made in paragraph 1 in favour of " any preference expressed by the judges ".

M. ANZILOTTI said that it meant preferences expressed by judges at the time of the election.

M. GUERRERO, Vice-President, considered that it would be better to delete this reservation; for an awkward situation might arise, when the members of a Chamber were being elected, if a judge announced that he would like to belong to that Chamber, and then, when the election was carried out, he failed to secure a majority.

The REGISTRAR recalled that, at the outset, the Special Chambers had been considered as Chambers of experts; this reservation had really been inserted to give the judges an opportunity of announcing that they possessed experience in one sphere more than in another.[2]

Count ROSTWOROWSKI thought that there was also another consideration which had led to this reservation; it was implied in the words: " so far as the provisions of Article 9 of the Statute permit ". That showed, therefore, that the preferences expressed by the judges would not be absolutely decisive; the Court would seek to combine with them the idea that the Special Chambers should be composed in such a way as to comprise the representatives of the main forms of civilisation.

Baron ROLIN-JAEQUEMYNS suggested that the whole of the final passage in the article should be omitted.

The PRESIDENT asked whether the Court decided to omit, in paragraph 1 of Article 24, all the words after the word " votes ".

Jonkheer VAN EYSINGA did not feel able to answer the question in the affirmative. It would, for instance, be a mistake to omit the reference to Article 9 of the Statute which now appeared in Article 24.

The PRESIDENT said that, personally, he would vote for the omission, for, in practice, the Court had not been regardful of the principle laid down in the passage in question.[1]

M. NAGAOKA was in favour of retaining the passage, first because the number of members of the Chamber for Summary Procedure had been increased, and secondly because Article 9 of the Statute was referred to in Articles 26 and 27 of the Statute, but not in Article 29.

M. FROMAGEOT, whose view was supported by M. URRUTIA, proposed that the passage should be worded as follows: ". . . subject to the provisions of Article 9 of the Statute ", without alluding to the preferences expressed by the judges.

The PRESIDENT suggested the following text: ". . . regard shall be had, in appointing these members, to the provisions of Article 9 of the Statute ".

The REGISTRAR pointed out that, if the reservation were omitted, the mention of Article 9 of the Statute in Article 24 of the Rules would merely be a repetition of what was laid down in Articles 26 and 27 of the Statute.

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[1] See p. 33.

[2] See *Acts of the Assembly of 1920*: Meetings of the Committees, I, p. 391; Plenary Meetings, pp. 439-440.

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[1] The President, however, at certain elections, invited the judges to express their preferences. See E 1, pp. 55-56; E 7, p. 48; E 10, p. 23. See also the following minutes:

EXTRACT FROM MINUTES OF THE 39th MEETING (MARCH 23rd, 1922).

" 335. — *Election of members of the Special Chambers.*

" The CHAIRMAN invited the members to state what were their preferences in accordance with Article 14 of the draft Rules.

" MM. ALTAMIRA, ANZILOTTI and HUBER stated that they would prefer to be members of the Chamber for Labour questions; MM. NYHOLM, MOORE, WEISS and ODA and Lord FINLAY expressed their preference for the Chamber for Transit and Communications."

EXTRACT FROM MINUTES OF THE 3rd MEETING (JANUARY 17th, 1931).

" 15. — *Agenda (Distr. 1810) No. 8. — Election of members of the Chamber for Labour cases for 1931, 1932 and 1933.*

" At the invitation of the PRESIDENT, who ascertained beforehand, in accordance with Article 14 of the Rules, the preferences of each of the members of the Court with regard to the technical Chambers to which they might be appointed, the Court, by secret ballot, proceeded to appoint the members of the Chamber for Labour cases."

EXTRACT FROM MINUTES OF THE 36th MEETING (DECEMBER 2nd, 1933).

" 37. — *General Agenda No. 7. — Election of members of the Chamber for Labour cases for 1934, 1935 and 1936.*

" The PRESIDENT, after reading Article 14 of the Rules, asked the members of the Court, as usual, to express any preferences they might have in favour of one or other of the Chambers that the Court was required to constitute.

" His own preference was in favour of the Chamber for Labour disputes.

" Mr. KELLOGG asked that, if possible, his name should not appear among the members of any Chamber."

M. URRUTIA observed that nothing was said on this subject in the Statute in connection with the Chamber for Summary Procedure. Yet it was desirable that the appointment of the judges of this Chamber should be governed—even more than in the case of the Special Chambers—by the principle of Article 9.

M. NAGAOKA pointed out that, according to the revised Statute, recourse to the Chamber for Summary Procedure still remained open in the cases referred to in Articles 26 and 27 of the Statute.

M. NEGULESCO said he agreed with the Vice-President's proposal. As regards the Special Chambers, the reference to Article 9 was already made in Articles 26 and 27 of the Statute. On the other hand, Article 29 of the Statute, which dealt with the Chamber for Summary Procedure, did not contain a reference to that article, because it had been intended to leave the Court's hands free in the appointment of the members of this Chamber. To introduce a reference to Article 9, in connection with the Chamber for Summary Procedure, would therefore be to go further than the Statute itself.

The PRESIDENT asked the Court to vote on the Vice-President's proposal.

By seven votes to three, the Court decided to omit the words: " regard being had for the purpose of this appointment to any preference expressed by the judges, in so far as the provisions of Article 9 of the Statute permit ".

The PRESIDENT noted that the first paragraph of Article 24 would now be worded as follows:

> " The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute of the Court and likewise the substitute members shall be appointed at a meeting of the full Court by secret ballot and by an absolute majority of votes."

Paragraph 2 had been deleted.

Paragraphs 3 and 4 would become paragraphs 2 and 3.

As no observations were offered, the President considered these paragraphs as adopted.

The last paragraph, which would become paragraph 4, was also adopted, and the article as thus amended was adopted in second reading.

The text of paragraphs 2, 3 and 4 (old paragraphs 3, 4 and 5) was as follows:

> " 2. The election shall take place in the last quarter of the year and the period of appointment of the members elected shall commence on January 1st of the following year.
>
> " 3. Nevertheless, after a new election of the whole Court, the election shall take place at the beginning of the following year. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election.
>
> " 4. The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall preside *ex officio* over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall preside over any Chamber of which he may be elected a member and of which the President of the Court is not a member."

11.II.36.*

Paragraph 5 of Article 24, discussed as Article 25, Paragraph 1, of the Text in First Reading.

The PRESIDENT invited the Court to begin the discussion of Article 25 [1] of the Rules, the deletion of which was proposed by Jonkheer van Eysinga.

Jonkheer VAN EYSINGA recalled that, in the course of the discussions on the Rules in 1922, M. Anzilotti had already made the same proposal. [2] At that time, however, there had been some ground for retaining the provision, which then composed one article together with what had afterwards become Article 4; [2] but that ground had now disappeared. The real reason for its deletion was that the terms of the Statute itself were already clear, specifying that the Special Chambers and the Chamber for Summary Procedure were to be composed of five judges—neither more nor less.

There was therefore no reason for repeating this provision in the Rules.

With regard to the deletion of the second paragraph of Article 25 (old Article 15), Jonkheer van Eysinga had simply re-submitted a proposal made by the President himself.[1]

The PRESIDENT suggested that paragraph 1 of Article 25 possessed some degree of utility, in that it constituted the complement to the provisions of Article 4 of the revised Rules [3]. Perhaps Jonkheer van Eysinga would be satisfied if the two provisions were united by transferring Article 25 to become the second paragraph of Article 4.

M. ANZILOTTI agreed with Jonkheer van Eysinga that the rule laid down in Article 25 already emerged clearly from the terms of paragraph 4 of Article 31 of the revised Statute.

The PRESIDENT acknowledged that it was a necessary consequence of the terms of paragraph 4 of Article 31 of the Statute, but considered that this fact would not immediately strike a reader.

Count ROSTWOROWSKI thought that Article 25 of the Rules formulated the principle which underlay paragraph 4 of Article 31. It might therefore be considered that Article 25, though not absolutely necessary, was not at all events entirely useless, as it conduced to clarity. As regards the position of the provision, he thought it was better to group all provisions concerning the Chambers together in their present position.

The PRESIDENT took the opinion of the Court regarding the deletion of Article 25 of the Rules.

The Court, by seven votes to two, with one abstention decided to maintain Article 25.

M. NAGAOKA, in view of the fact that Article 25 was to be retained, thought it better to add the words " in accordance with Article 31, paragraph 4, of the Statute ". This addition would enable a reader more readily to understand the article.

M. GUERRERO, Vice-President, did not approve of the addition proposed by M. Nagaoka, because it was Articles 26, 27 and 29 of the Statute which limited the number of judges

* D 2, A. 3, pp. 521-523.

[1] Text of Article 25 (former 15), discussed in second reading:
" 1. The Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court may not sit with a greater number than five judges." (Paragraph 1 had been modified and paragraph 2 suppressed in the " text of the revised Rules adopted by the Court on 10.IV.35 in first reading with the modifications considered necessary by the President to bring them into harmony with the revised Statute " — see D 2, A. 3, p. 971.)

[2] D 2, p. 116.

[3] See p. 28.

of the Special Chambers to five, and these articles were already cited in Article 25.

M. NAGAOKA observed that the principle formulated in Article 25 was, so to speak, condensed in paragraph 4 of Article 31, which also cited Articles 26, 27 and 29 of the Statute. In any case, his sole idea had been to let the reader know on what ground Article 25 was based.

M. NEGULESCO did not think it possible to make the addition proposed by M. Nagaoka, for it would imply that, if it were not for paragraph 4 of Article 31 of the revised Statute, the Chambers might sit with more than five judges. But the provision limiting the number of judges to five in the case of the Special Chambers had existed since 1922 in the terms of Articles 26 and 27 of the Statute of 1920.

M. ANZILOTTI was in favour of the President's suggestion to transfer Article 25 of the Rules to Article 4 (new), thus connecting both provisions with Article 31 of the Statute.

The PRESIDENT read a text drafted on the basis of M. Anzilotti's suggestion:

> " Where one or more parties are entitled to choose a judge under the conditions laid down by Article 31 of the Statute, the full Court may sit with a number of judges exceeding the number of members of the Court fixed by the Statute. On the other hand, the Chambers referred to in Articles 26, 27 and 29 of the Statute may not sit with a greater number than five, notwithstanding the presence of a judge selected in conformity with Article 31 of the Statute."

M. GUERRERO, Vice-President, would prefer not to make this transfer. Article 25 referred solely to the Chambers; it should therefore be left under the heading dealing with the Chambers.

The PRESIDENT said that the Registrar had handed him a fresh draft of Article 25; this took account of all the points of view expressed:

> " Where one or more parties are entitled, under Article 31, paragraph 4, of the Statute, to choose a judge to sit in a Chamber, the latter will always sit with five judges."

M. ANZILOTTI pointed out that, whilst the Registrar's proposal covered the case of judges chosen by States, there was also the case when members of the Court of the nationality of the parties concerned sat in a Chamber though not belonging to it.

The REGISTRAR replied that that was a matter of drafting. The following wording might be adopted:

> " In the circumstances contemplated by Article 31, paragraph 4, of the Statute, a Chamber will always sit with five judges."

The PRESIDENT personally would prefer to keep the text already adopted in first reading.

M. NAGAOKA asked that a vote should be taken upon the insertion, at the beginning of Article 25, of the words: " In accordance with the provisions of paragraph 4 of Article 31 of the Statute. . . . "

The Court, by six votes to three with one abstention, decided against the addition proposed by M. Nagaoka.

The PRESIDENT, observing that no one had asked for a vote to be taken on the question of the transfer of the provision, declared Article 25 adopted in its original form and position.

M. ANZILOTTI pointed out that it did not follow that the decision was unanimous.

The PRESIDENT recognised this. He noted that the Court was agreed that paragraph 2 of Article 25 [1] must be deleted in consequence of the coming into force of the revised Statute, and that Article 26 [2] (old Article 16) must disappear for the same reason.

14.II.36 (extracts).*

Article 24, Paragraph 5.

The PRESIDENT submitted a draft prepared by him with the assistance of some other members of the Court, in accordance with the decisions taken. This draft was as follows:

> "THE SPECIAL CHAMBERS AND THE CHAMBER FOR SUMMARY PROCEDURE.
>
> " *Article 24.*
>
> " *Paragraph 5* [former Article 25, paragraph 1, of the draft adopted in first reading]. The Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court may not sit with a greater number than five judges."

. . . . . .

The chief difficulty had lain in the fact that three numbers were required for these articles,[3] but only two were available; to overcome this difficulty, in the draft submitted the old Article 25 had been combined with Article 24, becoming the fifth paragraph of that article.

. . . . . .

10.III.36.**

Article 24. — Final Adoption.

In the French text of Article 24, paragraph 3, last line, the Drafting Committee proposed a modification which amounted to the correction of an error. The French text would reduce the period of office to two years, which was incorrect, as under the Statute that period was three years. Since the English text was correct, the French text had been made to conform with it.

With regard to the English text, two alterations were proposed in the first and second paragraphs. In the first, the word "also" had been substituted for "likewise", in the phrase "*also* the substitute members". In the second paragraph, the French words "*les élus*" had been rendered by "persons elected", instead of "members elected".

Article 24, as thus amended, was finally *adopted*.

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* D 2, A. 3, pp. 545, 546.

** *Ibid.*, p. 726.

[1] Of the text adopted in first reading, see p. 50.

[2] This article concerned the summons of deputy-judges to complete the Chambers.

[3] Articles 25, 26 and 27; see also p. 64, under Article 25.

ARTICLE 25

(This article is composed as follows: Paragraph 1 (new; cf. Article 27 (1) of the old Rules), Paragraph 2 (new), Paragraph 3 (new; cf. Article 27 (3) of the old Rules), Paragraph 4 = Article 27 (6) of the old text revised.)

JUDICIAL YEAR: JUDICIAL VACATIONS AND PUBLIC HOLIDAYS

11.II.36.*

Discussed as Article 26 (new draft proposed by the President) and Articles 26 and 27 (new draft proposed by M. Fromageot).

The PRESIDENT opened the discussion on Section 2: Working of the Court.

In the text which he had submitted to the Court as a basis for discussion,[1] the President had proposed a new Article 26 dealing with vacations and replacing the article which had been deleted.[2] The President's draft was based on Article 23 of the Statute, which laid down that the Court was to remain permanently in session except during the judicial vacations, the dates and duration of which would be fixed by the Court.[3]

M. Fromageot having submitted an amendment based on another conception, the President asked him to explain his proposal.[4]

M. FROMAGEOT thought it rather incongruous to begin the first Article of Section 2: " The Working of the Court ", with a provision concerning vacations—*i.e.*, the non-working of the Court. That was M. Fromageot's reason for proposing, as the first article concerning the working of the Court, a provision determining the judicial year, during which the Court was always at the disposal of parties. The first thing that occurred to one's mind was the possibility that certain judges might be unable to take part in its work. With regard to this point, what the Rules had to do was to lay down (Article 26 *bis*) what a judge who was temporarily unable to attend must do in order to fulfil the provisions of paragraph 3 of Article 23 of the revised Statute, the terms of which, in accordance with the general principle adopted in the Rules, should not be reproduced. His amendment next dealt with the periods during which the work of the Court would be suspended. This matter was dealt with in his draft Article 27. It must also be provided that, notwithstanding the judicial vacations, the President could always convoke the members of the Court.

With regard to the periods for which the Court's work might be suspended, mention must first be made of the customary public holidays at the place where the Court might be sitting, bearing in mind the fact that it would appear that the Court might sit elsewhere than at its permanent seat. Next came the Christmas and Easter holidays.

Lastly, with regard to the long vacation, the so-called judicial vacation, M. Fromageot considered that this should cover the months of August and September. Further, the last fortnight in July was often a very warm period when some members of the Court might need to go to watering-places. M. Fromageot realised that the Assembly of the League of Nations generally met in September, but that fact did not seem to make it necessary to alter the dates of the Court's judicial vacations, since judges were always at the President's disposal.

The PRESIDENT thought that, for the moment, the Court might usefully devote its attention to a question of principle upon which M. Fromageot had not commented: was a system which provided that, apart from the judicial vacations and the period of session, there might be other periods during which the work of the Court would be suspended consistent with Article 23 of the revised Statute ? Moreover, the Statute contemplated not one but several periods of judicial vacations.

Besides, if the periods for which M. Fromageot proposed that work should be suspended were added together, it would be found that they totalled four and a-half months, which seemed excessive.

M. URRUTIA thought that M. Fromageot's draft had the advantage of removing one objection—namely, that of placing the provisions concerning vacations before the more important provisions concerning the work of the Court. The draft did not, however, entirely satisfy him, more especially as regards the precise definition of what the Statute meant when it said that the Court would " remain permanently in session ". As regards this point, it would be better to revert to the wording used in the Statute itself. According to the Report of the Committee of Jurists in 1929 [1], the Court would, *in principle*, remain permanently in session, and the Conference of Signatories had adopted the same idea.[2] In connection with this point, Mr. Root had emphasised the desirability, from the point of view of the

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* D 2, A. 3, pp. 523-529.

[1] See D 2, A. 3, Annex 1, p. 974.

[2] Article 26 of draft adopted in first reading (old Article 16) had been deleted on the coming into force of the revised Statute, thus leaving the number 26 vacant. The President accordingly gave the number 26 to his draft Article designed to take the place of the old Article 27. The text of the President's draft was as follows:

" 1. The judicial vacations during the year shall be as follows: (*a*) the week preceding and the week following Easter Sunday; (*b*) the months of July and August; (*c*) from December 18th of the old year to January 7th of the new year.

" 2. During the judicial vacations, the Court will not sit, save for urgent business—*e.g.*, under Article 61 of the Rules or pursuant to a special resolution of the Court.

" 3. The Court will observe the public holidays customary in the country where it has its seat."

[3] See also discussion on 8.II.36 on p. 43 under Article 19.

[4] M. Fromageot's draft was as follows:

" *Article 26.* — The judicial year shall begin on January — in each year and, subject to the provisions of Article 27 of the present Rules, the work of the Court shall proceed uninterruptedly throughout it.

" *Article 26* bis. — Members of the Court who are prevented by illness or other serious reasons from attending one or more sittings or meetings *(réunions)* of the Court to which the President has summoned them shall notify the President, who will inform the Court.

" *Article 27.* — 1. In the absence of a special resolution to the contrary adopted by the Court in exceptional circumstances, the work of the Court shall be suspended:

" (*a*) On the public holidays customary at the place where it sits;

" (*b*) *From December 1st to January 15th and from the* Sunday preceding to the second Sunday following Easter;

" (*c*) During the period of the judicial vacation—that is to say, from July 15th to October 1st.

" 2. In case of urgency, the President may always convene the members of the Court during the periods mentioned in the preceding paragraph."

[1] Minutes, p. 113.

[2] *Ibid.*, pp. 36-39.

League of Nations, of facilitating the acceptance of membership of the Court for distinguished persons of all countries. Summarising, he said that it did not seem possible to say, as M. Fromageot did, that the Court functioned uninterruptedly; what was uninterrupted was the readiness of the Court to discharge its functions.

With regard to M. Fromageot's text of Article 27, M. Urrutia thought it would be better to avoid saying that the work of the Court " was suspended ".

As regards the duration of the vacations, M. Urrutia thought that this should form the subject of a separate discussion, envisaging the practical aspects of the question.

Count ROSTWOROWSKI, generally speaking, shared the views expressed by M. Urrutia. Nevertheless, having regard to the terms of the revised Statute, it would be better to apply the expression " judicial vacations " to all interruptions of its work provided for by the Court in its Rules. On this point, Count Rostworowski took the same view as the President.

The PRESIDENT considered that the Court must decide whether they wished to provide in the Rules for a " judicial year "; it must then decide when this " year " was to begin. The President proposed the date January 1st, which would make the beginning of the judicial year coincide with the beginning of the judges' term of office.

Baron ROLIN-JAEQUEMYNS thought it was a good point in M. Fromageot's text that he first of all dealt with the judicial year and then with the vacations. For the rest, if the Court adopted the expression " judicial year ", it was natural that this year should begin on January 1st and end on December 31st.

M. ANZILOTTI had no objection to this expression, but he would like to have a clear idea of the meaning of " judicial year " in this connection.

The PRESIDENT asked the Registrar to give the explanation asked for.

The REGISTRAR had understood that this expression was to take the place of what had previously been called " sessions ". The term " judicial year " seemed to be merely a new name for a session which, under the revised Statute, lasted the whole year.

M. URRUTIA observed that this expression had been used in the Report of the Committee of Jurists.[1]

The PRESIDENT noted that the Court adopted the principle of a judicial year beginning on January 1st, and approved the formulation of this principle in the Rules.

Jonkheer VAN EYSINGA said that a clear idea must be formed of the intention of the Conference of Signatories in 1929 in adopting the conception of judicial vacations.

Jonkheer van Eysinga regretted that he could not agree with the meaning given to the conception in M. Fromageot's proposal, which made the " judicial vacations " coincide with the summer holidays; that was too narrow an interpretation, since the very terms of Article 23 of the revised Statute indicated that there were to be several judicial vacations in a year, and that between the vacations the Court was in session.

On the basis of an analysis of the proceedings of the Committee of Jurists (pp. 36-39), Jonkheer van Eysinga had come to the conclusion that the meaning of the terms of Article 23 of the revised Statute was as follows: the Court had an entirely free hand to fix in its Rules the dates and duration of its vacations; but it would be well advised also to provide for the possibility of special decisions postponing vacations to a date other than that laid down or extending the duration laid down in the Rules. On this point, Jonkheer van Eysinga agreed with M. Fromageot's draft (Article 27). Nevertheless, it would be better not to limit, as this text did, the scope of the special resolution for which he provided.

The PRESIDENT thought that the Court would all at once agree in regard to the following point: it must be possible for the Court to meet and work during the periods fixed for the vacations in order to deal with an application for the indication of interim measures of protection, or to complete the examination of a case which was pending—to mention only two instances.

He noted the Court's agreement in regard to this point.

Continuing, the President questioned whether, supposing that the Court was not in vacation but had no case before it, it should, as suggested by Jonkheer van Eysinga, pass a special resolution declaring itself in recess. For his part, the President did not think so.

Count ROSTWOROWSKI also thought that the intervening period could not be regarded as part of the judicial vacations.[1]

M. URRUTIA likewise considered that, in practice, Jonkheer van Eysinga's suggestion would be open to serious objections. When the Court had no cases to deal with but nevertheless was not in vacation, if judges went away, it was on their own responsibility; they were liable to be recalled by the President even for a case which was not urgent. That was not the case during vacations. Accordingly, in the interests of the Court's work, it would be better not to confer the character of judicial vacations upon such intervening periods.

Nor did M. NEGULESCO think that the Court could adopt Jonkheer van Eysinga's suggestion. For how could the Court, in conformity with paragraph 1 of Article 23 of the revised Statute, fix the dates and duration of the supplementary vacations envisaged by Jonkheer van Eysinga ? On the other hand, supposing that the Court had to declare itself in recess owing to the absence of a quorum, how was the Court to take a decision to that effect without a quorum ?

Jonkheer VAN EYSINGA observed that the suggestions he had made were not his own; he had simply indicated the intentions of the Conference of Signatories of 1929.

The PRESIDENT asked the Court first of all to come to a decision regarding the proposal contained in Article 26 *bis* of M. Fromageot's amendment. In the President's view, this provision was in harmony with the provisions adopted in first reading, save for certain changes necessitated by the coming into force of the revised Statute. There was, however, one point in regard to the wording of this text: the President wanted to know what the distinction was between a " *séance* " (sitting) and a " *réunion* " (meeting).

M. FROMAGEOT recalled the remark that he had already made [2] to the effect that the Court might be *réunie* without, however, being *en séance:* for instance, for a ceremony, for the unofficial examination of a matter, etc.

[1] Minutes, p. 121.

[1] *Cf.* the Resolution of September 14th, 1929, by which the Assembly adopted " Regulations for the repayment of travelling expenses of judges ", see D 1, 3rd edition, 1936.

[2] P. 43.

The PRESIDENT doubted whether the President would be entitled to convene a member of the Court for a *réunion* which was not a *séance*.

M. URRUTIA thought that here, as always, they should stick to the Statute, and that consequently only the term "*séance*" (sitting) should be used in the text. The question whether judges would have to return to The Hague to attend a ceremony was very debatable; that was rather a question of an obligation of a private character.

Count ROSTWOROWSKI considered that a judge was not obliged to attend a "*réunion*" in the same way that he was obliged to attend a "*séance*". The President could, of course, inform his colleagues by letter that a ceremony would take place and ask them if they would attend; but they were not under an obligation to do so.

The PRESIDENT proposed, if M. Fromageot did not object, to delete the words "*ou réunions*".

It was decided accordingly.

The PRESIDENT also observed that the expression "*auxquelles le Président les a convoqués*" (to which the President has summoned them) must be broadly construed; the expression did not necessarily entail the despatch of a formal summons.

Baron ROLIN-JAEQUEMYNS questioned whether this provision was not somewhat too rigid with reference to periods of vacation.

The PRESIDENT considered that it was correct even as regards a period of vacation. If the President was entitled, under the Rules, to convene members even when the Court was in recess, they were bound to attend [1].

Baron ROLIN-JAEQUEMYNS was prepared to accept this as a principle; but he would wait until he had seen the other articles, in order to be able to pass an opinion as to whether it did not involve consequences going beyond the intentions of the Court.

The PRESIDENT declared the text proposed by M. Fromageot under No. 26 *bis* adopted, subject to the deletion of the words "*ou réunions*" and to the reservation made by Baron Rolin-Jaequemyns.

The PRESIDENT next raised the question of the most suitable method of providing for the assembly of the Court during vacations.

M. FROMAGEOT explained that the opening words of paragraph 1 of Article 27 of his amendment covered every contingency in which the Court might adopt a resolution to deviate from the dates laid down in its Rules for the beginning and end of the vacations. Some degree of flexibility must exist to meet the requirements of the Court's work.

Jonkheer VAN EYSINGA gathered that the idea was simply to be able, by means of a special resolution of the Court, to curtail the vacations laid down in the Rules, but not to extend them.

Baron ROLIN-JAEQUEMYNS thought that the words "*à moins de résolution spéciale contraire*", which were quite consistent with the Statute, would also enable the Court to move the dates of its vacations if that were necessary or convenient from the point of view of its work.

The PRESIDENT preferred the system embodied in paragraph 2 of Article 26 of his draft. During the judicial vacations, the Court would sit only to deal with urgent cases. But, as regards periods other than the judicial vacations, it would be undesirable for the Court to adopt resolutions declaring itself in recess.

M. NAGAOKA observed that, from the standpoint of interested States, it was desirable that the Rules should fix the periods of the judicial vacations definitely, so that, if their cases were not pressing, States might await the end of a vacation. It would therefore be better to adopt the system proposed by the President.

The PRESIDENT explained that the words "in virtue of a special resolution of the Court" were intended by him to enable the Court to proceed with a case which was nearly finished, but for the completion of which it would be necessary to sit for some days beyond the date fixed for the beginning of a vacation.

M. NAGAOKA pointed out that, though the Court might continue its labours for a few days, although the period of vacation had begun, in order to finish a case already begun, it could nevertheless be said that the judicial vacations began on a fixed date, in the sense that the Court could not during those days begin a case which had been submitted before the beginning of the vacation, but which was not urgent.

M. GUERRERO, Vice-President, said that they must avoid using in the Rules expressions which were inconsistent with the basic principles of the Court's organisation. For instance, the Rules should not say that the work of the Court was "suspended" at any time or for any period, because the work of the Court was carried on continuously; the proof of this was the fact that the President and the Registry remained permanently at the seat of the Court. The object of Article 23 was to fix the periods at which the judges would not normally be bound to sit. For that reason the wording of the President's draft seemed preferable.

The essential point was that judges should not be obliged to sit during the judicial vacations except in cases of urgency. In this connection, M. Guerrero thought it might be desirable to consider what the possible cases of urgency might be: he did not think it would be difficult to define them. He could hardly think of anything except a request for the indication of interim measures of protection or a request for an advisory opinion sent by the Council of the League of Nations and characterised as urgent.

M. FROMAGEOT thought it was impossible to say beforehand whether a case was urgent, for urgency was a question of fact. He asked whether nowadays requests for advisory opinions were not always accompanied by the urgency clause.

The REGISTRAR said that, as a rule, the so-called urgency clause consisted in a note to the effect that the Council wished to have the Court's opinion before a particular Council session.[1] The "urgency" would depend on whether the request was received at a time when, in order to comply with this wish, the Court would have to sit during a judicial vacation or take the request out of its normal turn in the List.

M. NEGULESCO considered that the text proposed as paragraph 2 of Article 26 by the President was preferable to that of M. Fromageot. According to the latter text, it was for the President to decide as to the urgency of cases. But in M. Negulesco's opinion the Court should decide whether a case was urgent, and this was provided for in the President's text.

Baron ROLIN-JAEQUEMYNS observed that the Court must first meet in order to be able to decide. The two texts, therefore, were identical in their results.

[1] *Cf.* note 1, p. 55, second column.

[1] See, for instance, C 77, p. 11.

The PRESIDENT had understood that the decision as to urgency always rested with the Court; but that decision must be taken in accordance with a criterion laid down in the Rules, for instance in Article 61, which said that requests for the indication of interim measures of protection were always urgent.

M. ANZILOTTI asked whether the intention was to rule out the possibility of a contentious case being treated as urgent.

The PRESIDENT considered that, except when interim measures of protection had to be indicated, a contentious case would hardly ever have to be taken urgently owing to the time occupied by the written proceedings.

M. ANZILOTTI thought that the decision on the merits of a question between States might at a certain moment become really urgent; in any case, this possibility should not be ruled out *a priori*.

Baron ROLIN-JAEQUEMYNS would prefer that, if the parties declared a case to be urgent, the President should decide on the question of urgency rather than that the Court should have to meet without the President having first decided whether the parties were right in claiming that the matter was urgent.

M. GUERRERO, Vice-President, would prefer that the parties should know beforehand that, during the judicial vacations, the Court would not meet except for certain cases: namely, those which he had specified.

12.II.36.*

Discussed as Article 26 (draft) and Article 27 (draft).

The PRESIDENT invited the Court to resume the discussion of Article 27 of M. Fromageot's draft;[1] that article corresponded to Article 26, paragraph 2, of the draft circulated by the President.[2]

Count ROSTWOROWSKI said that he fully appreciated the expression " the Court will not sit " in the text proposed by the President. As the revised Statute provided that the Court would remain permanently in session, *except* in certain circumstances, it recognised that during certain periods the Court would not be in session, and it would be perfectly correct to say that during these periods it was not sitting. Even during the judicial vacations the Court existed as an institution and its work was not interrupted; but it did not sit. The use of this expression would facilitate the remainder of their work on the revision of the Rules.

Jonkheer VAN EYSINGA admitted that, if the Court had plenty of work, the difficulty which had led the President to keep in his text the current expression " if the Court is not sitting " would cease to exist. But the question arose whether this expression was consistent with the revised Statute, which only admitted two alternatives: the Court was either in session or in vacation. Accordingly, to remain consistent with the terms of the revised Statute, all periods during which the Court was not working must be styled vacations. And the two texts which had been proposed left the Court free to pass resolutions adding some periods of the year to the three vacations for which it would provide in the Rules.

M. URRUTIA thought that the expression " if the Court is not sitting " was indispensable. The Court might be *en fonctions* in spite of the fact that its members were not assembled at The Hague. Even when the Court had cases before it, there were periods when the judges were not assembled at the Peace Palace. The expression " if the Court is not sitting " should be adopted not only in Article 26, but also in many other places in the Rules.

M. GUERRERO, Vice-President, considered that, according to Article 23 of the revised Statute, there might be several periods of judicial vacations, as was provided in the President's draft. The duration of these periods must be fixed. States which wished to come before the Court must know the periods at which they were not entitled to expect the Court to deal with ordinary, as opposed to urgent, cases. Moreover, from the point of view of the judges themselves, it was desirable to know as accurately as possible the duration of these periods.

They must, however, endeavour not to fix very long periods, in order to avoid giving the impression that for several months in the year the Court would not be at work. They might be fixed as proposed by the President.

M. URRUTIA thought he remembered that, at the previous sitting,[1] the Court had already in principle adopted an article to the effect that " the judicial year commences on January 1st ", and that subsequently it had been agreed to include the Article 26 *bis* proposed by M. Fromageot. If that was the case, he thought that the Court should now vote upon paragraph 2 of Article 26 proposed by the President; in the last place, the periods of the judicial vacations would have to be fixed.

The PRESIDENT confirmed what M. Urrutia had said regarding the decisions reached at the previous sitting and said that his intention had been that the Court should first of all reach agreement regarding the system of vacations, leaving aside for the moment the question of exact dates.

With regard to the duration of the vacations, the President wished to mention a factor militating in favour of the system of fixed periods, not hitherto brought up in the discussions. The members of the Registry were also entitled to their annual holidays. Each year the Registrar would have to fix in advance the dates at which each member of the Registry could take his or her leave. If the Court's judicial vacations remained indeterminate, that would be very difficult.

M. FROMAGEOT said that, in regard to Article 27 of his amendment, he saw no difficulty in substituting the words " *la Cour ne siège pas* " (the Court will not sit) for the words " *les travaux de la Cour sont suspendus . . .* " (the work of the Court shall be suspended).

With regard to the fixing of the periods during which, unless otherwise decided by special resolution, the Court would not sit, M. Fromageot wondered whether it was absolutely necessary to use the expression " judicial vacations ", which seemed to give rise to some confusion and misunderstandings. Might they not simply say that the Court would not sit during the Easter holidays and between certain dates in the summer, it being understood that these periods constituted what the revised Statute called " the judicial vacations " during which the Court would not sit ?

Jonkheer VAN EYSINGA gathered that, in M. Fromageot's view, " not to sit " and " to be in vacation " were synonymous expressions.

M. FROMAGEOT replied that two different conceptions were involved. The Court was always " *en fonctions* " (in

* D 2, A. 3, pp. 529-535.
[1] See note 4, p. 54.
[2] See note 2, p. 54, first Column.

[1] See p. 55.

session) and must always be able to sit. But in actual fact, the Court would not sit: (*a*) when it had nothing to do, and (*b*) during the vacations.

Jonkheer VAN EYSINGA inferred that, if an order had to be made at a time when the Court was not on vacation, the President would have to convene it.

M. FROMAGEOT thought that later on they should consider whether, when the Court was not sitting, the President would have to convene the Court to make an order, or whether he could make it himself.

M. GUERRERO, Vice-President, said that, except during the judicial vacations, the Court would always be sitting, but that that did not oblige judges to be continuously at The Hague.

M. URRUTIA thought that, if there were no cases to be dealt with, the Court would be "*en fonctions*" (in session) but would not sit.

The PRESIDENT asked the Court to vote on the following question:

> "Does the Court adopt the formula to the effect that during the judicial vacations the Court will not sit, save in exceptional cases—these cases to be specified later?"

M. ANZILOTTI asked whether that meant that, except during the vacations, the Court would sit continuously.

The PRESIDENT did not think that that followed.

Jonkheer VAN EYSINGA was not in favour of the proposed wording; it created an ambiguity by introducing into the Rules a notion which was not in the revised Statute.

The PRESIDENT took a vote on the question formulated above.

By eight votes to two, the Court answered the question in the affirmative.

M. URRUTIA, who had voted in the affirmative, explained that it was not to be inferred from his vote that he accepted the idea that the Court should "sit" during periods when, although not on vacation, there was no work for it to do.

MM. NEGULESCO, FROMAGEOT, Baron ROLIN-JAEQUEMYNS and M. GUERRERO, Vice-President, who had also voted in favour of the proposal, made similar reservations.

The PRESIDENT invited the Court to consider next the exceptional circumstances in which the Court might be called upon to sit during vacations. He observed that in this connection two systems were proposed: that embodied in the two paragraphs of Article 27 of M. Fromageot's amendment and that adopted in the President's text. According to the latter text, the President, in order to convene the Court during vacations, must do so in virtue either of a provision of the Rules—for instance Article 61—or of a special resolution of the Court. On the other hand, M. Fromageot's system left the President free to convene the Court at his discretion.

M. FROMAGEOT found it difficult to define beforehand all conceivable cases of urgency; urgency was a question of fact. For instance, a case of an urgent nature might come before the Chamber for Summary Procedure; in that case there would not necessarily be oral argument before the decision.

M. ANZILOTTI wished to bear out what M. Fromageot had said by taking the example of a case brought before the Court in the normal way and which was ready for hearing, but was not to be taken by the Court until after the judicial vacation. Supposing that, suddenly, this case became a source of friction between the two parties and the latter agreed to ask that it should be dealt with as speedily as possible, the Court could hardly refuse to take the case on the ground that it was in vacation. M. Anzilotti's conclusion was that it should be left to the President to decide whether or not a case was urgent.

M. URRUTIA did not see much difference in this respect between the President's draft and that of M. Fromageot. For the rest, both texts made provision for a special resolution of the Court.

The PRESIDENT observed that the most important possibility for which the words "a special resolution of the Court" in his text were intended to provide was the case where the beginning of a vacation was approaching and the Court found that it would require a few extra days to finish a case.

M. FROMAGEOT had had the same contingency in mind, but there was also another possibility, though not a probable one—namely, the case where the Court adopted beforehand a special resolution regarding the vacations.

M. NEGULESCO thought that, on careful perusal of the text of Article 27 proposed by M. Fromageot, it became apparent that the special resolution provided for in the first paragraph related to cases which were not urgent, but were already pending before the vacations.

M. FROMAGEOT said that the first paragraph was concerned with the fixing of the times during which the Court would not sit; these times might, if necessary, be varied by a resolution of the Court.

M. NEGULESCO went on to observe that the second paragraph of Article 27 of M. Fromageot's text left the President a free hand to convene the Court, when on vacation, if he considered that a case was urgent and that the Court must therefore assemble. M. Negulesco thought that there was an omission here and that it should be added that, if the Court held that there was no urgency, the case would be postponed until after the vacation.

M. URRUTIA thought that to leave the decision on the question of urgency to the President would be less disadvantageous than the system according to which the Court would have to be convened to decide the point.

Jonkheer VAN EYSINGA approved the somewhat general terms of paragraph 2 of Article 27 of M. Fromageot's text. It would be very difficult to define cases of urgency in the Rules.

Count ROSTWOROWSKI also preferred the system which left a certain discretionary power to the President.

The PRESIDENT, noting that no member of the Court shared his view—namely, that the summoning of the members of the Court during the vacation must be justified, either by the provisions of the Rules (*e.g.*, by Article 61) or else by a resolution of the Court—proposed that the question of the dates of the vacations should now be discussed.

M. ANZILOTTI wished first of all to have it clear what was meant by the expression "the Court is not sitting". This question had been reserved.

The PRESIDENT thought that the expression "the Court is sitting" meant that the judges were ready at short notice, if necessary, to hold either a public or private sitting. Nevertheless, in his opinion, any definition was dangerous

M. FROMAGEOT said that to say that the Court would not sit during certain periods did not mean that at all other times it would sit.

M. NAGAOKA, in voting in favour of the formula: " During the judicial vacations, the Court will not sit ", had not meant that phrase to be construed as meaning that except during vacations the Court would necessarily sit continuously; in his view, that was a question depending on circumstances.

Baron ROLIN-JAEQUEMYNS thought that to say the Court was sitting simply meant that it was ready to meet at any moment.

M. URRUTIA suggested that they should simply place on record in the minutes something on the lines of Baron Rolin-Jaequemyns' observation.

Count ROSTWOROWSKI regarded the rule providing that the Court would not sit during the judicial vacations as a legal provision releasing judges from their obligations during these periods. Arguing *a contrario*, they were not so released at other times. But whether they were or were not actually assembled was a pure matter of fact.

He therefore thought it might be well to place on record in the minutes the interpretation to the effect that the word " sit " did not necessarily imply the presence of judges at the seat of the Court.

M. GUERRERO, Vice-President, considered that, when the Rules said that during the judicial vacations the Court would not sit, the meaning was that the President was not entitled to summon the judges during that period unless an exception to this rule was provided for in the Rules of Court themselves. On the other hand, the fact that the Court was deemed to be sitting at all times except during the judicial vacations gave the President power to summon the members of the Court at any time.

M. ANZILOTTI said that, in his opinion, the practical aspect of the question was whether the Statute in force permitted the Court to empower the President to take decisions of minor importance, when it was sitting—*e.g.*, to make orders fixing time-limits. If the Statute did not do so, the question might arise whether it would not be better to adopt a more flexible system for the fixing of the vacations—a system which would enable the Court at the beginning of each year to arrange vacations of greater or less duration according to the amount of work in prospect.

M. GUERRERO, Vice-President, considered that the solution of the question raised by M. Anzilotti would be to leave all simple matters, in regard to which the intervention of the Court was unnecessary, to be decided by the President.

In this connection, it would suffice to say: " The President or the Court. . . ", instead of: " The Court or, if it is not sitting, the President ".

M. ANZILOTTI was doubtful whether the interpretation placed by the Vice-President on the Statute was admissible, having regard, for instance, to Article 48 of that instrument.

If the interpretation of the Vice-President were accepted, it would no doubt be possible to have a precise system and to fix the vacations once and for all. If, on the other hand, when the Court was sitting, all routine decisions must be taken by it, the problem became much more complicated.

M. Anzilotti had in this connection prepared a text which he distributed [1] explaining that this text of course did not pretend to define the expression " if the Court is not sitting ".

M. GUERRERO, Vice-President, considered that the difficulty alluded to by M. Anzilotti was disposed of by Article 30 of the Statute; for it was reasonable to suppose that, in virtue of that article, some powers conferred on the Court might be entrusted to the President by the Rules of Court.

M. ANZILOTTI observed that that was the manner in which the 1920 Statute had been interpreted, but the position had changed since the coming into force of the new Statute.

The PRESIDENT was not inclined to include in the minutes a definition of the meaning of the phrase: " if the Court is not sitting ".

At the moment and in connection with the question of vacations, the Court had agreed to say that, during vacations, the Court would not sit. No doubt in some other articles the expression might involve difficulties; but these might be left until they reached those articles. In these circumstances, he proposed that the Court should now consider the question of fixing the vacations.

He recalled that two suggestions had been made in this connection, his own and that of M. Fromageot; M. Anzilotti, in his proposal, had left blank the dates of vacations.

M. ANZILOTTI said that he had not put in definite dates because the fundamental idea of his proposal was that the dates should only be fixed at the beginning of each judicial year.

The PRESIDENT observed that, as regards the Christmas vacation, his draft provided for three weeks and that of M. Fromageot for four. He said that, in fixing the length of the Christmas vacation, one must not lose sight of the fact that there was a limit which the total amount of vacations must not exceed. The President had suggested three months as a limit; M. Fromageot four and a-half months. If the Court were to agree upon a total duration of the vacations, it would perhaps then be easier to divide them up between the three different periods.

Baron ROLIN-JAEQUEMYNS did not agree. When the Court had fixed the duration of the vacations proper and of holidays, the total might be reckoned up purely for purposes of verification, but it should not be taken as the starting-point.

M. GUERRERO, Vice-President, thought it would not be desirable for States to find in the Rules a provision to the effect that, in the absence of urgent cases, the Court would be closed to them during, for instance, a third of the year. Accordingly, shorter periods should be fixed such as those suggested by the President. If, however, there was no work, the President would not recall judges on the date fixed as the end of each vacation. As regards procedure, M. Guerrero suggested that the best method would be to start with the date for the beginning of the Christmas vacation and, having fixed that date, to discuss the date on which that vacation would end. Next they could take the Easter vacation in the same way, and finally the summer vacation.

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[1] Proposal by M. Anzilotti:

" There shall be three periods of judicial vacations during the year. These periods will (normally) be — months in the summer, — weeks at Christmas and — weeks at Easter.

" The beginning (and end) of each period shall be fixed by the Court at the beginning of each judicial year, subject, however, to any subsequent decision which the Court may take with a view to ensuring that satisfactory progress is made with its work.

" The decision of the Court fixing the beginning (and end) of the periods of judicial vacation and any subsequent resolution on the subject shall be published and communicated by the Registry to the Members of the League of Nations and to States entitled to appear before the Court.

" During the judicial vacations, the President may convene the Court for urgent cases."

The PRESIDENT asked the Court whether they agreed that the Christmas vacation should begin on December 18th.

By eight votes, with two abstentions, the Court decided upon this date.

The PRESIDENT asked the Court whether they agreed that the Christmas vacation should end on January 7th.

By five votes to four, with one abstention, the Court answered the question in the affirmative.

The PRESIDENT went on to say that, with regard to the Easter vacation, his plan was to include the week before and the week after Easter Sunday. M. Fromageot proposed the same commencing date, but made the vacation a week longer.

The President noted that the Court were agreed upon the date for the commencement of the Easter vacation — *i.e.* the Sunday before Easter — and asked whether a duration of two or three weeks was preferred.

By five votes to four, with one abstention, the Court decided that the Easter vacation should be three weeks.

The PRESIDENT proposed that the votes just recorded should be regarded as provisional.

This was agreed to.

The PRESIDENT thought that the Court might discuss the duration of the long vacation at the next sitting. In the meantime, he asked his colleagues to reflect on the question whether September should or should not be included in this vacation. The question was of some importance in that the Council, which met in September, might submit urgent requests for advisory opinion.

Count ROSTWOROWSKI raised the question whether judges must automatically return to The Hague on the date fixed for the termination of each vacation or whether they should await a summons from the President. He recalled that, hitherto, it had been held that judges should arrive automatically on February 1st, the opening date of the ordinary session, the fact being simply brought to their notice by the President.

The PRESIDENT did not think that this question should be dealt with in the Rules; it was one which should be left to practice.

M. FROMAGEOT thought that, if a case was in progress when the Court separated, members would return automatically on the date fixed in the Rules, but otherwise they would await a summons from the President. Probably, however, the President would always warn his colleagues when their presence would be required.

13.II.36.*

Discussed as Article 26 (draft).

The PRESIDENT invited the Court to resume the examination of the question of vacations. In view of the provisional decisions taken at the meeting on the previous day, he proposed that the Court should first discuss the length of the summer vacation.

In the proposal which he had made, September had not been included in the vacation; for it was in that month that the Assembly of the League of Nations met at Geneva, and the session of the Assembly was often preceded by one session of the Council, and was contemporaneous with another. Accordingly, it had seemed expedient to reserve the possibility of the Court's sitting during that period, without it being necessary for the President to issue an urgent summons to a meeting during the vacation.

Secondly, it would perhaps be desirable that September should be available for the meetings of one of the Special Chambers, or, more particularly, of the Chamber for Summary Procedure. Unless the full Court and the Chamber had to sit at the same time, it would not be necessary for the other judges to be summoned.

M. GUERRERO, Vice-President, thought that, while bearing in mind the considerations which the President had just mentioned, it would be possible to go some way to meet those judges who wished to have September included in the judicial vacation, by fixing September 15th as the last day of that vacation; for the Assembly and the Council did not usually meet till about September 10th, and it was not very likely that a request to the Court for an advisory opinion would be made during one of the first meetings of the Council.

The REGISTRAR observed that the Assembly of the League of Nations met on the second Monday in September, except when the second Monday fell later than the 10th, in which case it met on the first Monday of the month. The Council had, on some occasions, been convened three days prior to the meeting of the Assembly. [1]

M. NEGULESCO proposed that the judicial vacation should extend from June 15th to September 1st.

M. GUERRERO, Vice-President, suggested that M. Negulesco had perhaps not realised that the Easter holidays were often not over till the end of April. A period of one and a-half months, reckoned from the opening of the oral proceedings in a case, would not always suffice to enable the Court to conclude a case.[2]

M. NEGULESCO said that, in those circumstances, he was in favour of July 1st, the date proposed by the President.

M. FROMAGEOT observed that he had proposed July 15th for the beginning of the summer vacation.

M. GUERRERO, Vice-President, said that, as the period of the League of Nations' greatest activity was in September, it was desirable that the Court should be actually functioning during that period. He therefore favoured September 15th for the end of the judicial vacation, and he would agree to July 15th for its commencement.

M. FROMAGEOT considered that, if the Assembly requested the Court for an advisory opinion and if the matter was one of urgency, the Rules would fully justify the President in summoning the Court. On the other hand, it must not be forgotten that, if a case became ready for hearing on a given date, the Court would be under an obligation to be able to meet on the following day, if it were not in vacation.

The PRESIDENT did not agree with M. Fromageot on the latter point.

M. FROMAGEOT said he had nothing further to add if it was the President's view that, although the Court would not be in vacation from September 15th to October 1st, he could nevertheless refrain from summoning it to meet before October 1st.

The PRESIDENT thought it unlikely that it would be necessary, for many years to come, to summon the Court during September.

* D 2, A. 3, pp. 535-543.

[1] See Rules of the Assembly, Article 1, paragraph 1.

[2] Since January 1st, 1931, the period which has elapsed between the beginning of the oral proceedings in a case and the reading of the judgment or the opinion has been six weeks *as an average*. The minimum was ten days and the maximum fifteen weeks.

Baron ROLIN-JAEQUEMYNS suggested that, instead of fixing a certain date for the end of the vacation; the Court might follow the example set at Geneva, and fix a certain day of a certain week. It seemed quite unnecessary to oblige the judges to return to The Hague—say—on a Saturday, because the end of the vacation fell on that day.

M. GUERRERO, Vice-President, pointed out that the date laid down as the end of the judicial vacation was not one of those which had to be kept to automatically.

The PRESIDENT said that three dates had been proposed for the end of the judicial vacation: September 1st, September 15th and September 30th. He asked the members of the Court to say which of those three dates they preferred.

Two judges were in favour of September 1st.
Six judges were in favour of September 15th.
One judge was in favour of September 30th.
One judge abstained.

The PRESIDENT noted that the majority of judges preferred September 15th, and requested the Court to give its opinion as to the date on which the summer vacation should begin; that, he said, amounted to asking the Court's opinion as to the length of the vacation—*i.e.*, whether it was to last for two months, or for two and a-half months.

He would accordingly ask the Court to vote on the following question:

" Does the Court adopt two months as the duration of the summer holidays ? "

By seven votes to two, one judge abstaining, the Court adopted two months as the duration of the summer vacation.

The PRESIDENT explained that, since the Court had fixed September 15th as the end of the judicial vacation, the effect of adopting two months as the length of that vacation would be to make July 15th the first day of the summer vacation. He recalled that the decisions adopted on the previous day were still provisional, and said he would now ask the Court to make them definitive. He therefore invited the Court to say if it adopted, definitively, the period running from December 18th to January 7th of the succeeding year for the Christmas holidays.

By five votes to four, one judge abstaining, the Court answered in the affirmative.

The PRESIDENT next asked the Court to say if it adopted definitively, for the Easter holidays, the period from the Sunday before Easter to the second Sunday after Easter.

By eight votes to one, one judge abstaining, the Court answered in the affirmative.

The PRESIDENT noted that the Court did not desire to vote again on the period fixed for the summer vacation.

The text of the article which would embody the decisions just adopted could most easily be framed by a small committee; he therefore invited the Court to continue the examination of the other clauses, and to authorise two or three members of the Court to meet, together with himself, to draw up a text for submission to the Court at the meeting next day.

This was agreed to.

Jonkheer VAN EYSINGA asked if it was proposed to discuss, at that moment, the point raised by the words at the beginning of M. Fromageot's text of Article 27: " In the absence of a special resolution to the contrary, adopted by the Court in exceptional circumstances . . . "; the idea, he observed, was the same as that expressed, in other terms, in the President's proposal.

The PRESIDENT said he believed that the principle of this clause was generally accepted; the drafting of the text would be entrusted to the small committee which it had already been decided to set up.

M. NAGAOKA suggested that, in regard to the summoning of the Court for urgent cases during the judicial vacation (paragraph 2 of Article 27 of M. Fromageot's text), it would be expedient to insert a clause—such as was provided, in view of a special case, in the text of Article 61 submitted by the President [1]—to the effect that, if the presence of nine members could be secured, the attendance of the other judges was not necessary.

The PRESIDENT recalled in this connection that, in the report of MM. Fromageot and Politis on the work of the Committee of Jurists in 1929, it had been suggested to provide for the possibility, in periods of vacation, of summoning to The Hague, in case of urgency, *a sufficient number* of judges to enable the Court to function, and also for setting up a *Vacation Chamber* in cases where the summoning of the full Court might not be necessary [2].

In regard to these two suggestions, the President pointed out, in the first place, that there was nothing in the Statute to justify the creation, by way of the Rules of Court, of a Vacation Chamber. Furthermore, as regards the possibility of authorising the President to summon only nine judges to The Hague, in case of urgency, while the other judges would receive no summons, he considered that such a system would create an inadmissible differentiation between the members of the Court. In practice, it would be the nine members residing nearest to The Hague who would be summoned, and the remainder would be left out.

It was for that reason that the President had proposed the arrangement indicated in the text of paragraph 3 of Article 61 of the Rules, that had been submitted as a basis of discussion [1]. According to this arrangement, the President could, if necessary, simultaneously with the issue of the summons, get unofficially into touch with all the members of the Court to ascertain whether they were able to attend, and, when he had received a sufficient number of affirmative replies, he could—still unofficially—inform the other judges that they might absent themselves, unless they preferred to sit. That was the system which M. Nagaoka wished to see embodied in the new text of Article 26.

M. NAGAOKA considered that, unless cases of urgency were to be confined simply to measures of interim protection, it would be necessary to insert in this place the clause that had been proposed for Article 61.

M. GUERRERO, Vice-President, did not consider that this clause should be introduced as a general provision; indeed, when the Court reached Article 61, he would probably move its omission. In his view, the only possible solution was that all the judges should be summoned, both those residing near The Hague and those at a distance; the obligation was the same for all of them.

M. FROMAGEOT agreed with the Vice-President. The delicate duty which it was suggested to entrust to the President was not imposed upon him by the Statute, and it seemed inexpedient to introduce it by way of the Rules—whether in Article 61, relating to measures of protection, or in Article 26.

Assuming, then, that the suggestions of the report of the Committee of Jurists of 1929 must be set aside, it might be desirable to consider whether the Chamber for Summary

[1] See p. 244 (meeting of 25.II.36) and D 2, A. 3, p. 978.
[2] See Minutes of the Committee, p. 113.

Procedure could be described as a Vacation Chamber, assuming that the parties were disposed to accept such a solution.

The PRESIDENT feared that he had not made himself clear. He considered that it was the President's duty, even in cases of urgency, to summon all the members of the Court. But supposing that one of them had taken advantage of the vacation to go on a long journey, was the Court bound to await his return before it could meet ? The question must no doubt be answered in the negative, but it was still necessary to insert a clause in the Rules to enable it to be answered in that way.

M. GUERRERO, Vice-President, considered that the President, when issuing the summons, would have to fix the date on which the judges were to be at The Hague. If a judge for any reason was unable to attend, the Court would adjudicate as soon as the necessary quorum was reached.

The PRESIDENT pointed out that the President of the Court would have to fix a date sufficiently late to enable all the judges to be present.

M. FROMAGEOT observed that the fact that an overseas judge was entitled to six months' long leave every three years implied that he accepted certain obligations; if his home was in a country so far off that he could not easily return to The Hague on an urgent summons, he must refrain from visiting his own country until his long leave became due.

The PRESIDENT said that, personally, he had never regarded the system of long leave as implying an obligation for judges benefiting by that system to establish their residence elsewhere than in their own homes. A judge residing at a spot more than five days' journey from The Hague was, in his opinion, quite at liberty to continue to do so according to the revised Statute.

M. FROMAGEOT considered that overseas judges were equally bound to be able to come to The Hague at short notice.

The REGISTRAR pointed out the difference between Article 23 of the revised Statute and paragraph 5 of Article 27 of the Rules as adopted by the Court in 1931.

The PRESIDENT considered that there was nothing in Article 23 of the revised Statute which constrained an overseas judge to abandon his residence in his own country.

The REGISTRAR observed that a careful perusal of the report of the Committee of Jurists drawn up by MM. Fromageot and Politis in 1929 showed clearly that the rule concerning long leave was introduced to enable overseas judges to go home once every three years.[1]

M. FROMAGEOT observed that, according to this report, the main object was to ensure that the judges should always be at the Court's disposal and that they should be able to attend at The Hague at fairly short notice. If a judge was not at the Court's disposal because he had gone too far away, he was not faithfully observing his obligations.

The PRESIDENT was not sure that he quite agreed with M. Fromageot as to the import of the clause of the Statute prescribing that judges must always be at the Court's disposal. That phrase should not be so construed as to deprive judges of the right of going on long voyages during the vacation. In order to ensure the efficient working of the Court, the possibility of judges being absent must be envisaged, and the Court's right to go on with its work, in the absence of judges thus situated, must be recognised. That was the justification of the phrase which the President had proposed to insert in paragraph 3 of Article 61.[1]

M. ANZILOTTI said he had certain objections, relating rather to the wording of the phrase than to the idea which inspired it. The difficulty, it appeared, was to convey to the other members of the Court that their presence was not *called for*. However, the wording might be changed to as to render the President's idea acceptable.

The PRESIDENT said he was quite ready to alter the wording. The idea of the proposal, apart from the wording, continued to be as follows: if an urgent case presented itself, all the members would receive a summons; but if it was evident that a particular judge could not reach The Hague in sufficient time, the other members would be entitled to proceed with the case.

M. ANZILOTTI agreed with this statement.

Jonkheer VAN EYSINGA had some doubts as to the expediency of giving a general character to the clause which the President had proposed to insert in Article 61 to the effect that, as soon as the presence of nine members was assured, he would inform the other judges that their presence was not necessary.

M. NAGAOKA thought that the expression "general character" perhaps went too far; they should avoid giving an exaggerated scope to the proposal, for urgent cases did not often arise.

M. ANZILOTTI recalled the terms of a clause in the existing Rules which related to deputy-judges, but which appeared to possess a certain resemblance to the case which the Court was now considering. It laid down that: "Should a deputy-judge be so far from the seat of the Court that, in the opinion of the President, a summons could not reach him in sufficient time . . .", he would summon another deputy-judge.

M. GUERRERO, Vice-President, remarked that once, when he was acting in place of the President, a request for the indication of measures of protection had been filed; in agreement with the Registrar, he had only summoned those judges who would be able to reach The Hague within a few days. A letter had been sent to the other judges explaining to them that this meeting was to be held at such an early date that a summons could not reach them in sufficient time.[2] The Court had approved this proceeding.[3]

The PRESIDENT observed that he, personally, had said that he did not agree with it.[3]

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[1] Minutes of the Committee, p. 113.

[1] See meeting of 25.11.36, p. 244.

[2] C 71, pp. 142-144.

[3] Extract from the Minutes of the 28th Session of the Court, 1st meeting, held on May 10th, 1931:

"The PRESIDENT also explained that MM. Kellogg and de Bustamante had announced their arrival for the session which was to have begun on May 8th. When that session had been countermanded, the President had telegraphed to the two judges in question. His telegram had reached them just before their embarcation, and accordingly they had not started. As they would not have had time to reach The Hague for the present matter, the President had simply notified them of the present convocation of the Court, for their information."

Extract from the minutes of the 29th Session of the Court, 1st meeting, held on July 10th, 1933:

"The PRESIDENT, in opening the session, made the following statement:

"'During my absence of more than three weeks, the Vice-President has been good enough to discharge the duties of President at the seat of the Court, pursuant to Article 12 of the Rules of Court.

"'Accordingly, it was the Vice-President to whom it fell to take the decisions incumbent upon the President and rendered necessary as a result of the action taken by the Polish Government under the Order of Court of February 4th in the Prince von Pless case, and

M. ANZILOTTI thought that the Court must have confidence in the President, who would act in each case as circumstances required. It would be dangerous to attempt to insert a provision of a general character in the Rules.

The PRESIDENT held it to be agreed that the Court did not desire to include among the provisions of Articles 26 and 27 a clause similar to that which it was proposed to insert in paragraph 3 of Article 61.

M. NAGAOKA thought it was desirable, in those circumstances, to reserve the possibility, when the Court came to examine Article 61 of the Rules, of considering whether a text could be arrived at which would be acceptable also for Article 26 and for Article 27.

M. GUERRERO, Vice-President, had another observation to present. The Court had just fixed the judicial vacations. It was understood that all the judges, including the President and Vice-President, were entitled to take advantage of these vacations; on the other hand, Article 12 of the Rules laid down that the discharge of the duties of the President should always be assured at the seat of the Court; according to that provision, either the President or the Vice-President must remain at The Hague, even during the judicial vacations. Could not a rule be framed providing that, if the President had been replaced in the discharge of his duties during a judicial vacation, the Vice-President should receive compensation either before or after that vacation ?

The PRESIDENT thought that it would be necessary, if mention were made of the President or the Vice-President, to refer also to any other person who might be called upon to take their place.

M. GUERRERO, Vice-President, said that, however that might be, the difficulty subsisted; if the President's duties were discharged by the senior judge, the latter would doubtless be entitled to claim, later on, the vacation which he had lost by this circumstance.

M. ANZILOTTI was uncertain whether the Statute would allow of the solution proposed by M. Guerrero. It would amount, in fact, to excusing a judge from the obligation to sit on the Bench.

Count ROSTWOROWSKI considered that the Court was always entitled to grant leave to a judge, apart from cases of serious illness, for Article 23 of the revised Statute made mention also of " regular leave ".

M. FROMAGEOT observed that, according to the preparatory work, [1] that expression only referred to long leave granted to judges whose homes were more than five days distant from The Hague.

M. URRUTIA suggested that the consideration of the point raised by M. Guerrero should be postponed until the Court came to decide whether it intended to avail itself of the new right provided in Article 25 of the revised Statute, to which M. Anzilotti had already drawn attention [2]; the Court might make use of it to provide in its Rules for excusing certain judges from sitting in particular circumstances; and this might apply, for instance, to a President or a Vice-President who had not been able to take his judicial vacation.

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by the filing by the German Government of a suit concerning the application of the agrarian reform in Poland, and also, and more especially, by the German request for the indication of interim measures of protection. Likewise, it was the Vice-President, acting in the same capacity, who convened the 29th (extraordinary) Session of the Court—which I now declare open—and who drew up the agenda for this session. . . .' "

. . . . . .

" M. GUERRERO, Vice-President, after thanking the President, explained the steps he had taken in the Prince von Pless case and in the case concerning the agrarian reform in Poland.

. . . . . .

" As regards the agrarian case, M. Guerrero, Vice-President, stated the reasons which led him to fix for July 11th the meeting to hear the parties on the German Government's application for the indication of interim measures of protection, and to adhere to that date, despite the repeated requests of the Polish Government for an extension.

. . . . . .

" 2. — *Incidental question: validity of the summoning of the Court.*

" Sir CECIL HURST stated he had received the notice definitely convening the session only five days before the date fixed for its opening. That being so, he wondered whether judges who were in America—assuming they were communicated with—could be regarded as regularly summoned, in view of the fact that they had not had sufficient time to reach The Hague before the date fixed. If not, he doubted whether the decisions taken by the Court during the present session were valid: it was a question of construction of the Statute and Rules.

" In fact, according to Article 23 of the Statute and Article 27 of the Rules, all the judges were bound to be present at an extraordinary session and were accordingly entitled to be summoned to it. The date of sessions should accordingly be fixed so as to allow judges overseas sufficient time to reach The Hague.

" He hoped that one or other of the Vice-President's suggestions regarding the future course of the proceedings in the agrarian case might be adopted so as to give Poland an opportunity, if she wished, to raise this question.

" M. GUERRERO, Vice-President, stated that overseas judges had received telegrams informing them that their colleagues had been summoned for the session. If Sir Cecil Hurst's view prevailed, the fact that some judges were abroad at a great distance from the seat of the Court would prevent the President from usefully summoning the Court in urgent cases—*e.g.*, to pass upon an application for interim measures of protection. It would therefore be dangerous to accept the argument underlying Sir Cecil Hurst's statement.

" The REGISTRAR pointed out that the communication sent to overseas judges regarding the summoning of the present session followed the precedents established by the Court's practice, the last instance of which occurred when the 28th Session was summoned. This practice, moreover, was sanctioned legally by the fact that the Rules (Article 27, No. 4, paragraph 1) contemplated the possibility of some judges not being summoned for a given session; it was inspired, moreover, by the principle expressed in Article 3, paragraph 2, of the Rules.

" M. FROMAGEOT agreed with the Vice-President. It was absolutely necessary that the Court should be able, in case of necessity, to meet without delay. In his view, the relevant provision was that which fixed the quorum: once there was a quorum the Court could validly take decisions.

" At the request of Baron ROLIN-JAEQUEMYNS, M. GUERRERO, Vice-President, read the telegrams sent to those members of the Court whom, in the Vice-President's view, ' a summons would not reach in sufficient time '.

" According to M. Guerrero, the President, in summoning the Court to an extraordinary session, must have the right, in urgent cases—*i.e.*, when there was a request for an advisory opinion with an urgency clause in it, or when there was an application for interim measures of protection—not to summon judges sojourning too far from The Hague. It was for the President to decide whether the circumstances justified the summoning of the Court and to fix the date and conditions.

" M. ANZILOTTI, who thought that the Polish Government must in any event be asked to present observations on the German application, did not see how Poland could raise the question mentioned by Sir Cecil Hurst, since it did not know the conditions in which the session had been convened.

" Jonkheer VAN EYSINGA pointed out that the question was fundamentally a very simple one: once there was a quorum, the Court could validly perform its work.

" The PRESIDENT having asked Sir CECIL HURST whether he had a proposal to make, the latter explained that he would be satisfied if his statement could be recorded in the minutes.

" It was decided accordingly.".

[1] Minutes of the 1929 Committee, pp. 34-36.

[2] D 2, A. 3, p. 513 and p. 981 (Annex 3).

M. FROMAGEOT pointed out that the situation envisaged by the clause quoted by M. Urrutia was of quite a special character: it was apparent from the report of the Committee of Jurists of 1929 [1] that the contingency in view was that of a congestion of the General List; in order to enable some of the judges to deal with a given case submitted to the Court, these judges might be excused from taking part in another case which was under consideration at the same time. On the other hand, it was expressly stated that on no account must the Court give any opening to the suspicion that its composition had been arranged, at a given moment, with a particular case in view.

M. URRUTIA observed that, in regard to this point, the Committee of Jurists, which gave its opinion to the Council in 1930, seemed to have taken a different view. He founded himself on a paragraph of the report submitted by that Committee of Jurists. [2]

M. GUERRERO, Vice-President, said that, if the Court thought there were objections to inserting a clause of the purport that he had indicated in the Rules, he would not press the suggestion any further.

14.II.36.*

Article 25. — Second Reading.

The PRESIDENT announced that, with the assistance of some members of the Court, he had prepared a draft of the articles concerning vacations, leave and inability to attend, in accordance with the decisions of the Court. This text ran as follows:

. . . . . .

" *Article 25.*

" 1. The judicial year shall begin on January 1st in each year.

" 2. In the absence of a special resolution to the contrary, the Court will not sit during the judicial vacations, the dates and duration of which are fixed as follows: (*a*) from December 18th to January 7th; (*b*) from the Sunday before Easter to the second Sunday after Easter; (*c*) from July 15th to September 15th.

" 3. In case of urgency, the President can always convene the members of the Court during the periods mentioned in the preceding paragraph.

" 4. The public holidays which are customary at the place where the Court is sitting will be observed by the Court."

Article 26 [see under that article, p. 69].
Article 27 [see under that article, p. 70].

. . . . . .

The chief difficulty had lain in the fact that three numbers were required for these articles, but only two were available; to overcome this difficulty, the old Article 25 had been combined with Article 24, becoming the fifth paragraph of that article. The three numbers thus made available had been utilised as follows: in Article 25 had been inserted the provisions concerning the judicial year and vacations; in Article 26 the provision relating to leave; and in Article 27 the provision concerning the manner in which members of the Court who were unable to attend a sitting were to notify the Court of the fact.

Paragraph 2.

Jonkheer VAN EYSINGA questioned whether the latitude given to the Court by the first words of paragraph 2 of Article 25 was adequate. This text enabled the Court to decide that it would sit, notwithstanding the vacations; but it could not decide to add to the vacations.

It would be desirable to adopt a wording such as that of M. Anzilotti's proposal, [1] for instance. Moreover, that would seem more in accordance with the intention of the Conference of 1929.

In this connection, Jonkheer van Eysinga suggested the following wording for paragraph 2 of Article 25:

> " In the absence of any decision subsequently taken by the Court with a view to ensuring that satisfactory progress is made with its work, there will be three judicial vacations in the year: (*a*) . . . (*b*) . . . (*c*) . . ."

This wording incidentally avoided the use of the expression " the Court will not sit ".

The PRESIDENT recalled that the texts submitted represented a compromise designed in some degree to meet the various views expressed in the Court. Moreover, these texts seemed to provide for all possibilities. If, for instance, the Court thought it necessary to extend the period during which it would not sit, the President would not summon the members.

Jonkheer VAN EYSINGA had wished simply to draw attention to what he held to have been the intention of the 1929 Conference. [2] If none of the members of the Court supported his proposal, he would not ask for a vote.

M. GUERRERO, Vice-President, considered that Jonkheer van Eysinga's proposal was a useful one; he himself, at the meeting of the members of the Court summoned by the President, had drawn attention to this point. His colleagues had, however, considered that it was rather a question of practice, and that the President would always have regard to the merits of each case. These were the circumstances in which the draft submitted to the Court has been arrived at.

Jonkheer VAN EYSINGA said that he would be content if his proposal were recorded in the minutes and if it were noted that he was unable to agree to paragraph 2 of Article 25 in the form now submitted to the Court.

M. ANZILOTTI observed that he shared Jonkheer van Eysinga's views. In fixing the vacations, the Court should have left itself latitude to take into account the necessities of its work.

The PRESIDENT said that the observations of Jonkheer van Eysinga and M. Anzilotti would be recorded in the minutes, as also the explanation furnished by the Vice-President.

Subject to this, he declared the drafts submitted for Articles 25, 26 and 27 adopted by the Court in second reading.

(These articles were not discussed in first reading.)

21.II.36.*

Article 25.

M. NAGAOKA, referring to the words " the Court is not

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* D 2, A. 3, pp. 545-547.
[1] Minutes, p. 121.
[2] " As a remedy for the serious disadvantages inevitably arising from the presence on the Bench of so large a number of judges (fifteen), the revised Statute (Article 25) laid down that the Rules of Court might provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting." (D 1, 2nd edition, p. 52.)

* D 2, A. 3, p. 608.
[1] See note 1, p. 59.
[2] See statement by Jonkheer van Eysinga on p. 55.

sitting " in the text just adopted,[1] said that this phrase had been accepted in previous cases, when the Court was adopting other articles. He reserved his right to ask the Court to resume its consideration of Article 25, in connection with these words which had been inserted in it.

M. URRUTIA observed that the new Article 25 had only just been examined by the Court in first reading. He also desired to reserve his right to make a suggestion concerning this article at a fitting moment.

The PRESIDENT noted the intention expressed by MM. Nagaoka and Urrutia. Article 25 would be added to the list of questions reserved for further examination.

25.II.36.*

Article 25.

The PRESIDENT drew the Court's attention to the proposal submitted by M. Nagaoka to amend paragraph 2 of Article 25 of the Rules as follows:

> " In the absence of a special resolution by the Court, the dates and duration of the judicial vacations are fixed as follows. "

The PRESIDENT observed that M. Nagaoka was proposing to omit the words " the Court will not sit during the judicial vacations, of which " in paragraph 2 of Article 25.

M. FROMAGEOT admitted that this suggestion had the advantage of preventing an argument from being set up against the view which the Court had already adopted[2] —namely, that the question whether the Court was sitting or not was merely a question of fact.

Secondly, it was not correct to lay it down as a principle —as was done in paragraph 2 of Article 25, as adopted by the Court[3]—that the Court did not sit during vacations, seeing that the following paragraph expressly stated that in case of urgency the President might summon the members of the Court during the periods referred to in the preceding paragraph.

The main object of Article 25 was to fix the dates and duration of the judicial vacations, in accordance with the provisions of the revised Statute. The Court had done that in Article 25. To add that the Court did not sit during the judicial vacations would be to introduce words which seemed superfluous and which were apparently not correct.

M. GUERRERO, Vice-President, recalled that, when the Court adopted Article 25 of the Rules, it had not yet decided on the interpretation of Article 23 of the revised Statute. That had now been done, and if Article 25 of the Rules were left as it stood, there was a danger that the phrase " the Court will not sit during the judicial vacations " might be utilised to raise once more, by an argument *a contrario*, the question of the interpretation of Article 23 of the Statute, although it had been decided by the Court by a large majority.

He therefore saw no objection to accepting M. Nagaoka's proposal. That proposal did not, however, consist only in eliminating the words " the Court will not sit "; by the introduction of the words " unless otherwise decided by a special resolution of the Court ", it also made it possible for the Court to modify the duration and dates of the judicial vacations, whereas Article 25, as at present worded, was only concerned with the question whether or not the Court was sitting during the judicial vacations. It was no disadvantage that it allowed the Court this possibility, for Article 25 of the Rules would thus acquire the necessary flexibility.

M. ANZILOTTI agreed with what the Vice-President had just said as to the scope of the amendment suggested by M. Nagaoka. That amendment was in line with a proposal which he himself had already made.[1] The omission of the words " the Court will not sit during the judicial vacations " in Article 25 was an improvement in the text of the Rules. That change would not, however, in any way affect M. Anzilotti's attitude in regard to the Rules, and his objections to the expression " the Court is not sitting " had lost none of their force: the idea of conferring certain powers upon the President because the Court was not assembled appeared to him contrary to the revised Statute. Subject to that reservation, and having regard to the Court's former decision on this point, M. Anzilotti admitted the advantages of M. Nagaoka's proposal.

Jonkheer VAN EYSINGA, desiring to link the present discussion to the previous discussion on Article 25, recalled the proposals he had made.[2] That proposal, which was in substance in line with that of M. Nagaoka, was worded as follows:

> " In the absence of any decision subsequently taken by the Court with a view to ensuring that satisfactory progress is made with its work, there will be ", etc.

As this suggestion had not appeared at that time to commend itself to the majority of the Court, Jonkheer van Eysinga had withdrawn it. But he would rejoice if M. Nagaoka's amendment were now accepted, as it would improve the text.

The PRESIDENT said that he welcomed the idea underlying M. Nagaoka's proposal to omit the words " the Court will not sit during the judicial vacations ". To a certain extent, that would prevent arguments *a contrario* from being advanced.

Nevertheless, he was not satisfied with the proposed wording, which might, it seemed, make it necessary for the Court, if its work obliged it to encroach on the period of the judicial vacations for a few days, to pass a resolution in order to change the date of the vacations. That seemed to him to be going too far.

For the rest, he noted that, in the fourth paragraph of Article 25, as adopted by the Court, the text which he had proposed at the beginning of the session:[3]

> " The Court observes the public holidays customary in the country where it has its seat ",

had been modified so as to read: " The Court observes the public holidays customary in the place where it is sitting." The former wording had been intentionally proposed in conformity with Article 22 of the Statute, which laid down that " the seat of the Court shall be established at The Hague ". The meaning of the new text appeared to be substantially different.

The President would therefore accept M. Nagaoka's proposal, but, personally, he must make some reservations as to its wording.

M. NAGAOKA said that, so far as he was concerned, the

* D 2, A. 3, pp. 629-635.

[1] Draft Article 41, paragraph 6 (Article 40 of Rules of 11.III.36). See under Article 40, pp. 137-139.

[2] *Cf.* pp. 127 *et sqq.* (meeting of 20.II.36).

[3] On February 14th, p. 64.

[1] See note 1, p. 59.

[2] P. 64.

[3] See p. 54, note 2, first Column.

new wording that he had proposed was not intended to change the meaning of the former Article 25.

As regards the President's remark concerning the word "*siège*" ("is sitting") in the fourth paragraph, that text had been formerly adopted to provide for the possibility of the Court's sitting elsewhere than at The Hague. He saw nothing inconsistent in the maintenance of the word "*siège*" in the fourth paragraph and its omission in the second paragraph.

In regard to the third paragraph, the text might be made to read, for instance: "In urgent cases the President may always, even during the periods referred to in the preceding paragraph", etc. The introduction of the word "even" would make the intention of the paragraph clear.

Count ROSTWOROWSKI considered that, as regards its substance, M. Nagaoka's text was in line with the intentions of the authors of the Statute.

At a previous meeting,[1] Jonkheer van Eysinga had described how this question had come to be raised before the Conference of signatories in 1929. The object had been to give the Court the right to fix the periods of vacation in advance. But the Court had also been given power to modify the arrangements which it thus made, either by advancing or postponing the period in question.

As regards the possible objection to which the President had referred—namely, that if the vacation was due to begin on a certain date, and another ten days or a fortnight were required to dispose of a case, the Court might be compelled to pass a special resolution to enable itself to continue sitting for these few days—Count Rostworowski would observe that, if necessary, recourse could be had to the third paragraph, which laid down that in cases of urgency the President had power to summon the Court even during the judicial vacation. That power connoted the right to continue the Court's sittings beyond the date fixed for the beginning of the vacation.

There was nothing to prevent the Court from postponing the beginning of the vacation, in the interest of the good administration of justice, provided that it postponed the end of the vacation by a corresponding period. The principle that the Court fixed the vacations was laid down in the second paragraph. But the Court had also power to alter the dates of the vacations. Therefore, both M. Nagaoka's proposal and the proposal recently made by Jonkheer van Eysinga were in harmony with the views of the authors of the revised Statute.

M. FROMAGEOT feared that the introduction of the word "even" in the third paragraph might lead to confusion. In his view, the words "in case of urgency, the President may always summon the members of the Court during the vacation" showed clearly that this urgent summoning of the Court related solely to the vacation periods. If the word "even" were added, it might give the impression that, apart from the vacations, the President would never summon the Court except in cases of urgency; that would be misleading, since the President could summon the Court, irrespective of urgency, if there was a case on which the Court must adjudicate.

M. NAGAOKA said he would not press for the insertion of the word "even" in the third paragraph. The chief point, in his view, was the amendment to the second paragraph.

The PRESIDENT suggested, on the basis of M. Nagaoka's proposal, that Article 25 should be subdivided. The existing first paragraph, with its reference to the judicial year, would stand. In the second paragraph the words "The Court will not sit during the judicial vacations" would be omitted. The dates and duration of the vacations would be dealt with in another paragraph. There would be a third paragraph containing everything covered by the words: "Unless otherwise decided by a special resolution." This paragraph would confer power to alter the dates of vacations, to decide that the Court might sit during the vacations, or that it would not sit during other periods. The fourth paragraph would consist of the text of the present third paragraph:

> "In case of urgency, the President can always convene the members of the Court during the periods mentioned in the preceding paragraph."

In the fifth paragraph, the existing text might be replaced by the following:

> "The Court observes the public holidays customary in the country in which it has its seat."

M. GUERRERO, Vice-President, thought that the President's wish might be met without adding a paragraph, if the first part of the second paragraph were worded as follows:

> "The dates and duration of the judicial vacations are fixed as follows."

These dates, and the duration of the vacations, would not be susceptible of alteration.

The remaining paragraphs would be left as they stood, so that the President would still be entitled to summon the Court during those periods, and in cases of urgency.

The question to be decided was whether the Court would not prefer to retain a discretionary right to change the dates of the vacations by a resolution, in order to meet a possible need. For the judicial vacations had been instituted in order to provide the judges with a period of rest, during which they were, however, aware that they might be summoned in case of urgency. Should it prove necessary, owing to the special character of a given case, to proceed with it—say—till September 15th, the Court might, it appeared, decide by a special resolution to sit on until that date, and might then, in consideration of the purpose for which the judicial vacations were instituted by the Statute, declare that the vacation would be prolonged by an equivalent number of days. That would not deprive the President of his power to alter the dates of the vacation thus fixed, and to recall the judges, should an urgent case be submitted to the Court.

M. FROMAGEOT drew a distinction between the possibility of making slight variations in the dates and duration of the vacations, by means of a special resolution of the Court—that being the object of the words "Unless otherwise decided by a special resolution of the Court"—and the decision, which the Court might take, to sit through the whole or a part of the vacation.

He thought that these two objects might be combined if the text were worded:

> "In the absence of a special resolution by the Court (or "a resolution to the contrary") the dates and duration of the judicial vacations are" etc.

to which might be added:

> "Nevertheless, the Court may, if necessary, decide to sit during the whole or a part of the periods referred to above."

[1] Meeting of 11.11.36, p. 55.

Baron ROLIN-JAEQUEMYNS thought that the Rules should allow great elasticity in regard to the fixing of the dates and duration of vacations. The Court and the President ought to retain a very definite freedom of action in this matter.

Should the examination of a case not be concluded by July 15th, and should the President think it necessary to sit until July 18th in order to reach a decision, it must be possible for a resolution to be taken on this subject, without any interruption of the work in hand.

If, on the other hand, the Court found it necessary to go on sitting long beyond the date fixed for the opening of the vacation, it would be fitting that it should have power to make a corresponding extension of the vacation.

The powers of the President and of the Court, in this respect, though different, were in complete harmony. Personally, he was in favour of the text of paragraph 2 as amended by M. Nagaoka.

M. URRUTIA hoped the Court would adopt M. Nagaoka's proposal, in the form in which he had submitted it. It was in harmony with the spirit of the Statute.

The Jurists' Committee of 1929 had proposed the following formula:

> " The Court shall remain permanently in session except during the judicial vacations, the dates and duration of which shall be fixed by the Court at the end of each year for the following year."

The intention of the Jurists' Committee, in leaving it to the Court to settle these dates, was to ensure such a degree of flexibility as would enable the Court to discharge its duties to the best advantage.

When the draft of the Committee of Jurists of 1929 came before the Conference held in that year, the text was modified to read as follows: " the dates and duration of which shall be fixed by the Court ".

The Court was thus free either to fix its vacations every year, or to insert a clause in the Rules fixing their dates and duration for the succeeding years.

The text submitted allowed the Court considerable latitude in fixing the dates and duration of the vacations. There was, indeed, no difficulty in practice in providing that, should it be necessary, in order to conclude a case, for the Court to sit for a few days beyond the date fixed for the beginning of the vacation, the President could decide that this should be done by means of a special resolution.

As regards the fourth paragraph, M. Urrutia was prepared to agree, in accordance with the President's suggestion, that the text should read: " in the country in which it has its seat ", instead of " in the place where it is sitting ".

M. NEGULESCO agreed with what M. Urrutia had said. The best plan would be to keep the text in the form submitted by M. Nagaoka. As regards paragraph 4, the wording " in the country in which the Court has its seat " might be reinstated.

M. FROMAGEOT pointed out that the wording " the Court observes the public holidays customary in the place where it is sitting " was intended to provide for cases such as a visit to a spot in a country other than that in which the Court had its seat.

However, he would not oppose the reinstatement of the expression " in which the Court has its seat ".

M. GUERRERO, Vice-President, pointed out that the expression referred to by M. Fromageot also covered the eventuality of a Special Chamber being required to sit elsewhere than at The Hague, in accordance with Article 28 of the Statute.

It seemed, therefore, wiser to keep to the wording " customary in the place where it is sitting ".

The PRESIDENT asked the Court to vote on M. Nagaoka's proposal to word paragraph 2 of Article 25 of the Rules as follows:

> " In the absence of a special resolution by the Court, the dates and duration of the judicial vacations are fixed as follows: ", etc.

The above text was adopted by nine votes to one.

M. FROMAGEOT suggested to the President that it might also be advisable to take a vote on the following clause, which he had proposed to add:

> " Nevertheless, the Court may, if necessary, decide to sit during all or part of the above periods."

That text, he said, would enable the Court to sit, should it wish to do so, through a part of the vacation, without changing the dates of the vacations.

M. Fromageot still had some doubts as to the interpretation of the third paragraph. Did it show clearly enough that, since the President could summon the Court in case of urgency, he could, *a fortiori*, keep it sitting at The Hague ?

M. GUERRERO, Vice-President, considered that the case envisaged by M. Fromageot was covered by M. Nagaoka's wording which the Court had just adopted.

The PRESIDENT asked M. Nagaoka if he wished to amend the third paragraph of Article 25.

M. NAGAOKA said that he did not. He merely wished to make it clear that, in his view, the fact of the Court's continuing to sit beyond the date fixed for the beginning of the vacation in order to conclude a case in no way implied that a third State could take advantage of that circumstance to submit a new case to the Court. That interpretation seemed to have been accepted when Article 25 [1] was under discussion, and the amendment that he had proposed appeared to suffice.

Article 25. — Final Adoption.

The Drafting Committee proposed no change in the French text. As the article was a new one, the President read the English text.

Article 25 was finally *adopted.*

[1] Meeting of 12.II.36, pp. 57 *et sqq.*

ARTICLE 26 *(old Article 27, Paragraph 5 (2), (3) and (4)).*

LIST OF LEAVES PROVIDED FOR IN ARTICLE 23, PARAGRAPH 2, OF THE STATUTE, AND NUMBER OF MEMBERS OF THE COURT ON LEAVE AT ANY ONE TIME.

13.II.36.

See under Article 25, p. 62, for discussion of question of long leaves in connection with Article 25.

13.II.36.*

Discussed as Article 27 bis *of M. Fromageot's draft.*

Long Leave.

The PRESIDENT invited the Court to examine the article relating to long leave. He pointed out that paragraph 3 of the document which he had submitted [1] followed the text of the existing Rules; M. Fromageot's amendment [2] contained a slightly different wording.

M. URRUTIA considered that, in view of the decisions already adopted, it would be necessary to accept M. Fromageot's text (Article 27 *bis*).

Baron ROLIN-JAEQUEMYNS observed that this text spoke of the " special leave provided by paragraph 2 of Article 23 of the Statute . . .". But sick leave, or leave for special circumstances, was also special leave, though it was not referred to in the clause quoted. In his view, there was nothing in the Statute to prevent the granting of such leave. If special leave was mentioned, that term must therefore cover leave other than long leave. He suggested that the text should read: " . . . when they are taking leave under Article 23 of the Statute . . .", without confining the reference to paragraph 2 of that article.

M. FROMAGEOT observed that a prolonged period of absence, for instance in case of sickness, was not leave.

Jonkheer VAN EYSINGA thought that the Court should first settle the question of the regular leave referred to in paragraph 2 of Article 23 of the Statute. As regards that question, the wording proposed by M. Fromageot appeared to be the best; but it would be preferable to omit the word " special ", which did not appear in the text of the revised Statute, and was unnecessary.

M. FROMAGEOT explained that he had used the word " special " because mention had been made just before, in the preceding article, of judicial vacations, and now they were dealing with a particular case. However, he would not press for the retention of this word.

M. GUERRERO, Vice-President, pointed out that the Statute envisaged three cases of absence: vacations, leave for overseas judges, and inability to attend. If the word " leave " were used by itself, it would therefore refer to the leave mentioned in paragraph 2 of Article 23 of the Statute.

The PRESIDENT noted that the Court was agreed to delete the word " special " in paragraph 1 of Article 27 *bis* of M. Fromageot's text.

M. ANZILOTTI wished to know what was the reason for the omission of paragraph 5 of the old Article 27.[1] Was that paragraph regarded as superfluous in consequence of the coming into force of the revised Statute, or was it considered inconsistent with that Statute ?

The PRESIDENT explained that the paragraph had been omitted because it duplicated Article 23 of the revised Statute.

M. ANZILOTTI wished to know whether, henceforward, long leave could be granted to all judges whose homes were more than five days distant from The Hague, even if they continued to reside in their homes.

The REGISTRAR considered that those judges could not continue to reside in their countries, owing to the very terms of paragraph 2 of Article 23 of the Statute.

M. ANZILOTTI still had some doubts on that point.

The PRESIDENT thought that different views were held concerning the interpretation of Article 23 of the revised Statute. It was possible to construe it as forbidding a judge to reside at a distance greater than five days journey from The Hague; according to that interpretation, it would no longer be possible for an overseas judge to continue to reside at his home. But he would be entitled to periods of long leave. According to the President's interpretation, on the other hand, an overseas judge would be free to reside in his own country, and would nevertheless be entitled to long leave.

It was a question for the Court to decide.

M. URRUTIA pointed out that the interpretation adopted by the Court in 1931 was embodied in paragraph 5 of Article 27 of the Rules in force. That clause had been framed having regard to the terms of Article 23 of the revised Statute. If it were now to disappear, the interpretation of Article 23 of the Statute would be an open question.

M. ANZILOTTI, after studying the report of the Committee of Jurists of 1929,[2] pointed out that there was a passage in it indicating that overseas judges continuing to reside in their homes were not entitled to long leave.

M. GUERRERO, Vice-President, observed that, if the Court now introduced the old paragraph 5 of Article 27 into its Rules, it would be interpreting Article 23 of the revised Statute to mean that judges were not obliged to reside in the proximity of The Hague; but that, if they

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* D 2, A. 3, pp. 543-545.

[1] Article 27 of President's draft:

" 1. . . .

" 2. Except when they are on leave as provided in Article 23, paragraph 2, of the Statute, judges must hold themselves at the disposal of the Court.

" 3. The order in which these leaves are to be taken shall be laid down in a list drawn up by the Court according to the seniority in age of the persons entitled. This order can only be departed from for serious reasons duly admitted by the Court.

" 4. The number of judges on leave at any one time must not exceed two.

" 5. The President and Vice-President must not take their leave at the same time." (See D 2, A. 3, p. 974.)

[2] Article 27*bis* of M. Fromageot's draft:

" 1. The order of the special leaves provided for by Article 23, paragraph 2, of the Statute shall be laid down in a list drawn up by the Court according to the seniority in age of the persons entitled. This order can only be departed from for serious reasons duly admitted by the Court.

" 2. The number of members of the Court on leave at any one time must not exceed two. The President and Vice-President must not take their leave at the same time." (See D 2, A. 3, pp. 981-982.)

[1] 1931 Rules.

[2] Minutes, p. 121.

voluntarily resided at a distance from The Hague, they would not be entitled to the benefits of long leave.

The REGISTRAR wished to discuss the question from the point of view of its historical surroundings.

The new text of Article 23 of the Statute had its origin in complaints that the composition of the Court in extraordinary sessions held in the winter differed from its composition in ordinary sessions held in the summer. It had been sought to remedy this defect by making it a strict obligation for all judges " to hold themselves permanently at the disposal of the Court ". It had been found that this obligation was a severe one for overseas judges, and that it was perhaps not without danger, in the sense that it might prevent certain persons from accepting the office of judge; it was for that reason that long leave had been introduced, by way of compensation for these judges. Consequently, the institution of long leave was linked to the obligation of judges to hold themselves permanently at the disposal of the Court.

In 1931, when the Court, at the invitation of the Assembly, revised its Rules in order, so far as possible, to take into account the essential principles of the revised Statute, it considered that, as that Statute had not yet come into force, it could not compel judges to accept this obligation, since it was not laid down in the Statute of 1920. It therefore offered a choice to the overseas judges: either they might voluntarily accept the obligation in question, and consequently become entitled to long leave; or they could retain the freedom which they enjoyed under the old Statute, and renounce any right to long leave.[1]

Now that the revised Statute had come into force, it appeared that the choice allowed by the Court in 1931 could no longer be maintained, and that all the judges were henceforward under an obligation to hold themselves permanently at the disposal of the Court, an obligation which, in the case of overseas judges, had its counterpart in the institution of long leave.

M. FROMAGEOT confirmed what the Registrar had said, and considered that it was because the Court had to provide for the case of judges elected under the régime of the old Statute that, in 1931, it had offered the overseas judges the choice that had been mentioned.[2]

The PRESIDENT noted that the text proposed by M. Fromageot, under the heading of paragraph 1 of No. 27 *bis*, was adopted, subject to the omission of the word " special ". He noted that the Court had also accepted the text proposed by M. Fromageot under the heading paragraph 2 of No. 27 *bis*.

14.II.36*.

Articles (25), 26, (27) — Second Reading.

The PRESIDENT announced that, with the assistance of some members of the Court, he had prepared a draft of the articles concerning vacations, leave and inability to attend, in accordance with the decisions of the Court. This text ran as follows:

> " 1. The order in which the leaves provided for in Article 23, paragraph 2, of the Statute, are to be taken shall be laid down in a list drawn up by the Court according to the seniority in age of the persons entitled. This order may only be departed from for serious reasons duly admitted by the Court.
>
> " 2. The number of members of the Court on leave at any one time must not exceed two. The President and Vice-President must not take their leave at the same time."
>
> (*Note.* — For explanation of arrangement of these articles, see under Article 25, p. 64.)

The PRESIDENT declared the drafts submitted for Articles (25), 26 (and 27) adopted by the Court in second reading.

(This article was not discussed in first reading.)

10.III.36.*

Article 26. — Final Adoption.

The REGISTRAR recalled that, in the course of the discussion of the long-leave roster at a previous meeting,[1] an amendment to this article had been suggested. The suggestion had been to substitute for the criterion of age some other criterion which would be applicable in all circumstances.

The PRESIDENT thought that the words " a list drawn up by the Court according to the seniority in age of the persons entitled " might be replaced by: " a list drawn up by the Court on the basis of the rules laid down in Article 2 of these Rules ".

The REGISTRAR suggested the following: " according to the seniority of the persons entitled resulting from Article 2 of these Rules ".

M. GUERRERO, Vice-President, considered that, as the article was to be amended, it would be well to lay down that the list would be prepared for a three-year period. Then the Court, in preparing it, would have more latitude to take into account, besides procedure, any other circumstances which might influence its decision. Might they not therefore word the provision as follows: " in a list drawn up by the Court for each period of three years " ?

M. URRUTIA suggested: " The Court shall, as far as possible, follow the order laid down in Article 2 of the Rules." Seniority in age would thus cease to be the sole criterion. It would, however, be better to give the Court some guidance, as otherwise it might find itself in an embarrassing position in difficult cases.

The PRESIDENT asked M. Urrutia if he would agree to the suggestion that the passage in question should read: " in a list drawn up by the Court for each period of three years ".

M. URRUTIA agreed to this, and the PRESIDENT declared the amendment approved by the Court.

Count ROSTWOROWSKI observed that they should say: " of the Statute *of the Court* ".

This was agreed to.

The first sentence of paragraph 1 of Article 26 was adopted in the following form:

> " The order in which the leaves provided for in Article 23, paragraph 2, of the Statute of the Court are to be taken shall be laid down in a list to be drawn up by the Court for each period of three years ".

Article 26 was finally *adopted*.

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* D 2, A. 3, pp. 545-547 (extracts).

[1] *Cf.* D 2, A. 2, p. 84.

[2] See, in E 6, p. 19, the letter sent by the Secretary-General of the League of Nations to the nominating groups in view of the general election of judges in 1930.

* D 2, A. 3, pp. 726-727.

[1] Meeting of 13.II.36, pp. 68-69.

ARTICLE 27 *(Article 27, Paragraph 4, old Rules).*

OBLIGATION OF MEMBERS OF THE COURT TO ATTEND AT SITTINGS OF THE COURT

4.III.35.*

Discussed as Paragraph 4 of Article 27.

The PRESIDENT said that no amendments had been proposed to this text.

The REGISTRAR pointed out that M. Fromageot had submitted an amendment, which had not, however, been accepted. It was to the following effect: the following sub-paragraph to be added to paragraph 4 of Article 27:

> " Judges appointed under Article 31 of the Statute must hold themselves at the disposal of the Court on the date fixed by the latter for its first meeting for the examination of the case in respect of which they have been appointed."

The PRESIDENT put to the vote Article 27 of the Rules at present in force.

Article 27 was adopted in its existing form.

3.IV.35.

The old Article 27 was adopted in first reading, including paragraph 4 which subsequently became the present Article 27.

11.II.36.

See under Article 25, pp. 54-56, for discussion of Article 26 *bis* of M. Fromageot's draft (Article 27 of Rules in force) in connection with Article 25.

13.II.36.

See under Article 25, p. 62, for discussion of subject of Article 27 in connection with Article 25.

See under Article 26, p. 69, for discussion of subject of Article 27 in connection with Article 26.

14.II.36.*

Articles (25, 26), 27. — Second Reading.

The PRESIDENT announced that, with the assistance of some members of the Court, he had prepared a draft of the articles concerning vacations, leave and inability to attend, in accordance with the decisions of the Court. This text ran as follows:

> " *Article 27.* — Members of the Court who are prevented by illness or other serious reasons from attending one or more sittings of the Court to which they have been summoned by the President, shall notify the President, who will inform the Court."
>
> (*Note:* For explanation of the arrangement of these articles, see under Article 25, p. 64.)

Count ROSTWOROWSKI presumed that the omission of all reference to leave in Article 27 was intentional.

The PRESIDENT confirmed this; the long leaves were fixed by the Court, and the President would not summon a judge when he was on leave.

The President declared the drafts submitted for Articles (25, 26) and 27 adopted by the Court in second reading.

11.III.36.**

Article 27. — Final Adoption.

The PRESIDENT said that, in the case of Article 27 (French text), the Committee suggested a slight verbal change. Instead of " *à une ou plusieurs séances* ", they proposed to say: " *aux séances* ". Similarly, in the English text, " one or more sittings " would be amended to read " a sitting ".

Article 27, as thus amended, was finally *adopted*.

17.III.36.

See under Resolution concerning the Court's Practice, p. 356, for a reference to Article 27 of the Rules in connection with a proposed amendment to the Resolution.

ARTICLE 28 *(Article 29, old Rules, with New Second Paragraph).*

SITTINGS OF THE COURT AND OF THE CHAMBERS OF THE COURT

17.V.34.**

Discussed as Article 29.

The PRESIDENT, *in opening the meeting, observed that* the business on the agenda was the examination of the Articles of the Rules, beginning with Article 29.

He thought that his colleagues would agree that they should first proceed to consider each article, as it were, in first reading.

Article 29 of the Rules.

The text at present in force was as follows:

> " During the sessions the dates and hours of sittings shall be fixed by the President."

The text proposed by the Co-ordination Commission was:

> " The dates and hours of sittings shall be fixed by the President of the Court."

The second paragraph of the commentaries following this article in the report contained a reference to a provision regarding the Special Chambers (66 [7]),[1] proposed by the Commission.[2]

M. ANZILOTTI wondered whether it would not be better, in this text, to delete the words " of the Court ". Article 29 concerned a function of the President; if the Court was sitting, the President of the Court was meant;

* D 2, A. 3, p. 406.
** *Ibid.*, pp. 13-14.

* D 2, A. 3, pp. 545-547 (extracts).
** *Ibid.*, p. 727.
[1] Article 70 of Rules of 11.III.36.
[2] See D 2, A. 3, p. 865.

if a Chamber was sitting, the President of that Chamber was meant.

The PRESIDENT recalled that the Co-ordination Commission proposed to retain in Article 29 the rule already laid down therein with regard to sittings of the full Court, and to insert towards the end of the Rules two other articles, of which the first, Article 66 (7), related to the Special Chambers for Communications and Labour, and the second (Article 67) related to the Chamber for Summary Procedure.

M. ANZILOTTI appreciated this, but thought that, since the words " of the Court " were superfluous in Article 29, that article would be made clearer by their deletion; this would remove a doubt which, though disposed of later, would nevertheless arise here.

M. GUERRERO, Vice-President, proposed the following:

" The dates and hours of sittings of the Court shall be fixed by the President."

That would show clearly that the article referred to sittings of the full Court, the question of Special Chambers being dealt with separately.

The PRESIDENT said that the Court had before it two proposals: that of M. Anzilotti for the deletion of the words " of the Court ", and that of the Vice-President, which was supported by M. Adatci.

Would M. Anzilotti be prepared to accept the latter text ?

M. ANZILOTTI said that he would.

Jonkheer VAN EYSINGA observed that, if the Court adopted the text proposed by the Vice-President, the result would be that the Chamber for Summary Procedure or the Chamber for Labour cases would not be " the Court ". For what was said here was: " The dates and hours of sittings of the Court shall be fixed by the President ", thereby excluding sittings of the Special Chambers; this amounted to saying that the Court was not sitting when a Special Chamber sat. Hitherto, it had been held that a sitting of a Special Chamber was always a sitting of the Court.

Jonkheer van Eysinga therefore proposed to add to the Vice-President's text the words: " Subject to Article 66 (7). . . ."

M. GUERRERO, Vice-President, thought that the following would perhaps satisfy Jonkheer van Eysinga:

" The dates and hours of sittings of the full Court shall be fixed by the President."

Jonkheer VAN EYSINGA replied that it would.

The PRESIDENT wished to draw attention to a matter of wording which had struck him: the text proposed for Article 66 (7) was as follows:

" 1. The rules for procedure before the full Court shall, as far as possible, apply to procedure before the Special Chambers referred to in Articles 26 and 27 of the Statute."

Article 67 was similar. The President wondered whether this wording was adequate, seeing that Article 29 was included in the section of the Rules headed: " Working of the Court ". Any difficulty arising from this would be removed if Article 29 were transferred to the part dealing with procedure. Moreover, the addition of the word " full " also made this transfer desirable.

Count ROSTWOROWSKI would be in favour of the addition of the word " full ", but uniform expressions must be used throughout. In Article 66 (7) the expression " procedure before the full Court " was used.

M. NEGULESCO pointed out that in Article 25 of the Statute the expression " full Court " was to be found.

The PRESIDENT was anxious to propose a rather more complete text, covering not only the full Court but also the Special Chambers, and running more or less as follows:

" The dates and hours of sittings of the full Court shall be fixed by the President of the Court. The dates and hours of sittings of the Chambers shall be fixed by the President of the Chamber, except that the first sitting shall be called by the President of the Court."

M. ADATCI entirely approved of this text, but would not its adoption involve some alteration of Articles 66 (7) and 67 ?

The PRESIDENT thought that the Co-ordination Commission could without difficulty prepare a final text, if the Court was prepared to accept this amplification in principle.

The President, after taking the opinion of his colleagues, said that the Court was agreed that the Co-ordination Commission should be requested to prepare a new draft of Article 29, covering not only the full Court, but also specifically referring to the Special Chambers.

18.V.34.

Discussed as Article 29.

Article 29 was adopted in the following form:

" 1. The dates and hours of sittings of the full Court shall be fixed by the President of the Court.

" 2. The dates and hours of sittings of the Special Chambers and of the Chamber of Summary Procedure shall be fixed by the Presidents of the respective Chambers. The first sitting, however, of a session of a Chamber shall be summoned by the President of the Court."

27.II.35.

See under Article 70, p. 295, for reference to Article 29 (Article 28 of Rules of 11.III.36) in connection with Article 66 (7) of the draft (Article 70 of Rules of 11.III.36).

3.IV.35.*

Discussed as Article 29.

First Reading.

The article was adopted without amendment in first reading.[1]

The REGISTRAR, however, observed that the second paragraph might perhaps overlap the new Article 75 (Article 71 of the Rules in force).[2]

The PRESIDENT said that the question would be considered when the Court discussed Article 75.

9.IV.35.

See under Article 71, pp. 298-299, for discussion of

* D 2, A. 3, p. 425.

[1] The text was the same as that adopted on 18.V.34 (see above) except for the addition, after the words " Special Chambers " of the words " referred to in Articles 26 and 27 of the Statute of the Court ".

[2] See p. 297 (meeting of 27.II.35).

Article 29, paragraph 2 (Article 28 of Rules of 11.III.36) in connection with Article 75 (Article 71 of Rules of 11.III.36).

17.II.36.*

Discussed as Article 29.
Second Reading.

The PRESIDENT said that, as no observations had been offered in regard to paragraph 1 of Article 29.[1] that paragraph was adopted.

He opened the discussion on paragraph 2.

M. ANZILOTTI pointed out that, as a result of the modifications introduced in consequence of the coming into force of the revised Statute (omission of the words " of a session "), the last sentence was now worded in such a way that it appeared to refer to the case of a Chamber meeting for the first time after the election of its members. It would be necessary to employ a wording showing clearly that what was meant was the first meeting of a Chamber for the examination of a given case.

In this same connection, the PRESIDENT said that the Registrar had already suggested to him the following text:

" The first sitting, however, of a Chamber, convened for a particular case, shall be fixed by the President of the Court."

As no objection was offered, the President declared that paragraph 2 of Article 29 was adopted with the wording proposed by the Registrar for the last sentence, except that (in the French) the word " *cas* " would be replaced by " *affaire* ".

The PRESIDENT further suggested, before leaving this article, that the English text corresponding to the fourth line of paragraph 2 should read: " . . . shall be fixed by the Presidents of the Chambers respectively ".

This was agreed to and the article was adopted in second reading.

11.III.36.

Final Adoption.

The former Article 28 now became the new Article 46. Accordingly, the old Article 29 would now bear the number 28. The Drafting Committee proposed no change in this article.

Article 28 was finally *adopted.*

ARTICLE 29 *(Article 30, old Rules).*

QUORUM

17.V.34.**

Discussed as Article 30.

The PRESIDENT, in opening the discussion on Article 30[2], recalled that the present wording was as follows: " If . . . it is impossible to obtain the prescribed quorum, the Court shall adjourn . . . " This wording implied a decision to adjourn taken by the Court; but if there was no quorum, there could, properly speaking, be no meeting of the Court. The Co-ordination Commission had therefore adopted a text which implied that adjournment was automatic. In England, in similar circumstances, the expression " The meeting stands adjourned " was used. The French text proposed was a translation of this: " *La séance est levée et n'est reprise que lorsque le quorum est atteint*" (The sitting shall stand adjourned and shall not be resumed until the quorum is obtained).

M. ANZILOTTI had never understood why this rule had only been adopted for the full Court. Did not the same apply as regards the Special Chambers ? As they were now revising the Rules, did not that constitute a gap which should be filled ?

The REGISTRAR recalled that this point had not been dealt with in the original Rules for a formal reason: no quorum was provided for the Special Chambers. Accordingly, it had doubtless been held that the full number of members of a Chamber must be present and that this was self-evident. Proof of this was to be found in Article 16, which provided that the Chambers might be completed by summoning judges who were not members thereof.

M. ANZILOTTI did not attach much importance to the point, but took advantage of the present revision of the Rules to call attention to it.

Jonkheer VAN EYSINGA pointed out that in any case Article 29 contained a rule which might not be applied in the same manner in the case of the Chambers and in that of the full Court. That was why Articles 66 (7) and 67 contained the words " as far as possible " as a saving clause.

The PRESIDENT thought it would be well to have a rule precluding the possibility of a Special Chamber sitting with less than five members (three in the case of the Chamber for Summary Procedure).

Count ROSTWOROWSKI, in another connection, observed that Article 30 was somewhat emphatically worded: " If . . . it is impossible to obtain the prescribed quorum . . . " Perhaps it would be better to say: " If . . . it is found that there is no quorum. . . ."

The REGISTRAR showed that the use of the word " impossible " was accounted for by the provisions of Article 25 of the Statute, which laid down that deputy-judges were to be called upon until the list was exhausted, before recording that no quorum could be obtained. Of course, the position had altered since 1922, more especially as a result of the coming into force of the resolutions adopted by the Assembly in 1930.

M. NEGULESCO pointed out that Article 30 must be read as a whole; its real purpose was to show that judges *ad hoc* were not to be reckoned in calculating the quorum. But

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* D 2, A. 3, p. 565.

** *Ibid*, pp. 14-17 and 23.

[1] Text discussed:

" 1. The date and hour of sittings of the full Court shall be fixed by the President of the Court.

" 2. The date and hour of sittings of the Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court shall be fixed by the President of the respective Chambers. The first sitting, however, of a Chamber shall be fixed by the President of the Court. (See D 2, A. 3, p. 974.)

[2] Text proposed in the Co-ordination Commission's Report of 14.V.34:

" If a sitting of the full Court has been summoned and it is impossible to obtain the prescribed quorum, the sitting shall stand adjourned and shall not be resumed until the quorum is attained. Judges appointed under Article 31 of the Statute shall not be taken into account for the calculation of the quorum."

there were no judges *ad hoc* in the Special Chambers. That was why the article said: " . . . at any sitting of the full Court. . . ."

The REGISTRAR said that M. Negulesco's observation raised a difficulty: the position would be quite different from the point of view of the presence of judges *ad hoc* in the Chambers, when the revised Statute came into force.

The PRESIDENT considered that it would certainly be well at the present time to adopt texts which would meet the situation as it would be after the coming into force of the revised Statute.

Jonkheer VAN EYSINGA thought it would be better to note M. Anzilotti's observation, and to consider it again when Article 66 (7) was examined.

The PRESIDENT observed that the Court was at present considering a section of the Rules entitled " Working of the Court ". There was no doubt that " the Court " was an expression which covered not only the full Court but also the Court sitting as a Special Chamber. That was why it would be well to insert here rules governing the working of the Special Chambers.

Count ROSTWOROWSKI thought it would be possible to overcome the difficulty by inserting in Article 66 (7) the words: " for *the working of* and procedure before the full Court ". Thus they would apply by analogy, not only rules regarding procedure, but also rules regarding the working of the Court.

The PRESIDENT agreed that, from the point of view of arrangement and style, it would be better to omit from articles concerning the working of the Court any reference to the Special Chambers.

M. ADATCI thought that the articles already existing in the Rules amply sufficed to regulate the working of the Special Chambers.

The PRESIDENT suggested that the Co-ordination Commission might be asked to propose a text which would cover the ideas propounded.

M. GUERRERO, Vice-President, in no way opposed the reference of the article to the Co-ordination Commission, but he suggested, in order to save time, that, in the case of articles of no great importance, the best way would be to try to adopt such articles in their final form at the full meeting of the Court.

The PRESIDENT agreed. Nevertheless, he thought that the reference of articles to the Co-ordination Commission might sometimes constitute a saving of time, because it was difficult to draft an article at a full meeting. For Article 30, he proposed the following wording:

> " If at a sitting of the full Court it is found that the prescribed quorum is not attained, the sitting shall stand adjourned and shall not be resumed until the quorum is obtained. This rule shall also apply to sittings of the Special Chambers."

M. SCHÜCKING and M. ADATCI did not favour this text, as, in their view, the question of the quorum did not arise in the case of the Special Chambers.

Jonkheer VAN EYSINGA wondered whether it would not be better, for the moment, to content themselves with the suggestion made by Count Rostworowski—*i.e.* to insert in Article 66 (7) the word " working ", without adding any rule concerning the Special Chambers to Article 30.

The PRESIDENT thought that in fact it was preferable not to insert a rule regarding the Special Chambers in Article 30.

M. SCHÜCKING thought that they might even suppress the first sentence of Article 30, for, if there was no quorum, there was no Court and no business could be done.

The PRESIDENT thought that further reflection was necessary, since Article 30 concerned not only public sittings of the Court but also private deliberations.

M. SCHÜCKING thought that, if there was no quorum, the Court must also suspend private deliberations.

The REGISTRAR recalled that, in its original form, Article 30 did not contain the second sentence concerning judges *ad hoc*. That sentence was only added in 1926.

The first sentence was not originally intended to indicate that the Court would not give any decision if there was no quorum; its purpose had rather been to indicate that if, at a given moment, there was no longer a quorum, the session did not come to an end but was simply adjourned. Obviously, if there was no quorum, the Court could not take any decision, but there were two possible solutions: the closure of the session, or a simple adjournment; and the intention was to adopt the latter solution.

The PRESIDENT thought that there might perhaps be some danger in deleting Article 30. Moreover, Article 30 had never impeded the working of the Court.

Count ROSTWOROWSKI thought that in any case it would be difficult to delete the first part of Article 30 and to leave the second part. It would therefore be better to keep Article 30 as it was; it was of use, since it afforded a solution for the difficulty mentioned by the Registrar.

The PRESIDENT took a vote on the following question:

> " Does the Court desire to delete the first sentence of Article 30 ? "

M. ANZILOTTI observed that the coming into force of the new Statute would confer quite a different meaning on this rule.

M. WANG proposed the following amendment: " If, at a sitting of the Court . . ."; thus omitting the word " full ", so as to render the article applicable to any sitting of the full Court or of a Chamber.

The PRESIDENT wished first of all to have the vote of the Court on the question put by him.

By eleven votes, with one abstention, Article 30 was retained as a whole.

The PRESIDENT recalled M. Anzilotti's proposal that the article should be made explicitly to apply to the Chambers.

M. ANZILOTTI said that, in reality, what he had in mind was the principle that a Special Chamber must sit with the full number of members composing it.

The PRESIDENT, in order to ascertain the opinion of the Court on this point, suggested the following question:

> " Does the Court desire to introduce into the Rules a provision requiring the presence of all the judges convened at a sitting of a Chamber ? "

It was understood that this question covered, *inter alia*, judges *ad hoc* and substitutes.

M. ANZILOTTI pointed out that, if the Court answered this question in the affirmative, it would be laying down

the principle that judges *ad hoc* must always be present both in the full Court and in the Chambers.

M. WANG said that, if a vote were taken on this question, he would prefer not to vote. He did not clearly understand the force of the expression: " all the judges convened ".

M. GUERRERO was in the same position.

But perhaps it would be unnecessary to refer at all to the Special Chambers, seeing that the Statute fixed no quorum for them. For this reason it would be better, in Article 30, only to speak of sittings of the full Court.

The PRESIDENT, in these circumstances, thought it unnecessary to take a vote. And he declared that the change in the wording proposed by Count Rostworowski, consisting in the substitution of the words " it is found that the prescribed quorum is not attained " for the words " it is impossible to obtain the prescribed quorum ", was adopted.

(Same meeting.)

Discussed as Article 30.

Baron ROLIN-JAEQUEMYNS referred to an observation he had made in regard to Article 30 of the Rules, and which he still maintained.

The present wording of that article was (French text): " . . . *la Cour s'ajourne jusqu'à ce que le quorum soit atteint* ".

The proposed text was as follows (French text): " . . . *La séance est levée et n'est reprise que lorsque le quorum est atteint.*"

He thought the former wording was better, for the new text appeared to make it impossible to interrupt the session; and yet that possibility ought to be reserved.

The PRESIDENT asked Baron Rolin-Jaequemyns if he saw any objection to the English phrase: " The meeting stands adjourned."

Baron ROLIN-JAEQUEMYNS considered that that English phrase, with which he agreed, was more accurately rendered by the former French text. The new text spoke of " *séance levée* " and " *reprise* ", which meant something quite different.

M. FROMAGEOT proposed that the text should read: " The sitting [*séance*] stands adjourned. The Court shall meet again as soon as a quorum is obtained."

The PRESIDENT proposed the following wording:

> " If, at any sitting of the full Court, it is found that there is no quorum, the President shall adjourn the sitting until a quorum has been obtained; if necessary, he shall close the session."

That text, he said, was in accordance with the Court's practice, and it was wider than the present form.

The REGISTRAR drew attention to paragraph 2 of Article 27 of the Rules, according to which the President declared the session closed when the agenda was exhausted. Unless they introduced some words into Article 30 qualifying that rule, the President would be unable to close the session when there was no quorum.

The PRESIDENT proposed that the text should read as follows: " The President shall adjourn the sitting [*réunion*] until a quorum is obtained "; several judges having said that they preferred the word " *séance* " to " *réunion* ", the President put that question to the vote.

By ten votes to two, the Court decided in favour of " *séance* ".

It was agreed to insert the text, as thus amended, in the draft proposed by the Co-ordination Commission.

18.v.34.

Discussed as Article 30.

Article 30 (Revised Text).

Article 30 was adopted in the following form:

> " If a sitting of the full Court has been summoned and it is found that there is no quorum, the President shall adjourn the sitting until a quorum has been obtained. Judges appointed under Article 31 of the Statute shall not be taken into account for the calculation of the quorum."

First and Second Readings and Final Adoption.

On 3.IV.35 the article was adopted in first reading with the text approved on 18.v.34 and with the number 30.

On 17.II.36 it was adopted in second reading unchanged except for the substitution of " nominated " for " appointed " in the second sentence, and on 11.III.36 it was finally *adopted* with a slight change in the English text only—the word " convened " being substituted for " summoned " in the first sentence—as Article 29.

ARTICLE 30 *(Article 31, old Rules).*

DELIBERATIONS OF THE COURT

17.v.34.*

Discussed as Article 31. [1]

The PRESIDENT read the first paragraph of this article, which was worded as follows in the Co-ordination Commission's text:

> " The Court shall sit in private to deliberate upon the decision of any case, or upon any advisory opinion."

He explained that this wording did not cover deliberations on questions which might arise during the examination of a dispute or an advisory opinion, but which did not lead up to the final decision. The text further omitted the passage which appeared in the present Rules concerning administrative matters. These matters were now dealt with in the final paragraph. He added that the various changes proposed were designed to bring the wording of Article 31 into harmony with the Court's practice.

M. URRUTIA said that, if he remembered rightly, the Court had allowed dissenting opinions when making orders.

The PRESIDENT said that it was true that separate opinions had occasionally been allowed in connection with important orders. But in every such case, the Court had taken a special decision.

M. FROMAGEOT asked if it would not be possible, in paragraph 7, to omit the words: " upon a draft judgment or advisory opinion ".

If the text were thus amended, it would be possible, in case of an order dealing with a question of serious importance,

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* D 2, A. 3, pp. 23-25.

[1] For text discussed, see D 2, A. 3, p. 865. Text as adopted on 18.v.34 follows on pp. 75-76.

to allow the individual opinion of a judge to be known, if there were good reasons for doing so.

M. SCHÜCKING pointed out that the text of paragraph 7 showed that the separate opinion had to be submitted in accordance with the terms of Article 57 of the Statute. But that article contained no special provisions relating to separate opinions. The object of that paragraph was merely to show that Article 57 did not permit judges to be content with an insertion in the minutes of their dissenting opinion upon the judgment or advisory opinion. In the interests of clarity, some slight changes would therefore be necessary in the text of paragraph 7.

The PRESIDENT asked when that paragraph had been adopted.

The REGISTRAR said that its adoption dated from 1926. The passage to which it was then intended to refer was the clause in the (French) text of Article 57 of the Statute containing the words "*d'y joindre*". What was intended was that any statement of a separate opinion must be appended to the judgment or advisory opinion.

M. FROMAGEOT proposed that the text should read: "in accordance with Article 57".

M. ANZILOTTI pointed out that paragraph 6, which began with the words: "No detailed minutes shall be prepared . . .", should be followed immediately by paragraph 8, which began with the words: "Subject to a contrary decision by the Court, the same procedure. . . ."

Jonkheer VAN EYSINGA thought that the words "the same procedure shall apply . . ." in paragraph 8 were rather vague. Would it not be better to say: "paragraphs 1 to 6 apply to administrative decisions"?

The PRESIDENT emphasised the importance of the text of Article 31, which was intended to show that the Court's decisions were adopted by a strictly judicial procedure.

Possibly, the following text for the final paragraph might be clearer than that now before the Court:

> "Subject to a contrary decision by the Court, the procedure laid down in the preceding paragraphs shall apply to private meetings for deliberation on all questions other than cases submitted to the Court, and on any administrative matters."

M. ANZILOTTI could agree with this text, provided that it were placed immediately after paragraph 6.

M. FROMAGEOT said that what appeared rather awkward in the text of paragraph 8 was the passage: "the same procedure shall apply as regards administrative matters".

Jonkheer VAN EYSINGA suggested that the text should read: "paragraphs 1 to 6 shall apply to administrative matters".

The PRESIDENT pointed out that, if that text were adopted, it would make it quite impossible for the Court to allow a dissenting opinion in connection with an order.

Baron ROLIN-JAEQUEMYNS said that, in the case of judgments, the expression of a dissenting opinion was a right which the judges possessed. Having regard to Article 71, paragraph 2, of the Rules, the same applied to advisory opinions, though the Statute did not say so. But, in the case of orders, the expression of a separate opinion was something which the Court might or might not allow. Though not confirming it as a right, it was desirable not to exclude it altogether.

The PRESIDENT said he would prefer to retain the text proposed by the Co-ordination Commission, without, however, accepting Jonkheer van Eysinga's suggestion. He asked what advantage M. Fromageot saw in omitting the words "upon a draft judgment or advisory opinion" in paragraph 7. It might be desirable, in regard to any question other than a final decision, that a judge should be enabled to make a declaration, which would then be inserted and preserved in the minutes.

M. FROMAGEOT thought that paragraph 7 related to the exercise of a judge's right, under the Statute, to express his dissenting opinion; and it was in order to allow this right to be exercised, in the case of orders also, that he had proposed to omit the words "upon a draft judgment or advisory opinion".

The PRESIDENT thought that, so far as orders were concerned, the desired result could be attained in another way; he feared that the omission of these words, as proposed by M. Fromageot, might have unforeseen consequences.

M. URRUTIA thought it would be better to leave paragraph 7 in the form in which it had been proposed. That text would always allow the Court to decide that a judge might submit a dissenting opinion in connection with an order.

M. SCHÜCKING moved the adoption of paragraph 7, as amended in accordance with M. Fromageot's proposal.

It would suffice to note in the minutes of the present meeting that the question of separate opinions in connection with orders was not prejudged.

Baron ROLIN-JAEQUEMYNS proposed to retain paragraph 8, as amended in accordance with the President's suggestion.

Jonkheer VAN EYSINGA supported this proposal. He pointed out, however, that the paragraph appeared to open the door to the submission of separate opinions in regard to administrative questions, which would perhaps be going too far. He thought, therefore, that the text should exclude such a possibility.

Baron ROLIN-JAEQUEMYNS thought it would suffice to indicate, in the text, that paragraph 7 would not apply to administrative matters.

The PRESIDENT thought it could be left to the Co-ordination Commission to find a new wording in regard to that point.

Subject to that reservation, he asked the Court to adopt the text of Article 31 proposed by the Co-ordination Commission, as amended during the meeting.

18.V.34.*

Discussed as Article 31 (Revised Text).

Article 31 was adopted in the following form:

> "1. The Court shall sit in private to deliberate upon the decision of any case or upon any advisory opinion.
>
> "2. During the deliberation referred to in the preceding paragraph, only persons authorised to take part in the deliberation and the Registrar, or, in his absence, the Deputy-Registrar, shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, because of exceptional circumstances.
>
> "3. Every judge who is present at the deliberation shall state his opinion, together with the reasons on which it is based.

* D 2, A. 3, pp. 34-35.

" 4. Any judge may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. A request to this effect shall be complied with.

" 5. The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the judges voting in an order inverse to the order of precedence established by Article 2.

" 6. No detailed minutes shall be prepared of the Court's private meetings for deliberation upon judgments or advisory opinions; such minutes, which are to be considered as confidential, shall record only the subject of the debates, the votes taken, the names of those voting for and against a motion, and statements expressly made for insertion in the minutes.

" 7. After the final vote taken on a judgment or advisory opinion, any judge who desires to set forth his individual opinion must do so in accordance with Article 57 of the Statute.

" 8. Subject to a contrary decision by the Court, the procedure laid down in the foregoing paragraphs shall apply to private meetings for deliberation upon any questions other than those mentioned in the first paragraph and relating to cases before the Court.

" 9. The foregoing paragraphs 2, 4, 5 and 6 shall apply to private deliberations by the Court upon any administrative matter."

23.V.34.*

Discussed as Article 31.

Advisory Procedure.

Baron ROLIN-JAEQUEMYNS pointed out that the text of Article 31, as recently adopted by the Court, made mention of advisory opinions. The Court had, however, decided to leave everything concerned with advisory opinions on one side. The text of Article 31 should not, therefore, be regarded as definitive.

The PRESIDENT said that the decision referred to by Baron Rolin-Jaequemyns related only to Chapter II: " Procedure ", and not to Chapter I, which contained Article 31; moreover, even in the text at present in force, that article related both to advisory and contentious procedure.

Baron ROLIN-JAEQUEMYNS, referring to the minutes of 19.V.34 (see pp. 84-85), understood that the Court had decided that no mention was to be made of advisory opinions in any of the articles at present under discussion. At any rate, he was glad that his observation had led to this point being made clear, by eliciting this explanation from the President.

1.VI.34.*

Discussed as Article 31.

The PRESIDENT said that the Court had adopted this article (18.V.34 [1]) in the form in which the Co-ordination Commission had submitted it after a first examination. Now, in paragraph 5 of the text thus adopted, the Co-ordination Commission proposed to add the words " of the Rules of Court " after " Article 2 ", in order to avoid any misunderstanding which might result from the fact that, in paragraph 7, Article 57 " of the Statute " was mentioned.

1.VI.34.*

Discussed as Article 31.

The PRESIDENT asked the members of the Court to refer to the printed text of the existing Article 31 of the Rules. The sixth paragraph was worded as follows, in the French text: " . . . *les procès-verbaux de ces séances se bornent à mentionner l'objet des débats* . . .". The English text said: " . . . such minutes, *which are to be considered as confidential*, shall record . . . ". The words underlined in the English text did not appear in the French version.

He asked the Court to decide either to omit these words in the English or to add corresponding words in the French text.

M. ADATCI thought it would be better to add the words in the French text.

M. FROMAGEOT agreed with M. Adatci. The French text of paragraph 6 of that article might be worded as follows: " *Les procès-verbaux de ces séances*, qui doivent être tenus pour confidentiels. . . ."

The PRESIDENT noted that the Court was in favour of this proposal.

3.IV.35.**

Discussed as Article 31.

M. ANZILOTTI observed that paragraph 8 was not clear; the dividing line between that paragraph and paragraph 1 was not defined.

The PRESIDENT explained that the first paragraph referred to deliberation upon the final decision of a case, whereas paragraph 8 covered any other decisions taken by the Court in regard to a case pending before it.

M. ANZILOTTI thought that the word " decision " in paragraph 1 had a much wider meaning than that indicated by the President.

Jonkheer VAN EYSINGA suggested that it would be possible to re-embody the substance of paragraph 8 in paragraph 1, simply by attributing to the word " decision " the meaning suggested by M. Anzilotti, and paragraph 8 might be deleted.

Baron ROLIN-JAEQUEMYNS thought that, in order to make the meaning clearer, they might add to paragraph 1 the words: " as also upon any question connected therewith ", and delete paragraph 8.

The PRESIDENT observed that that might compel the Court, under paragraph 3, to call upon each judge present at the deliberation to state his opinion together with his reasons, even in regard to a very simple question—that was a difficulty which the Drafting Committee had sought to avoid.

Jonkheer VAN EYSINGA asked why the expression " subject to a contrary decision by the Court " [1] appeared in paragraph 9 and not in paragraph 8.

The REGISTRAR explained that these words had been deleted from paragraph 8 in consequence of an observation made by M. Fromageot in the Drafting Committee.

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* D 2, A. 3, p. 56.
** *Ibid.*, pp. 141-142.
[1] See above.

* D 2, A. 3, pp. 154-155.
** *Ibid.*, pp. 425-427.
[1] These words appeared in paragraph 8 in the text adopted in 1934. The Drafting Committee subsequently deleted them in paragraph 8 and inserted them in paragraph 9.

M. Fromageot had probably been influenced by the idea —which was in accordance with the explanations given in the Co-ordination Commission's report on the text of the article proposed [1]—that paragraph 1 of Article 31 referred to the deliberation upon cases ready for hearing, whereas paragraph 8 referred to decisions which the Court might have to take in regard to cases in the list, but not yet ready for hearing; that was why M. Fromageot had considered that, in the latter case, it was impossible to deviate from the Court's ordinary procedure.

M. URRUTIA submitted some suggestions for consideration at the second reading.

He thought paragraph 1 of Article 31 might be drafted as follows:

> " 1. The Court shall sit in private to deliberate *and adjudicate* upon any case or upon any advisory opinion."

In paragraph 5, which repeated the terms of the existing Rules, M. Urrutia did not understand the meaning of the expression: " *les conclusions adoptées . . . déterminent la décision de la Cour* " (the decision of the Court shall be based upon the conclusions adopted . . .). In his view, the conclusions constituted the Court's decision. Similarly, M. Urrutia did not understand the meaning of the passage in the English text of this paragraph running: " the decision shall be based upon the conclusions of the majority of the judges ".

In order to make paragraph 8 of Article 31 clearer, Jonkheer VAN EYSINGA suggested the following:

> " The procedure laid down . . . any questions relating to contentious cases or cases for advisory opinion other than those covered by paragraph 1, that is to say to cases not yet ready for hearing."

The PRESIDENT observed that that would result in lengthening the deliberation by making abstentions impossible.

Jonkheer VAN EYSINGA, to overcome this difficulty, proposed that the expression " subject to a contrary decision " should be added to paragraph 8.

M. ANZILOTTI could not accept this last suggestion. A decision in regard to a request for interim measures of protection would come under paragraph 8 of Article 31, and, in his view, the Court could not modify its procedure in connection with questions of that kind.

The REGISTRAR said that paragraph 1 traced its origin to the following proposal of the Second Committee: " The deliberations of the Court, under Article 54 of the Statute, shall take place in private." The terms used by the Second Committee clearly showed that paragraph 1 of Article 31 referred to the deliberation upon a case which was not only ready, but actually had been heard.

The PRESIDENT wondered whether it would not be better to revert to the text adopted by the Court for paragraph 8 on June 1st, 1934; that text covered the same ground and began with the words: " Subject to a contrary decision by the Court [2] ". Personally, he doubted whether the distinction drawn between deliberation on a case which was ready and that on a case which was not ready for hearing was a sound one.

M. ANZILOTTI, in view of the difficulties resulting from the employment of the word " decision " in paragraph 1, suggested the following text for this paragraph:

> " The Court shall sit in private to deliberate upon any case or upon any advisory opinion."

If this text were adopted, paragraph 8 could be deleted.

The PRESIDENT observed that, at the Court's discussions in May 1934 (*cf.* minutes of May 17th, 1934 [1]), this first paragraph had always been regarded as relating only to the final decision of the Court upon a case.

The President proposed that the Court should adopt Article 31 as submitted by the Drafting Committee, reserving paragraph 8.

M. SCHÜCKING observed that paragraph 8 was subsidiary to paragraph 1.

Baron ROLIN-JAEQUEMYNS was anxious that paragraph 3 of Article 31 should also be reserved.

That being so, the PRESIDENT proposed that the discussion of Article 31 should be postponed to a meeting at which M. Fromageot could be present.

10.IV.35.*

Discussed as Article 31.

M. FROMAGEOT explained that the Drafting Committee, to whom Article 31 had been referred, proposed to omit paragraph 8 of the Drafting Committee's original text and to alter paragraph 1 to read as follows:

> " 1. The Court shall sit in private to deliberate upon disputes which are submitted to it and upon advisory opinions which it is asked to give."

The first paragraph, as thus worded, would cover deliberations on all questions relating to contentious and advisory cases, and not only deliberations on the judgments and opinions themselves. The paragraph which had been intended to deal with deliberations on questions not exclusively concerned with judgments and advisory opinions would thus become superfluous.

He added that, in the paragraph which had become paragraph 8 (the former paragraph 9), the Drafting Committee proposed to omit the reference to paragraph 6; for, in practice, detailed minutes of administrative meetings were always drawn up.

M. URRUTIA suggested that the first line of paragraph 1 should be made to read: " the Court shall . . . deliberate *and decide* [2] upon . . .". Nowhere in any of the articles framed by the Drafting Committee was it laid down that the judgment was drawn up after deliberation by the full Court, as was prescribed in Article 86 in the case of advisory opinions; there was a gap in the Rules in regard to that point.

The PRESIDENT explained that, in the case of judgments, this rule followed from the terms of the Statute; and the principle adopted had been not to repeat anything in the Rules which was already said in the Statute.

The REGISTRAR said that the rule in question was to be found in Article 25 of the Statute, which laid down that " the full Court shall sit except when it is expressly provided otherwise ". The provision that now appeared in the first paragraph of Article 86 of the draft was the result of a long discussion which took place in 1922 [3] on the question whether that article also applied to advisory procedure.

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[1] D 2, A. 3, p. 865, column 2.
[2] See pp. 75-76, meeting of 18.V.34.

* D 2, A. 3, pp. 454-455 and 459.
[1] P. 74.
[2] See above (meeting of 3.IV.35).
[3] See D 2, pp. 98, 162 *et sqq.*, 169 *et sqq.* and 219.

M. URRUTIA said he would not press his proposal.

The further discussion of Article 31 was postponed until the text proposed by the Drafting Committee should have been distributed.

(Same meeting.)

Discussed as Article 31. — First Reading.

The PRESIDENT asked the Court to vote on the new text submitted by the Drafting Committee for Article 31 (see above).

The Court unanimously adopted this text.

The PRESIDENT put to the vote the proposal to omit paragraph 8 of Article 31.

The Court unanimously approved of the omission of that paragraph.

The PRESIDENT noted that the Court approved of the omission of the reference to paragraph 6 in paragraph 8 (former paragraph 9).

He noted that Article 31 was adopted, as thus amended, in first reading with the following text:

"1. The Court shall sit in private to deliberate upon disputes which are submitted to it and upon Advisory Opinions which it is asked to give.

"2. During the deliberations referred to in the preceding paragraph, only persons authorised to take part therein and the Registrar, or, in his absence, the Deputy-Registrar, shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, based on exceptional circumstances.

"3. Every judge who is present at the deliberations shall state his opinion together with the reasons on which it is based.

"4. Any judge may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. A request to this effect shall be complied with.

"5. The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the judges voting in an order inverse to the order of precedence established by Article 2 of the present Rules.

"6. No detailed minutes shall be prepared of the private meetings of the Court for deliberation upon judgments or advisory opinions; the minutes of these meetings are to be considered as confidential and shall record only the subject of the debates, the votes taken, the names of those voting for and against a motion and statements expressly made for insertion in the minutes.

"7. After the final vote taken on a judgment or advisory opinion, any judge who desires to set forth his individual opinion must do so in accordance with Article 57 of the Statute.

"8. Unless otherwise decided by the Court, paragraphs 2, 4 and 5 of this article shall apply to private deliberations by the Court upon any administrative matter."

17.II.36.*

Discussed as Article 31. — Second Reading.

M. ANZILOTTI asked whether the heading "Deliberations" (before Article 31) had been omitted, as might appear from the text circulated by the President [1].

The PRESIDENT said that that was so: the word "*délibéré*" in the French text was, it seemed, a technical term, applying rather to discussions between the judges in regard to a judgment or an opinion, and would hardly be in place in this connection. As a consequence, the title at the head of the (new) Article 25 "Sessions" had also been deleted.

Jonkheer VAN EYSINGA pointed out that the omission of the last-mentioned heading would have been necessary in any case, as a result of the coming into force of the revised Statute.

The PRESIDENT observed that, in connection with Article 31 of the Rules, the Court would have to examine a question raised by the Vice-President and by M. Urrutia in 1935, [1] which had been reserved, [2] at that time, for the second reading: the question was the possible introduction, in the first paragraph of that article, of the expression: "The Court shall sit in private to deliberate, *and to decide* upon disputes . . .", in order to show that the adoption of a draft judgment at a private sitting was to be regarded as actually fixing the decision of the Court.

M. URRUTIA pointed out that, according to Article 55 of the Statute, the Court's decisions were taken by a majority of the judges present; according to Article 56, the judgment had to contain the names of the judges who had taken part in the decision; Article 57 laid down that individual opinions might be subjoined to the judgments; according to Article 58, the judgment, signed by the President and the Registrar, had to be read in open Court, due notice having been given to the Agents. It followed, in M. Urrutia's opinion, that, according to the Statute, the judgment already existed, as such, before it was read in open Court; in his opinion, the reading in open Court was a special formality, designed to convey the judgment officially to the knowledge of the parties to the suit. In the same way, Article 31 of the Rules laid down that the Court took its decision when sitting in private; its publication did not take place till afterwards. Similarly, in the clauses referring to advisory opinions, it was clear that the opinion was adopted by the Court sitting in private, and that it was afterwards read in open Court.

In practice, however, the Court had considered that a judgment was made at the public sitting at which it was read, and that, in consequence, the composition of the majority depended upon the number of judges who were present at that sitting. It might accordingly happen, if some of the judges who had voted on the judgment were absent from the public sitting, that the sense of the majority would shift.

For his part, M. Urrutia would like to see it laid down that the judgment was made at the meeting of the Court at which the decision was taken, and that the public sitting for the reading of the judgment was only a formality. In that case, provided that there was a quorum, it would not be necessary that the same judges who took part in the voting should be on the Bench when the judgment was read. This method would, incidentally, put an end to the practice according to which, if a judge who had taken part in the deliberations was not present when the judgment was read in open Court, his vote was not taken into consideration.

In order to attain this result, it would be necessary to change the wording of Article 31 in the manner that M. Urrutia had suggested; it would also be necessary to make some slight changes in the form of the judgments.

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* D 2, A. 3, pp. 566-573.

[1] *Ibid.*, Annex 1, p. 974.

[1] See p. 315 (meeting of 22.II.35), p. 350 (meeting of 7.III.35), pp. 76-77 (meeting of 3.IV.35).

[2] P. 318 (meeting of 23.II.35).

M. Urrutia added that judgments made in the manner that he had suggested would not be secret judgments, but simply judgments which, until they were published, would not yet be binding upon the parties.

M. GUERRERO, Vice-President, recalled that last year [1] he had instanced the possibility of a final vote on the judgment having been adopted, when the Court was sitting in private, by a very small majority, and then, owing to the alteration of a vote, or simply to a judge's absence through ill-health, of the judgment having to be reversed at the time of the public sitting. This would lead to the consequence, *inter alia*, that the dissenting opinions would have to be submitted, not by the judges who were in the minority when the vote was taken by the Court sitting in private, but by the other judges. It was necessary to ensure that such a situation could not arise.

On the other hand, the system proposed by M. Urrutia would reverse the practice which had been followed during the fifteen years that the Court had been at work, a practice which was moreover in line with that followed by most national courts. The best solution would therefore appear to be to give the judgment the date of its reading in open Court, but to specify in the judgment itself the date on which the final decision was taken by the Court sitting in private and the names of the judges who took part in the vote. It would indeed be unjust to disregard the vote of a judge who had taken part in the whole of the deliberations and in the final voting, merely because he had not been able to attend the public sitting for the reading of the judgment. Of course, there must be a quorum of judges on that occasion, for if not there would be no sitting.

M. NEGULESCO could not agree to the system proposed by M. Urrutia, for its effect would really be that the Court's judgment was delivered at the meeting at which the decision was taken, that the reading in open Court was a mere formality, and that the Court might be differently composed when the judgment was read. Such a system, in spite of M. Urrutia's valuable arguments, would be in conflict both with the practice of the Court and with the provisions of the Statute. When Article 58 of the Statute laid down that the judgment must be read in open Court, it made publicity the essential condition of the existence of the judgment. Until the judgment had been read, the Court was held to be engaged in deliberating, so that every judge was free to change his opinion, if he found that he had been mistaken. Otherwise, if an opposite system were adopted, the judges would have their hands tied after the decision had been taken by the Court sitting in private, and they would be forced to announce to the parties in open Court findings which they knew to be erroneous. Such a system would compel judges to give judgment against their conscientious convictions.

If the judgment came into being as from the moment when the Court took its decision sitting in private, it must then become binding upon the parties, in accordance with Article 59 of the Statute; the result would be to admit the existence of secret judgments, but that would be contrary to the spirit and letter of the Statute. It could not be held that the judgment existed for the judges, but that it did not exist for the parties, for such a system could find no justification in any clause of the Court's Statute.

The new clause in Article 67 of the Statute, [2] prescribing that the Court's opinions were to be read in open Court, was an extension of the principle of publicity of judgments to advisory opinions, and a recognition of the principle that the Court could not deliver secret opinions.

The system advocated by M. Urrutia might well be suitable in arbitration cases, but it was not compatible with the fundamental principles of a Court of Justice. The Court, being a judicial institution, could not deliver secret judgments or opinions, for publicity was an essential condition of its existence.

For the same reasons, M. Negulesco could not agree with the opinion of the Vice-President, M. Guerrero, whose system was closely akin to that of M. Urrutia.

M. URRUTIA said he was not making any proposal, but he thought that in any case the revised Rules would have to lay down uniform provisions for judgments and opinions. In his view, the clauses relating to advisory opinions were in line with the ideas which he had just stated. Thus, according to Article 86 of the revised Rules adopted in first reading [1], the authorities mentioned in that article were summoned to attend at the giving of the opinion — *i.e.* at the reading of an opinion which was already in existence.

M. FROMAGEOT, desiring to meet the Vice-President's opinion, suggested the following solution: the terms of the judgment would be definitively fixed, so far as the Court was concerned, in private session, following the deliberations, and in accordance with the conclusions reached by the majority of the judges; but, so far as the parties were concerned, this decision would not exist until it had been read in open Court. If that were accepted, it would be quite possible to make Article 31 of the Rules read: " The Court shall sit in private to deliberate and decide. . . ."

On the other hand, in paragraph 5 of Article 31 of the Rules, instead of saying " the decision of the Court *shall be based upon* the conclusions . . .", it might be said ". . . *is constituted by* the conclusions ".

This plan would obviate the objection which was pointed out by M. Guerrero, and which was a very real one.

M. GUERRERO, Vice-President, thought that, if the judgment were regarded as definitive from the time at which the Court took its final vote at its private sitting, all the difficulties would be eliminated. For example, if nine judges had taken part in the voting, and if one of them were unable to attend the public sitting for the reading of the judgment, he might, on that occasion, be replaced by another judge who had not taken part in the deliberations; the name of the latter judge would not, of course, appear in the list of judges present at the head of the judgment; the list would contain, instead, the name of the judge who had voted but had not been able to be present at the sitting. The judgment might bear the date either of the public sitting or of the final vote taken by the Court, sitting in private.

M. ANZILOTTI could not agree to the intermediate proposal of the Vice-President, which M. Fromageot had supported, because it seemed scarcely in line with the principles of the Statute.

To begin with, M. Anzilotti considered that the Court should discontinue the present practice of stating that a judge had taken part in the deliberations but had been prevented from attending the public sitting at which the judgment was read, for there was no foundation for such a practice. That was, however, a separate question.

[1] See p. 315 (meeting of 22.II.35) and p. 350 (meeting of 7.III.35).
[2] *Cf.* Article 74, paragraph 1, of the 1931 Rules (revised Statute, Article 67).

[1] *Cf.* Article 74, paragraph 1, of the 1931 Rules (Article 67 of the revised Statute).

In regard to the real problem, the idea of the Vice-President and M. Fromageot seemed to be that, so far as the Court was concerned, the judgment came into being at the moment when it was finally accepted at the Court's private meeting, so that the Court was then bound by it, and could no longer alter it. His own view, on the other hand, was that it was important to preserve the liberty of the Court to reconsider its findings, up to the very last moment, if it considered that an error had been made. It would be an almost intolerable position for the judges if they found that a mistake had been made, and that they were precluded from correcting it, although the judgment had not yet become binding upon the parties.

If the question were regarded in the light of the clauses relating to individual opinions, it would be seen that the practice of dissenting opinions could not be reconciled with a system which rendered the judgment binding as from the time when the decision was taken in private session. Having regard to the provisions of the Statute, the only practical rule, in M. Anzilotti's opinion, would be that the judgment should not become binding, even upon the Court, until it had been read at the public sitting.

Baron ROLIN-JAEQUEMYNS thought that M. Anzilotti's scruples were fully justified: the Court, he said, was not bound until the last moment by a decision that it had taken in private. It was only bound by the judgment which it delivered in public. That condition was essential for the Court's judgments.

M. FROMAGEOT having asked what solution could be found, under that system, for the difficulty caused by the possible absence of a judge, if his absence shifted the majority, Baron ROLIN-JAEQUEMYNS answered that, if a judgment were adopted by so small a majority that the absence of a judge might alter it, the Court would be well advised to resume its deliberations.

Jonkheer VAN EYSINGA said that it was beyond doubt that, in this question, the Statute maintained the rule of ordinary law and intended that the judgment should be read in open Court. Moreover, in Article 67 of the revised Statute (". . . The Court shall deliver its advisory opinions in open Court . . ."), it had been made clear that, in this respect, advisory opinions would be governed by the same rule as judgments. But the fact that the judges were free till the very last moment—even after the vote on the second reading—to modify their opinion, did not mean that it was expedient that they should do so. For that reason, in the interests of the efficient working of the Court, the interval between the final vote at the private meeting and the reading of the judgment in open Court must be reduced as much as possible. That indeed was what the Court endeavoured to do. As regards the embarrassing contingencies which had been suggested, he thought that the best course would be to leave their solution to the wisdom of the Court when a case actually arose.

Count ROSTWOROWSKI supported the arguments used by M. Fromageot, M. Urrutia and the Vice-President. The present practice was based on the fiction that the final vote was taken at the public sitting, which was endowed with an importance that it did not possess.

If the Court fashioned its Rules in accordance with realities, it would always be the last private meeting devoted to a given case which would be regarded as decisive. That idea was expressed in paragraph 5 of Article 31, which was the essential provision: it was at the "final discussion" that the Court's decision was taken. It was the final discussion which revealed the definitive position of all the judges; if, after the second reading, a member of the Court should discover that he had made a mistake, it would be possible to hold a third reading, and so on. There seemed no reason why the reading in open Court should not be postponed.

M. GUERRERO, Vice-President, replying to M. Anzilotti and Baron Rolin-Jaequemyns, said that if, after the voting at the private sitting, a judge found that he had made a mistake, there was still time for him to inform the President of this circumstance and to ask for a private meeting to be convened and for a new vote to be taken. It would only be after the latter vote that the judgment would be definitively fixed.

The PRESIDENT asked M. Urrutia what was the aim of the alteration he proposed. Was it intended to enable a judge who had taken part in the final vote to leave the Bench before the judgment was read?

M. URRUTIA explained that he had raised the point solely as a question of principle. He desired that the Rules should conform to what, in his view, was laid down in the Statute.

Whatever conclusion the Court might come to on this point, he was glad that he had raised it because, even if his ideas were not adopted, there would be a record of them in the minutes, in case the Court, at some subsequent date, should wish to change its attitude.

M. ANZILOTTI suggested that, as MM. Guerrero and Urrutia were disposed to admit that the Court might reconsider a judgment which had been adopted in second reading, it seemed to be agreed that a judgment thus adopted was not yet definitive.

M. FROMAGEOT thought that the question to be settled was really at what time the majority which adopted the judgment was constituted: whether at the private meeting or at the public sitting. His own view was that the majority was constituted at the private meeting. The question of the moment at which the discussion must be regarded as final was entirely different; that was a question of fact.

M. ANZILOTTI pointed out that, if this view were accepted, it could not be known whether the decision was or was not final until the public sitting. It was, consequently, the majority at the public sitting which was decisive.

MM. FROMAGEOT and URRUTIA observed that no decision was ever taken at the public sitting, since there was no voting on that occasion.

M. ANZILOTTI said he could understand the view—while not accepting it—that the judgment became definitive after the second reading. But he could not understand the contention that it was the final discussion that was decisive, though the question when that discussion took place was undecided.

The PRESIDENT agreed with Count Rostworowski that any fictitious element should be eliminated. Nevertheless, it was rather difficult, in view of the terms of the Statute, to get rid of it altogether, seeing that Article 54 of that instrument obliged the judges to withdraw to consider their judgment in private, when the hearing was closed. For, according to the Statute, and apart from all theoretical considerations, it was in fact at the end of the private deliberations that the judges adopted their decision. On the other hand, the Statute laid down that the decision had to be delivered in public, and it was at the moment of its delivery that the obligations of the parties came into being. It was therefore inevitable that there should be an interval

of time between the adoption of the final decision at the private sitting and the delivery of the judgment in open Court.

However, since M. Urrutia had only raised the point as a question of principle, the President thought that the Court could obviate any difficulty by means of its practice: it would suffice to hold a very short meeting, just before the judges went into the Hall of Justice for the delivery of the judgment; at this meeting the President would take a vote on the text already printed. The judgment could be signed by the President after that vote, which would constitute the final adoption of the judgment. This course seemed preferable to a modification of the Rules.

M. GUERRERO, Vice-President, feared that the President's suggestion would not completely solve the difficulty, for it did not abolish the interval between, on the one hand, the private meeting at which the Court, in fact, took the decision that brought the judgment into existence and fixed the date of the public sitting, and, on the other hand, the public sitting itself. But perhaps it would suffice to take some steps to put an end to the anomaly by which a judge who had taken part in the whole proceedings and in the final decision had to be told that his vote would be disregarded because he had not been able to attend the delivery of the judgment.

The REGISTRAR observed that the length of time between the final decision and the public sitting for the delivery of judgment was governed by two circumstances: the printing of the judgment and the necessity for summoning the agents.

In the Registrar's view, there were three ways of reducing this interval—which appeared to be the chief cause of the difficulty—to very small dimensions. The first method would be to read in public, not the printed text, but the last roneographed text of the judgment. If this method were adopted, the final discussion might be held in the morning, and the judgment could be read in the afternoon of the same day. The second method would be to hold the final discussion on the definitive proof sheets of the printed edition of the judgment, after which it would only remain to print off additional copies. In this way, the judgment might be adopted at an afternoon meeting and read in open Court on the following morning. A third practical course would be on the lines suggested by the President, namely, to hold a private meeting for the final vote immediately before the public sitting for the delivery of the judgment; but, in the Registrar's view, it would be necessary to specify in the Rules (Article 31, paragraph 5) that the final discussion would take place at a private meeting which would precede the public sitting convened in pursuance of Article 58 of the Statute.

The Registrar said he had purposely not touched on the presence of the agents, because they were bound to hold themselves at the Court's disposal, and could, in consequence, always be summoned at sufficient notice to ensure that they would be present in Court at the appointed time.

M. FROMAGEOT, referring to the President's suggestion, remarked that, if the Court met in private immediately before the public sitting, the private meeting would constitute the conclusion of the deliberations.

Count ROSTWOROWSKI observed that the Court had decided that its orders should bear the date of the Court's decision, and not that of the day on which it was read in open Court. [1] True, it was announced that the order would be published later on, but the President had immediately informed the agents of its operative portion.

M. ANZILOTTI observed that the agents were thus already acquainted with the purport of the order, whereas, with the method proposed by M. Urrutia for judgments, there would be a period during which the judgment would be definitive, but would not be known to the parties; he also emphasised the difference in the respective importance of judgments and of orders.

M. URRUTIA thought it should be possible to remedy this difficulty by adopting his proposal to word the first sentence of Article 31: " The Court shall sit in private to deliberate *and decide* . . . ", and by laying down, in the article concerning judgments, that the date of a judgment was that of the Court's final decision in private session.

The PRESIDENT pointed out, on the other hand, the objections to giving an impression that the Court was adopting a new method, which differed, moreover, from that followed by national Courts of justice.

M. URRUTIA asked the President to put to the vote his proposal to word Article 31 as follows: " The Court shall sit in private to deliberate *and decide* . . .".

M. GUERRERO, Vice-President, supported this proposal and considered that the present practice was not in line with Article 54 of the Statute, which laid down that the Court's deliberations were, and remained, secret. For, if it were held that the judgment became definitive at the public sitting for its delivery, that would mean that part of the deliberations took place in open Court—seeing that the final vote was the culminating act of the deliberations.

The PRESIDENT asked the Court to decide upon the following question:

> " Does the Court desire to add the words ' and decide ' after the word ' deliberate ' in the first line of paragraph 1 of Article 31 ? "

Baron ROLIN-JAEQUEMYNS said that he would have voted for this addition if the words " and decide " had been proposed without a commentary. But, as it was, he must vote against it.

M. URRUTIA said he gathered that, generally speaking, his opinion did not appear to be shared by the Court and that he therefore withdrew his proposal.

M. GUERRERO, Vice-President, said he would submit M. Urrutia's proposal on his own behalf.

The PRESIDENT asked the Court to vote on the question which he had just read.

By six votes to four, the Court rejected the proposal.

The PRESIDENT declared that, as no other observation had been presented, paragraph 1 was adopted without alteration.

Article 31, Paragraph 2.

The REGISTRAR pointed out that an alteration must be made in the paragraph as a consequence of the amendment to Article 19 which the Court had adopted.[1] Instead of saying: " and the Registrar, or, in his absence, the Deputy-Registrar ", it would be necessary to say, for instance: " or, as the case may be, the Deputy-Registrar or the official appointed to replace him ".

Jonkheer VAN EYSINGA supported this suggestion.

The PRESIDENT proposed to say: " the Registrar, or, in his absence, his substitute ".

[1] See C 17—II, pp. 11, 12; C. 53, pp. 189, 199; C. 77, p. 167.

[1] See p. 44.

Jonkheer VAN EYSINGA preferred the expression " as the case may be ", which had already been employed in Article 23.

The PRESIDENT noted that the proposal to draft the passage in question: " and the Registrar, or his substitute, as the case may be ", had encountered no objection, and that the paragraph was adopted with this alteration.

Article 31, Paragraph 3.

The PRESIDENT observed that, as no observation had been offered, this paragraph was adopted as it stood.

Article 31, Paragraph 4.

The PRESIDENT declared that paragraph 4 was adopted without amendment.

Article 31, Paragraph 5.

Jonkheer VAN EYSINGA pointed out that in Article 2 the word " préséance " (precedence) had been eliminated.[1]

The PRESIDENT suggested that the words " of precedence " were superfluous in this case, and might be simply omitted.

As there was no opposition, the PRESIDENT declared that the words " of precedence " were omitted, and that paragraph 5 was adopted as thus amended.

Article 31, Paragraph 6.

The PRESIDENT declared that paragraph 6 was adopted.

Article 31, Paragraph 7.

The PRESIDENT declared that, as no observation had been offered, paragraph 7 was adopted.

Article 31, Paragraph 8.

The PRESIDENT declared that paragraph 8 was adopted.

In consequence, the whole of Article 31, amended as mentioned above, was adopted in second reading.

4.III.36.

See under Article 84, p. 349, for reference to Article 31 (Article 30 of Rules of 11.III.36) during discussion of Article 84.

11.III.36.*

Final Adoption as Article 30.

There were no changes either in the French or the English texts of paragraph 1.

In the second paragraph of the French text, the Drafting Committee proposed at the end of the paragraph to delete the words " *motivée par des circonstances exceptionnelles* " (based on exceptional circumstances). The Committee thought that this phrase added nothing and that the Court should not unnecessarily tie its hands. The Committee also thought that the words " *le cas échéant* " (as the case may be), in the same paragraph, were superfluous, and proposed their deletion.

This was agreed to.

In paragraph 3, the Committee proposed no change.

In paragraph 4, it suggested no change in the French, but in the English text proposed to say " Effect shall be given to any such request ", instead of " A request to this effect shall be complied with ". The former wording was nearer to the French text.

This was agreed to.

There were no changes in paragraphs 5, 6 and 7.

Article 30, as a whole, was finally *adopted*, paragraphs 2 and 4 being amended as indicated above.

ARTICLE 31 *(Article 32, old Rules).*

RULES OF PROCEDURE PROPOSED BY THE PARTIES TO A CASE

19.V.34.*

Discussed as Article 32.

The PRESIDENT invited the Court to discuss Article 32, as given in the Co-ordination Commission's report, in the following form:

> " The Court, or, if it is not sitting, the President, may apply the rules contained in this chapter, with such modifications as they may see fit, having regard to the particular circumstances of each case, and provided that the said modifications are jointly proposed by the parties or interested Governments."

M. URRUTIA suggested that, instead of saying: ". . . the President may apply . . .", the text should read: ". . . the President shall apply . . ."; for, in this case, the President was bound to apply the rules in question.

Count ROSTWOROWSKI thought that the text of this article sought to express two conflicting notions. On the one hand, it laid down that the Rules of Court had to be applied; on the other hand, it authorised the President, or the Court, to modify them. The text might perhaps run: " The Court, or, if it is not sitting, the President, may, in applying the rules contained in this chapter . . ."

Advisory Procedure.

M. ANZILOTTI said that, on coming to Article 32, they found themselves, for the first time, in presence of a text which definitely attempted to cover both contentious and advisory procedure. Would it not be better, in order to proceed more rapidly, to put this attempt on one side, for the time being, and to consider the text only in so far as it was concerned with contentious procedure; it would still be open to them later on, when they came to discuss advisory procedure, to see what steps were needed in order to regulate it: for he regarded it as settled that the Court would have to deal with advisory procedure. The question whether it should be dealt with by provisions covering both kinds of procedure, or by separate provisions for each kind, was a matter that had better be reserved. In regard to that point, M. Anzilotti observed that the Statute had not dealt with advisory procedure, and that its terms were adapted only to contentious procedure. The adoption in the Rules of a terminology not in harmony with the Statute might give rise to serious difficulties of interpretation.

Turning to another aspect of the question, M. Anzilotti observed that Article 32, in the form which the Co-ordination Commission had given it, differed from the existing text of the article owing to the introduction of words

[1] In the French text. See p. 7

* D 2, A. 3, pp. 35-41.

* D 2, A. 3, pp. 727-728.

providing that no modification could be made except by agreement between the parties. He considered that the present text of Article 32 was more flexible, for it seemed to allow the possibility of modifications being made by the Court, even if there were no agreement between the parties. Was it wise, he asked, to tie the Court's hands in this way ? Moreover, in Article 33, paragraph 3, of the Co-ordination Commission's draft, it was only stipulated that the Court should take account *so far as possible* of any agreement between the parties.

The PRESIDENT said it was quite true that the text proposed by the Co-ordination Commission covered both contentious and advisory procedure. It was also true that the present Statute did not deal with advisory procedure. But it was true, at the same time, that the Co-ordination Commission, in preparing these texts, had not been able to leave the Court's practice out of consideration; and, beginning with the very first occasion on which a case was submitted for an advisory opinion, the Court had, as a fact, applied the articles of its Rules with a certain elasticity.

M. URRUTIA asked whether the wording of the Rules now in force had led to any difficulties in practice.

The PRESIDENT admitted that the Court had been able to fulfil its duties with the present Rules. Nevertheless, several members of the Court had considered that the gaps in the Rules should be filled; and this was one of the gaps.

M. URRUTIA recognised that this was so, but it seemed to him that, if there was disagreement among the members of the Court as to some of the changes proposed, and if there was no urgent need of a change in regard to the points in question, it would be better to be content with the present text.

M. GUERRERO, Vice-President, pointed out that M. Anzilotti's observation did not only affect Article 32; it touched on a question which would arise repeatedly during the discussion. He agreed with M. Anzilotti that it would perhaps be wiser, in the section of the Rules now under examination, to deal only with contentious procedure, leaving it open to the Court, later on, to elaborate the section devoted to procedure in advisory cases. That course would enable the Court to consider whether there were certain rules applicable to contentious cases which it would be better not to apply in advisory cases.

The PRESIDENT admitted that, in theory, it would be easy to divide the chapter dealing with procedure into two sections, the first of which would apply solely to contentious and the second to advisory cases. But, in practice, that method would necessarily involve a vast amount of repetition.

But there was another consideration: in 1927, the Court had accepted the principle that, when an advisory opinion was asked for on a question relating to an existing dispute, the parties had a right to appoint judges *ad hoc*. The Court had therefore admitted that, from one point of view, an advisory case may be of the same character as a contentious case. The Fourth Committee's report, drawn up in 1933, was very largely governed by that idea.

M. NEGULESCO pointed out that the Fourth Committee had already considered the idea, which M. Anzilotti, the Vice-President and M. Urrutia had just put forward, of having a separate heading, under which advisory opinions would be dealt with. But the Co-ordination Commission had adopted a proposal of the President for the insertion, in some of the clauses relating to contentious procedure, of words indicating that the said clauses should also be applied in advisory procedure. That had been the method adopted in Article 32 of the present draft.

As Rapporteur to the Fourth Committee, M. Negulesco had agreed to this course when the point was discussed in the Co-ordination Commission. In adopting this attitude, he had been influenced by the discussions which took place, in 1926 and 1927, on the proposal that led to the adoption of the clause constituting paragraph 2 of Article 71 of the present Rules, and also on the proposal, put forward in 1926, that an article in the chapter of the Rules dealing with advisory procedure should contain a list of the rules relating to contentious procedure which would be applicable, by analogy, also to advisory procedure.

M. Negulesco added that his attitude on this question was also due to his desire to make it clear to the whole world that, when the Court delivered advisory opinions, it was exercising a judicial function, and that advisory and contentious proceedings were on a equal footing.

The PRESIDENT thought that the members of the Court would find it easier to understand the system proposed if they would refer to Appendix 3 to the Co-ordination Commission's report; there they would find twelve articles which could be applied without difficulty either to contentious or to advisory procedure.[1] The President made a detailed analysis of the articles in question.

M. URRUTIA pointed out that, in the revised Statute, a new chapter headed " Advisory Opinions " had been added. The inference was that it had been intended to separate procedure concerning advisory opinions from contentious procedure. It was no doubt with the same intention that Article 68 had been worded in such a way as to enable the Court to be guided, in regulating advisory procedure, by the clauses relating to ordinary contentious procedure, without compelling it to intermingle the clauses relating to these two categories of procedure.

M. Urrutia further drew attention to the Protocol for the accession of the United States of America to the Court. Was it possible, he asked, for the Court to modify that Protocol, in which some of the articles of the present Rules —*e.g.*, Articles 73 and 74—had been embodied by reference ?

His conclusion was that it would be better, for the time being, to leave on one side questions relating to advisory procedure, and to deal only with contentious procedure. No doubt, that would probably make it necessary to repeat some of the rules; but in his view that was not a serious objection.

Article 32 of the Rules.

Count ROSTWOROWSKI thought it would be possible, without deciding on the question of principle, to satisfy M. Anzilotti's objection to the words " parties or interested Governments ", in Article 32, by replacing them, for example, by the word " agents " .

Turning to another question, he observed that the main object of Article 32 was to confer certain powers on the Court, or, if it was not sitting, on the President.

If one compared the proposed text of Article 32 with the present text, it would be seen that the powers which the existing text conferred upon the Court alone were now to be extended, if the Court was not sitting, to the President also. But the effect of this extension had been to narrow the scope of the clause, which now no longer applied to " rules " but only to " modifications ".

Similarly, in requiring the modifications to be " jointly

[1] See D 2, A. 3, p. 896 (Annex 6).

proposed ", the new draft of Article 32 was less elastic than the existing text.

Personally, Count Rostworowski would prefer that Article 32 should be left as it stood, without the addition extending the President's powers, and without the restriction of the scope of the article which resulted from that extension.

The PRESIDENT did not think there was any difference between the old and the new wording, as regards the importance attached to agreement between the parties. In his view, Article 32, even in its present wording, did not authorise the Court to make any modification, except as a result of proposals submitted jointly by the parties.

M. FROMAGEOT considered that the chief guarantee which the Rules of Court gave to the parties and to the Governments was that their provisions would invariably be applied, unless the parties had agreed to ask for some modification. Accordingly, Article 32 did not appear to him to give the Court power to apply, if it saw fit, any rules other than those set forth in the Rules of Court, unless the parties had asked it to do so.

Nevertheless, the wording of the article was unsatisfactory. He would propose the following new draft:

> " The Rules contained under this heading shall not preclude the adoption by the Court of such special modifications as may be jointly proposed by the parties to the suit, and which the Court may consider appropriate to the case and in the circumstances."

That text would not, he believed, in any way modify the substance of what was said in the existing rule.

On the other hand, the wording he proposed differed from that of the Co-ordination Commission in that it spoke of the " Court ", but not of the " President ". In truth, it appertained to the Court alone to decide whether there was occasion to depart from the provisions that it had laid down in its Rules, for the representatives of the parties were entitled to have a reliable guarantee of the stability of the rules of procedure.

M. SCHÜCKING said he had always understood Article 32 as precluding the Court from modifying the Rules, *proprio motu*; and he was surprised to learn that M. Anzilotti considered that Article 32 entitled the Court to do so. If M. Anzilotti was right, it was, in M. Schücking's view, important to amend the text proposed by the Commission.

M. ANZILOTTI said that a distinction must be drawn between the rules which specially concerned the rights of the parties, and which the Court was, no doubt, not entitled to modify *proprio motu*, and the rules which concerned the purely internal working of the Court—for instance, certain duties of the Registrar.

The PRESIDENT said he must make a most categorical reservation in regard to the distinction which M. Anzilotti had just drawn.

Advisory Procedure.

Recurring to the question of the method to be adopted in regulating advisory procedure, the PRESIDENT pointed out that Jonkheer van Eysinga had given his opinion that, if this matter were to be regulated, it would be necessary for the Court to have separate rules for an advisory opinion on a " question ", and on advisory cases relating to a " dispute ". [1]

If the Court shared that opinion, it would be necessary for the chapter on " Procedure " in the Rules to be arranged not under two headings, but under three, which would, rather complicate matters.

Jonkheer VAN EYSINGA thought that a complicated set of Rules would be preferable to a text which, though simpler, disregarded the need for distinguishing between opinions on a " question " and opinions on a " dispute ". That did not, of course, preclude the possibility of saying, in a given article, that the same rules could be applied to different categories of procedure.

M. URRUTIA observed that there was a substantial change in the heading of the chapter which the Court was now considering. In the existing Rules, the heading was: " Contentious Procedure ", whereas, in the new text, the heading proposed was simply " Procedure ", so as to include both contentious and advisory procedure. The Court might therefore decide the question of principle by making its choice between these two headings.

M. FROMAGEOT thought that the heading in question should be devoted entirely to contentious procedure, and that another heading should be devoted to advisory procedure, as was in fact now done.

Personally, he was in favour of the method for regulating advisory procedure separately, which consisted in inserting a reference in an article to the relevant articles relating to contentious procedure. He had no fears as to the danger of some articles being omitted in such an enumeration, which was held to be the objection to this method. [1]

As regards the distinction that had been drawn between advisory opinions asked for concerning a dispute between two countries—or on the occasion of such a dispute—and those asked for concerning a question of a general nature, M. Fromageot considered that there was no objection to inserting, in the heading relating to advisory opinions, an enumeration of the articles applicable to all advisory cases, and that there should further be a mention of the articles of contentious procedure which were applicable only when the opinion asked for concerned a " dispute ", and which would not be applicable when the opinion was asked for on a " question ".

The text which he had submitted for Article 32 employed the expression " parties to the suit " (" *parties en cause* "), because it assumed that the present heading would be devoted solely to contentious procedure. However, it might be wiser to say " parties concerned ", as was done in the existing article, because cases sometimes arose—*e.g.* in connection with Article 62 of the Statute—where a Government was concerned in the solution of a question without being really a party to the suit.

M. GUERRERO, Vice-President, proposed that the question whether the rules should cover both categories of procedure or whether each category should be dealt with in a separate chapter should be put to the vote. His own view was that there ought to be two separate chapters.

In regard to Jonkheer van Eysinga's distinction between opinions on a " question " and opinions on a " dispute ", he thought that the Court should be allowed all possible latitude.

In regard to Article 32, the texts on which the Court would have to vote were: the text of the Co-ordination Commission, the text of the existing Rules, and also the text proposed by M. Fromageot. He himself was in favour of the last.

[1] See above, and the Co-ordination Commission's report, D 2, A. 3, p. 861.

[1] See D 2, A., pp. 184-198.

The PRESIDENT proposed to word the question which the Court would vote upon as follows:

> " Does the Court desire to maintain the system of regulating contentious and advisory cases under different headings ? "

By eleven votes to one, the Court answered the question in the affirmative.

Article 32 of the Rules.

The PRESIDENT accordingly invited the Court to proceed to examine Article 32 as drafted by the Co-ordination Commission, save that the words " parties or interested Governments " were to be replaced by " parties concerned "; this change followed from the vote just taken. He also drew attention to M. Fromageot's draft, which was as follows:

> " The rules contained under this heading shall not preclude the adoption by the Court of modifications which may be jointly proposed by the parties concerned, and which the Court considers appropriate to the case and in the circumstances."

M. ANZILOTTI asked whether M. Fromageot's draft precluded the adoption of fresh rules. He pointed out that rules of procedure might be proposed in a special agreement which were not modifications of the existing rules but special rules for the particular case.

M. FROMAGEOT meant the word " modifications " to cover such rules.

M. ANZILOTTI raised the question whether the same would hold good with regard, for instance, to the rules relating to an *appel incident*, a subject not dealt with in the Rules. Appeal, revision and cassation should likewise be covered. Nothing should be left out.

M. FROMAGEOT thought that the wording of the text he had proposed covered the whole matter. Nevertheless, he would be prepared to modify his draft as follows:

> ". . . not preclude the adoption by the Court of special modifications or additions . . .".

The REGISTRAR referred to certain points in the history of Article 32 which bore upon the discussion which had just taken place:

In 1922, the word " rules " had been adopted because the intention had been to make it as clear as possible that the parties were not to feel that they were precluded from applying to the Court because they wished to lay down in a special agreement certain rules of procedure differing from the rules embodied in the Rules of Court.

Again, on the same occasion, a proposal that the article should also cover modifications made *proprio motu* by the Court was rejected. Thus the scope of the article was limited to the approval by the Court of proposals made by the parties.

Lastly, another proposal to limit the scope of the article to " directory " rules *(règles " dispositives ")* had been likewise rejected. Accordingly, the intention had been to cover all rules of procedure contained in the Rules of Court.

M. GUERRERO, Vice-President, presumed that M. Fromageot's draft was to be read as meaning that the Court could adopt or reject any modifications or additions proposed by the parties.

M. FROMAGEOT said that that was so. Referring to the records of the preparation of Article 32, he pointed out that the Rules, save in the case provided for by that Article 32 and subject to amendment, were to be regarded as fixed.

M. ADATCI asked whether M. Fromageot, in the draft proposed by him, preferred the expression " *parties intéressées* " to the expression " *parties en cause* ".

M. FROMAGEOT, referring to the terms of Articles 62 and 63 of the Statute, replied that he did.

M. ADATCI raised the question whether " *parties en cause* " were covered by the terms of M. Fromageot's draft.

M. FROMAGEOT thought that they were *a fortiori*.

The PRESIDENT proposed that the Court should vote on Article 32 in the following form:

> " The Rules contained under this heading shall not preclude the adoption by the Court of such special modifications or additions as may be jointly proposed by the parties concerned and as may be considered by the Court appropriate to the case and in the circumstances."

The Court unanimously adopted this text.

23.V.34.*

Decision concerning Advisory Procedure.

Baron ROLIN-JAEQUEMYNS pointed out that the text of Article 31, as recently adopted by the Court, made mention of advisory opinions. The Court had, however, decided to leave everything concerned with advisory opinions on one side. The text of Article 31 should not, therefore, be regarded as definitive.

The PRESIDENT said that the decision referred to by Baron Rolin-Jaequemyns only related to Chapter II: " Procedure ", and not to Chapter I, which contained Article 31; moreover, even in the text at present in force, that article related both to advisory and contentious procedure.

Baron ROLIN-JAEQUEMYNS, referring to the minutes of 19.V.34 (see top of this page), understood that the Court had decided that no mention was to be made of advisory opinions in any of the articles at present under discussion. At any rate, he was glad that his observation had led to this point being made clear, by eliciting this explanation from the President.

1.VI.34.**

Discussed as Article 32.

> " The Rules contained under this heading shall not preclude the adoption by the Court of such special modifications or additions as may be jointly proposed by the parties concerned and as may be considered by the Court appropriate to the case and in the circumstances."

The PRESIDENT raised the question whether any importance attached to the word " concerned ". The Rules nearly always simply used the word " parties ".

Jonkheer VAN EYSINGA thought that the intention, in using a somewhat more general expression, was also to cover interveners.

M. FROMAGEOT recalled that he had at first submitted a proposal in which the words " *parties en cause* " (parties to the case) appeared; he recognised, however, that the expression " *parties intéressées* " (parties concerned) appeared preferable to the other, for instance, if one imagined the case of a Government which, though not making common cause

* D 2, A. 3, p. 56.
** *Ibid.*, p. 142.

with either party, nevertheless intervened because it considered that it had an interest in the interpretation of a treaty.

M. ADATCI feared that the word " *intéressées* " was somewhat ambiguous.

The PRESIDENT thought that there were objections to allowing a difference to remain between the wording of this article and that of most others, which simply spoke of " *parties* ".

M. ANZILOTTI said that, when reading this article, the possibility of intervention did not occur to the mind. He thought that the expression " parties concerned " was a pleonasm.

The PRESIDENT thought that the word " concerned " should be deleted.

4.IV.35.*

Discussed as Article 32.[1]

A discussion took place concerning the arrangement of the articles of Heading II, Procedure before the Court,[2] in the course of which the character and consequent position of Article 32 was debated. It was suggested (1) that it should be relegated to the end of the heading, as possessing an element of arbitral procedure and (2) that it should be included in a group of articles concerning the " conduct of the case ". The latter proposal was actually adopted, but subsequently doubt having been expressed whether Article 32 would be in its right place in this group, this decision was revoked and the question of the position of Article 32, regarded as a general provision, re-opened and provisionally reserved.

. . . . . .

Article 32. — First Reading.

M. ANZILOTTI observed that some changes might have to be made in the wording of Article 32, according to the position in which it was placed in the Rules; for instance, it was not certain that it should refer to " this heading ".

The PRESIDENT wished to reserve another point which had not been discussed either by the Court or by the Drafting Committee: if Article 32 were placed at the end of Heading II, after the section relating to advisory opinions, the question would arise whether, in the case of advisory opinions, a modification of the procedure on the proposal of the parties would be admissible.

The REGISTRAR explained that the difficulty arose from the fact that, in the existing Rules, Article 32 was placed in a heading entitled " Contentious Procedure ", whereas in the draft it was included in a heading which also covered advisory procedure. This had completely altered the scope of the article, which was now directly—and not merely by analogy and at the discretion of the Court—applicable to advisory opinions.

There being no further observations in regard to Article 32, the PRESIDENT declared that article adopted in first reading, subject to the reservations indicated above.

The text adopted in first reading, but with modifications resulting from the discussions on May 8th, 9th and 10th, 1935 (see hereafter), was as follows:

> " The Rules contained in Sections 1, 2, 3 and 5 of this heading shall not preclude the adoption by the Court of particular modifications or additions proposed jointly by the parties and considered by the Court to be appropriate to the case and in the circumstances."

8.IV.35.*

Discussed as Article 32.

On the submission by the President of a new plan for the Rules taking into account decisions taken (see Explanatory Note, p. VIII), Baron Rolin-Jaequemyns raised a question regarding the position of Article 32.

In reply M. FROMAGEOT explained that, in this plan, Article 32 had been intentionally placed at the beginning of Heading II and separate from any section, because it was to be regarded as a general rule applying to everything dealt with in that heading.

9.IV.35.**

Discussed as Article 32.

A further discussion took place concerning the plan for the arrangement of the Rules[1] in the course of which the President said that it would be well to place the articles relating to judgments under a separate heading, for if they came under Heading II they would come under the operation of Article 32, which provided for the parties proposing agreed modifications in the procedure in a case. It was hardly admissible that suggestions by the parties should be allowed to affect the form and contents of judgments.

M. FROMAGEOT could not see any objection to placing these articles in Heading II, as it was not easy to see what influence in practice the parties could exercise on these articles, which either reproduced provisions of the Statute or laid down rules of an administrative nature.

Jonkheer VAN EYSINGA thought it would be easy to avoid the danger pointed out by the President by altering the position of Article 32.

M. NEGULESCO suggested that, if Articles 82-85 were put in Heading II, Article 32 might be placed at the end under a special heading, whereupon M. FROMAGEOT said that Article 32, owing to its character, must come at the beginning of Heading II.

M. ANZILOTTI suggested that, if Articles 82-85 were put under Heading II, any erroneous impression could be avoided by wording the beginning of Article 32: " The provisions of Sections 1, 2 and 3 of the present Heading. . . ."

In reply to a question, the REGISTRAR said that there were no cases on record in which the parties had submitted suggestions in regard to judgments in pursuance of Article 32.

M. NEGULESCO observed that, in the advisory case concerning Nationality Decrees in Tunis and Morocco, the Council had requested the Court to settle the procedure in agreement with the States concerned.

Having decided that Articles 82-85 should be placed in Heading II and Article 86 relating to Advisory Opinions in Heading III, the Court also decided to add after " the Rules " in the first line of Article 32, the words " of Sections 1, 2 and 3 of the present Heading ".

10.IV.35.

Discussed as Article 32.

A further discussion took place on the arrangement of Heading II of the Rules (see Explanatory Note, p. VII, and,

* D 2, A. 3, pp. 427-430.
[1] For text discussed, see preceding page.
[2] See Explanatory Note, p. VII.

* D 2, A. 3, p. 439.
** *Ibid.*, pp. 451-452.
[1] See Explanatory Note, p. VIII.

for full discussion, D 2, A. 3, pp. 459-461). It was again proposed that Article 32, instead of being placed by itself, apart from the sections, should be put at the beginning of Section I as an introduction to the general rules.

M. FROMAGEOT said that, if Article 32 were placed in Section I, it would no longer possess the general character given it by the plan and which it ought to have.

18.II.36.

(Heading II. — Contentious Procedure.)

Article 32. — Second Reading.

The article was adopted without discussion with the text of the first reading unchanged.

Note. — For references to Article 32 (Article 31 of the Rules of 11.III.36) during the discussion on Article 72, see pp. 308-310 and 312-313 of this volume.

10.III.36.*

(Heading II. — Contentious Procedure.)

Article 31. — Final Adoption.

In Article 31, the PRESIDENT said that the numbers of the sections mentioned therein would now have to be altered (1, 2 and 4, instead of 1, 2, 3 and 5).

Article 31, as thus amended, was finally *adopted*.

ARTICLE 32

(Paragraph 1: new; Paragraph 2: Paragraph 1, sub-paragraph 2, of old Article 35; Paragraph 3: new.)

INSTITUTION OF PROCEEDINGS

22.V.34.*

Discussed as Article 35 (draft).[1]

The PRESIDENT pointed out that the text submitted by the Co-ordination Commission was designed to meet the same purpose as paragraph 1 of the existing article, except that the clauses relating to agents had been transferred to one of the articles already adopted. The article was in the following terms:

"1. When a case is brought before the Court by special agreement, the latter shall specify the subject of the dispute and the names of the parties concerned.

"2. Agreements which may have been concluded between the parties to the dispute in regard to modifications to be proposed jointly by them to the Court under Article (32) of the Rules, and agreements relating either to time-limits or to other questions affecting the procedure in the case, should not be mentioned in the special agreement, but should be jointly communicated to the Court by the agents.

"3. When a case is brought before the Court by an application, the latter shall specify the names of the parties concerned, the subject of the dispute, the provisions relied on in submitting the case to the Court, and the provisions governing the particular matter in issue. The application shall also contain, in addition to a specification of the claim, a succinct statement of the facts. The evidence in support of the claim should not be annexed to the application.

"4. The original of an application shall either be signed by the agent of the party submitting the application and communicated by him to the Court, or else it shall be signed by the diplomatic representative at The Hague and submitted by him to the Court. If the document is signed by the agent, his signature must be authenticated by his Government's diplomatic representative at The Hague, or by the competent authority of the said Government."

M. ANZILOTTI wished to know whether the idea was that this article should only govern procedure before the full Court.

The PRESIDENT pointed out that this article and those that followed it were, in form, applicable only to the full Court. But following these articles came a provision that they were also to apply to procedure before the Special Chambers.

M. URRUTIA observed that paragraph 2 contained an innovation in that it stated that the special agreement must contain nothing concerning the procedure in a case and that agreements concerning either time-limits, or other questions of procedure, must be jointly communicated by the agents to the Court, separately from the special agreement.

M. Urrutia did not altogether approve of this innovation; and he also raised the question what would happen if, notwithstanding this rule, States were to deal in the special agreement with a question concerning procedure.

23.V.34.**

Discussed as Article 35 (text proposed by the Co-ordination Commission).

The PRESIDENT, recalling that the discussion of Nos. 1 and 2 of Article 35 had been begun on the previous day, called on M. Schücking, who wished to speak.

M. SCHÜCKING said in the first place that he had been surprised to see that paragraph 1 was simply an extract from Article 40 of the Statute.

With regard to paragraph 2, M. Schücking felt the same hesitations as had been expressed by M. Urrutia on the previous day. Of course, it might be well to separate the special rules relating to procedure from the provisions embodied in the special agreement. But he was not sure that they could oblige Governments always to preserve this distinction and always to formulate rules of procedure in a separate document.

M. Urrutia had already indicated that it might be to the parties' interest to treat rules concerning the procedure as an inseparable part of the special agreement. Accordingly, they might fail to comply with the rule contained in paragraph 2, and the question therefore arose

* D 2, A. 3, pp. 54-55.
[1] See D 2, A. 3, p. 868.

* D 2, A. 3, p. 728.
** *Ibid.*, pp. 64-66.

whether provisions concerning procedure contained in the special agreement itself would be legally inoperative.

Perhaps, however, the answer to this question was supplied by the fact that the conditional mood had been used in the sentence to which he referred.

The PRESIDENT, explaining the origin of the first two paragraphs of Article 35, showed that the first paragraph simply led up to the negative rule contained in paragraph 2.

With regard to the latter paragraph, he recalled that there were some questions in regard to which the Court must retain the last word so as to be able, for instance, to have due regard to the exigencies of its work as a whole. Moreover, special agreements often assumed the form of a treaty ratified by Parliament: it would not be proper for the Court to disregard a solemn instrument of this kind. This had suggested the idea of indicating certain questions which, preferably, should not be dealt with in the special agreement.

M. FROMAGEOT was inclined to propose the deletion of paragraph 2, first because he did not thoroughly comprehend a rule indicating what a particular document of procedure should not contain.

But there was also a more substantial reason. The drawing up of a special agreement was a most difficult task, and often it was only by making material concessions that the matter was brought to a successful conclusion. They must as far as possible avoid interfering with the agreement thus concluded. And understandings reached during the drafting of the special agreement, for example, with regard to certain time-limits, were an essential part of the special agreement. They must not therefore declare beforehand that the Court could not accept the agreement of the parties on a particular point, for it might be thanks to this very agreement that the parties had been enabled to sign their special agreement.

On the contrary, everything must be done to assist Governments in the drawing up of their special agreements: the Court's rights would remain intact, since the parties would be proposing, not absolutely fixing, the time-limits.

Summarising, M. Fromageot considered that the Rule embodied in paragraph 2 of the proposed Article 35 was open to many practical and political objections.

M. ANZILOTTI supported what M. Fromageot had said regarding paragraph 2.

Moreover, paragraph 1 of the proposed text surprised him. Was it conceivable that a special agreement would not indicate the parties concerned and the subject of the dispute ?

Baron ROLIN-JAEQUEMYNS wished for enlightenment on one point in paragraph 2. Did the words " Agreements . . . should not be mentioned in the special agreements . . ." mean that such agreements need not be mentioned, or that they absolutely must not be mentioned in the special agreement ? He thought it would be well to say that clauses of the kind in question need not be included in the special agreement. But the expression " should not " did not seem a very happy way of expressing this.

The PRESIDENT, observing that some members of the Court had proposed the deletion of paragraph 2 of Article 35, took a vote on this proposal.

The proposal was adopted by ten votes to two.

The PRESIDENT had already explained that the two paragraphs which had just been discussed were to be read in conjunction. Accordingly, he considered that the deletion of paragraph 2 of Article 35 involved that of paragraph 1 also.[1]

The Court agreed.

Article 35, Paragraph 3.[2]

The PRESIDENT recalled that this text was based partly on the present Article 35 of the Rules and partly on a proposal of M. Fromageot.[3]

M. FROMAGEOT explained his proposal, which in substance was much the same as that of the Co-ordination Commission, from which it differed mainly in form. With regard to the word " *ampliatif* " in his proposal, which had given rise to some misgivings, M. Fromageot had no objection to its deletion. M. Fromageot explained that what he had meant to bring out was the special character of the application compared with that of the Case, as revealed by the preparatory deliberations on the existing Statute and Rules. The application was an act which a Government must be able to undertake rapidly, in order to bring the matter speedily before the Court, and thus to give effect to its intention of obtaining a judicial settlement of the dispute. Then followed the Case, which went into all the necessary details, and which constituted the main element of the claim.

In M. Fromageot's view, this idea was not sufficiently brought out in the text proposed by the Co-ordination Commission.

M. SCHÜCKING had been under the impression that the Commission had meant to extend the scope of the application.

According to Article 40 of the Statute, the application need only state the subject of the dispute and indicate the parties concerned. In the existing Rules, two further elements were provided for: an indication of the claim and a succinct statement of the facts.

It might be maintained that this addition was justified by the terms of the Statute. For the Statute laid down that the subject of the dispute was to be indicated, and this might be held to cover a succinct statement of the facts, and likewise a definite claim: since it might be difficult to explain the subject of the dispute without referring to the facts underlying it, and a claim formulated by one party against the other was an essential element in a dispute.

It was now proposed to add two further elements: the provisions relied upon in submitting the case—*i.e.* the provisions conferring jurisdiction upon the Court; and the provisions governing the particular case in issue. Was this covered by the terms of the Statute ?

Apart from the question whether it was possible to keep on adding, by way of the Rules, to the matters to be covered by the application, M. Schücking pointed out, with regard to the point last mentioned, that there were many cases in which the claimant relied on generally accepted international law, and not on definite provisions governing the particular matter in issue.

Lastly, M. Schücking did not see the necessity of forbidding parties from immediately submitting, in the application, evidence already in their hands; moreover, the applicant might have a legitimate interest in so doing.

M. Schücking finally raised the question what the consequences would be if an application did not fulfil one of the requirements laid down by the Rules only and not by the Statute.

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[1] A new text of paragraph 1 was adopted subsequently; see meeting of 31.V.34, p. 95.

[2] For text, see preceding page, meeting of 22.V.34.

[3] See D 2, A. 3, p. 913.

24.V.34.*

Discussed as Article 35 (draft).

Paragraph 3.

The PRESIDENT opened the discussion on paragraphs 3 and 4 of Article 35, as proposed by the Co-ordination Commission.

As had been already mentioned, in the case of paragraph 3, the Court had to consider, in addition to the text submitted by the Co-ordination Commission, a proposal by M. Fromageot. The second sentence of that proposal was worded as follows: " a reference to the contractual clause in virtue of which the application is submitted ". It had seemed to the Co-ordination Commission that those words covered two different things: the contractual clause which entitled a State to sue another State before the Court; and the contractual clauses which were relied on in the action. The Commission thought that those two points had better be kept distinct; it therefore proposed that the text should read: " The provisions on which it relies in submitting the case to the Court, and the provisions governing the case. . ."

M. FROMAGEOT agreed that the clause under which an application was submitted and the clauses which were alleged in support of the application were two different things.

An application might be perfectly well founded, though the Government in question was in no way entitled to submit it. It was precisely that difference that he had sought to bring out in his text by distinguishing between the provisions which might justify the submission of the application, and the grounds—whatever they might be, contractual or other—alleged in support of the claim.

The PRESIDENT thought that it would be necessary to amplify M. Fromageot's text. If the applicant State based its application on a treaty clause, it was necessary that the application should specify the treaty in question, in order that the other parties to the said treaty might avail themselves of their right to intervene under Article 63 of the Statute.

M. ANZILOTTI observed that, hitherto, the applications submitted to the Court had left much to be desired; it seemed as if, sometimes, the agents did not precisely understand what an application was. It was, no doubt, impossible to provide remedies in the Rules for all defects in applications, but it would be well to take this opportunity of making it clear what an application should consist of. Perhaps, at the same time, they might examine and settle the question, which had already arisen many times, of modifications that were made in a claim during the proceedings.

M. Anzilotti said he had been considering what form of clause could be inserted in the Rules, which would be clear and calculated to receive the attention of the agents. From this general point of view, he favoured M. Fromageot's text. Its advantage lay in the enumeration, in the form of a list, which it contained; in the Commission's text all the details were combined in a single phrase.

On the previous day, M. Schücking had reminded the Court of the necessity for keeping within the terms of the Statute in specifying what an application should contain. That was certainly necessary, but the Statute itself laid down that the contesting parties and the subject of the dispute must be indicated. As regards the indication of the parties, M. Anzilotti could accept M. Fromageot's text, namely: " the indication of the party against whom the claim is submitted ". On the other hand, in regard to the subject of the dispute, it was necessary that the Court should have before it a definite claim; and the nature of the claim could only be understood if it was accompanied by a statement, however brief, of the reasons on which it was based.

On the other hand, one might justifiably doubt whether it was consistent with the Statute to require, as was done in M. Fromageot's text, " reference to the treaty clause under which the application was submitted ". It appeared to M. Anzilotti that, according to the Statute and the Covenant, the Court always had jurisdiction if the parties were agreed. The Court's jurisprudence had recognised the possibility of its jurisdiction being based on an agreement arrived at between the parties, independently of any formal act. He considered that, if a State submitted an application and the State against whom the action was brought did not raise a plea to the jurisdiction, the Court was competent under the Statute. Moreover, it was questionable whether a clause of this kind was expedient from a practical point of view. For it was not impossible that a State, which found it difficult to accept a special agreement, might yet refrain from objecting to an application being filed against it, and, surely, they should do nothing to deter States from bringing their disputes to the Court.[1]

The Co-ordination Commission had hesitated in view of Article 53 of the Statute. Article 53 of the Statute laid down that the Court, before giving its decision, must satisfy itself that it had jurisdiction. But that did not debar an application from being submitted without a formal reference to a treaty clause; of course, the Court would have to consider, later on, whether it had, or had not, jurisdiction, and then the existence of a jurisdictional clause would be an important consideration. But that did not imply that the Court must insist on the said clause being specified in the application itself.

Lastly, M. Anzilotti remarked that, on the previous day, a member of the Court had asked why the agents should be forbidden to attach the evidence to the application. He, himself, felt the same doubt; but perhaps the Commission had merely wished to convey—as was perfectly correct—that it was not necessary for the evidence to be attached to the application; if, however, that was not what the Commission meant, he must make an express reservation on that point.

As regards the reservation made in M. Fromageot's text, concerning the explanations to be added in the Case, M. Anzilotti thought it should be made clear that this reservation did not cover the subject of the claim, which, in his view, became definitive, when once the application had been filed.

The PRESIDENT observed that the Commission's text was based upon the Statute. The latter had originally been framed with the idea that the Court would have compulsory jurisdiction, so that it had not seemed necessary to state, in the article of the draft Statute dealing with applications, that the convention on which an application was based must be specified in the application.

The system of compulsory jurisdiction was subsequently replaced by jurisdiction based on agreement between the parties, but no consequential change had been made in the article dealing with the contents of applications.

According to the Statute, as adopted at Geneva in 1920, it was necessary that, in every case, the applicant State

* D 2, A. 3, pp. 66-77.

[1] Concerning the question of *forum prorogatum*, see also following pages.

should give the reason why the respondent State was deemed to have accepted the Court's jurisdiction. That was why it was desirable that the application should mention the ground on which the Court's jurisdiction was alleged to be based.

In reply to what M. Anzilotti had said, the President explained the reason why the Co-ordination Commission had laid down that the evidence must not be attached to the application: when an application was filed, the Registrar had to have it translated and printed at once, together with its annexes; if the latter were bulky, this work would become laborious and expensive; it seemed, therefore, desirable to insert a clause in the Rules to show that it was to the Case that the annexes must be attached.

The REGISTRAR thought that the question was perhaps even more essential. Article 40 of the Statute laid down that: " The Registrar shall forthwith communicate the application to all concerned ". If the application were supplemented by a volume of annexes, which had to be considered as an integral part thereof, the communication of such documents " forthwith " would become impossible, for the reasons that the President had given.

M. ANZILOTTI could not, in any case, see why they should exclude the possibility of submitting any kind of document whatever with the application.

" *Forum prorogatum* ".

M. SCHÜCKING agreed with M. Anzilotti that it was not desirable to insist on the application containing a reference to the treaty clause upon which it was based. The institution of the *forum prorogatum* [1] had been introduced into the procedure by the Court's practice, in particular in Judgment No. 12, [1] and it was in the interests of the good administration of justice. If they now made it a necessary condition for the admissibility of an application that it must specify the treaty clause, and if, in a given case, the applicant were unable to specify it because no such clause existed, the Court would be compelled to reject the application *a limine*. But that would amount to abolishing the institution of the *forum prorogatum*, and, in his view, that would not be in the interests of international justice.

Jonkheer VAN EYSINGA said he could agree with all that MM. Schücking and Anzilotti had said; but he wished to emphasise, in addition, the necessity for there being free and easy access to the Court of Justice. The idea that a case could be brought before it in a very short space of time was one of the corner-stones of that institution. As early as 1907, when efforts were made to set up a Court of Arbitral Justice, alongside the Permanent Court of Arbitration, the words " The Court must be freely and easily accessible " were employed.

He therefore considered that M. Schücking had been right in warning them against multiplying the conditions which a State had to fulfil in order to bring a case before the Court by application. They must beware of adding anything to the points specified in Article 40 of the Statute, beyond what was already laid down in the existing Article 35 of the Rules.

As regards the argument based on Article 53 of the Statute, he did not find it convincing; for a State, such as that article was concerned with, would certainly not accept the *forum prorogatum*.

M. NEGULESCO said he would continue to uphold the standpoint of the Co-ordination Commission, as it enabled regard to be had for both the kinds of interests that were involved—namely, the interests of the respondent and the interests of third States. The interests of the respondent were safeguarded by the right of raising a plea to the Court's jurisdiction; and those of third States were safeguarded by the right of intervention, whether under Article 62 or under Article 63 of the Statute. In his view, the text proposed by the Commission guaranteed the exercise of the latter right more adequately than did M. Fromageot's text; however, it might be even better to say, in the first of these texts: " the provisions on which the Court's jurisdiction is based ", and " the provisions, if any, which are relied on in the application ".

They had heard some objections based on the notion of *forum prorogatum*. He believed that those objections were unfounded.

For, if, in a case brought before the Court by application, the respondent's agent omitted to file a plea to the jurisdiction in good time and began to plead on the merits, that would not suffice to establish the Court's jurisdiction. In questions concerning which the Statute had not expressly provided that the Court should have jurisdiction, such jurisdiction could not result from a mere tacit agreement.

They must therefore ensure that the respondent had the possibility of lodging a plea to the jurisdiction. Now, according to Article 38, No. 1, as drafted by the Co-ordina-

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[1] Extracts from Minutes of the 22nd meeting of the 31st Session of the Court, held at The Hague on Thursday, March 15th, 1934, at 4 p.m.:

" 68. — *Revision of the Rules.*

. . . . . .

" M. GUERRERO, Vice-President, thought that the Article [32 *bis*] did not provide for the case of a unilateral application not based on the ' Optional Clause ' conferring so-called compulsory jurisdiction on the Court. He asked the Registrar whether the Court would automatically transmit such an application to the cited Government.

" The REGISTRAR said that if the application was made under an instrument other than the Optional Clause, known to the Court and in which the cited Government had accepted the Court's compulsory jurisdiction, it would no doubt be automatically transmitted; if it invoked some such clause unknown to the Court, the applicant would be likely to be asked for explanations. It should not be forgotten that the cited Government might, upon receipt of an application, be willing to accept the Court's jurisdiction *ad hoc*, even though not obliged to do so. This was a reason for notifying applications in all events.

" M. FROMAGEOT thought it should be stipulated in the Rules that an application must specify the provision (Article 36 or the Statute or other clause) upon which it relied. If the cited Government accepted the Court's jurisdiction, although not bound to do so, that really amounted to a special agreement.

" M. ANZILOTTI said that, in view of this possibility, the Court should not refuse to transmit the application.

" M. FROMAGEOT thought that, where an application was submitted to the Court without any jurisdictional clause being invoked, he doubted whether the Court ought to transmit it. If it did so, the other Government would quite possibly prefer to reserve its attitude and refrain from making any reply.

" M. GUERRERO, Vice-President, thought that the discussion at any rate proved that the Rules were incomplete in the respect referred to by him.

. . . . . .

" Count ROSTWOROWSKI thought that the solution of the question raised by M. Guerrero concerning applications based on inadequate grounds might be given in this Article [38]. A clause might be inserted authorising a Government cited to reply immediately, denying the Court's jurisdiction; if the Court agreed with its objection, it would not call for the submission of the applicant's case.

" M. ANZILOTTI agreed with this suggestion in principle, the wording being reserved."

[1] A. 15.

tion Commission, such a plea could be lodged without awaiting the filing of the Case, if the objection was on a point of law, independent of the merits. But the respondent would be unable to file such a plea unless the application specified the treaty clause on which it relied in claiming that the Court had jurisdiction. That was the justification of the first idea that found expression in the Commission's text.

As regards the idea that the application must indicate the clauses, if any, which were relied on in the application, that information was required to enable States to judge if they ought to intervene, in particular, under Article 62 of the Statute.

M. URRUTIA said he had asked himself whether the existing Article 35 did, or did not, call for amendment, and had answered the question in the affirmative. For the Court had already accepted the principle that it could, to a certain extent, in its Rules, elaborate the contents of Article 40 of the Statute. It could therefore proceed further in that path. In regard to the question whether they should require a mention of the contractual clause in virtue of which the application was submitted—in other words, upon which the application relied in claiming that the Court had jurisdiction—he was likewise inclined to answer affirmatively, having regard, in particular, to Article 53 of the Statute. It was, very probably, a clause of that nature that M. Fromageot had had in mind in framing his text. Generally speaking, M. Urrutia regarded the last-named text as more precise than that of the Co-ordination Commission.

M. FROMAGEOT was convinced of the need for having it clearly laid down in the Rules what an application must contain. Article 40 of the Statute was no obstacle to that being done; for, though it said that the application must indicate the subject of the dispute and the contesting parties, it did not say that the application must not contain anything more.

Nor were the ideas that had been expressed as to the desirability of free and easy access to the Court—worthy of attention though they were—to be regarded as an obstacle. It would be possible to take them into account without sacrificing the clause requiring a reference to the treaty provision under which the application was submitted, for instance, by saying: " A reference, if desirable, to the treaty provision. . . ." That would empower the Court to refrain from rejecting an application which was not founded on any compulsory jurisdictional clause, but which had been accepted by the other side.

In any case, M. Fromageot thought that it would be well to make it quite clear that, when a State could cite a provision giving the Court compulsory jurisdiction, it should do so; but that, if it could not cite such a provision, it would not necessarily follow that its application could not be entertained.

In his draft, M. Fromageot mentioned " a succinct statement of the facts and grounds alleged in support of *the application* ". Since this statement might in some cases include mention of the instruments alleged in support of the claim, it would be better to substitute " claim " for " application ".

As regards evidence, it might be definitely indicated that it was to be produced with the Case; this would be better than the negative rule in the text proposed by the Commission. They might say: " the foregoing to be amplified by argument and evidence, which shall be produced with the Case provided for in Article 40 ".

As regards the order of the various rules, M. Fromageot thought that the rule regarding the precise indication of the claim should precede that regarding the succinct statement of facts; then the clause regarding amplification would immediately follow the latter.

M. GUERRERO, Vice-President, considered that to impose obligations more extensive than those placed upon the parties by the Statute would amount to overstepping the limits of the Statute. To require the parties to indicate in the application the provisions relied on by that instrument in submitting the case to the Court would, moreover, be harmful to the development of the Court's jurisdiction and inconsistent with its practice; for this would exclude the possibility of basing the Court's jurisdiction on an express or tacit agreement by the parties in the course of the proceedings.

With regard to the indication of " provisions governing the case " proposed by the Co-ordination Commission, M. Guerrero said that this obligation ought not to be imposed on an applicant; sometimes no provisions applicable to the particular case existed. It would be very difficult for a party to conform to this Rule when, for instance, submitting an application based on a general principle of law.

In his view, the Commission's proposals would thus have the effect of imposing upon parties obligations which would lead them to hesitate before resorting to the Court. It would therefore be better to abandon the new Rules suggested in the draft.

Count ROSTWOROWSKI, on the contrary, was in favour of the introduction of an obligation to indicate in the application the alleged basis of the Court's jurisdiction as well as the legal grounds on which the claim was based. With regard to the argument against this based on what was known as the *forum prorogatum*, Count Rostworowski observed that the result of construing the fact that a State consented to argue the merits as implying that it accepted the Court's jurisdiction might be to impute to that State an intention which it did not possess. It should therefore be made quite clear from the outset that the Court's jurisdiction was optional and dependent on the consent of the parties.

Count Rostworowski was also in favour of the indication, in the application, of the treaty provision, if any, on which the applicant's claim was based. In this connection, he accepted M. Fromageot's suggestion that they should add the words " if any ", in order to cover a case where general international law was applicable. But care must be taken to make it clear that these words did not apply to the indication of the alleged basis of jurisdiction.

The PRESIDENT took a vote on the following question, which was intended to enable the Court to come to a decision on the question of principle:

> " Does the Court consider it desirable to lay down that mention shall be made in the application of the treaty provision (or unilateral declaration) in virtue of which the applicant State arraigns the other State before the Court ? "

He explained that the words " or unilateral declaration " were intended to cover undertakings in regard to the protection of minorities given by certain States.

Six votes were recorded in the affirmative and six votes in the negative, whereupon the President gave his casting vote in the affirmative.

The PRESIDENT observed that the Court had to decide as to the embodiment in the Commission's draft of the idea expressed by the words: " and the provisions governing the case ".

M. ANZILOTTI asked whether the word "provisions" was to be read as meaning treaty provisions only.

M. SCHÜCKING did not think the word "provisions" would cover general rules of law.

M. WANG wished to know whether the word covered not only provisions of international law but also those of municipal law.

M. FROMAGEOT said that, in his draft, the grounds therein mentioned might be grounds of treaty law, but might also be based on general international law.

Baron ROLIN-JAEQUEMYNS thought that if, in accordance with the vote just taken, a reference to the treaty provision under which the application was submitted had to be added, it would be preferable to deviate as little as possible from the existing wording of Article 35, for any fresh draft would be liable to lend itself to interpretation. Accordingly, if a completely altered version of Article 35 were proposed, Baron Rolin-Jaequemyns would be inclined to vote against any change whatever.

The PRESIDENT called upon the Court to answer the following question:

> "Does the Court think it desirable that mention should be made in the application of the grounds alleged in support of the claim?"

M. WANG asked whether a vote on this question would settle the point concerning the clause providing for the mention of the "provisions governing the case".

The PRESIDENT said that it would.

The President took a vote on this question, which was answered in the affirmative by eight votes to four.

The PRESIDENT said that the Court had still to decide whether the following sentence was to be retained:

> "Evidence in support of the claim shall not be appended to the application."

M. FROMAGEOT proposed the following:

> "The foregoing to be amplified by argument in the Case and by evidence which shall be annexed thereto."

He added that the object of both wordings was to ensure that evidence was not appended to the application.

Baron ROLIN-JAEQUEMYNS did not think the sentence read by the President was very clear:

> "Evidence in support of the claim shall not be appended to the application."

Did that mean that if evidence was appended it would be disregarded, or that it must not be appended?

The PRESIDENT recalled that the idea of the Co-ordination Commission was to say that evidence was not to be appended to the application; he added that, in Article 40, it was stated that documents in support were to be appended to the Case. In his opinion, a provision of the kind suggested by the Commission was simply for the guidance of parties; no penalty was contemplated.

M. ANZILOTTI did not think that evidence would be submitted too soon. Moreover, a Government could not be reproached because it immediately placed the evidence at the disposal of the other side.

M. SCHÜCKING referred to the distinction drawn in German procedure between directory rules (*Soll-Vorschriften*) and mandatory rules (*Muss-Vorschriften*), and suggested that the same distinction should be made between the various points to be covered in the application—*i.e.*, between those points which the application must cover in order to be valid and those which are merely indicated to the parties by way of guidance. Adopting this method, they might prescribe the inclusion in the application of the fresh points contemplated, whilst avoiding any danger of the Court's being obliged to refuse to entertain an application because it did not fulfil all the formal conditions.

M. FROMAGEOT thought it would be a good thing to say in the article dealing with applications that evidence was to be presented in the Case; but he thought it unnecessary strictly to forbid an applicant to present it with the application.

M. GUERRERO agreed with M. Fromageot. It was in the article dealing with the application that the attention of parties should be drawn to the proper time for submitting evidence.

M. URRUTIA observed that the applicant might regard it as essential to produce certain documents establishing the Court's jurisdiction, and that it might be to the advantage of the Court to have these together with the application. For that reason, M. Urrutia preferred the wording of M. Fromageot, which afforded useful guidance without establishing an invariable rule.

M. FROMAGEOT did not think that this contingency could arise. The application was a sort of notice.

The PRESIDENT asked whether there would be any objection to a sentence running as follows:

> "Evidence in support of the claim shall be annexed to the Case mentioned in Article 40."

There being no objections, the President asked whether any other material point was raised by the third paragraph of Article 35.

He read a new draft, which was as follows:

> "When a case is brought before the Court by application, the latter shall give the names of the parties concerned, the subject of the dispute, the treaty provision or unilateral declaration pursuant to which the application is made, a succinct statement of the facts and grounds alleged in support of the claim and an indication of the claim itself, all these points to be amplified by argument and evidence, which shall be produced in the Case provided for in Article 40."

M. ANZILOTTI's only objection to this text was that it seemed to render it possible to amend the actual claim in the Case.

M. FROMAGEOT thought that the Co-ordination Commission should rearrange the text, so as to place the reference to evidence after the passage regarding the succinct statement.

The PRESIDENT proposed that the Court should approve this paragraph in principle, but refer the wording of it back to the Co-ordination Commission with a view to the preparation of a new draft. This draft could be distributed to all members of the Court, who could present any criticisms in writing, as was done in the case of the minutes.

Jonkheer VAN EYSINGA observed that this text provided that the application must contain a succinct statement of grounds, which must include in particular treaty provisions or rules of international law on which the claim was based. This enormously enlarged the scope of the application, and the latter, by losing its brevity, also lost

its most essential characteristic. M. van Eysinga made the fullest reservations with regard to this point.

M. GUERRERO, Vice-President, felt some anxiety as to the difficulty with which parties might be confronted when presenting an application, as a result of the decision just taken by the Court.

He thought that the application should be regarded as an urgent document, which should be very brief and even provisional in character. The parties would develop their arguments and explain the provisions on which they relied in their Cases, Counter-Cases and at the oral proceedings. There was at present some danger of confusion between the spheres of the application and of the Case. The rule now before the Court, instead of facilitating the task of parties, would complicate the presentation of an application and make access to the Court more difficult.

The PRESIDENT suggested the deletion of the words " and grounds ". They might put: " a succinct statement of facts and an indication of the claim ". This would bring the wording closer to the existing text of Article 35 of the Rules.

Jonkheer VAN EYSINGA referred to the definition of the application given by the Jurists' Committee in 1920:

> " Submissions are not presented in their final form in the application, that document merely giving a general indication sufficient to define the dispute and enable proceedings to be begun."

The PRESIDENT observed that, acting in accordance with this standpoint, the Court had for a long time allowed submissions to be amended. He also recalled that, at the Court's preliminary session, the question of assimilating the application to the Case had been considered. It had however, been observed that it would be impossible for the claimant to give details of the suit in the application, having regard to the considerable time required for the collection of the necessary material. Moreover, such assimilation would be contrary to the Statute which, in Articles 40 and 43, established a clear distinction between the application and the Case.

He said that the Court had no intention of departing from the principles referred to by Jonkheer van Eysinga and himself; he also stated that the Co-ordination Commission would submit a new text for paragraph 3 of Article 35; this text would, in point of fact, be paragraph 1 of the Article, since paragraphs 1 and 2 had been deleted.

Article 35, Paragraph 1.

Baron ROLIN-JAEQUEMYNS raised the question whether the old first paragraph of No. 1 of Article 35, upon which no vote had been taken, should really be deleted.[1] Might not the Co-ordination Commission consider the question once more ?

The PRESIDENT said that the Commission would try to find a satisfactory formula.

Article 35, Paragraph 4.[2]

M. GUERRERO, Vice-President, asked why the Court could not accept an application submitted, for instance, by the Consul of the applicant State at The Hague, Amsterdam, or Rotterdam, by a Minister accredited to Paris, or in general to some place other than The Hague, or even by a person not occupying any official position, provided that such person were duly authorised to act.

The REGISTRAR recalled that hitherto applications had usually been filed by the diplomatic agent of the Government concerned at The Hague. Sometimes also, when the Government had appointed its agent in anticipation of the presentation of the application, the latter had been filed by that agent. Lastly, on one occasion, a Minister at Paris, who was not accredited to The Hague, had addressed an application to the Court. Other cases might, of course, arise in the future.

M. FROMAGEOT observed that for other reasons also it would be well to put: " by a duly authorised person ". The essential thing was that an application must be presented by a person duly empowered to act on behalf of his Government. The application must designate the agent, who might be the same person or someone else.

M. SCHÜCKING thought that it was impossible to give a privileged position to diplomatic representatives at The Hague, who were not accredited to the Court.

M. GUERRERO, Vice-President, had some doubts as to the suitability of the expression: " a person duly authorised to present the application ". How was the Government to give this authorisation ?

M. ANZILOTTI thought that a distinction should be made between the signature of the application, on the one hand, and its presentation, on the other. It might be signed by the Minister for Foreign Affairs, and any individual might be authorised by the Government to present it.

In M. FROMAGEOT's view, an application should be signed either by the Minister for Foreign Affairs or by the diplomatic representative at The Hague or some other capital, whilst it might be presented by some other specially authorised person.

Jonkheer VAN EYSINGA understood the Vice-President's hesitation, but believed that it was only in the case of countries not having a Minister at The Hague that difficulties might arise. No doubt, satisfaction could be given to the very justifiable wishes of the Vice-President without disturbing the existing practice, which was, in the case of countries having Ministers at The Hague, to keep in contact with them. Where there were no such Ministers, it must become the duty of some person duly authorised for the case to take the necessary action.

The REGISTRAR considered that any additions that tended to make things easier for the States could not fail to be valuable. However, care must be taken not to disturb the existing practice, which was to consider that the diplomatic agent accredited to The Hague was *ex officio* entitled to speak for his Government.

M. GUERRERO, Vice-President, thought that this was only a question of drafting. They might add the words: " or, if there is no diplomatic representative at The Hague, by some other diplomatic representative or other duly authorised person ".

Article 35, Paragraph 3 (actual text).

M. ANZILOTTI pointed out that the Co-ordination Commission had proposed to omit paragraph 3 of the existing Article 35. Nevertheless, from a practical point of view, it might not be without importance to draw the attention of the agents to the desirability of stating immediately upon the institution of the proceedings whether they wished

[1] See p. 88.
[2] For text, see p. 87, meeting of 22.V.34.

the case to be referred to one of the Special Chambers.

The PRESIDENT pointed out that paragraph 3 contained two sub-paragraphs:

> " Should the notice of a special agreement, or the application, contain a request that the case be referred to one of the Special Chambers mentioned in Articles 26 and 27 of the Statute, such request shall be complied with, provided that the parties are in agreement.
>
> " Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for Summary Procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not relate to the matters dealt with in Articles 26 and 27 of the Statute."

The REGISTRAR observed that, when the Statute was revised in 1929, the Jurists' Committee proposed to add a paragraph in the following terms to Article 26 and to Article 27:

> " Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present article, if the parties so request."

That clause was, as a fact, inserted in the revised Statute. It was therefore held that labour questions and questions of transit and communications could not be brought before the Chamber for Summary Procedure, except in virtue of an amendment to the Statute. They should therefore reflect whether, having regard to that circumstance, it was now possible for the Court to introduce the same change in the form of an amendment to the Rules.

In regard to the origin of the difficulty, he observed that it was laid down in Article 25 of the Statute that

> " The full Court shall sit except when it is expressly provided otherwise."

It was true that in Articles 26 and 27 a special exception was made in favour of the Chamber for Labour cases and the Chamber for Transit and Communications cases; but in the last-named articles it was said that " in the absence of any such demand "—that is, in the absence of a demand by the parties for the case to be submitted to a Special Chamber—" the Court will sit with the number of judges provided for in Article 25 ". It had been held that that was sufficient to bar the Court from having jurisdiction when it sat as a Chamber of Summary Procedure.

The PRESIDENT observed that Articles 26 and 27 of the Statute had been added to that instrument at the last moment; they did not appear in the original text of the Jurists' Committee at The Hague. On the other hand, the text drawn up at The Hague contained a clause which provided for a Chamber for Summary Procedure having unlimited jurisdiction, subject to the agreement of the parties. The President was convinced that, when Articles 26 and 27 were inserted, there was no intention of making it impossible for parties to a dispute to submit cases concerning labour, or communications and transit, to the Chamber for Summary Procedure. He added that, after the revised Statute had come into force, there would perhaps be a tendency to bring cases before the Chamber for Summary Procedure, which would then be reinforced by national judges. That appeared to him another reason for not restricting the competence of that Chamber. He asked the Court if it desired to omit the last paragraph of Article 35.

Jonkheer VAN EYSINGA said he would prefer to decide on the fate of these two paragraphs, which formed a complete whole, at the same time.

The PRESIDENT pointed out that the right of the parties would not really be in any way prejudiced by the omission of these paragraphs. The right of the parties to found themselves on the interpretation of the Statute adopted ten years ago would remain intact. But he would prefer that the Court should not, by a clause in its Rules, prejudge a question which it might be called upon some day to decide, after hearing arguments, in a specific case.

Baron ROLIN-JAEQUEMYNS thought it would be best that the Court should reflect on the question of omitting paragraph 3 until it had before it the full text of Article 35 which was to be submitted on behalf of the Commission.

25.V.34.*

Paragraph 3 of Article 35 (old Rules).

The PRESIDENT recalled that, at the end of the meeting on the previous day, the Court was discussing paragraph 3 of Article 35 of the existing Rules, a clause not reproduced in the text proposed by the Co-ordination Commission; he proposed to adjourn further discussion on that point and to go on to Article 35 *bis*, as drafted by the Commission.

In this connection, he observed that he had promised Baron Rolin-Jaequemyns that the Co-ordination Commission would consider the situation resulting from the omission of any reference to special agreements in Article 35. Now, paragraph 3 of Article 35, like a special agreement, required the consent of both parties. In those circumstances, it might be advisable to have a new and separate article dealing both with special agreements and with the subject of paragraph 3 of Article 35.

(This was agreed to.)

28.V.34.

See under Article 43, p. 145, for a reference to Article 35 (Article 32 of Rules of 11.III.36) during discussion of Article 40, paragraph 6 (Article 43 of Rules of 11.III.36).

31.V.34.**

Discussed as Article 35 (draft).

The PRESIDENT invited the Court to proceed to consider Article 35, some paragraphs of which had been reserved.

In accordance with a very sound suggestion on the part of Baron Rolin-Jaequemyns, the text for Article 35 of the Rules proposed by the Co-ordination Commission began with a paragraph concerning the contents of a special agreement.

This paragraph, which was as follows:

> " 1. The special agreement submitting a case to the Court shall be governed by the terms of Article 40, paragraph 1, of the Statute ",

added nothing to Article 40 of the Statute, but served to fill a gap in Article 35, for this article formed part of a section entitled " Institution of proceedings ".

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* D 2, A. 3, p. 77.
** *Ibid.*, pp. 134-139.

M. FROMAGEOT did not think the Rules could " govern " a special agreement. On the other hand, they could prescribe the procedure to be followed when a case was submitted by special agreement.

Baron ROLIN-JAEQUEMYNS observed that the proposed text undoubtedly referred to this procedure.

M. ANZILOTTI, on reading the proposed Article 35 as a whole, had construed the first paragraph as meaning that, in so far as concerned cases brought by special agreement, the Court had nothing to add to the Statute; but that, on the contrary, where an application was submitted by one party only, the Court had to consider safeguards for the other party, and for that reason must lay down what the application must contain.

M. URRUTIA thought that the following wording might satisfy M. Fromageot:

> " When a case is brought before the Court by special agreement, the provisions of Article 40, paragraph 1, of the Statute shall apply."

Count ROSTWOROWSKI thought it would be simpler to begin the article as follows: " a case brought by special agreement . . .". With regard to a case brought by special agreement, it would in fact suffice to say that it must fulfil the terms of Article 40 of the Statute.

M. FROMAGEOT wanted to express the same idea as follows: " the submission of a case by a special agreement is governed . . .".

The PRESIDENT pointed out that the object of Article 35 was to lay down, first, what a special agreement must contain and, secondly, what an application must contain.

Baron ROLIN-JAEQUEMYNS also agreed with what Count Rostworowski had said. Article 40 of the Statute merely referred to the notification of a special agreement already concluded, and Article 35 only referred to it in order not to omit the case of a special agreement, but the essential thing in Article 35 of the Rules was the application.

M. ANZILOTTI proposed the following wording:

> " The special agreement whereby a case is brought before the Court shall be notified as laid down in Article 40."

The PRESIDENT pointed out that the object of Article 35 was to indicate to lawyers responsible for drawing up an application or special agreement what those documents should contain. It was not therefore merely a question of notification.

Count ROSTWOROWSKI wished to keep the beginning of Article 35 as proposed and to add: " shall be notified and drawn up . . .". The words " drawn up " would cover the contents of the special agreement.

M. FROMAGEOT would prefer a text on the lines of that proposed by M. Urrutia. He suggested that, in this connection and in order to meet the President, who wished the first two paragraphs of Article 35 to begin in the same way, the first paragraph might be worded as follows:

> " When a case is brought before the Court by means of a special agreement, Article 40, paragraph 1, of the Statute shall apply."

And the second paragraph would begin as follows:

> " When a case is brought before the Court by means of an application, the application shall contain. . . ."

Thus the two paragraphs would balance perfectly.

The PRESIDENT took a vote on M. Fromageot's text, which was to replace paragraph 1 of Article 35 proposed by the Co-ordination Commission.

This text was unanimously adopted.

Article 35, Paragraph 4.

The PRESIDENT next turned to paragraph 4 of Article 35 proposed by the Co-ordination Commission. This paragraph corresponded to paragraph 3 of the existing Article 35. He recalled that the question of the retention of this paragraph had been reserved, the President having given his opinion in favour of its deletion. The Co-ordination Commission, however, had confined itself to endowing it with the form of a rule of procedure which it did not at present possess. The proposed paragraph was as follows:

> " 4. A request that the case submitted by means of the above-mentioned special agreement or application should be referred to one of the Special Chambers mentioned in Articles 26 and 27 of the Statute shall be made in the document instituting proceedings or shall accompany that document. Such a request shall be complied with provided that the Court is satisfied that the parties are in agreement. Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for Summary Procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not relate to the matters dealt with in Articles 26 and 27 of the Statute."

The President added that the provision adopted in 1922 had been based on the idea that, if the parties, or one of them, desired to request that a case be submitted to a Special Chamber, such a request must be made at the beginning of the proceedings. That idea was brought out more clearly in the Co-ordination Commission's text.

M. FROMAGEOT proposed to amend the wording as follows:

> " A request that a case submitted by means of a special agreement or an application should be referred to one of the Special Chambers . . . must have been agreed to beforehand by the parties."

Baron ROLIN-JAEQUEMYNS did not consider that a request for a case to be referred to a Special Chamber need be embodied in the special agreement itself; it need only be inserted in the document notifying the special agreement.

The PRESIDENT pointed out that it was for that reason that the proposed text used the words: " . . . in the document instituting proceedings, or should accompany that document "; that wording would include a covering letter or a special letter.

He would, however, prefer to omit the words " subject to the condition that the case does not relate to the matter dealt with in Articles 26 and 27 of the Statute " in the Co-ordination Commission's text, as they did not appear in accordance with the real meaning of the Statute. It would be remembered, in this connection, that the revised Statute expressly recognised the right of the parties to have questions of labour, communications and transit examined by the Chamber for Summary Procedure.

M. ANZILOTTI asked how the question of technical assessors assisting in proceedings before a Chamber for Summary Procedure would be dealt with. For Article 26 of the Statute laid down that the judges would, on all occasions, be assisted by four technical assessors. But how was the

Chamber for Summary Procedure—which now consisted of three judges only—to function, if those judges were to be assisted by four technical assessors ?

M. FROMAGEOT proposed an amendment affecting the French text only and added that it would be well to make it clear in the text which was the relevant paragraph of Article 27 of the Statute.

The REGISTRAR said that it was paragraph 2 of Article 27 that should be mentioned.

The PRESIDENT read the Co-ordination Commission's proposal, as thus amended:

> " A request that a case should be referred to one of the Special Chambers mentioned in Articles 26 and 27 of the Statute shall be made in the document instituting proceedings or shall accompany that document. Such a request shall be complied with provided that the Court is satisfied that the parties are in agreement. Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27, paragraph 2, of the Statute, or that the case be referred to the Chamber for Summary Procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not relate to the matters dealt with in Articles 26 and 27 of the Statute."

He put this text to the vote.

Subject to possible drafting alterations, it was unanimously adopted.

Article 35, Paragraph 2.[1]

The PRESIDENT drew attention to an alternative text proposed by Jonkheer van Eysinga for paragraph 2.[2]

The Court would have to choose between the Co-ordination Commission's text [3] and that of Jonkheer van Eysinga.

Jonkheer VAN EYSINGA observed that, in order to facilitate access to a permanent international Court, it was important that the unilateral document instituting proceedings—the application—should not be overloaded. That object was quite satisfactorily attained in Article 40 of the Statute. But, in the proposed Article 35 of the Rules, several requirements with regard to the application had been added which were not justified by Article 40, and which appeared to depart from the idea of an indication of the subject of the dispute, as prescribed by that article. These new requirements include a mention of the treaty provisions or other rules of law alleged as the basis of the claim, and a reference to the clause on which the applicant founded the Court's jurisdiction. Jonkheer van Eysinga was not opposed to the latter addition, which the Court had already adopted [4]—and he had therefore retained it in his text—but he was not in favour of the former. His own view was that it sufficed to say that the subject of the dispute must be specified in the application; it was in the Memorial that a reference to the rules of law on which the party relied should be given.

A State finding itself impelled, in given circumstances, to submit an urgent application would be much embarrassed if it was obliged to mention, in that document, all the treaty provisions or other rules of law on which its claim was based.

The alternative text that he proposed only differed, in substance, from the Commission's text by its omission of the words: " the treaty provision and other rules of law alleged as the basis of the claim ". For, if that passage were maintained, they would be losing sight of the important rule which underlay the Court's jurisdiction—namely, that the Court must be freely and easily accessible.

M. GUERRERO, Vice-President, was prepared to accept Jonkheer van Eysinga's text. He agreed with the latter that the Court should do its utmost to avoid complicating the task of a party desiring to submit an application. Sometimes, in an urgent case, a party had no time to make an exhaustive study of the issues, or to consider all the treaty provisions or legal principles on which its application might be founded, before sending the case before the Court.

M. NEGULESCO said that, personally, he preferred the Co-ordination Commission's text. For, in his opinion, the words proposed by the Commission: " . . . the treaty provision or other rules of law alleged as the basis of the claim ", were necessary; for, as Article 62 of the Statute gave a right of intervention to third States, it was necessary that the wording of the text should be regardful of that aspect of the question.

M. ANZILOTTI feared that the Co-ordination Commission's text went too far. He agreed with the Vice-President that a reference to the treaty provision or other rule of law alleged as the basis of the claim ought not to be required. On the other hand, it would not suffice merely to indicate the subject of the claim, since the same thing might be claimed on widely different grounds. In his view, these difficulties might be removed by adopting a text simply requiring an indication of the grounds on which the claim was based; for instance: " . . . a precise indication of the subject of the claim and of the grounds upon which it is based ". These grounds might be either grounds of fact or of law.

M. SCHÜCKING agreed with the opinions expressed by Jonkheer van Eysinga, the Vice-President, and M. Anzilotti. If the Rules prescribed a succinct statement of the facts, that statement would suffice to describe the nature of the claims, so that it would be unnecessary to require a reference to rules of law—perhaps of common law—which it might sometimes be very difficult to give. They should avoid requiring an application to cover too much ground.

M. FROMAGEOT also considered that the words " . . . the mention of the treaty provision or other rule of law alleged as a basis for the claim . . ." went too far; he thought, however, that they should not omit all mention of the grounds alleged as the basis of a " claim ". He therefore suggested that the Court should retain the whole of the first part of the Co-ordination Commission's text of paragraph 2, omit the words he had just quoted, and amplify the paragraph in the following manner:

> " . . . a succinct statement of the facts and grounds on which the claim is based, these facts and grounds

[1] See pp. 87-88 and 95. Paragraph 3 of 22.V.34 has become paragraph 2.

[2] Text of proposal: " The application whereby a case is submitted to the Court shall contain, in addition to the indication of the subject of a dispute and the parties concerned and a reference to the provision on which the applicant founds the jurisdiction of the Court, a succinct statement of the facts and a statement of the claim; all these points to be further developed and supported by evidence in the memorial to which the evidence will be annexed ".

[3] " 2. The application whereby a case is brought before the Court shall contain, in addition to the name of the applicant party and the specification of the subject of the dispute: the name of the party against whom the claim is made; reference to the provision relied upon by the applicant to establish the Court's jurisdiction; a precise statement of the claim; reference to the treaty provision or rule of law relied upon to support the claim; and a succinct statement of facts; the foregoing to be amplified in the case by argument and by evidence, which shall be appended thereto." (Revised text: see p. 93, first column).

[4] See pp. 91-92.

being developed and the evidence adduced in the Memorial, to which the evidence will be annexed ".

M. NEGULESCO was in agreement with M. Fromageot's text, subject to the addition of the words: " *grounds of fact and of law* ", thus indicating the legal basis of the action.

M. FROMAGEOT observed that the word " grounds " (*motifs*) included grounds both of fact and of law.

M. GUERRERO, Vice-President, asked the President to put Jonkheer van Eysinga's proposal to the vote first, as it appeared the simplest. It was clear, after M. Fromageot's explanations, that the latter's proposal went as far as that of the Co-ordination Commission.

M. WANG supported the amendment which M. Fromageot desired to make in the Co-ordination Commission's text, and which, it seemed, should satisfy Jonkheer van Eysinga. The word " succinct " was indeed very elastic and could be interpreted in any way, so that, in case of urgency, the statement could be kept very short; while, if the applicant party had more time, the statement might be fuller.

Count ROSTWOROWSKI was in favour of substituting M. Fromageot's text for the last lines of paragraph 2, as drafted by the Commission; but he thought it would be a pity to abandon the idea that was brought out in the phrase which M. Fromageot desired to omit. A State should not bring a case before the Court unless it considered that some legal right had been violated. It was therefore necessary that there should be a legal ground for the submission of the application, and it should be mentioned in that document. M. Fromageot's text seemed to him to satisfy that requirement, since it contained the word " grounds ".

Jonkheer VAN EYSINGA observed that the whole question now under discussion had its basis in Article 40 of the Statute, which in regard to both cases—special agreements or applications—prescribed that the " subject of the dispute and the contesting parties " must be indicated. The elaboration of the legal grounds and the succinct statement of facts, the inclusion of which in the application it was sought to prescribe, would be found to be already included in it, if the words " subject of the dispute " were wisely interpreted.

M. ANZILOTTI emphasised once more the difference between the case of an application and a special agreement. The latter was a step taken jointly by the two parties, whereas the former—the application—was taken by the initiative of one party only. But, as it produced certain effects on the other party and on the subsequent proceedings, it was only just that the interest of the opposing party in being informed of the precise nature of the claim made upon it should be borne in mind. A succinct statement of the grounds did not, from that point of view, appear to be going beyond what could be required of the party submitting the application.

The PRESIDENT doubted whether—apart from the wording—there was any great difference between the texts proposed by Jonkheer van Eysinga and the Co-ordination Commission, respectively, if they omitted the words: " a reference to the treaty provision or other rule of law alleged as the basis of the claim ".

The PRESIDENT asked the Court to vote on the omission, which should be regarded as proposed by Jonkheer van Eysinga, of the words he had just quoted.

By ten votes against two, the Court voted for the omission of the words.

The PRESIDENT then put to the vote M. Fromageot's proposal that the latter part of paragraph 2 of Article 35 should be worded as follows:

" . . . specify . . . the precise nature of the claim, and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed and the evidence adduced in the Memorial, to which the evidence will be annexed ".

This text was adopted by nine votes against three.

M. FROMAGEOT asked why the Co-ordination Commission had, in the second paragraph, used the words: " a reference to the clause on which the applicant founds the Court's jurisdiction ". The original wording had been: " a reference to the clause in virtue of which the application is submitted ".

M. ANZILOTTI explained that these words were ambiguous. It might be thought that they had in view the provision relied on for the substance of the claim.

I.VI.34.*

Discussed as Article 35 (draft).

Article 35 of the Rules. " 1. When a case is brought before the Court by means of a special agreement, Article 40, paragraph 1, of the Statute shall apply.

" 2. When a case is brought before the Court by means of an application, the application shall specify, in addition to the name of the applicant and the subject of the dispute: the name of the party against whom the claim is submitted, the provision on which the applicant founds the jurisdiction of the Court and the precise nature of the claim, and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed and the evidence adduced in the Memorial to which the evidence will be annexed.

" 3. The original of an application shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party at The Hague, or, if the party has no diplomatic representative at The Hague, by a duly authorised person. If the document bears the signature of a person other than the diplomatic representative of that party at The Hague, the signature shall be legalised by this diplomatic representative or by the competent authority of the Government concerned.

" 4. A request that a case should be referred to one of the Special Chambers mentioned in Articles 26 and 27 of the Statute shall be made in the document instituting proceedings or shall accompany that document. Such a request shall be complied with provided that the Court is satisfied that the parties are in agreement. Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27, paragraph 2, of the Statute, or that the case be referred to the Chamber for Summary Procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not relate to the matters dealt with in Articles 26 and 27 of the Statute."

M. FROMAGEOT referred to the possibility of a State which had not signed the Optional Clause bringing a suit against a party which had signed the Clause. The Optional Clause could only be invoked on condition of reciprocity, and in such a case that condition would not be present.

* D 2, A. 3, pp. 153-154.

Must a State which thus submitted an application without being in a position to invoke the Optional Clause be refused access to the Court, if the other party made no objection to the application? Perhaps the word "*éventuellement*" (if any) might be inserted before (after) the words: "*la mention de la disposition . . .*" (specify the provision . . .)

M. SCHÜCKING was also anxious that the *forum prorogatum* should not be ruled out.

M. NEGULESCO was afraid that the word "*éventuellement*" might make it possible for an applicant to bring a suit before the Court without there being any treaty provision giving the Court jurisdiction.

Baron ROLIN-JAEQUEMYNS foresaw some danger in this contingent clause. It would be better simply to say that a State, in applying to the Court, need only specify the claim. If the Court had no jurisdiction, it would say so; if it had jurisdiction, it would take cognisance of the application. Baron Rolin-Jaequemyns therefore would be opposed to the addition of the word "*éventuellement*", but he would agree to the deletion of the whole phrase to which it was to be added.

I.VI.34 (2nd meeting on that date).*

Discussed as Article 35 (draft).

The PRESIDENT requested the Court to return to the discussion of Article 35, in the second paragraph of which M. Fromageot had desired to insert the word "*éventuellement*".

M. FROMAGEOT recalled that the first draft of the Statute had provided for free recourse to the Court. In October 1920, the Council of the League of Nations had decided against that method; it was then considered that a case could not be brought before the Court unless both parties assented to that course beforehand; that assent might find expression in the conclusion of a special agreement by the parties, or in their accession to the Optional Clause, or to any other clause giving the Court compulsory jurisdiction.

The situation discussed at the end of the morning sitting was that in which two parties, though not having signed a clause of the above description, filed applications against each other. Did not the agreement that was envisaged and prescribed in the Statute exist in such a case, seeing that both parties, desirous of a pacific settlement, were applying to the Court in regard to the same facts? No doubt, each of them was doing so unilaterally; yet, in fact, they were submitting the same dispute to the Court. Could it not be held that there was a tacit agreement? Would the Court, in such a case, be justified in rejecting the applications, on the ground that they were submitted unilaterally, because there had been no formal acceptance of the Optional Clause, or of a compromissory clause such as that in the Minorities Treaties?

For these reasons, M. Fromageot would not press for the insertion of the word "*éventuellement*", which he had formerly proposed.

Count ROSTWOROWSKI said that M. Fromageot had asked whether the Court should reject the application, because it contained no mention of a clause conferring jurisdiction upon the Court. He (Count Rostworowski) considered that paragraph 2 merely gave extremely useful information to the parties as to what their applications should contain, and it should not follow as a consequence that the smallest failure to observe the provisions of the paragraph must entail the rejection of the application.

M. SCHÜCKING thought that there was danger in laying down additional requirements as to what an application must contain, without being clear as to the legal consequences that would ensue if the application failed to comply with those requirements. He himself differed from Count Rostworowski as to these consequences. In that connection, he referred to Article 16 of the Instructions for the Registry [1], which was in the following terms:

> "Should an application—whether instituting proceedings, or for permission to intervene, or for revision—or a request for an advisory opinion, or a Case, Counter-Case, Reply or Rejoinder addressed to the Court, not be prepared in accordance with the forms prescribed by the Rules of Court, the Registrar will inform the party which has deposited the document in question; if the document is not amended within the time fixed for its presentation, he will inform the Court."

It would thus become the duty of the Registrar to draw the attention of the party concerned to the fact that the application did not contain a mention of the provision on which it claimed to found the Court's jurisdiction. Should the party not comply with his request, the Registrar would have to inform the Court; in that case, the Registrar would not, it appeared, communicate the document to the other party.

The Co-ordination Commission's report also stated that: "if the rules concerning the contents of the application were not complied with, if there was anything missing—*e.g.*, the clause conferring jurisdiction—the Court should reject the application *a limine*". Accordingly, if these conditions were inserted in the Rules, definite consequences would ensue.

Count ROSTWOROWSKI drew a distinction, among the requirements of paragraph 2, between those which entailed the rejection of the application and those which did not. Article 40 of the Statute required that the application should indicate the subject of the dispute and the contesting parties; if Article 40 of the Statute were not complied with, the application might be rejected. The other conditions laid down in the paragraph were, however, simply recommendations which the Court made, through the Rules, to the parties, in order that the latter should give it certain very useful information; the non-observance of these conditions should not, it would appear, entail the rejection of the application, because they were not conditions prescribed by the Statute.

M. ANZILOTTI admitted that, if one adopted Count Rostworowski's standpoint, the situation was quite different and the objections which he had raised when the article was discussed lost much of their force; but if one took that point of view, the present wording of the article appeared defective. In his opinion, there was nothing in the proposed text, or indeed in any other clause of the Rules, to justify the distinction between the indications which were essential in order that the application might be accepted, and other indications which it was merely recommended that the application should contain, but the absence of which would not prevent it from being accepted. If they went by the text as adopted by the Court, it was impossible to contend that the indication of the parties and of the subject of the dispute were the only essential conditions; the

* D 2, A. 3, pp. 155-160.

[1] See **E** 5, p. 61.

mention of the clause on which the applicant founded the Court's jurisdiction should also be deemed an essential condition for the acceptability of the application.

M. GUERRERO, Vice-President, did not think that Count Rostworowski's interpretation was entirely correct. The new Article 35 of the Rules prescribed conditions which were additional to those laid down in Article 40 of the Statute. The terms in which the article was couched were imperative, both in regard to the two conditions prescribed in Article 40 of the Statute and to the new conditions that were to be added in the Rules. Taking the article as it was worded, it could not be argued that some of the conditions were binding while others were optional; all the conditions specified were binding. Perhaps, however, it would be possible to meet those members of the Court who considered that no further obligations should be imposed on parties submitting applications by modifying the text in such a manner as to indicate that some conditions were absolutely binding, whereas others were not. The binding conditions would be the two requirements prescribed by the Statute itself. The others, which were rather of an optional character, would be those added in the Rules, and they would be in the nature of recommendations.

Jonkheer VAN EYSINGA held that the question must be considered in close connection with the first paragraph of Article 38 of the Rules. If a State approached the Court by means of an application, and if that document were transmitted to the respondent, three possible situations might arise:

The State might consider itself bound to accompany the applicant before the Court, because there was an undertaking obliging it to do so; or it might file an objection to the jurisdiction; or, again, even in the absence of a provision obliging it to accompany the applicant before the Court, it might, in given circumstances, be disposed to do so.

The last-mentioned course might sometimes, having regard to the political conditions prevailing at a given moment, be the only means of securing the legal settlement of a dispute, and it was one which the Court should not exclude. It was therefore important that States should retain the possibility of presenting themselves before the Court in pursuance of a tacit agreement.

M. SCHÜCKING desired that the text should make a clear distinction between those requirements which must be fulfilled in order that an application might be entertained and those which were merely in the nature of recommendations.

M. NEGULESCO was inclined to agree with the opinions of Count Rostworowski, M. Schücking and the Vice-President. But the case suggested by M. Fromageot raised a question concerning the Court's jurisdiction: M. Fromageot thought that, in a case where two parties, without having signed an optional clause, filed applications against each other, the Court would have jurisdiction; M. Negulesco was of a contrary opinion.

Moreover, Article 14 of the Covenant laid down that:

> " The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it."

The meaning of the words ". . . which the parties thereto submit to it " had been debated in 1920. Did it mean both the parties to the dispute, or only one of them ? The conclusion reached was that the word " parties " in Article 14 of the Covenant meant both the parties. Consequently, the idea of a unilateral summons before the Court could only be accepted if a prior agreement existed. Moreover, the Court had hitherto admitted that, in case of a special agreement, there were no parties, in the strict sense of the term: there was no claimant or respondent. How, then, could it be held that a case might be brought before the Court unilaterally—a method which presupposed a claimant and a respondent—and that a tacit special agreement had been established between the parties ? If there was a special agreement, then, according to all the Court's Rules, that agreement must be notified, which notification was not possible in the case of a unilateral summons. In fact, every application instituted proceedings, and in the case under consideration there were two separate proceedings. The two different applications, instituting two separate proceedings, could not influence the jurisdiction of the Court in relation to each other. The applications would be separate, so that the Court would have to examine the question of jurisdiction specially and individually for each of them.

M. Negulesco believed that unilateral proceedings could be instituted only if a convention existed giving the right to institute them to both parties concerned and that, in the absence of such a convention, it was impossible to hold that an application could be entertained in virtue of a sort of tacit special agreement; for the Court had made special rules of procedure for applications and for special agreements.

Baron ROLIN-JAEQUEMYNS did not believe it possible for a kind of special agreement to be arrived at by means of an application. On the other hand, he admitted that the distinction between points that must necessarily be mentioned in an application and those which it might usefully contain but which could also be left out was, in itself, a right distinction; and, bearing this distinction in mind, a new draft might be prepared separating the obligatory conditions from those which it was simply desirable that an application should fulfil.

With that object in view, Baron Rolin-Jaequemyns proposed the following text:

> " When a case is brought before the Court by means of an application, the latter must, in any case, indicate the party making the application, the subject of the dispute, and the party against whom the claim is submitted; it may further contain a reference to the clause upon which the applicant founds the Court's jurisdiction, together with a succinct statement of the facts and grounds upon which the claim is based, these facts and grounds being developed and the evidence adduced in the Memorial to which the evidence will be annexed."

M. GUERRERO, Vice-President, was prepared to accept Baron Rolin-Jaequemyns' proposal, but desired to read the following text which he had prepared:

> " When a case is brought before the Court by means of an application, the application must indicate, in addition to the subject of the dispute and the party against whom the claim is submitted . . .",

and so on, to the word " annexed "; after which he would add:

> " Failure to observe the first two of the above conditions will prevent the acceptance of the application."

An application was bound to give information on the two points laid down in the Statute. The information on the other points was optional, and its absence would not make it impossible for the Court to entertain the application.

M. FROMAGEOT thought the proposal would be clearer if it were worded as follows:

> " . . . the application must, before it can be entertained, indicate the party making the application, the subject of the dispute and the party against whom the claim is submitted; it shall further indicate . . . ".

M. URRUTIA would gladly accept the Vice-President's proposal, but he was troubled about the difficulties which might arise, in practice, if they laid down that certain conditions were essential for the application, while the others were optional.

It would be better, in his view, to lay down fewer conditions in the Rules, but to put them all on an equal footing, so that non-observance of any one of them would bar the acceptance of the application. If they took that course, it would be best to confine the essential conditions to those that were prescribed in the Statute—namely, the indication of the subject of the dispute and the names of the parties.

Count ROSTWOROWSKI observed that paragraph 2 was concerned, not with formal conditions, but with the contents of the application. That paragraph should not go into the reasons which would prevent an application from being entertained. Regarded from that standpoint, the paragraph presented no difficulty.

As regards the drafts submitted by Baron Rolin-Jaequemyns and the Vice-President, he preferred the latter, with the amendment proposed by M. Fromageot. But he thought the same object could be attained by saying: " When a case is brought before the Court by means of . . . the application is *bound* to indicate . . .". Then would follow the two essential conditions, after which the text would go on: " It shall also indicate . . . ", etc.

M. ANZILOTTI thought the discussion had raised a number of important questions, on which it was impossible to decide without previous reflection. If Article 35 was not regarded as specially important, would it not be better to postpone its examination ?

M. ADATCI thought that the Co-ordination Commission might accept the suggestion put forward by the Vice-President and Baron Rolin-Jaequemyns—namely, to insert the points laid down in the Statute as essential conditions, and to mention the others as desirable or as recommended.

M. GUERRERO, Vice-President, would prefer that the Court should at least settle the principle of Article 35 before separating. Moreover, the Court would have to proceed, later on, to a second reading of the Rules as a whole.

The words " in order that it can be entertained " (" *sous peine d'irrecevabilité* ") suggested by M. Fromageot would, it seemed to him, meet all the opinions that had been expressed.

The PRESIDENT said that the Court had adopted a draft Article 35 on the previous day. M. Fromageot had felt certain scruples, which led him to propose the insertion of the word " *éventuellement* " in the text. Personally, he (the President) thought the word was unnecessary; for, if there was an arrangement between two States to bring a case before the Court by submitting separate applications against each other, the agreement necessary to give the Court jurisdiction was, in that way, provided. On the other hand, they must be careful not to expose a State to the danger of being summoned before the Court without being informed as to the legal provision on the basis of which it was summoned. It was therefore desirable that the application should mention this legal basis, quite apart from any question of penalties, or of a refusal of the application. There was also a danger in enumerating the points which must be indicated, failing which the application would be refused; for it might be deduced that, even if the other conditions laid down in the Rules were not complied with, the application could be entertained.

The Court could, no doubt, take time for reflection, and postpone the final drafting of Article 35 until it resumed work on the revision of the Rules. But, if it wished to do so, it would be well to decide first which part of the article was to be reserved. Was it the whole article, or only paragraph 2 ?

M. ANZILOTTI agreed with the idea put forward by Count Rostworowski and Baron Rolin-Jaequemyns. Perhaps it might be laid down—following the method adopted in certain codes of procedure—that an application which failed to contain certain information, such for example as the indication of the party against whom the claim was submitted, or the indication of the subject of the dispute, would be automatically null and void; on the other hand, the Court might refuse to accept an application at the request of the party interested, owing to the non-observance of some other condition.

M. FROMAGEOT said he did not wish to make any suggestion regarding the substance; but he wondered if the following text might satisfy all the opinions that had been expressed:

> " When a case is brought before the Court by means of an application, the latter must indicate the party making the application, the party against whom the claim is submitted and the subject of the dispute; it must also, so far as possible, specify the provision . . ."

M. GUERRERO, Vice-President, though he preferred the text containing the words: " in order to be entertained ", also considered this wording in harmony with his point of view. But would it not be well to remind parties, in more definite terms, of their obligation to bring their applications in conformity with the conditions prescribed by the Rules ?

M. FROMAGEOT recalled that some members of the Court, though agreeing that there was an obligation to indicate the subject of the dispute, and the parties thereto, in the application, had nevertheless thought it wiser to be content with emphasising the binding character of this obligation, without making mention of penalties in case of a failure to observe it.

The PRESIDENT thought it desirable that the Court should adopt a decision in regard to Article 35 before it separated. The text of one complete section of the Rules would then be settled.

Accordingly, he put the text proposed by M. Fromageot for paragraph 2 to the vote; this text was unanimously adopted.

The President declared that the text thus approved would replace paragraph 2 of Article 35, as adopted by the Court on the previous day.

He then proposed the adoption of paragraphs 1, 3 and 4 of that article.

The PRESIDENT noted that, except for reservations by two judges, the Court made no objection to the adoption of paragraphs 1, 3 and 4 of Article 35, in the form in which they had been circulated on that day (see p. 97).

26.II.35.

See under Article 67, p. 284, for reference to Article 35 (Article 32 of Rules of 11.III.36) in connection with Article 66 (6) (Article 67 of Rules of 11.III.36).

4.IV.35.

Discussed as Article 33 in First Reading.

The article was adopted with the following text:

" 1. When a case is brought before the Court by means of a special agreement, Article 40, paragraph 1, of the Statute of the Court shall apply.

" 2. When a case is brought before the Court by means of an application, the application must indicate the party submitting it, the party against whom the claim is brought and the subject of the dispute; it must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court and the precise nature of the claim, and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed and the evidence adduced in the Memorial, to which the evidence will be annexed.

" 3 and 4. [For the text of these paragraphs, see page 97 (18th meeting, 1.VI.34).] "

5.IV.35.*

Discussed as Article 33.

Articles 33 and 36 (35 of Rules of 11.III.36).

M. URRUTIA, without making any fresh observations in regard to the text of Articles 33 and 36, raised the question whether it would not be better to reverse the position of these two articles, thus restoring the order adopted in May 1934,[1] which he thought was more logical.

The PRESIDENT observed that, according to the normal sequence of events in a case, the instrument instituting proceedings came first, and, together with it or immediately afterwards, came the appointment of agents.

18.II.36.**

Discussed as Article 33. — Second Reading.

M. NAGAOKA remarked that paragraph 1 of this article referred to paragraph 1 of Article 40 of the Statute. On the other hand, paragraph 2 of Article 33, which concerned applications, contained no corresponding reference. The wording of Article 33 might therefore give the impression that paragraph 1 of Article 40 applied only to special agreements. To avoid that impression, M. Nagaoka proposed that paragraph 1 of Article 33 should run as follows:

" When a case is brought before the Court by means of a special agreement, the subject of the dispute must be indicated clearly and without ambiguity."

The PRESIDENT observed that paragraph 2 of Article 33 contained a number of rules regarding the bringing of a case by application. No corresponding rules were necessary when a case was submitted by special agreement, because the form of the special agreement was entirely the concern of the parties.[2] As a matter of fact, the first paragraph referred to by M. Nagaoka had been inserted simply in order that the article should not be completely silent with regard to special agreements.

Baron ROLIN-JAEQUEMYNS was afraid that, if M. Nagaoka's amendment were adopted, there would be an apparent contradiction between the rules regarding applications and those regarding special agreements. For the rest, he thought it would be more logical to group together all the rules relating to cases brought by application, and, on the other hand, all those relating to special agreements. Thus it would be better only to deal with cases brought by application in Article 33, and to put paragraph 1 with another article.

M. NAGAOKA said that, if the words " clearly and without ambiguity " might be open to an interpretation *a contrario* which M. Nagaoka had not envisaged, it might be better to say " in precise terms ".

Jonkheer VAN EYSINGA thought it was desirable to retain paragraph 1, for it constituted, in some degree, an application of Article 40 of the Statute, which dealt first with a special agreement and then with an application.

M. NAGAOKA suggested that, if the Court decided to keep paragraph 1 as it was, paragraph 2 might be drafted as follows:

" When a case is brought before the Court by means of an application, the application must, *in accordance with Article 40 of the Statute*, indicate the party submitting it. . . . "

M. FROMAGEOT was not in favour of this addition.

The PRESIDENT saw an advantage in the addition proposed by M. Nagaoka; for, under Article 32 of the Rules,[1] the Court could modify the provisions in this heading. It could not in any circumstances, however, make a modification inconsistent with an article of the Statute, and the provision made in paragraph 2 was one formally prescribed by the Statute and consequently invariable. It would not be inappropriate to indicate this.

The President took the opinion of the Court on M. Nagaoka's proposal to add the words " in accordance with paragraph 1 of Article 40 of the Statute " after the words " the application must ", in paragraph 2 of Article 33.

By seven votes to three, it was decided to add these words.

Jonkheer VAN EYSINGA thought that in paragraph 2, before the words " it must also . . .", there should be a full-stop instead of a semi-colon; for, whereas the first sentence dealt with what an application must contain under Article 40 of the Statute, the remainder of the paragraph laid down what an application must " as far as possible " specify.

The PRESIDENT declared paragraph 2 of Article 33 adopted, with the modification above mentioned.

Article 33, Paragraph 3.

The REGISTRAR remarked that, under paragraph 3, the original of an application must be signed either by the agent of the party submitting it, or by the diplomatic representative of that party at The Hague or, finally, if there were no such representative, by a duly authorised person.

The mention of the agent of the party seemed superfluous, because if he were entrusted with the signature of an application, he would fall into the category of duly authorised persons. Furthermore, was it logical to refer here to the agent, seeing that the method of appointment of an agent was not dealt with until Article 36, and under that article this appointment might be made in the application itself ?

* D 2, A. 3, p. 435.
** *Ibid.*, pp. 573-577.
[1] See D 2, A. 3, pp. 920-921, Articles 32 *bis* (36) and 35 (33).
[2] *Cf.* pp. 87-88, 95.

[1] Article 31 of Rules of 11.III.36.

The PRESIDENT pointed out that, if the Court omitted the reference to the agent in Article 33, only the diplomatic representative would be able to sign an application, except in the case of a party without a representative at The Hague.

M. ANZILOTTI, though he appreciated the Registrar's point, thought there was no objection to mentioning the agent, even though the method of appointing him was not specified until later.

Baron ROLIN-JAEQUEMYNS thought that the most normal person to sign was the diplomatic agent, since it was laid down in the same article that the diplomatic representative must certify his appointment as agent of the party.

M. ANZILOTTI thought that the proper rule was that agents appointed *ad hoc* should, preferably, act in cases before the Court.

The PRESIDENT declared paragraph 3 adopted without modification.

Article 33, Paragraph 4.[1]

Jonkheer VAN EYSINGA considered that the final words of this paragraph should be deleted, viz.: " . . . compliance with the latter request is, however, subject to the condition that the case does not relate to the matters dealt with in Articles 26 and 27 of the Statute ". There had been a reason for these words under the old Statute; but now that a final paragraph had been inserted both in Article 26 and in Article 27 of the revised Statute to the effect that recourse might always be had to summary proceedings *in labour and transit cases, that reason had ceased to exist.*

Again, the section beginning with Article 33 of the revised Rules dealt only with procedure before the full Court, procedure before the Chambers being dealt with in Section 3. Accordingly, the provisions in Article 33 relating to the Chambers should be transferred to Section 3. The only point that remained to be dealt with in paragraph 4 of Article 33 was the case of a request by the parties for the attachment of assessors to the Court in transit cases heard by the full Court. Jonkheer van Eysinga therefore proposed a new text for paragraph 4 of Article 33 and a new Article 70 *bis* drafted on the lines which he had indicated; these texts ran as follows:

> Substitute the following text for paragraph 4 of Article 33:
>
> " A request that technical assessors should be attached to the full Court under Article 27, paragraph 2, of the Statute, shall be submitted in the document instituting proceedings or must accompany that document. Such a request shall be complied with if the Court is satisfied that the parties are in agreement."
>
> New Article 70 *bis*:
>
> " A request that a case should be referred to one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute shall be made in the document instituting proceedings or shall accompany that document. Such a request shall be complied with if the Court is satisfied that the parties are in agreement. Similarly, a request that technical assessors should be attached to the Court under Article 27, paragraph 2, of the Statute, shall also be granted."

The PRESIDENT thought that the Court could at once agree on the deletion of the last lines of paragraph 4; it was by pure oversight that they had been reproduced in the text circulated to judges.

With regard to the new text proposed by Jonkheer van Eysinga for paragraph 4, the President was not sure what the idea had been in making the appointment of assessors dependent upon the request to that effect being made in the document instituting proceedings or presented together with that document.

The REGISTRAR thought he remembered that two reasons had been mentioned: the first was the necessity for agreement between the parties; if the request were made by one party only, the other would have to be consulted. The second reason was the duty laid upon the President under Article 7 to obtain all information likely to be helpful in the choice of assessors. The idea had been that the request should be presented as soon as possible in order to give the President time to take the necessary steps.

M. ANZILOTTI pointed out that, even in the absence of agreement, the Court could always decide to have assessors. There seemed, therefore, no objection to the rule. On the other hand, he thought the wording of the paragraph was not clear. The fact was that, if parties were agreed in wanting technical assessors, they should say so at once; but a party might submit a request on its own account later, in which case the Court would have to give a decision.

The PRESIDENT thought that the real meaning of the text submitted to the Court was that, if the Court at the outset of the proceedings was informed that the parties were in agreement, it must allow assessors to sit; but that the request need not necessarily be made in the document instituting proceedings or accompanying that document.

As this view of the matter met with no opposition, the President noted that the Court were in agreement on the principle and that a new draft embodying it would have to be prepared.[1]

The President next drew attention to Jonkheer van Eysinga's proposal to restrict paragraph 4 of Article 33 to the question of the nomination of assessors under paragraph 2 of Article 27 of the Statute.

M. GUERRERO, Vice-President, gathered that the Court were agreed that a request for the addition of assessors might be made, not merely upon the institution of proceedings, but at any other time. That being so, this section of the Rules, which concerned the institution of proceedings, would no longer be the right place for the provision.

M. NAGAOKA, having regard to the view adopted, thought it undesirable to say that the request must be made in the document instituting proceedings, especially as that seemed somewhat inconsistent with the terms of the Statute.

The PRESIDENT observed that the Court had agreed that the Statute gave a single party the right to submit a request, it being understood that, if the other party was not in agreement, the decision would rest with the Court, but that, if both parties agreed to make the request upon the institution of proceedings, the Court was bound by this agreement.

He asked the Court whether they adopted Jonkheer van Eysinga's proposal to limit paragraph 4 of Article 33 to the application of paragraph 2 of Article 27 of the Statute.

He declared the proposal adopted.

The President observed that, in the last place, Jonkheer van Eysinga had proposed that the provisions regarding

[1] See p. 97, meeting of 1.VI.34 for draft text of paragraph 4 as adopted in first reading.

[1] *Cf.* Article 7, paragraph 3, of the Rules of March 11th, 1936.

requests for the reference of cases to the Chambers should be transferred to a new Article 70 *bis*.

Jonkheer VAN EYSINGA said that there was already a reference to the document instituting proceedings in Article 71, which dealt with procedure before the Chambers. Accordingly, the provisions relating to the Chambers and at present included in Article 33, paragraph 4, should also be transferred to the same position.

M. NEGULESCO believed that the document instituting proceedings mentioned in paragraph 4 was addressed to the full Court, which must decide whether the case should be referred to a Chamber.

The REGISTRAR recalled that, under Articles 26, 27 and 29 of the Statute, a case was bound to be referred to a Chamber if the parties made a joint request to that effect. Similarly, in the absence of such a request, the full Court was bound to adjudicate (Article 25).

M. GUERRERO, Vice-President, remarked that that was why the Chambers were always in being.

The PRESIDENT wished to know, in a case where one party to a suit referred to the Chamber for Transit cases asked that assessors should be appointed, and the other party did not agree, with whom the decision should rest, the Court or the Chamber ?

M. ANZILOTTI said that the decision would no doubt rest with the Chamber, for the Chamber was also the Court.

Jonkheer VAN EYSINGA remarked that the Court had implicitly settled this point in connection with Article 7 of the Rules[1]; for the second paragraph of that article, as now drafted, made it clear that, from the outset of the proceedings, all action would be taken by the Chamber.

No further point having been raised in connection with Article 33, the PRESIDENT declared it adopted, with the exception of paragraph 4, which was reserved.

The article was adopted in second reading except for paragraph 4 reserved.

19.II.36.*

Article 33 of the Text in First Reading: Suppression of Paragraph 4; cf. *Article 7 and Article 71* (1).

The PRESIDENT said that, as had been decided, he and some other members of the Court had prepared texts to give effect to the decisions adopted in regard to paragraph 4 of Article 33.

The proposals made were as follows:

1. Delete paragraph 4 of Article 33.
2. Draft Article 7 as follows.[1]
3. Draft Article 71 as follows.[2]

The President explained that it was proposed to delete paragraph 4 of Article 33 and to add a paragraph 3 to Article 7; an alteration would also be made in Article 71 of the Rules.

11.III.36.**

Article 32. — Final Adoption.

The PRESIDENT said that no change was proposed by the Drafting Committee in the first paragraph of Article 32.

In the second paragraph, the Committee wished to simplify the wording by saying: "*. . . à fournir dans le mémoire et des preuves, qui y seront annexées*" (being developed in the Memorial to which the evidence will be annexed).

In paragraph 3, the Drafting Committee proposed a change which might seem to be a substantial amendment. The suggestion was to delete the words in line 4 of the old text: "*si la partie n'a pas de représentant diplomatique à La Haye*" (if the party has no diplomatic representative at The Hague). The reason for the proposal was the practical difficulty arising if the person accredited to The Hague did not reside there.

With regard to the English text, the President said that the Committee proposed a slight change in paragraph 3 consisting in the substitution of the word "must" for "shall" in the phrase "the signature *must* be legalised".

The Court approved this modification.

The PRESIDENT declared Article 32 finally *adopted*, with the amendments indicated above.

ARTICLE 33 *(New Article).*

TRANSMISSION OF AN APPLICATION TO THE OPPOSING PARTY, AND NOTIFICATION OF A SPECIAL AGREEMENT

19.V.34.

See under Article 35, p. 108, for a reference to Article 35 *bis* (Article 33 of Rules of 11.III.36, during discussion of Article 32 *bis* (Article 35 of Rules of 11.III.36).

25.V.34.*

Discussed as Article 35 bis.

Article 35 bis. "When a case is brought before the Court by means of an application, a copy of the application, certified correct by the Registrar, shall be communicated forthwith by the latter to the respondent State."

The PRESIDENT pointed out that this article was in complete accordance with the existing practice. On the other hand, the present Rules did not contain any special clause providing for the immediate communication of the application to the State against which the action was brought. Furthermore, Article 40 of the Statute appeared to put respondent States on the same footing as all the other States entitled to appear before the Court.

Count ROSTWOROWSKI wondered whether the word "forthwith" might not be a cause of difficulty, if an application were found not to be quite in order as regards form.

The REGISTRAR did not think this could be the case, so far as concerned the application of Article 16 of the Instructions for the Registry.[3] When notifications were made "forthwith", this was understood to mean that they were made as soon as the necessary corrections had been effected.

The PRESIDENT thought it would be difficult to omit the word "forthwith", as it appeared in Article 40 of the Statute.

M. GUERRERO, Vice-President, thought that the only point which required to be made clear in this article was in regard to the authority, in the respondent State, to whom the Registrar's communications should be sent.

The REGISTRAR pointed out that Article 36, paragraph 2,

* D 2, A. 3, pp. 77-78.
[1] See p. 33.

* D 2, A. 3, pp. 581-582.
** *Ibid.*, pp. 728-729.
[1] See under Article 7, p. 34.
[2] See under Article 71, p. 299.
[3] For the text, see E 3, p. 54.

of the Rules referred to " the channels provided for in the Statute, or by special arrangement . . ."; he also referred to the explanations he had given at a previous meeting [1] in reply to a question by M. Urrutia on the scope of this clause.

Jonkheer VAN EYSINGA said he had no special objection to the proposed Article 35 *bis*, but he pointed out that the obligation to communicate the application to the respondent party was already laid down in Article 40 of the Statute and in Articles 32 *bis*, 35 *bis* and 36 of the Rules.

M. FROMAGEOT observed that the communication provided for in Article 35 *bis* was a very important act of procedure, and it was right that it should be expressly indicated.

He suggested that the word " communicate " should be replaced by " notify ", for this was certainly a notification.

M. ANZILOTTI pointed out that the word " communicate " was used in the Statute (Article 40, paragraph 2) in that very connection.

Baron ROLIN-JAEQUEMYNS believed that, according to the terminology hitherto employed, the application was *notified* to the Court and *communicated* to the parties.

The PRESIDENT preferred that the Court should decide by a majority in favour of one or other of these terms; the terminology chosen would then be adopted throughout the Rules.

He asked the Court to vote on the question in the following form: " communication " or " notification ".

The former expression was adopted by nine votes against two, with one abstention.

The Co-ordination Commission was instructed to see that this term was employed in all passages of the Rules referring to communications made to a party.

The PRESIDENT declared *that Article 35 bis was adopted.*

1.VI.34.*

Discussed as Article 35 bis.

The PRESIDENT proposed that the Court should take Article 35 *bis*, which was as follows:

> " When a case is brought before the Court by means of an application, a copy of the application certified by him to be correct shall immediately be communicated by the Registrar to the party against whom the claim is brought."

M. FROMAGEOT thought that this wording was not clear. It would be better to say:

> " . . . the Registrar shall immediately communicate to the party against whom the claim is brought a copy of the application certified by him to be correct."

There being no observations, the PRESIDENT declared Article 35 *bis* adopted in this form.

. . . . . .

Baron ROLIN-JAEQUEMYNS, reverting to Article 35 *bis*, observed that, when the Registrar communicated a certified copy of a document, the intention was that the recipient should keep it. The act, therefore, was not a communication but a transmission.

M. URRUTIA would prefer to keep the word " communicate ", which was used in the Statute.

The PRESIDENT said that was why the Co-ordination Commission had used it.

Baron ROLIN-JAEQUEMYNS recalled that, under Article 40 of the Statute, the Registrar forthwith communicated the application to all concerned. This he did by transmitting a copy. It would therefore be better to draft Article 35 *bis* as follows:

> " When a case is brought before the Court by means of an application, the application shall be communicated to the other party by the Registrar, who shall transmit a copy thereof to it."

M. FROMAGEOT pointed out that the transmission of a copy constituted a communication. That was why they should say in Article 36: " The Registrar shall forthwith transmit to all judges copies of special agreements or applications . . .", and in Article 35 *bis* the word " transmitted " should be substituted for " communicated ".

The PRESIDENT took the opinion of the Court as to the substitution of the word " transmitted " for " communicated ", in Article 35 *bis*.

This amendment was decided upon by eight votes to four.

4.IV.35.*

Discussed as Article 34. — First Reading.

Jonkheer VAN EYSINGA suggested that Articles 34 and 35 might well be combined.

In view of the explanations given by the PRESIDENT and by Count ROSTWOROWSKI—to the effect that Article 34, which supplemented Article 40 of the Statute, was of a more important kind than Article 35, and also that Article 34, related only to applications, whereas Article 35 covered both applications and special agreements—Jonkheer VAN EYSINGA did not press his proposal.

There being no further observations, Article 34 was adopted in first reading with the following text:

> " When a case is brought before the Court by means of an application, the Registrar shall immediately transmit to the party against whom the claim is brought a copy of the application certified by him to be correct."

18.II.36.**

Discussed as Article 34 and adopted in Second Reading with a New Paragraph 2.

The PRESIDENT opened the discussion on Article 34 of the Rules.

The REGISTRAR raised the question whether, in view of the insertion in this article at the first reading of a special provision concerning the transmission of an application to the other party, a corresponding provision should not be included to cover the case where a special agreement was notified by one party only. Article 36, paragraph 1, provided that, " if the special agreement is filed by one only of the parties, the other party shall, *when acknowledging receipt of the communication announcing the filing* . . ."; this pointed to an omission in the Rules which should perhaps be made good. This might be done by the addition, for instance, of the following second paragraph to Article 34:

> " When a special agreement is notified to the Court

* D 2, A. 3, pp. 146-147.
[1] See p. 108, meeting of 19.V.34.

* D 2, A. 3, p. 430.
** *Ibid.*, pp. 577-579.

by one only of the parties, the other party shall be immediately informed of the fact by the Registrar."

As, by definition, the contents of the special agreement would be known to the other party, only the fact of its notification need be conveyed to that party.

The PRESIDENT, who was not satisfied with the term "notification" in this context, proposed that both cases should be covered by one paragraph reading:

> "When a case is brought before the Court by means of an application or a special agreement filed by one party only, a copy of the application or of the special agreement certified correct by the Registrar . . ."

Jonkheer VAN EYSINGA recalled that, in the course of previous discussions, it had been said that a document was "notified" to the Court, and that the Court "communicated" the document notified to the parties by sending them a copy.

M. ANZILOTTI asked what the procedure was when a special agreement was filed by one party only.

The REGISTRAR said that there were two possibilities: Either the duly authorised person would come to the Registry and file the document, without presenting a written note with it; in that case, a letter was sent to the other party announcing the fact that the document had been filed and at the same time, of course, a note was placed in the file which served as a minute of the act of filing; but a certified copy of the special agreement was not necessarily sent to the other party. Or else the person filing the document would accompany it with a note; in that case a copy of this note was sent to the other party.[1]

M. FROMAGEOT, who was anxious to make good the omission pointed out by the Registrar, suggested the following wording—to which the Registrar agreed—for the second paragraph of Article 34:

> "When a case is brought before the Court by means of a special agreement filed by one only of the parties, the Registrar shall immediately notify the other party of the fact."

M. NAGAOKA wished this text to become the *first* paragraph of Article 34, as Article 33 dealt first with the case of a special agreement.

M. FROMAGEOT observed that it was the exception for a special agreement to be filed by one party only, a circumstance which would seem to justify the order followed in Article 34.

Jonkheer VAN EYSINGA agreed in principle with the proposed clause, but would prefer the terminology previously established to be used. According to that terminology, the word "*communique*" should be used instead of "*notifie*".

M. FROMAGEOT pointed out that, as the Registrar need not necessarily communicate a copy of the special agreement to the parties, for they were already acquainted with it, seeing that they had signed it themselves, he could confine himself to informing them that it had been filed; on the other hand, the expression "*fait connaître*" might be used if the word "*notifie*" gave rise to objections; but the two expressions had practically the same import.

M. GUERRERO, Vice-President, would prefer the word "*notifier*", which was more usual in legal terminology, to be used.

Jonkheer VAN EYSINGA recalled that the Court had decided to use the word "*communication*" everywhere in the Rules where communication to a party was meant, the word "*notification*" being reserved to denote the transmission of documents to the Court. He did not, however, press the point and accepted M. Fromageot's text.

The PRESIDENT noted that the Court adopted the following second paragraph for Article 34:

> "When a case is brought before the Court by means of a special agreement filed by one only of the parties, the Registrar shall immediately notify the other party of the fact."

There being no further observations, the President declared Article 34 adopted with the above amendment in second reading.[1]

11.III.36.*

Article 33. — Final Adoption.

The Drafting Committee proposed no change in the French text.

In the English text, it suggested the substitution of "forthwith" for "immediately", and in paragraph 2, the Committee proposed to add: "that it has been so filed" in order to bring it more into conformity with the French.

The whole of Article 33, as thus amended, was finally *adopted*.

ARTICLE 34 *(Article 36, old Rules).*

TRANSMISSION OF SPECIAL AGREEMENTS AND APPLICATIONS TO MEMBERS OF THE COURT AND TO STATES

25.V.34.*

Discussed as Article 36.

Article 36. — "(1) The Registrar shall forthwith communicate to all the members of the Court copies of special agreements, applications, or requests for advisory opinions, which have been notified to him.

"(2) He shall also communicate copies of them through the channels provided for in the Statute, or by special arrangement, as the case may be, to all Members of the League of Nations and to all States not members of the League entitled to appear before the Court."

The PRESIDENT observed that this text—in which the words "or requests for advisory opinions" would have to be deleted—corresponded to Article 36 of the existing Rules.

M. ANZILOTTI pointed out that the text of the existing Rule did not mention the communication of "copies". He asked what was the reason for this addition in the proposed text.

The PRESIDENT said that the alteration was made because, in English, if it were said that the Registrar communicated the special agreement, etc., that would mean that he communicated the original document.

* D 2, A. 3, pp. 78-79.
[1] See, for instance, C 61, pp. 15-16.

* D 2, A. 3, p. 729.
[1] See p. 104 (4.IV.35) for text of paragraph 1.

M. FROMAGEOT proposed to follow the terminology of Article 40 of the Statute and to say: " copies of special agreements or applications, which have been notified or addressed to the Registrar . . .".

The PRESIDENT said that, in those circumstances, it would appear better to retain the text of Article 36 now in force, as it satisfied everybody.

1.VI.34.*

Discussed as Article 36.

The Court next took Article 36, which was as follows:

" 1. The Registrar shall forthwith communicate to all judges special agreements or applications which have been notified to him.

" 2. He shall also communicate them, through the channels provided for in the Statute, or by special arrangement, as the case may be, to Members of the League of Nations and to States not members of the League entitled to appear before the Court."

M. FROMAGEOT would have preferred the word " transmit " to " communicate " in paragraph 1.

. . . . . .

The PRESIDENT thereupon reverted to Article 36, the first paragraph of which began with the words: " The Registrar shall . . . communicate . . .".

Count ROSTWOROWSKI thought that, so as to give the Rules the character of an application of the Statute, it would be better to say: " The Registrar shall forthwith transmit to all the judges copies . . .".

Jonkheer VAN EYSINGA wondered whether it would not be better to keep to the existing text of Article 36 of the Rules and to say that the Registrar shall communicate special agreements or applications—without mentioning copies.

M. FROMAGEOT proposed the following:

" 1. The Registrar shall forthwith transmit to all the judges copies of special agreements or applications which have been notified to him.

" 2. He shall also transmit copies through the channels provided for in the Statute, or by special arrangement, as the case may be, to Members of the League of Nations and to States not members of the League entitled to appear before the Court."

The PRESIDENT took a vote on this draft.

Article 36, in this form, was adopted by seven votes to five.

4.IV.35.

Adopted as Article 35 in First Reading.

The article was adopted with the following text:

" 1. [Text as adopted on 1.VI.34.]

" 2. He shall also transmit through the channels indicated in the Statute of the Court or by special agreement, as the case may be, copies to Members of the League of Nations and to States not members of the League entitled to appear before the Court."

* D 2, A. 3, p. 147.

18.II.36.*

Discussed as Article 35. — Second Reading.

The first paragraph of Article 35 was adopted without observations.

The PRESIDENT observed that there was a proposal to add the following at the beginning of paragraph 2:

" In pursuance of the provisions of Article 40, paragraph 3, of the Statute. . . ." [1]

M. ANZILOTTI asked the reason for this addition.

The REGISTRAR said that paragraph 2 of Article 36 of the Rules in force,[2] which corresponded to paragraph 2 of Article 35 of the revised Rules, had been inserted because, in paragraph 3 of Article 40 of the 1920 Statute, there was no reference to States not members of the League of Nations. Since this reference had been added in the revised Statute, it was open to question whether there was any need to retain paragraph 2 of Article 35 (old 36). It had been thought better to keep it, because it gave some indication regarding the method to be followed in giving the information provided for in paragraph 3 of Article 40 of the revised Statute. At the same time, it had been considered that, since that paragraph was partly reproduced in paragraph 2 of Article 35, it would be desirable to make it clear in the latter that it was simply intended to carry out what was already laid down in the Statute.

The PRESIDENT personally would have preferred to delete the words " not members of the League " in the last two lines of the paragraph. The article would then read:

" He shall also transmit . . . and to States entitled to appear before the Court." [3]

Jonkheer VAN EYSINGA having asked what the phrase " He shall also transmit through the channels indicated in the Statute . . ." meant, the PRESIDENT explained that it referred to transmission through the Secretary-General of the League of Nations, as prescribed in paragraph 3 of Article 40 of the revised Statute.

MM. FROMAGEOT and NAGAOKA pointed out that paragraph 2 of Article 40 of the Statute said: " the Registrar shall forthwith communicate the application to all concerned ", and that no mention was made of the special agreement. Paragraph 3 said nothing regarding the communication of a special agreement. Article 35 of the Rules therefore extended the scope of the Statute by providing for the communication of copies of special agreements. For these reasons the proposed addition did not appear suitable.

The REGISTRAR explained that paragraph 2 of Article 40 really only contemplated the communication of an application to the other party. It was unnecessary to make the same provision in regard to special agreements, because the other party to a case brought by special agreement would naturally be acquainted with the terms of that document. In 1934 [4] the Court had considered it desirable to include in the Rules a special provision—now Article 34—concerning the communication of an application to the other party. As a consequence of this, the words " all concerned " in paragraph 2 of Article 40 of the Statute had assumed a wider

* D 2, A. 3, pp. 579-580.

[1] In the text prepared for the second reading by the President—*i.e.*, the text adopted in first reading " with modifications considered necessary to bring it into harmony with the revised Statute "—these words were added. (See D 2, A. 3, p. 975.)

[2] 1931 Rules.

[3] This suggestion was adopted.

[4] See p. 103.

sense. Again, paragraph 3 of Article 40 had always been regarded as referring to paragraph 1 (special agreements) as well as to paragraph 2 (applications), and as authorising, or even prescribing, having regard to the articles of the Statute concerning intervention, the transmission of copies of all documents instituting proceedings. For these reasons, there was reallly no inconsistency between Article 40 of the Statute and Article 35 of the Rules.

The PRESIDENT nevertheless considered that the transmission of a copy of a special agreement could not be regarded as " in pursuance of " the provisions of Article 40, paragraph 3, of the Statute.

M. GUERRERO, Vice-President, remarked that, according to Article 40, paragraph 3, of the Statute, it was only necessary to notify *(informer)* States; accordingly, the transmission to States of copies of special agreements did not take place in pursuance of Article 40 of the Statute.

The PRESIDENT observed that the deletion of the words " in pursuance of the provisions of Article 40, paragraph 3, of the Statute " would not in the least affect the substance of the paragraph.

Baron ROLIN-JAEQUEMYNS agreed, but thought that the sending of a copy of the special agreement was in accordance with the spirit of the Statute and that it was not a bad thing to indicate this. In many cases it was desirable to establish the connection between the Statute and the Rules.

M. URRUTIA would prefer not to add the words just referred to by the President and to revert to the existing text of the present Article 36 of the Rules.

The PRESIDENT put the following question to the Court:

" Does the Court decide to add the words ' in pursuance of the provisions of Article 40, paragraph 3, of the Statute, ' at the beginning of paragraph 2 of Article 35 of the Rules ? "

By nine votes to one, the Court decided against the addition of these words.

The PRESIDENT said that these words would accordingly be deleted in paragraph 2 of Article 35 of the Rules.

The REGISTRAR suggested that the word " judges " in paragraph 1 of Article 35 should be replaced by " members of the Court "; judges *ad hoc* would not forthwith receive copies of special agreements or applications, because they would not yet have been appointed when the case was submitted.

There being no observations, the PRESIDENT said that, in paragraph 1 of Article 35, the words " judges " would be replaced by " members of the Court ", and declared Article 35 adopted in second reading with the amendments indicated above.

11.III.36.*

Article 34. — Final Adoption.

The PRESIDENT said that the Drafting Committee proposed the following text for paragraph 1:

> " The Registrar shall transmit forthwith to all the members of the Court copies of special agreements or applications submitting a case to the Court."

In the second paragraph, a slight correction in the English text was proposed: " in a special arrangement " instead of " by special agreement ".

Article 34, as thus amended, was finally *adopted.*

ARTICLE 35 *(Article 35, Paragraph 1, old Rules, and New Paragraph).*

APPOINTMENT OF AGENTS

19.V.34.*

Discussed as Article 32 bis.

The PRESIDENT explained that the text proposed by the Co-ordination Commission was to be found in its original form in the report of the Second Committee, submitted in 1933[1]. There had been a proposed modification, which was to be found in Appendix 3 of the report of the Co-ordination Commission, and an amendment proposed by M. Fromageot, which was contained in Appendix 7 *a*.[2] He added that the fundamental idea had been to include everything connected with the appointment of agents in one article.

Lastly, he said that, in view of the decision just taken by the Court[3], it would be necessary to delete paragraphs 6 and 7 of the Co-ordination Commission's text and to delete the word " representatives " in paragraph 8. The text proposed by the Commission was accordingly as follows:

> " 1. Whenever a special agreement submitting a case to the Court is filed, the agents respectively appointed to represent the parties filing this instrument shall be designated at the same time.
>
> " 2. If the special agreement is filed by only one of the two parties, the other party shall inform the Registry of the Court of the name of its agent when acknowledging receipt of notice that this instrument has been filed or, failing this, as soon as possible.
>
> " 3. The application submitting a case to the Court or, failing this, the covering letter accompanying this document, shall give the name of the agent appointed to represent the applicant Government.
>
> " 4. The party against whom the application is directed and to whom notice thereof is given shall, when acknowledging receipt of such notice or, failing this, as soon as possible, inform the Registry of the Court of the name of its agent.
>
> " 5. Applications for permission to intervene made under Article 58 of the Rules, declarations of intention to intervene made under Article 60 of the Rules and requests for the revision or interpretation of a judgment made under Article 66 of the Rules, shall likewise be accompanied by the appointment of an agent.
>
> " 6. The appointment of an agent shall be accompanied or followed by the indication of the address selected by him at the seat of the Court to which notices and communications in regard to the case are to be sent.
>
> " 7. As far as possible, agents appointed pursuant to the present article shall remain at the seat of the Court until the judgment or advisory opinion has been delivered."

* D 2, A. 3, pp. 41-43.

[1] See D 2, A. 3, p. 763 for text of Committee and p. 866 for text of Commission.

[2] See D 2, A. 3, pp. 900 (Rule 41) and 913.

[3] See pp. 84-85 (meeting of 19.V.34—" Advisory procedure ").

* D 2, A. 3, p. 729.

The PRESIDENT added that paragraph 7 had only been retained provisionally by the Co-ordination Commission. With regard to this point, he referred to the explanations given in the Commission's report.

Baron ROLIN-JAEQUEMYNS did not favour a rule in which the words " as far as possible " were used as in paragraph 7. The previous paragraph said that agents were to supply the address selected by them at the seat of the Court. Was not that enough ?

M. ANZILOTTI observed that the heading which they were considering now related only to contentious proceedings. The sub-heading stated that these were general provisions. Would it not therefore be better to place at the beginning of this article—which really contained special rules—a general rule which would be applied by the subsequent paragraphs ? They might, for instance, put:

> " Every proceeding before the Court shall be taken by an agent furnished with legal authority by his Government."

M. SCHÜCKING attached great importance to the principle enunciated by M. Anzilotti. He recalled that, on one occasion, the Minister of a certain country at The Hague had filed a document which, being a document of procedure, should have been presented by the agent of the Government in question. In the absence of a rule, however, the Court had felt obliged to accept it.

M. FROMAGEOT had thought that the practice was not to reproduce in the Rules provisions contained in the Statute; and the Statute laid down in Article 42 that the parties were to be represented by agents.

M. ANZILOTTI had proposed a rather different form of words for this very reason.

M. FROMAGEOT pointed out that it was not for the Court to propose rules as to the respective rôles of agents and counsel. They must therefore be careful that the rule to be embodied did not prejudge that question.

The REGISTRAR observed that, in practice, certain proceedings were normally taken by the diplomatic representatives of interested Governments at The Hague; in particular, that was so as regards the filing of the document instituting proceedings. If this were to be regarded as a procedural act, Governments would be placed in a somewhat difficult position by the proposed draft.

M. FROMAGEOT wondered whether this difficulty could not be overcome by introducing the rule proposed by M. Anzilotti with the words:

> " Once a special agreement or application has been filed, every proceeding . . .", etc.

This would imply that the special agreement or application could be filed by the Minister accredited to The Hague.

M. URRUTIA thought it would be useful to state, in the case of a suit brought before the Court by application, to what authority of the country against which the suit was brought notice of the application should be given.

The REGISTRAR, after drawing attention to Article 35 *bis*, which was as follows:

> " When a case is brought before the Court by means of an application, a copy of the application certified correct by the Registrar shall immediately be transmitted by the latter to the respondent State ",

pointed out that a circular letter had twice been sent to all Governments asking them to state to what authority communications, including those in question, were to be sent.[1] Care had been taken to add that, in the event of no answer being received from a Government, it would be presumed that the notification was to be sent to its Ministry for Foreign Affairs. In reply to this circular, most States had indicated either their legation at The Hague, or the Prime Minister, or again, the Minister or Ministry for Foreign Affairs. Accordingly, such notifications were despatched in accordance with an agreement reached with each Government. It was to this agreement that Article 36, paragraph 2, of the Rules referred when it said that the Registrar " shall transmit applications through the channels provided for by special arrangement ".

The PRESIDENT referred to the text as submitted to the Court:

> " Once a special agreement or application has been filed, every proceeding before the Court shall be taken by an agent furnished with legal authority by his Government."

Jonkheer VAN EYSINGA wondered whether this text would not overlap the first paragraph of Article 34 of the Co-ordination Commission's draft:

> " The original of every document of the written proceedings in a case submitted to the Court . . . shall be signed by the agent or by the representative ", etc.

M. FROMAGEOT pointed out that Article 32*bis* dealt solely with the appointment of agents, whereas Article 34 dealt more particularly with the signature of documents of procedure by the agents.

The PRESIDENT said that, embodying the alterations which had been made, the text of Article 32*bis* was now as follows:

> " (1) Once a special agreement or application has been filed, every proceeding before the Court shall be taken by a duly appointed agent."

Then would follow paragraphs 1 to 5 and 8 of the Co-ordination Commission's text, numbered 2 to 7.

M. GUERRERO, Vice-President, accepted this text and simply asked that the word " two " should be deleted in the Commission's text, as in a case submitted by special agreement there might be several parties.

The PRESIDENT said that this paragraph would in that case be as follows:

> " If the special agreement is filed by one only of the parties, the other party . . .", etc.

M. ANZILOTTI did not much like the expression " as soon as possible "; it was not a legal expression.

M. FROMAGEOT thought it was unavoidable, since in the Court's Rules they could not fix absolute time-limits as in municipal codes.

The PRESIDENT asked the Court whether they accepted the text of Article 32*bis*, subject to re-examination of the wording by the Co-ordination Commission.

The Court unanimously answered in the affirmative.

23.V.34.*

Discussed as Article 32 bis.

The PRESIDENT read the text submitted by the Co-ordination Commission:

> " *Article 32* bis. — 1. When once a special agreement or application has been filed, every proceeding

* D 2, A. 3, pp. 56-59.

[1] See E 10, Engl. ed., p. 57.

before the Court must be taken by a duly appointed agent.

"2. When a special agreement is filed, the agents shall be appointed at the same time. If the special agreement is filed by only one of the parties, the other party shall inform the Registry of the Court of the name of its agent when acknowledging receipt of the notice that the said instrument has been filed, or failing this, as soon as possible.

"3. The application or, failing this, the covering letter accompanying this document shall give the name of the applicant Government's agent."

(For text of paragraphs 4, 5 and 6, see page 107; paragraph 7 of page 107 is dropped.)

As regards paragraph 1, the Co-ordination Commission had felt some doubts owing to the fact that the duties of an agent were of two kinds: active and passive. Paragraph 1, as at present worded, might appear to be limited to acts in which the agent himself took the initiative. In case the Court desired to eliminate that doubt, the Co-ordination Commission had prepared the following alternative text, which, however, was practically a reproduction of a clause of the Statute:

"For all acts of procedure before the Court, the parties shall be represented by agents duly authorised by their Governments."

M. ANZILOTTI pointed out that the Commission's second alternative text which, from a general point of view, he preferred, was open to the objection that a special agreement or application was, as a rule, filed by the diplomatic agent of the State concerned at The Hague.

Jonkheer VAN EYSINGA, in regard to the same point, thought it would be necessary to amplify the second text by the addition of the words: "when once a special agreement or application has been filed", appearing in paragraph 1.

Count ROSTWOROWSKI observed that the Court had inserted those words to enable the diplomatic agents to file the instrument instituting proceedings. But was it the intention, on the other hand, to withhold from them the right of filing the document discontinuing the suit, when this had to be done? The text was silent on that point. It appeared to him that whatever steps were permitted to the diplomatic agents at the outset of a case should also be permissible at the end. He was not making any proposal, but would be glad to be clear on the point he had just raised.

M. ANZILOTTI thought that the best solution would be that all acts of procedure could be effected either by a duly appointed agent, or by the diplomatic agent duly accredited by the Government concerned at the seat of the Court. He pointed out that, as a matter of fact, the diplomatic agents of certain Governments had, on various occasions, taken action in regard to cases pending before the Court.

The PRESIDENT pointed out that M. Anzilotti's proposal was not more flexible than the text which provided that parties had to be represented by duly authorised agents.

M. ANZILOTTI differed; he considered that the text in question would exclude diplomatic agents not having been authorised to act as agents with the Court.

M. SCHÜCKING emphasised the importance of the idea of litispendence in proceedings before the Court.

In order to determine the moment at which a suit began—a moment which was important from that point of view—it was essential to lay down that, once a special agreement or application had been filed, all the acts of procedure must be effected by the agents. If a Government did not feel confidence in the agent whom it had appointed, it could withdraw his mandate and appoint another.

The PRESIDENT asked the Court whether it was prepared to accept, as paragraph 1 of Article 32 *bis*, the text proposed by the Co-ordination Commission, which was in the following terms:

"When once a special agreement or application has been filed, every proceeding before the Court must be taken by a duly appointed agent."

M. NEGULESCO thought that the Court had better accept the alternative text suggested by the Commission, and amended in accordance with Jonkheer van Eysinga's proposal. The text with which Article 32 *bis* opened ought to be couched in general terms, and be applicable to all cases. But the text of paragraph 1 covered only acts of procedure of an active kind; it did not cover the acceptance of notifications.

M. FROMAGEOT observed that the appointment of an agent by the other party was not a matter which concerned the applicant party; the latter was entitled to have the necessary notifications made, no matter whether the other party had, or had not, appointed an agent.

The PRESIDENT remarked that, if the Court adopted M. Negulesco's text for paragraph 1 of Article 32 *bis*, it would be necessary to change the wording of paragraphs 2 and 4 of the Co-ordination Commission's text.

Count ROSTWOROWSKI preferred the Commission's text, but would have liked it to be amplified by a passage affirming the agent's right to receive notifications.

M. FROMAGEOT thought that the words "all notifications shall be made to the said agent" might be added to paragraphs 2 and 4.

M. ANZILOTTI considered that the wording of the Co-ordination Commission's text was adequate. It followed, as a matter of course, that, once the agent had been appointed, the notifications would be made to him.

In regard to Count Rostworowski's suggestion, he thought it would be sufficient, in order to enable diplomatic agents to come before the Court, that the text should speak of a duly *authorised* agent, instead of a duly *appointed* agent.

M. FROMAGEOT, in the same connection, suggested that a special clause should be added in the article dealing with the withdrawal of cases.

M. GUERRERO, Vice-President, was uncertain as to the exact meaning of the words "when once" in the Commission's text. Did it mean that, when the instrument was filed, an agent must already have been appointed, thus excluding the possibility of its being filed by a diplomatic agent? As the Court was agreed that this should be permitted, it would appear better to say: "After a special agreement . . . has been filed." Similarly, he was uncertain whether the article also covered the notifications which had to be made by the Court. In that connection, he suggested omitting the word "effected", and to say: "every act of procedure before the Court must be performed . . .", etc.

The REGISTRAR thought that in any case they should avoid laying down that every communication by the

Registry must be made to an agent. That would make it too easy for a party to protract the proceedings by omitting to appoint its agent. The Court must be perfectly free to make the communications to an agent, if he had been appointed, or, failing such appointment, to the Government concerned, through the agreed channel.

The PRESIDENT submitted the following text to enable the Court to express its opinion on M. Anzilotti's suggestion:

> " Except for acts effected by the diplomatic agent, every proceeding before the Court must be taken by a duly appointed agent."

M. ADATCI admitted that such a rule would be consistent with the Court's practice, but thought it was inexpedient to affirm it in the Rules of Court.

M. SCHÜCKING was also of the same opinion as M. Adatci. The insertion of this clause in the Rules would be detrimental to the judicial character of the Court and to its procedure.

Jonkheer VAN EYSINGA thought that it would be better to delete No. 1 of Article 32 *bis*, as proposed by the Co-ordination Commission. The introductory matter which it contained was perhaps unnecessary, and if it disappeared, the remainder of the article, in conjunction with Article 48 of the Statute, would provide all that was required.

M. FROMAGEOT said that in that case the question whether the actual filing of the special agreement or the application constituted an act of procedure which must be effected by an agent would be left undecided.

Jonkheer VAN EYSINGA thought that the question was already settled by the nomenclature used in the Rules and in the Statute, from which it appeared that the documents of the procedure were those filed after the institution of the suit.

The PRESIDENT asked the Court to decide by vote whether it wished to retain paragraph 1 of Article 32 *bis*.

By six votes against six and by the President's casting vote, the Court decided not to retain this text.

The PRESIDENT pointed out that, as a result, it would be necessary for the Co-ordination Commission to re-examine the text of Article 32 *bis* from a drafting point of view. Subject to that reservation, he declared the article adopted.

1.VI.34.*

Discussed as Article 32 bis.

Article 32 bis. " 1. When a case is brought before the Court by means of a special agreement, the appointment of the agent, or agents, of the party or parties submitting the special agreement shall be notified at the same time as the special agreement is filed. If the special agreement is filed by one only of the parties, the other party shall, when acknowledging receipt of the communication announcing the filing of the special agreement, or failing this, as soon as possible, inform the Registry of the Court of the name of its agent.

" 2. When a case is brought before the Court by means of an application, the application, or the covering letter, shall give the name of the agent of the applicant Government.

" 3. The party against whom the application is directed and to whom it is communicated shall, when acknowledging receipt of the communication, or if not as soon as possible, inform the Registry of the Court of the name of its agent.

" 4. Applications to intervene under Article 58 of the Rules, interventions under Article 60 of the Rules and requests for the revision or interpretation of a judgment under Article 66 of the Rules, shall similarly be accompanied by the appointment of an agent.

" 5. The appointment of an agent must be accompanied or followed by a mention of his permanent address at the seat of the Court to which any communications in regard to the case are to be sent."

M. ANZILOTTI, in connection with paragraph 5, wondered whether it was desirable to use the words " or followed ", which seemed to nullify another rule.

Baron ROLIN-JAEQUEMYNS recalled that the Court had laid stress on the necessity for the immediate appointment of an agent, when the special agreement or application was submitted to the Court. It was therefore quite possible that a Government appointing its agent would not, at that moment, know his address at The Hague.

M. FROMAGEOT emphasised the importance of obtaining the address of an agent as soon as he was appointed. The object of this notification of his address was to enable the agent to receive any communications sent to him. He would, of course, receive communications some time before his arrival at The Hague, for instance, the Memorials or Counter-Memorials; but it was better to address such communications to him at the address selected by him at The Hague, even though he had not yet arrived there.

The PRESIDENT took the opinion of the Court regarding the deletion of the words " or followed ", as proposed by M. Anzilotti.

By nine votes to three, the Court decided to delete the words " or followed " in Article 32 *bis*.

The PRESIDENT took a vote on Article 32 *bis* as a whole.

Article 32 *bis* was adopted.

4.IV.35.

Adopted as Article 36 in First Reading.

The text adopted, save for slight purely verbal changes—in paragraph 1, line 3, " submitting " was replaced by " lodging " and the words " The Registry of " in paragraphs 1 and 3 were deleted—and for the renumbering of the articles mentioned in paragraph 4, was the same as that adopted on 1.VI.34 (see above).

5.IV.35.

See under Article 32, p. 101, for a question as to the relative position of Article 33 (Article 32 of Rules of 11.III.36) and Article 36 (Article 35 of Rules of 11.III.36).

Second Reading and Final Adoption.

On 18.II.36 the article was adopted in second reading as number 36. In paragraph 4 the words " *en vertu de* " (" under ") in the French text were replaced throughout by " *conformément à* ", a change which involved no alteration of the English text. Otherwise no change was made.

On 11.III.36 the article was finally *adopted* as Article 35 with one slight alteration in the English text of paragraph 3: " or, *failing this*, as soon as possible " instead of " or, *if not*, as soon as possible."

* D 2, A. 3, pp. 142-143.

ARTICLE 36 *(Article 35, Paragraph 2, old Rules).*

DECLARATION PROVIDED FOR IN THE RESOLUTION OF THE COUNCIL OF THE LEAGUE OF NATIONS

19.V.34.*

Discussed as Article 32 ter.

The PRESIDENT drew attention to the Co-ordination Commission's suggestion that immediately after Article 32 *bis* should follow the provision numbered 32 *ter*, running as follows:

> " The declaration provided for in the Resolution of the Council of the League of Nations of May 17th, 1922 (annex), shall, when it is required under Article 35 of the Statute, be filed with the Registry at latest together with the notification of the appointment of the agent."

This corresponded to No. 2 of the present Article 35, save that the " first document of the written proceedings " was replaced by " the appointment of the agent ". The Co-ordination Commission also suggested that, if a new printed edition of the Rules were prepared, the terms of the Resolution of May 17th, 1922, of the Council of the League of Nations, which constituted an annex to Article 32 *ter*, should be placed at the end of the Rules.

The PRESIDENT, after taking the opinions of members of the Court, declared that Article 32 *ter* was unanimously adopted.

1.VI.34.**

Discussed as Article 32 ter.

The PRESIDENT read Article 32 *ter*:

> " The declaration provided for in the Resolution of the Council of the League of Nations dated May 17th, 1922 (Annex), shall, when it is required under Article 35 of the Statute, be filed with the Registry at the same time as the notification of the appointment of the agent of the State in question."

He observed that, at a previous meeting, the Court had approved a suggestion made by the Co-ordination Commission to the effect that, instead of printing the whole text of the Resolution of May 17th, 1922, below Article 35 of the Rules, the text of the Resolution should be placed at the end of the volume. In that case, it would be better to delete the word " (Annex) " in line 3 of the article, and to replace it by an asterisk referring to a note at the bottom of the page, which note would run: " For the text of this Resolution, see page. . .".

Secondly, were the words " of the State in question ", at the end of the article, really necessary ?

There being no objection, the PRESIDENT recorded that Article 32 *ter* would run as follows:

> " The declaration provided for in the Resolution of the Council of the League of Nations dated May 17th, 1922, shall, when it is required under Article 35 of the Statute, be filed with the Registry at the same time as the notification of the appointment of the agent."

First and Second Readings and Final Adoption.

On 4.IV.35, the article was adopted in first reading with the number 37.

On 19.II.36, it was adopted unchanged in second reading, and, on 11.III.36, it was finally *adopted* as Article 36, omitting the reference to Article 35 of the Statute which was held not to be justified by the terms of that article and was moreover unnecessary.

ARTICLE 37

(Paragraphs 1, 2 and 3: new; Paragraph 4: old Article 33 (2); Paragraph 5: old Article 33 (3).)

PRESIDENT TO ASCERTAIN THE VIEWS OF THE PARTIES WITH REGARD TO QUESTIONS CONCERNING THE PROCEDURE, AND ORDERS FOR THE FIXING OF TIME-LIMITS

19.V.34***.

Discussed as Article 33.

The PRESIDENT recalled that this article, in its original form, had been seriously criticised in the note constituting Appendix 9 [1] to the Co-ordination Commission's report. As a result of this criticism, its length had been curtailed and its contents modified. The text now proposed by the Co-ordination Commission was as follows:

> " 1. In every case submitted to the Court for judgment or advisory opinion, the President, as soon as the agents have been appointed, shall convene them and ascertain from them the intentions of their Governments in regard to all questions connected with the procedure.
>
> " 2. In the light of the information thus obtained, the Court, or the President, if the Court is not sitting, shall make such orders as they may see fit fixing the number and order of presentation of the documents of the written proceedings, the precise dates for the completion of the various acts of procedure, any steps to be taken for the settlement by the Court of any question arising in connection with Article 31, paragraph 4, of the Statute, any arrangements to be made for the hearing of witnesses and the date of the hearing.
>
> " 3. In drawing up orders made under this article, regard shall be had as far as possible to any agreement concluded between the agents.
>
> " 4. Should one of the agents file a preliminary objection, the dates and the order of presentation of documents to be filed in support of or to refute the objection and the arrangements to be made to enable the Court to hear oral observations, shall be fixed by means of an order made under this article and having

* D 2, A. 3, p. 44.
** *Ibid.*, pp. 143-144.
*** *Ibid.*, pp. 44-45.
[1] See D 2, A. 3, p. 916.

regard to the nature of the objection and the grounds on which it is based.

" 5. The Court may extend time-limits which it has fixed. It may likewise decide in certain circumstances that any proceeding taken after the expiration of a time-limit shall be considered as valid.

" If the Court is not sitting, the President may exercise the powers mentioned in this article."

The President added that the words relating to advisory procedure were to be deleted from this text.

M. FROMAGEOT thought that the first three paragraphs raised no important points; on the other hand, paragraph 4 concerned objections, a very delicate subject.

The article laid down that a meeting was to take place between the President and the parties' agents. Could an agent raise a preliminary objection at that meeting, as paragraph 4 seemed to suggest ?

The PRESIDENT said that the paragraph was based on the idea that the preliminary objection had already been lodged.

M. FROMAGEOT, in order to bring this out, proposed that in paragraph 4 the word " file " should be replaced by " have filed ".

22.V.34.*

Discussed as Article 33.

The PRESIDENT, in opening the discussion upon Article 33, called on M. Anzilotti to speak, as he had expressed a wish to make some observations.

M. ANZILOTTI wished the Rules to include a provision concerning the computation of times, distinct from the provision in Article 33, paragraph 2, where that question was only mentioned incidentally. There was likewise a gap in this respect in the existing Rules, though this gap was intentional, it having been argued that the question did not arise with regard to time-limits fixed by the Court, which assigned a definite date for the completion of every act of procedure. But, in the Statute itself, there was at all events one clause—the clause relating to the revision of judgments—where the time-limit laid down was six months in one connection and ten years in another. It might well happen that, in the future, cases would be referred to the Court under international conventions in which the time-limits for appeals were fixed in months or years. Of course, the Court had no power to impose a certain system of making this calculation upon Governments, but there was no reason why it should not be stated that, in the absence of some provision to the contrary jointly made by the parties, the Court would calculate times in a particular way.

Lastly, it should be laid down that acts of procedure must be performed during hours when the Registry was open to the public.

Summarising, M. Anzilotti considered that Article 33 should be restricted to the question of the consultation of agents, and that there should be a special article regarding the fixing and calculation of times.

The REGISTRAR recalled that, in the original Rules, the hours at which the Registry was open had been laid down. It had, however, been considered better to delete this provision, because it was impossible to maintain it in practice, since States showed little inclination to observe it.

M. ANZILOTTI did not approve of this system, as he held that regard should also be had to the rights of the party which stood to benefit by the fixing of a time-limit and which was entitled to demand that this time-limit should be observed.

The REGISTRAR thought that that was a question of interpretation. The Court fixed the time-limit by assigning a definite date, and the parties sometimes argued that that date only expired at midnight.

The PRESIDENT gathered that M. Anzilotti wanted to include in the Rules a provision to the following effect: When a time-limit was fixed for the filing of an instrument instituting proceedings or of a document of procedure, the instrument or document must be delivered to the Registry before 6 p.m. on the last day of the time allowed.

M. ANZILOTTI agreed that that was his idea; but the *dies a quo et ad quem* should not be reckoned.

The REGISTRAR observed that, unless it was proposed to abolish the rule to the effect that the Court, or the President if the Court was not sitting, could decide that a proceeding taken after the expiration of a time-limit was nevertheless to be considered as valid, it would probably be simpler to leave things as they were in order to avoid the too frequent application of the latter rule.

The PRESIDENT held that the rule just referred to by the Registrar could not apply to time-limits accepted by both parties for the filing of instruments instituting proceedings. On the other hand, he thought that, when a time-limit was fixed by the Court, the latter was entitled to accept a document the filing of which was belated.

M. ANZILOTTI had had in mind mainly the first of these cases, but observed that in the second case also there might be a right appertaining to the other party and requiring protection.

M. FROMAGEOT said that M. Anzilotti had raised a series of different questions:

(1) Was it expedient to make a rule as to the computation and calculation of time-limits fixed by the Court ?

(2) When, in a treaty, time-limits for the institution of proceedings were provided for, but no definite date was indicated, should the Court adopt a rule for the calculation of such time-limits ?

(3) Should the Court lay down definite hours, outside which documents would not be accepted, for the filing of documents of procedure with the Registry ?

(4) Could the Court, or the President, accept a document which had been filed too late ?

M. Fromageot, for his part, would like the Rules—as at present—to lay down the principle that, in proceedings before the Court, time-limits were fixed by the assignment of definite dates. They might then lay down how, in the case of a treaty in which time-limits were indicated—for instance, in months—these months would be calculated. Lastly, a rule should be made regarding extensions of time-limits.

The questions who should fix time-limits—the President or the Court—and whether the President should first summon the agents in order to come to an understanding with them regarding the fixing of time-limits, were in an entirely different category and should be dealt with in a separate rule.

The PRESIDENT asked the Registrar if there was any difficulty, from his point of view, in having a separate article to deal with the calculation of time-limits.

The REGISTRAR replied in the negative, but observed

* D 2, A. 3, pp. 45-52.

that a rule of that kind had been proposed, as early as 1922, and had been rejected.[1]

M. ANZILOTTI considered that the situation had changed. In 1922, the provision in Article 61 of the Statute was the only clause which fixed time-limits by months or by years, whereas now there were various conventions containing provisions to that effect.

The REGISTRAR said that the reason why the idea of having a rule dealing with the calculation of time-limits had been rejected in 1922 was, really, that it was held that the Court could always overcome the difficulty by fixing an exact date; any clause providing for the fixing of time-limits by months, etc., which might appear in a special agreement or a convention, would be regarded as a proposal made to the Court under Article 33.

M. ANZILOTTI was prepared to admit that a clause of that kind in a special agreement could be deemed to be a proposal made jointly by the parties to the Court. But that could hardly be done in the case of a convention —perhaps a general convention—wherein it was provided that a given question might be referred to the Court, on appeal, within a period of, say, six months.

Jonkheer VAN EYSINGA, on the contrary, doubted whether, if a convention provided that an appeal might be lodged with the Court within a period of six months, the Court had power to modify that provision by means of its Rules.

M. ANZILOTTI agreed that the Court could not do so; but he thought that a subsidiary provision in the Rules, prescribing the method by which the Court calculated time-limits, in the absence of a convention, would be of value to the Governments.

The PRESIDENT thought it would be possible for the Court, following a practice that was customary in commercial affairs, to lay down certain presumptions upon which the parties might be assumed to be agreed.

Jonkheer VAN EYSINGA doubted whether it was possible to admit the existence of presumptions of that kind in dealing with an international institution which the nations had created to safeguard their own interests.

M. ANZILOTTI pointed out that, in the case dealt with in Article 61 of the Statute, the Court was competent to lay down the manner in which it would calculate the time-limits provided in that article.

M. URRUTIA observed that, in Article 33 as formulated by the Co-ordination Commission, the rule that time-limits should be fixed by the Court in each case had been taken out. It would be better to re-insert it. That provision should form the subject of a separate article, corresponding to the existing Article 33, either as it stood, or in an amended form, but in any case distinct from the article which would provide for the preliminary conversation of the President with the agents. Similarly, M. Urrutia did not consider that Article 33 should be concerned with preliminary objections; that question should form the subject of a special article, inserted at an appropriate place.

To sum up, he thought that there should be three articles: a first article to state the principle, a second article to regulate the preliminary conversation with the agents, and a third to deal with preliminary objections.

M. SCHÜCKING agreed with M. Urrutia that it would be necessary to have several articles. But they should follow the natural sequence of the proceedings, and begin by laying down the rule about the preliminary conversation with the agents, after which would come the special article concerning the calculation of time-limits.

M. GUERRERO, Vice-President, did not consider that the text proposed by the Co-ordination Commission constituted an innovation on the existing Article 33. The new article was merely an interpretation of the old text, which was more condensed. He therefore preferred to maintain Article 33 as it stood.

He agreed with M. Urrutia that it would be best to transfer any clauses relating to preliminary objections to the relevant articles.

As regards M. Anzilotti's proposal, he agreed that the Rules ought to contain a clause showing how the Court proceeded in determining time-limits when it fixed them itself; some paragraphs on that subject would have to be added to Article 33.

A rule might be drafted laying down that the last day of a time-limit always expired at midnight, and not at the hour at which courts closed their doors; account must also be taken of the case of a time-limit expiring on a day that was a public holiday in Holland, and of the case of several public holidays following each other in succession.

There would have to be another paragraph dealing with time-limits fixed by the parties themselves, in which case the above-mentioned rule would of course only have a subsidiary value.

M. FROMAGEOT thought it would be best to deal first with the procedural time-limits fixed by the Court—namely, in the manner described in the first paragraph of the existing Article 33.

Next, they should deal with the case where time-limits for the institution of proceedings were prescribed in a treaty; here it might be laid down that, unless otherwise provided, such time-limits were reckoned from midnight on the *dies a quo* till midnight on the *dies ad quem*.

Lastly, it would be stated that, where a time-limit ran out on a day treated as a public holiday by the Court, it would be deemed to expire on the first working-day following the public holiday.

The PRESIDENT proposed to postpone the discussion till a text had been formulated to express M. Anzilotti's ideas; but he observed that the Vice-President had also made a suggestion.

M. GUERRERO, Vice-President, said his proposal had merely been to maintain the existing Article 33 of the Rules.

Jonkheer VAN EYSINGA considered, however, that the first paragraph of the Commission's text would be of value.

On the other hand, the second paragraph of the text proposed by the Commission did not give a complete list of all the points which might be the subject of orders, but only of some of them. In order to make it clear that the list of points was not exhaustive, Jonkheer van Eysinga proposed inserting the words "*inter alia*" after the word "fix".

Another way of arriving at the same result would be to make use of the expression: "The Court shall make orders for the conduct of the case."

The PRESIDENT remarked that the object of the list given in the second paragraph was simply to draw the attention of agents to certain points which they should look up before attending for the preliminary conversation that was contemplated.

[1] See D 2, p. 130.

Jonkheer VAN EYSINGA drew attention once more to the reasons given by the Commission in regard to paragraph 2 of Article 33.[1] In the discussions in the Commission he had expressed doubts as to whether, if a case were submitted by special agreement, the Court had power, in the absence of an agreement between the parties, to vary the general rule that the memorials had to be filed simultaneously, not in succession. When a case was submitted by special agreement, under the old system, there was neither plaintiff nor defendant. But the text proposed would empower the Court to place the parties, so to speak, in the position of plaintiff and defendant.

The PRESIDENT drew attention to paragraph 3 of the same article, which stated that: " ... under this article regard shall be had, so far as possible, to any agreement concluded between the agents "; those words expressed the general principle.

It was, however, beyond doubt that, even when both parties had agreed to submit a case by special agreement, it sometimes happened that one of the parties was in the position of plaintiff, and the other of defendant. The advantage of the clause proposed by the Commission was that, if the parties did not agree with one another to file their memorials in succession, the Court had power, in exceptional circumstances, to take the situation of fact into account and to rule that the documents must nevertheless be filed in succession.

M. ANZILOTTI said that this was, perhaps, largely a question of words. He agreed with M. van Eysinga that there could be no question of a plaintiff, in the strict sense of the term, unless an application had first been filed. But that was no reason why the Court should not decide, if it deemed it necessary for the better conduct of the proceedings, that one of the parties should file its case before the other. In all other respects, there would be no plaintiff or defendant, but only parties, who had filed their procedural documents in a particular order instead of in another.

Recurring to the fundamental point, M. Anzilotti considered that a special clause would be necessary to deal with the question of time-limits; at the same time, the provision concerning the President's conversation with the agents of the parties ought to be retained: if the Court had hitherto been able to function with success, that was largely due to the fact that the agents had had conversations either with the President, or else with the Registrar, who reported to the President.

In M. Anzilotti's opinion, the first question to be settled was whether the Court did, or did not, desire to insert in the Rules a clause concerning time-limits, distinct from the provisions of Article 33, as proposed by the Commission, providing for the conversation between the President and the agents.

M. GUERRERO, Vice-President, also attached great importance to the conversations with the agents provided for in the draft. But he thought that when Article 33 said that the Court would have regard, so far as possible, to an agreement between the parties, the existence of these conversations was, in fact, assumed. Moreover, the first paragraph of Article 33, as now in force, appeared to him more elastic than the text of the draft article. It might not perhaps prove easy, in every case, to convene the agents, who might thereby suffer hardship, when the necessary information could be obtained by correspondence.

[1] See D 2, A. 3, p. 867.

M. ADATCI desired to preserve the first three paragraphs of Article 33, as submitted by the Co-ordination Commission. He believed that the President's task would be facilitated by the new clauses proposed, as they would furnish him with a legal basis, which had hitherto been lacking, in his dealings with the agents.

As regards Jonkheer van Eysinga's remarks on the list given in paragraph 2 of the proposed article, the list in question was not meant to be exhaustive, so that the Commission would see no objection to adding the words " *inter alia* ", as suggested by Jonkheer van Eysinga; or they might say " in particular ".

In regard to the order in which documents had to be filed in a case submitted by special agreement, M. Adatci considered that the Court or its President could prescribe such arrangements in an order, without thereby indicating that one or other of the parties was the plaintiff or the defendant.

Furthermore, M. Adatci agreed with the suggestion of dividing Article 33, as drafted by the Co-ordination Commission, into two portions. In that connection, he favoured the Vice-President's proposal.

Finally, he was convinced that paragraph 4 of Article 33, as submitted by the Commission, should be transferred to another position.

The PRESIDENT considered that the discussion had resulted in agreement upon certain questions.

In the first place, it had been recognised that it was desirable to include in the Rules a special provision concerning the calculation of time-limits. In this connection, M. Fromageot had proposed the following:

> " Time-limits for the completion of the various acts of procedure prescribed by the Court or by the President shall be fixed by the assignment of definite dates. When time-limits have been laid down in a treaty or agreement for the institution of proceedings before the Court, if these time-limits are fixed in days, weeks, months or years, they shall, in the absence of provision to the contrary, be calculated from midnight on the *dies a quo* to midnight on the *dies ad quem*. If the last day is a holiday at the seat of the Court, the time-limit shall expire at midnight on the first working-day following."

The President suggested that this text should be referred to the Co-ordination Commission for any necessary touching-up. It would be followed by an Article 33 *bis* containing those provisions of the proposed Article 33 which were not suppressed or transferred elsewhere.

M. SCHÜCKING agreed in principle, but he had understood that M. Adatci had proposed that the article which contained the provisions regarding the conversation between the President and the agents should precede that containing rules concerning time-limits. In M. Schücking's view, all proceedings should begin with this conversation, and this logical order should be followed in the Rules.

The PRESIDENT having observed that one part of the text proposed by M. Fromageot concerned the powers of the Court, M. FROMAGEOT pointed out that, in a special agreement, the parties might stipulate that the special agreement was to be filed with the Court within a certain time, failing which it would lapse. In principle, the Court had no power to interfere with this time-limit. But there might be some obscurity, and in that case the rule proposed by M. Fromageot would operate. On the other hand, if it were laid down in a special agreement that proceedings must be instituted within two months, these two months being

calculated in a certain way, the Court would simply have to accept that ruling.

The PRESIDENT asked M. Anzilotti whether he proposed the deletion of the last paragraph of Article 33 as proposed by the Co-ordination Commission.

M. ANZILOTTI said that he did not. He merely felt some doubts regarding the last sentence which gave the President wider powers than the existing Article 33, and which were perhaps excessive.

With regard to paragraph 2 of the Commission's text, M. Anzilotti thought that it should be formulated with due regard to the fact that, as was obvious, it did exclusively relate to procedure in the strict sense of the term. It should be clearly indicated that this paragraph concerned only arrangements for the conduct of the case.

The PRESIDENT proposed that Article 33 should be referred back to the Co-ordination Commission, which could submit a new text divided into two or three articles. One of these articles would be based on the text proposed by M. Fromageot, the two others on the Commission's text. The latter would also propose the logical position to be given to these articles.

M. FROMAGEOT drew attention to a suggestion which he had made [1] to the effect that, if the party which had to deposit a case or counter-case had not observed the time-limit fixed, the Court should be able to extend this time-limit, but only if the other party did not claim to take advantage of this failure to observe the time-limit.

The question would arise more particularly in the case of the simultaneous presentation of documents of procedure. In that case, if an extension of time was granted owing to the non-presentation of a case or counter-case by one of the parties, it must be understood that the case which had been filed would remain in the Registry during the prolongation. Regard must be had not only to the wishes of the party which was belated, but also to the interests of the punctual party.

M. SCHÜCKING recalled that M. Fromageot wished Article 53 of the Statute to be applied in a case when a party was late in filing a document of procedure when the other party objected to the acceptance by the Court of that document. But, in M. Schücking's opinion, that involved extending the application of Article 53 in a way which to his mind was not legally admissible.

M. FROMAGEOT proposed that they should leave aside for the moment the question of the application of Article 53.

M. ANZILOTTI laid stress on the importance of the question which had just been raised. In his opinion, they must distinguish between a simple extension of a time-limit and a case where the time-limit had already expired and the question was whether a proceeding taken too late was to be considered as valid.

With regard to the mere extension of a time-limit. M. Anzilotti was in favour of giving the Court unlimited powers. On the other hand, in a case where a document of procedure was not filed by the prescribed date, M. Anzilotti suggested a middle course—namely, that the Court should consider the proceeding as valid, provided that it was completed within a certain time, after the expiration of which, failing an agreement between the parties, Article 53 would be applied.

M. GUERRERO, Vice-President, preferred to avoid drastic solutions and to leave the Court a certain latitude.

If, when the time-limit expired, the party concerned had not filed its memorial and the other party did not agree to its acceptance, the Court should decide, but only after hearing both parties. It would in fact be an incidental point to be decided by the Court.

M. FROMAGEOT drew attention to the fact that the provision would acquire the requisite elasticity if *force majeure* or other reasons regarded as valid were taken into account in appraising the causes of delay.

Count ROSTWOROWSKI wondered whether it would not be desirable to group all rules regarding time-limits in a single article, the question raised by M. Fromageot being dealt with in the fifth paragraph of Article 33.

In his view, the text proposed by the Commission for Article 33 would require some slight modifications. He pointed out the danger of giving paragraph 2 too elastic a wording. Certainly, the old Article 33 also laid down that the Court's powers were to be exercised by the President when the Court was not sitting. But, unlike the proposed text, which enumerated the Court's powers, though not exhaustively, the former rule concerned only time-limits. If the words "*inter alia*" were also added, it would not be clear in what respects the President could exercise the Court's powers. Could not the Co-ordination Commission try to find some way of drafting Article 33 in more precise language ?

The PRESIDENT recalled that the Court had referred the drafting of Article 33 back to the Co-ordination Commission, which was to prepare a new text in the light of the observations made.

As regarded M. Fromageot's proposals, he observed that failure by parties to observe time-limits did not seem to have involved the Court in any difficulties.

The REGISTRAR recalled that the practice hitherto followed, in the event of a document not having been filed by the prescribed date, was to ascertain quite unofficially whether the other party would raise any objection to the acceptance of such document.

23.V.34.*

Discussed as Article 33.

Article 33, Paragraph 1, of the Rules. "1. In every case submitted to the Court, the President, as soon as the agents have been appointed, shall convene them and shall ascertain from them the intentions of their Governments in regard to all the questions connected with the procedure [*liée à la procédure*]."

M. ANZILOTTI expressed some doubts as to the meaning of the final words, and it was decided, on the proposal of Baron ROLIN-JAEQUEMYNS, to replace them by the words: "related to the procedure" ("*se rattachant à la procédure*").

M. GUERRERO, Vice-President, recalled the fears that he had expressed on the previous day concerning the compulsory convening of the agents. The President could quite well obtain the information he required by letter, without being expressly required to convene them. He would therefore prefer that the words "shall convene them and shall ascertain from them" should be replaced by the words "shall seek to ascertain". Even so, he thought that the obligation placed on the President to obtain information on *all* the questions of procedure was, perhaps, excessive.

Jonkheer VAN EYSINGA entirely approved the proposal that there should be personal contact between the Presi-

[1] See D 2, A. 3, p. 913.

* D 2, A. 3, pp. 59-62.

dent and the agents. So far as he was able to judge from similar circumstances, outside the Court, such conversations must be regarded as of the greatest value.

M. ANZILOTTI was of the same opinion, but thought that this personal contact would be established with the diplomatic agents at The Hague, at any rate when dealing with distant countries.

M. FROMAGEOT thought that, in the case of a distant country, the Government concerned could always overcome the difficulty by appointing its Minister at The Hague, or one of its Ministers in Europe, as a temporary agent.

M. URRUTIA regarded the convening of the agents proposed in the Co-ordination Commission's text as an innovation which, in principle, would be very useful; but it might happen —seeing that it was necessary to wait until the agents had come to The Hague before making the order on the procedure—that the promulgation of the order might be delayed for several months. For these reasons, he would prefer to allow the President some latitude. Thus the text might be worded in the following terms:

> " In every case submitted to the Court, the President, as soon as the agents have been appointed, may convene them and ascertain from them the intentions of their Governments."

The PRESIDENT thought that the text proposed by the Co-ordination Commission was quite elastic enough. In his view, too much importance should not be attached to exceptional cases.

Baron ROLIN-JAEQUEMYNS agreed with M. Urrutia's point of view. The article might be worded as follows:

> " The President . . . may convene them in order to obtain information from them in regard to all the questions related to the procedure."

M. GUERRERO, Vice-President, wished to propose a more elastic text, namely:

> " In every case submitted to the Court, the President shall obtain information, so far as possible, as to the intentions of the Governments parties to the suit in regard to the questions of procedure."

This text would allow the President complete latitude to establish personal contact with the agents, if they were at The Hague, or to have conversations with the diplomatic representatives in that city, if he saw fit. M. Guerrero had no objection whatever to the proposed innovation, but he had some fears as to the compulsory convening of the agents.

M. ADATCI said that he had always wished to see provision made for personal contact between the President and the agents before the opening of the procedure, and he had gladly welcomed the idea embodied in paragraph 1. In regard to the case instanced by M. Urrutia, he could imagine circumstances in which a distant country would hesitate to put an ordinary diplomat in touch with the President of the Court. But such a case would be so exceptional that it was unnecessary for the Court to provide for it. Nevertheless, M. Adatci was in favour of M. Urrutia's amendment, in the form given to it by Baron Rolin-Jaequemyns.

M. ANZILOTTI had understood that the intention, in the Co-ordination Commission's text, was to make it an actual obligation for the President to establish personal touch with the agents before regulating the procedure. That was indeed no innovation, except that this personal contact between the President and the agents would thus become an essential element of the proceedings.

He would be prepared to vote for a clause of that kind; but he thought that, if it were amended so as merely to empower the President to obtain information, it would cease to be of value.

As regards distant countries, he did not see that any difficulty would arise: if the case were not urgent, one could wait as long as necessary; if it were urgent, the countries concerned would certainly send their agents to Europe.

The PRESIDENT pointed out that the object of the proposed text was, on the one hand, to ensure personal touch between the President and the agents, and on the other hand, to impose certain obligations on the parties.

M. GUERRERO, Vice-President, said that he would not press the amendment he had suggested. Nevertheless, he must again point out that, if the President had to obtain information as to the intentions of the Governments in regard to the course of the proceedings, it might be necessary to convene the agents repeatedly.

Baron ROLIN-JAEQUEMYNS thought it might be useful for the Governments to know in advance that their agents might be convened by the President. He considered, therefore, that it was desirable to provide, in the texts, for their being convened. But he would prefer that this should not be compulsory and that the President should be allowed complete latitude, in accordance with the idea of M. Urrutia —whose amendment he would re-submit in his own name.

The PRESIDENT wondered whether, if the President were merely given a discretionary power, the agents would not be entitled to refuse to attend when they were convened.

Baron ROLIN-JAEQUEMYNS said that, if the President convened the agents, the latter would be acting very unwisely if they failed to present themselves.

M. GUERRERO, Vice-President, said he would withdraw his amendment, as the majority of the Court appeared to regard the convening of the agents as necessary.

The PRESIDENT said that the Court would therefore only have to vote on the amendment that had been proposed by M. Urrutia, and had now been submitted by Baron Rolin-Jaequemyns. It was worded as follows:

> " In every case submitted to the Court, the President, as soon as the agents have been appointed, may convene them and ascertain from them the intentions of their Governments in regard to the questions connected with the procedure."

On the proposal of M. FROMAGEOT, it was decided to replace the words " in regard to the questions . . ." by " in regard to questions relating to the procedure ".

Jonkheer VAN EYSINGA asked whether, if he voted for this text, he could afterwards vote in favour of the Commission's text.

The PRESIDENT said that, if the text amended by Baron Rolin-Jaequemyns were adopted, it would definitively replace the Co-ordination Commission's text.

He then put the amended text to the vote.

The Court, by seven votes to five, adopted this text.

The PRESIDENT took a vote on the question whether the Court finally adopted this text as paragraph 1 of Article 33.

The Court, by eight votes, with four abstentions, answered this question in the affirmative.

Article 33, Paragraph 2, of the Rules. " 2. In the light of the information thus obtained, the Court, or the President if the Court is not sitting, shall make such orders for the conduct of the case as they may see fit fixing, *inter alia:* the number and order of presentation of the documents of the written proceedings; the time-limits for the completion of the various acts of procedure; the steps to be taken for the settlement by the Court of any question arising in connection with Article 31, paragraph 4, of the Statute, and the date of the hearing."

M. ANZILOTTI did not understand why special reference had been made to Article 31, paragraph 4, of the Statute.

M. NEGULESCO proposed the addition of a reference to Article 48 of the Statute. This reference might very well replace the enumeration contained in the article, which, moreover, was not exhaustive.

The PRESIDENT said that the purpose served by this enumeration was to bring to the notice of the agents the chief questions in regard to which it was desirable that they should be able to make known their Governments' standpoint to the President.

M. URRUTIA considered that, having regard to the change adopted in paragraph 1 of the article, the phrase: " In the light of the information thus obtained " in paragraph 2 should be amended, for there might be cases in which the President would not exercise the right henceforth conferred upon him by paragraph 1.

Count ROSTWOROWSKI pointed out that the essential thing was that the President should communicate to the Court whatever information he had obtained. The sentence might run: " In the light of the information furnished by the President . . .". This wording would not render personal contact between the President and the agents any less desirable, but was non-committal as to the results obtained therefrom.

M. ANZILOTTI observed that the present difficulty arose from the fact that the Court, in paragraph 1, had adopted a text which established no obligation either to convene the agents or even to obtain information.

Baron ROLIN-JAEQUEMYNS saw no objection to beginning paragraph 2 of the article with a phrase running as follows: " In the light of the information obtained by the President, the Court shall make such orders . . .". This wording took into account M. Urrutia's objection; it likewise harmonised very well with paragraph 1, as just adopted.

M. GUERRERO, Vice-President, who took the same view as had just been expressed by M. Anzilotti, proposed that the first paragraph of the article should be referred back to the Co-ordination Commission. In voting in favour of paragraph 1 as amended by M. Urrutia, his intention had not been that the President should be released from the duty of obtaining the necessary information.

M. FROMAGEOT pointed out that the effect of the vote recorded was that the President had the option of convening the agents, but it was his duty to collect information; the information obtained by him would constitute the basis of the Court's deliberation.

The PRESIDENT asked whether there was any objection to wording the first phrase of paragraph 2 as follows, as proposed by Baron Rolin-Jaequemyns:

" In the light of the information obtained by the President, the Court . . ."

He declared this wording adopted.

He also recorded that the Court agreed to the deletion —proposed by M. Anzilotti—of the words: " the steps to be taken for the settlement by the Court of any question arising in connection with Article 31, paragraph 4, of the Statute ".

Finally, he took a vote on paragraph 2 of Article 33 as thus amended.

This paragraph was unanimously adopted.

Article 33, Paragraph 3, of the Rules. " 3. In drawing up orders made in accordance with the preceding paragraph, regard shall be had as far as possible to any agreement which may have been concluded between the agents."

M. ANZILOTTI proposed to substitute the expression " reached between the parties " for the expression " which may have been concluded between the agents ".

The PRESIDENT took a vote on paragraph 3 of Article 33 with the change proposed by M. Anzilotti.

This paragraph was unanimously adopted.

Article 33, Paragraph 4, of the Rules. " 4. The Court may extend time-limits which it has fixed. It may likewise decide, in certain circumstances, and after giving the agent of the other party an opportunity of stating his opinion, that a proceeding taken after the expiration of a time-limit shall be considered as valid."

Upon a vote being taken, this text was unanimously adopted.

Article 33, Paragraph 5, of the Rules. " 5. If the Court is not sitting, the powers conferred upon it by this article shall be exercised by the President, subject to any subsequent decision of the Court."

Upon a vote being taken, this text was unanimously adopted.

29.V.34.

For discussion on Article 37 as Article 33 (draft) in connection with Article 47 (Article 41, draft) see Article 47 (pp. 159-161 of this volume).

1.VI.34.*

Discussed as Article 33.

The PRESIDENT next turned to Article 33, which was as follows:

" 1. In every case submitted to the Court, the President ascertains the views of the parties with regard to questions connected with the procedure; for this purpose he may summon the agents to a meeting as soon as they have been appointed.

" 2. In the light of the information obtained by the President, the Court will make such orders for the conduct of the case as it may deem fit in order to determine in particular the number and order of the documents of the written proceedings and the time-limits within which the various acts of procedure are to be completed.

" 3. In the making of an order under the foregoing paragraph, any agreement between the parties is to be taken into account so far as possible.

" 4. The Court may extend time-limits which it has fixed. It may likewise decide, in special circumstances and after giving the agent of the opposing party

* D 2, A. 3, pp. 144-145.

an opportunity of stating his opinion, that a proceeding taken after the expiration of a time-limit shall be considered as valid.

" 5. If the Court is not sitting. the powers conferred upon it by this article shall be exercised by the President, subject to any subsequent decision of the Court."

Paragraph 1 was adopted.

M. FROMAGEOT, with reference to paragraph 2, observed that the phrase: " the Court will make such orders for the conduct of the case as it may deem fit . . ." was extremely heavy.

Baron ROLIN-JAEQUEMYNS thought that the words " such " and " as it may deem fit " were superfluous and might be deleted.

The PRESIDENT noted that the Court had no objection to the proposed deletion, and read paragraph 2, which would accordingly run as follows:

" 2. In the light of the information obtained by the President, the Court will make orders for the conduct of the case in order to determine in particular the number and order of the documents of the written proceedings and the time-limits within which the various acts of procedure are to be completed."

The PRESIDENT recorded that paragraph 2 was adopted in this form.

The PRESIDENT also noted that there was no observation with regard to paragraphs 3, 4 and 5, and that, accordingly, Article 33 was adopted as a whole.

27.II.35.

For discussion on Article 37 as Article 33 (draft) in connection with Article 71 (Article 68, draft) see Article 71 (p. 297-298 of this volume).

4.IV.35.*

Discussed as Article 38.

Count ROSTWOROWSKI raised the question of the title to be given to this new section; he thought that " *Subsequent* conduct of the case " would be appropriate.

Jonkheer VAN EYSINGA observed that the expression " Conduct of the case " was already used in paragraph 2 of Article 38, and that it there bore a particular meaning, different from that which it would have in the proposed heading.

The PRESIDENT pointed out that the translation into English of the expression " *Direction du procès* " would give rise to great difficulty. In the Statute, the translation given was " Conduct of the case ", but that was not appropriate in a heading.

The REGISTRAR said that that expression would inevitably be translated into any Germanic language by a technical term possessing a meaning quite different from what was intended. That would undoubtedly lead to confusion.

At the resumption of the sitting, the PRESIDENT said that he should prefer the question of the heading to be given to the section comprising Articles 38 to 40 to be reserved. He next opened the discussion on the text of Article 38.

Jonkheer VAN EYSINGA considered that the object of paragraph 2 of Article 38 was simply to lay down that orders must be made respecting the first steps in the proceedings—the fixing of the number and order of documents of the written proceedings, and of the time-limits for the presentation of these documents. As regards the remainder of the proceedings, the Court was left a free hand. But the terms of the paragraph gave the impression that all arrangements for the conduct of the case were to be made by orders at the outset of the proceedings.

The PRESIDENT said that the Court's right to make orders was derived from Article 48 of the Statute. Judging from that provision, the idea of the Statute seemed to be that, as a general rule, the Court's decisions in regard to the conduct of the case should take the form of orders. In practice, the Court had used orders for decisions not sufficiently important to be given the form of a judgment but too important to be simply announced. After indicating the main categories of decisions which it was the practice of the Court to give in the form of orders and of those which were given a simpler form, he said that, in his opinion, Article 38 of the Drafting Committee's draft was consistent with that practice.

M. GUERRERO, Vice-President, was afraid that the expression, in the first paragraph of Article 38, " the President ascertains the views of the parties with regard to questions connected with the procedure ", might create the impression that the whole procedure was to be arranged in agreement with the parties. In order to prevent any misunderstanding, he proposed that the passage should run: " with regard to questions connected with certain steps in the proceedings ".

M. NEGULESCO considered that the text proposed for Article 38 was likely to lead to considerable confusion by creating the impression that the Court could only make orders at the outset of a case and following upon the conversation between the President and the agents. In order to avoid creating this impression, it would be desirable to adopt the suggestion made by M. Anzilotti and Jonkheer van Eysinga at the morning meeting, and to include paragraphs 4 and 5 of Article 38 in Article 39, placing the article thus composed among the general provisions.

M. ANZILOTTI had always understood that paragraphs 1 and 2 of Article 38 were intended to establish in the Rules the practice which had been followed by the Court since its creation; if that were so, the article only related to orders made at the outset of proceedings. Accordingly, it in no way prejudiced the Court's right subsequently to make other orders for the conduct of the case.

Jonkheer VAN EYSINGA thought that that was certainly what Article 38 was intended to mean; but he doubted whether everyone would understand it like that.

The PRESIDENT observed that, if the Court adopted the change proposed by M. Guerrero, it would be necessary also to indicate the domain in which the President could not consult the parties.

M. ANZILOTTI remarked that the doubts felt by M. Guerrero and Jonkheer van Eysinga arose simply from the phraseology used; perhaps some more flexible expression could be found than: " questions connected with the procedure ".

Jonkheer VAN EYSINGA would be satisfied if the word " orders " were qualified by the adjective " initial "; that would indicate more clearly the matters to which the conversation between the President and the parties' representatives would relate.

* D 2, A. 3, pp. 431-434.

M. GUERRERO, Vice-President, proposed that, in the first paragraph, they should say: " concerned *with the first steps* in the proceedings ", in order to make it clear to agents that Article 38 did not give them the right to discuss with the President the whole of the procedure but only the first steps thereof. He also proposed to delete the words " in particular " in the second paragraph.

Baron ROLIN-JAEQUEMYNS thought that the President should not discuss the procedure with the parties' representatives; he should simply ask them what their intentions were and what arrangements, in their view, it would in practice be possible to make.

Count ROSTWOROWSKI, in order to take into account the distinction drawn during the meeting between questions which must be dealt with by order and those which need not be so dealt with, proposed to add the word " necessary " after the word " orders " in the second paragraph of Article 38.

Jonkheer VAN EYSINGA proposed that the words " for the conduct of the case " in paragraph 2 should be deleted, and that the last words of the paragraph: " . . . within which the various acts of procedure are to be completed " should be omitted.

M. ANZILOTTI, in order to meet the various objections raised, suggested that the first paragraph should run: " In every case . . . procedure *which must be settled at the outset of the case.* . . . "

The PRESIDENT observed that this qualification would put the President in a difficult position in his conversations with the agents.

M. SCHÜCKING supported Count Rostworowski's proposal that the word " necessary " should be inserted in paragraph 2, because in some circumstances the Court's decisions were communicated to parties without being given the form of orders.

The PRESIDENT would have preferred to keep the text as adopted in June 1934 [1]; but, if the Court wished to adopt a different wording, he proposed that they should say in paragraph 2: " . . . the Court will make orders in accordance with Article 48 of the Statute . . . ".

M. GUERRERO, Vice-President, instead of the two suggestions already made by him in connection with paragraph 1, now proposed that in the second line the word " *des* " should be substituted for " *les* " before " *questions* " (English: " *certain* " questions).

The PRESIDENT first took a vote on M. Guerrero's proposal:

> " Does the Court decide to substitute the word ' *des* ' for ' *les* ' in the second line of paragraph 1 of Article 38 (English: ' certain ' questions) ? "

By eight votes to three, the Court answered the question in the affirmative.

The PRESIDENT then put the following question:

> " Does the Court decide to maintain paragraph 1 of Article 38 with M. Guerrero's amendment ? "

The Court unanimously answered in the affirmative.

Turning to the second paragraph, the PRESIDENT took a vote on Jonkheer van Eysinga's proposal that the words " orders for the conduct of the case " should be replaced by " the necessary orders " and that the last words of the paragraph (" within which . . . completed ") should be deleted.

M. WANG having asked that the two points should be voted upon separately, the PRESIDENT put the following question:

> " Does the Court decide to substitute the words ' the necessary orders ' for the words ' orders for the conduct of the case ' ? "

By seven votes to four, the Court answered the question in the affirmative.

With regard to the second part of the motion, M. WANG suggested to Jonkheer van Eysinga that it would suffice to delete the word " various " (" *divers* ") in the last phrase of paragraph 2.

Jonkheer VAN EYSINGA accepted this suggestion.

The PRESIDENT took the opinion of the Court on the following question:

> " Does the Court decide to delete the word ' various ' in the last line of paragraph 2 of Article 38 ? "

By eight votes to three, the Court answered the question in the affirmative.

The PRESIDENT next took a vote on the following question:

> " Does the Court decide to maintain paragraph 2 of Article 38 as now amended ? "

The Court unanimously answered the question in the affirmative.

Count ROSTWOROWSKI pointed out that the deletion of the words " for the conduct of the case " in paragraph 2 made it very difficult to use the expression " Conduct of the case " as a heading for the section.

The PRESIDENT did not think so, having regard to the difference between the meaning which that expression bore in the body of the article and the meaning which it would have as a heading. In any case, the question was for the moment reserved.

Jonkheer VAN EYSINGA wished paragraphs 4 and 5 of Article 38 to be attached to Article 39, which would then consist of three paragraphs corresponding to those of Article 33 of the existing Rules.

M. ANZILOTTI supported this proposal. If it were adopted, however, the words " or by the President if the Court is not sitting " would have to be deleted from the new first paragraph (Article 39 of the Drafting Committee's text), as they were covered by paragraph 5 of Article 38.

Count ROSTWOROWSKI agreed with the President that paragraph 5 of Article 38 could not be taken out of that article, because it concerned the general powers of the President. On the other hand, he thought it logical to transfer paragraph 4 of Article 38, which concerned time-limits, to Article 39.

Jonkheer VAN EYSINGA was prepared to accept this proposal; but it would be necessary to embody in the new article thus composed a new paragraph corresponding to paragraph 5 of Article 38.

10.IV.35.*

Discussed as Article 38. — First Reading.

The PRESIDENT submitted to the Court a proposal by the Drafting Committee to replace the words: " and the time-limits for the completion of the different acts of procedure ", in paragraph 2 of Article 38, by the words: " and the time-

[1] See p. 118.

* D 2, A. 3, p. 464.

limits within which they must be presented ". This change had appeared logical to the Committee, as a consequence of the amendments already adopted, which limited the article, in fact, to the fixing of time-limits for the written procedure.

This proposal was adopted without a vote.

The article was adopted in first reading with the following text:

" 1. In every case submitted to the Court, the President ascertains the views of the parties with regard to questions connected with the procedure; for this purpose he may summon the agents to a meeting as soon as they have been appointed.

" 2. In the light of the information obtained by the President, the Court will make the necessary orders to determine in particular the number and order of the documents of the written proceedings and the time-limits within which they must be presented.

" 3. In the making of an order under the foregoing paragraph, any agreement between the parties is to be taken into account so far as possible.

" 4. The Court may extend time-limits which it has fixed. It may likewise, in special circumstances and after giving the agent of the opposing party an opportunity of submitting his views, decide that a proceeding taken after the expiration of a time-limit shall be considered as valid.

" 5. If the Court is not sitting and without prejudice to any subsequent decision of the Court, the powers conferred upon it by this article shall be exercised by the President."

19.II.36.*

Discussed as Article 38.

The PRESIDENT observed that the Court was in possession of a document [1] containing some proposals by Jonkheer van Eysinga for a rearrangement of Articles 38 and 39.[2]

He invited Jonkheer van Eysinga to explain these proposals.

Jonkheer VAN EYSINGA considered that Article 38, as framed by the Co-ordination Commission,[3] provided for all the orders that had to be made during both the oral and the written procedure. But, in the course of the discussions in 1935, the Court had worded the first three paragraphs in such a way that they now referred only to the written procedure; it seemed clear, however, that paragraphs 4 and 5 of Article 39—which corresponded to the old Article 33—related to all the time-limits fixed during every stage of the procedure. The result had been to render Article 38 obscure to an uninitiated reader. The position would be clearer if paragraphs 4 and 5 and Article 39, which related to the whole of the procedure, were placed immediately after Article 32. The question raised by the words " if the Court is not sitting " was not affected either way by Jonkheer van Eysinga's proposal.

The PRESIDENT did not see what connection there would be between a new article, consisting of paragraphs 4 and 5 of Article 38 together with Article 39, and Article 32, which was a provision of a special character. Would it, he asked, be logical to insert a clause relating to the promulgation of orders before the articles relating to the institution of proceedings ?

Jonkheer VAN EYSINGA said he was merely proposing to restore the arrangement existing in the Rules now in force. The new article to be inserted after Article 32 could be identical with the former Article 33, except for the amendments made in it in 1935.

M. FROMAGEOT did not quite understand the criticisms which Jonkheer van Eysinga made in regard to Article 38. That article was concerned with the time-limits for the written procedure.

Jonkheer VAN EYSINGA said that time-limits might also have to be fixed in the oral proceedings—for instance for the hearing of witnesses; in that case, they would certainly have to be fixed by an order.

M. FROMAGEOT contended that these were not time-limits of the same category as those referred to in Article 38, in the form now under consideration by the Court. He would hesitate to disrupt the arrangement of Article 38, and thought it would be difficult to remove its fourth and fifth paragraphs, and transfer them, together with Article 39, to the beginning of the section.

The PRESIDENT thought that Jonkheer van Eysinga's suggestion was open to the objection that it re-introduced into the Rules a system under which the articles relating to contentious procedure would not be arranged in logical sequence.

M. ANZILOTTI thought it was manifest that Article 38 was only concerned with the written proceedings. But, in that case, why had that article been placed before Article 39, and before the written proceedings, under the heading " Orders for the conduct of the case " ? It was that fact alone which introduced a doubt as to the scope of the article.

The PRESIDENT pointed out that the first paragraph of Article 38 referred to the conversation between the President and the agents, a conversation which preceded the fixing of the time-limits for the written proceedings.

M. ANZILOTTI remarked that that conversation was a necessary element in the conduct of the written proceedings.

M. FROMAGEOT remarked that the articles grouped under the heading " Written proceedings " were concerned with the procedure to be observed by the parties, whereas Articles 38 and 39 were concerned with the measures which were incumbent upon the Court; that accounted for the heading " Orders for the conduct of the case ", under which these articles were placed.

M. ANZILOTTI thought that what Jonkheer van Eysinga wished to avoid was that the reader, before coming to " Written proceedings ", should encounter provisions which, in reality, were entirely concerned with those proceedings.

Jonkheer VAN EYSINGA pointed out that the Court had agreed in 1935 that the article would now apply only to the written proceedings,[1] but, in that case, the question of time-limits fixed after the end of the written proceedings was not dealt with at all.

The PRESIDENT considered that, even if Jonkheer van Eysinga's arguments were well founded, that would not be a sufficient reason for abandoning the logical and chronological order which the Court had endeavoured to introduce into the Rules in 1935.

Jonkheer VAN EYSINGA contended that, in spite of the advantages of logical arrangement, the text adopted in 1935 was defective, because it omitted all references

* D 2, A. 3, pp. 582-591.

[1] See D 2, A. 3, p. 982, Annex 7.

[2] For text of Article 39, see p. 131 (meeting of 10.IV.35).

[3] See p. 111.

[1] See meeting of 10.IV.35, above.

to time-limits in the oral proceedings. In the Rules at present in force,[1] those time-limits were covered by Article 33.

Baron ROLIN-JAEQUEMYNS considered, on the other hand, that the section " Orders for the conduct of the case " had been placed before the sections " Written proceedings " and " Oral proceedings " because it related both to oral and to written proceedings. Orders for the conduct of the case might be made equally well in either.

M. NEGULESCO agreed with Jonkheer van Eysinga. Article 39, which referred to time-limits of every description, was a general provision, and should be given the same position that it occupied in the old Rules. On the other hand, provision for the prolongation of time-limits was only made in paragraph 4 of Article 38, which dealt exclusively with the written proceedings. On what clause would the Court then rely if it wished to prolong a time-limit for the submission of a document that had been fixed during the oral proceedings ? If Article 38 were invoked in this case, objections might be made by the parties. He was consequently of opinion that it was necessary to revert to Article 33 of the Rules now in force, in which the corresponding text was placed after Article 32.

M. ANZILOTTI suggested that the first three paragraphs of Article 38 should be left as they stood; paragraph 5 should be reserved; and paragraph 4 should become the second paragraph of Article 39. The Rules would then contain one article devoted particularly to written proceedings, followed by another containing general provisions; the whole of these clauses would remain under the heading " *Orders for the conduct of the case* ".[2]

The PRESIDENT reminded the Court that, when it adopted the Rules in first reading, it had abolished the heading " General provisions ",[3] which came before Article 32 in the Rules now in force.

Baron ROLIN-JAEQUEMYNS observed that the Rules at present contained a section headed " General Rules ", and that the question of time-limits was dealt with under that section; it followed that provisions concerning time-limits did not apply specially to the written proceedings, but to the oral proceedings as well.

M. URRUTIA thought that M. Anzilotti's proposal might satisfy all the points of view. However, it was not necessary to maintain the heading " Orders for the conduct of the case " before Article 38. As a fact, all the articles in question came under the heading " Procedure before the full Court. General Rules. Institution of proceedings."

In agreement with M. Anzilotti, the PRESIDENT put the following question to the Court:

> " Does the Court decide to transfer paragraph 4, Article 38, to the end of Article 39, as a second paragraph ? "

M. GUERRERO, Vice-President, did not feel able to vote for M. Anzilotti's proposal because paragraph 4 of Article 38 could not, in his view, be included in Article 39; on the other hand, paragraph 4 of Article 38 was closely linked to paragraphs 2 and 3 of that article. In regard to the heading " Orders for the conduct of the case ", he thought it should be retained in order to assist the reader.

As regards the question whether Article 38 related solely to the written proceedings, M. Guerrero drew attention to the words " in particular " in paragraph 2 of Article 38.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to transfer paragraph 4 of Article 38 to the end of Article 39, as paragraph 2 of that article ? "

By five votes against four, with one abstention, the Court answered the question in the negative.

As a result, the order adopted for the provisions of Articles 38 and 39 at the first reading was maintained.

The PRESIDENT asked Jonkheer van Eysinga if he wished his proposal to be put to the vote.

Jonkheer VAN EYSINGA thought that, as the Court had not accepted M. Anzilotti's proposal, it would be still less likely to accept his own; he would therefore not press it. He would, on the other hand, return to the question of the heading preceding Articles 38 and 39.

M. FROMAGEOT considered that the question of headings could be more usefully considered when the examination of all the articles had been completed; for some of the articles might be transposed, and the numbering might have to be changed.

Jonkheer VAN EYSINGA said that, if the Court had adopted the method proposed by M. Fromageot from the outset, he could have agreed with it. But the Court had already decided to omit the headings " Sessions " and " Deliberation ",[1] and not to revert to the system of numbering employed in the present Rules,[2] so that the question was no longer intact.

M. GUERRERO, Vice-President, said he could not agree with M. Fromageot. Since this question had been raised, it must be settled forthwith; if not, it would be very difficult later on to propose the transfer of certain clauses, for requests that an article should be transposed and inserted under other headings would be dependent upon the wording of the headings in question.

The PRESIDENT saw a difficulty in maintaining the heading which preceded Articles 38 and 39, because it gave, in the Rules, a French translation of an English expression which had been rendered differently in Article 48 of the Statute.[3] On the other hand, it was not certain that it would always be necessary to fix the time-limits in the oral proceedings by an order. But the heading " Orders for the conduct of the case " would be interpreted as meaning that the articles which followed related to time-limits of all kinds. Finally, this heading emphasised a point which, in Article 38, was not of chief importance; for the important point was the contact established between the President and the agents at the outset of a case, as prescribed by that article.

As regards what M. Fromageot had said, the President confirmed that at the end of the second reading it would be necessary to review all the headings very carefully, and also the drafting of the Rules as a whole. But that was no reason for not deciding now to delete the heading " Orders for the conduct of the case".

Baron ROLIN-JAEQUEMYNS asked whether, if this heading were omitted, it would be replaced by any other. If it were not, Articles 38 and 39 would appear under the heading " Institution of proceedings "; but orders were not concerned with the institution of proceedings.

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[1] 1931 Rules.
[2] *Cf.* p. 119, meeting of 4.IV.35.
[3] *Cf.* Explanatory Note, p. IX.

[1] Meeting of 17.II.36, p. 78.
[2] See Explanatory Note, p. IX, and D 2, A. 3, p. 508.
[3] These expressions and translations are the following: in the Rules, " Orders for the conduct of the case " and *"Ordonnances réglementaires "*; in the Statute, " Orders for the conduct of the case " and *"Ordonnances pour la direction du procès "*.

M. URRUTIA considered that, if Article 38 was retained as it stood, it would be better to delete the heading " Orders for the conduct of the case ".

M. NAGAOKA thought that the difficulties would be removed if Article 38 of the Rules was interpreted in the same sense as Article 48 of the Statute—*i.e.* as not necessarily obliging the Court to make an order whenever it fixed a time-limit.

The PRESIDENT said that the Court had three proposals before it: to adopt the heading " Orders for the conduct of the case ", to delete it, or to reserve the question for the time being.

The President amended the question to read as follows:

" Does the Court decide to maintain, provisionally, the heading ' Orders for the conduct of the case ' ? "

By seven votes against three, the Court answered the question in the affirmative.

The PRESIDENT observed that a decision would have to be taken on the first four paragraphs of Article 38. He proposed that the Court should express its opinion separately on each paragraph.

Article 38, Paragraph 1.

As no objection was made to the first paragraph, the PRESIDENT declared that it was adopted.

Paragraph 2.

M. GUERRERO, Vice-President, moved that the second line should read: " The Court *or the President* will make the necessary orders . . . ." He would make a similar proposal regarding paragraph 4 when they reached it. If his proposal was adopted he would, later on, move the omission of paragraph 5, which would then become superfluous.

He recalled that, at an earlier meeting,[1] it had been objected to this plan that it would give the President the right to make orders without consulting the Court. even when the latter was sitting. To obviate this difficulty, it should be recorded in the minutes that it was understood that the powers in question would be exercised by the Court when the latter was assembled. In practice, the President was best situated for knowing what time-limits could most appropriately be fixed for the written procedure.

M. ANZILOTTI could not agree with the Vice-President in regard to paragraph 2 of Article 38. If it were made to read " The Court or the President ", that would surely mean that the power to make orders was vested in the President as well as in the Court. But it seemed inconceivable that these powers should be vested concurrently in both of them. The question that arose was therefore whether the Court could confer on the President alone the power to make the orders referred to in paragraph 2. Looking at it all round, M. Anzilotti saw no reason why it should not be decided that the President would make these orders; that would, naturally, not prevent him from consulting the Court if the latter was assembled. There would, however, M. Anzilotti thought, have to be one exception: where there was a divergence between the parties. The Statute did not, it appeared, give the President power to settle divergences of that kind. It would therefore be necessary to legislate for that case in another clause, and to prescribe that the Court be summoned, in such a contingency. Paragraph 5 would, of course, disappear.

M. FROMAGEOT suggested that the difficulty might be solved by adding to Article 10—which described the powers of the President—a second paragraph, laying down that the President might exercise the powers of the Court in certain cases: namely, in administrative questions and in the questions of procedure that the Court was now examining. In the latter case, if the parties were agreed, and if the Court was not assembled, the President would be able to take action, subject always to any subsequent decisions which the Court might take. The insertion of a general clause of that character in Article 10 would make it possible to avoid, in other articles, the difficulty arising from the use of the words: " if the Court is not sitting".

Count ROSTWOROWSKI said that, personally, he was averse to this question being dealt with in an article of a general character. It seemed better that rules for the division of powers between the President and the Court should be prescribed for each separate case. For though, in certain cases, the Court was entitled to delegate the powers which it derived from the Statute, the situation was not always the same.

M. FROMAGEOT thought that, though a provision of a general character might prove to be too far-reaching, it would nevertheless be possible, in paragraph 5 of Article 38, to specify that the powers were conferred upon the President, subject to two conditions: that the members of the Court were not assembled at the moment, and that the parties were agreed. The main object was to make it clear what were cases in which the President could take action alone.

M. NEGULESCO thought it would be necessary to have a clause confined to the special case of Article 38. On the other hand, he was in favour of retaining the expression: " The Court, or the President if the Court is not sitting." As regards the fixing of time-limits, less weight should be given to the interests of the parties than to the Court's interest in ensuring the satisfactory progress of the case. If the parties were not agreed concerning a time-limit, this divergence should not be regarded as a dispute which must invariably be submitted to the Court: the President must have power to settle such a dispute if the Court was not sitting.

As to whether it was possible, under the present Statute, to employ the expression " if the Court is not sitting " in the Rules, M. Negulesco thought that point was decided in advance by the revised Statute, for it made use of that expression in Article 66.

M. NAGAOKA, with reference to M. Fromageot's proposal, favoured the insertion of a general clause in Article 10. However, the wording of the proposal appeared too wide. It would, he thought, be necessary to add at the beginning: " Except as otherwise provided elsewhere in the present Rules." Perhaps the addition of these words would allay Count Rostworowski's misgivings.

M. URRUTIA observed that specific cases differed widely in character. For instance, in regard to the first fixing of time-limits, it was hardly conceivable that the parties should disagree; but the case was different in regard to requests for extensions of time, which might well encounter opposition. For these reasons, M. Urrutia supported Count Rostworowski's opinion.

The PRESIDENT referred to the phrase " if the members of the Court are not assembled " which, in M. Fromageot's

[1] See under Article 46, meeting of 15.11.36, pp. 157 *et sqq.*

proposal, would replace the words " if the Court is not sitting ". He feared that this formula might not be sufficiently precise, unless the Court settled how it was to be construed. If this were not done, it might cause the impression that an attempt was being made to avoid the strict application of the provisions of the revised Statute concerning the obligation of members to be always at the disposal of the Court. It was not clear, indeed, what number of judges must be present in order that it might be said that the members of the Court were assembled.

M. FROMAGEOT observed that M. Negulesco had pointed out that the phrase " if the Court is not sitting " had received the imprimatur of the revised Statute. There was therefore no reason for not retaining it in Article 38.

Jonkheer VAN EYSINGA considered that, under the system of the old Statute—Article 23 of which laid down that the Court would meet only once a year for an ordinary session, and that it could hold extraordinary sessions, if required—the expression " if the Court is not sitting " had a perfectly definite meaning. But now Article 23 had been amended, with the effect that the Court was always in session. Jonkheer van Eysinga would find it difficult to understand—and he believed that all who took an interest in the Court would share his difficulty—if, at the very moment of the introduction of this new idea according to which the Court was regarded as being in permanent session, it were to delegate more extensive powers to its President than under the old system. That would be a move in a direction opposite to what had been contemplated.

As regards M. Negulesco's observation, Jonkheer van Eysinga observed that the latter had so often emphasised the need, in the case of exceptions, of interpreting them strictly, that he would no doubt agree that, although the expression appeared in Article 66 of the revised Statute, that did not imply that its use was to be generalised.

M. ANZILOTTI considered, with reference to the same observation, that the Court should be clear as to the signification of the phrase " if the Court is not sitting " in the revised Statute. It did not necessarily mean the same as it did in the old Statute. It might signify, for instance, that the Court could delegate powers, but only in periods of vacation, since during those periods the Court would not be sitting.

The PRESIDENT said that the following proposals were before the Court:

The Vice-President had proposed to add the words " or the President " after the words " the Court " in paragraph 2 of Article 38.

M. Anzilotti had proposed to substitute " the President " for " the Court ".

M. Fromageot had proposed to omit paragraph 5 and to insert a new paragraph in Article 10.

M. Negulesco considered that paragraph 5 and paragraph 2 should be left as they stood, on the ground that the phrase " if the Court is not sitting " was employed in the revised Statute.

Finally, M. Nagaoka had suggested adding some words to the new paragraph which M. Fromageot had proposed to insert in Article 10.

In the President's view, the Court should vote first on M. Anzilotti's proposal.

M. ANZILOTTI explained that his proposal also involved the insertion of a clause specifying that the Court's powers could only be delegated to the President if the parties concurred.

The PRESIDENT suggested that the best way of giving effect to that suggestion would be to retain paragraph 2, and to amend paragraph 5.

M. ANZILOTTI said he was averse to the retention of the words " if the Court is not sitting ".

M. NAGAOKA was not certain that it would be necessary, if the Court decided to maintain paragraph 5, to retain that expression. Would not the phrase which already appeared in this paragraph " without prejudice to any subsequent decision of the Court " suffice to guarantee the powers of the Court ?

The PRESIDENT said he would take note of this suggestion.

In view of M. Anzilotti's explanations, he would prefer to put the Vice-President's proposal first, and would ask the Court to vote on the following question:

> " Does the Court decide to insert the words ' or the President' in paragraph 2, after the words ' the Court'?"

By seven votes against three, the Court rejected this proposal.

M. FROMAGEOT said he had voted against the proposal because, if paragraph 5 were to be retained, he would wish it to be slightly amended. And, if it were adopted with such amendments as might be found necessary, there would be no need to modify paragraph 2, or, indeed, paragraph 4 either.

Count ROSTWOROWSKI thought that the Court would nevertheless be wise to observe the order adopted in Article 38, which began by laying down the principle—namely, that it was the Court that took action—and then proceeded to specify the exceptional cases in which the President might act in the Court's place. It seemed, therefore, expedient that the Court should vote first upon paragraph 2.

Baron ROLIN-JAEQUEMYNS thought that, in any case, the President's powers would have to be laid down in one of the paragraphs of Article 38. In the absence of the Court, the President must have the same power to make orders as the Court itself, without prejudice, of course, to any decision which the Court might have already taken.

Paragraph 5.

The PRESIDENT proposed that the Court should decide upon paragraph 5, which, he said, would have to be put to the vote by sections, the first being that of the retention of the words " if the Court is not sitting ".

Jonkheer VAN EYSINGA moved to replace these words by the words: " during the judicial vacations ".

M. NEGULESCO recalled that, shortly before, he had raised the question of Article 66 of the revised Statute. Jonkheer van Eysinga had objected that advisory opinions belonged to a special sphere, so that the article must be interpreted restrictively. M. Negulesco desired, nevertheless, to point out that, according to the text of the article, if the Court was not sitting, the President might decide what international organisation was likely to be able to give information on the matter. Now, the question whether the Court was sitting was one of fact. And if, in fact, in connection with advisory opinions, Article 66 considered that the Court might not be sitting at a given moment—*i.e.*, that its members might not be assembled at The Hague—how was it possible for the same Court, at the same time, to be regarded as sitting, in connection with a contentious case ? The expression " if the Court is not sitting " must, in M. Negulesco's opinion, apply to every kind of case which might be submitted to the Court.

M. GUERRERO, Vice-President, noted that it was the opinion of several members of the Court that it would be wiser not to use the words " if the Court is not sitting " in the Rules. He would accordingly propose that paragraph 5 should be worded as follows:

> " Without prejudice to any previous decision of the Court, the powers conferred upon the latter under the present article will be exercised by the President."

Baron ROLIN-JAEQUEMYNS moved to amend this text by adding the words " or subsequent ". The Court's sovereign powers would still subsist, and it might at any subsequent moment make an order, in which case it would not be bound by what the President had decided.

M. GUERRERO, Vice-President, thought that it would be a serious matter if the Court were to take a subsequent decision reversing the action already taken by the President in an order.[1] He thought, however, that Baron Rolin-Jaequemyns' wishes might be met by simply omitting the word " previous ".

The PRESIDENT suggested that the Court should vote first on Jonkheer van Eysinga's proposal to substitute " during the judicial vacations " for " if the Court is not sitting ", the words " without prejudice to any subsequent decision . . ." being allowed to stand.

M. ANZILOTTI pointed out that this proposal implied that the preceding paragraphs would remain as they stood, and thought it would be best to adopt Jonkheer van Eysinga's proposal, if it was agreed that it was the Court that made the orders. Indeed, if this hypothesis were accepted, it was the Court that would always have to make the orders—except, of course, during the judicial vacations—since at all other times the Court could be summoned to meet. Nevertheless, he would, personally, abstain from voting.

The PRESIDENT asked the Court to vote on the following question:

> " Does the Court decide to amend the fifth paragraph of Article 38, by inserting the words ' during the judicial vacations ' in place of ' if the Court is not sitting ' ? "

By eight votes against one, with one abstention, the Court answered the question in the negative.

The PRESIDENT asked the Court to vote on the Vice-President's text, it being understood that the wording might, if necessary, be reconsidered:

> " Without prejudice to any decision of the Court, the powers mentioned in this article shall be exercised by the President."

M. FROMAGEOT said he would vote against the text, because he thought the words " any decision of the Court " were too vague.

By six votes against four, the Court adopted the Vice-President's proposal.

Paragraph 3.

The PRESIDENT put paragraph 2 to the vote. It was adopted by nine votes, with one abstention.

Paragraph 3.

Baron ROLIN-JAEQUEMYNS pointed out that this paragraph related not only to orders made by the Court, but also to those made by the President. It would, perhaps, be necessary to alter the wording to make that clear.

The PRESIDENT thought that Baron Rolin-Jacquemyns' point could be met if the drafting of this paragraph were reserved.

Subject to that reservation, paragraph 3 was adopted.

Paragraph 4.

Baron ROLIN-JAEQUEMYNS proposed to omit the words " *par elle* " (" which it has ") at the beginning of this paragraph, because the Court could also intervene to extend time-limits fixed by an order made by the President.

The PRESIDENT asked the Court to vote on the following question:

> " Does the Court consider that the words ' *par elle* ' (' which it has ') in the second line of paragraph 4 be omitted ? "

Five votes were given for the proposal and five against it.

The PRESIDENT said that the proposal was therefore not adopted, as he gave his casting vote in favour of the *status quo.*

M. GUERRERO, Vice-President, proposed to substitute the word " *exécuté* " (executed) for " *entrepris* " (taken).

The PRESIDENT suggested that the word " *accompli* " might be used, but proposed to reserve the question of the use of the word " *entrepris* " (taken).

Subject to that reservation, he asked the Court to vote on paragraph 4, which was then unanimously adopted.

Paragraph 5.

The PRESIDENT asked if the Court desired to have a fresh vote for the adoption of paragraph 5.

As no observations were offered, he declared that paragraph 5 was adopted, subject to final drafting.

Subject again to final drafting, the whole of Article 38 was adopted.

20.II.36.*

Discussed as Article 38. — Second Reading.

Paragraph 5.

M. NEGULESCO asked the President to allow him, notwithstanding the decision taken at the meeting on the previous day, to revert to Article 38, paragraph 5. After mature reflection, he wished to alter his vote on the subject and give it in favour of the old text [1] of this paragraph.

The text which had been adopted was as follows:

> " Without prejudice to any decision of the Court, the powers mentioned in this article shall be exercised by the President."

According to the Statute in force, judges were free to return to their respective countries. The President, however, could, under the terms of the text referred to, convene the Court at any moment, for instance to settle a difference of opinion between two parties concerning a time-limit.

The old text, which provided that, if the Court was not sitting, the President made orders for time-limits, seemed altogether preferable, because it delegated this power to the President without giving him the option of convening the Court.

[1] *Cf.* Article 33 of the Rules in force before March 11th, 1936.

* D 2, A. 3, pp. 591-602.

[1] See text, p. 120.

Again, the consistent practice of the Court was that, while the Court was sitting, it exercised all its powers itself. But from the text adopted at the last meeting, it might be inferred that the President would exercise the powers of the Court, subject to a contrary decision of the latter. There was no intention, however, in the present Statute to diminish the powers of the Court.

Moreover, the use of the phrase " if the Court is not sitting " was sanctioned by the fact that it was used in Article 66 of the revised Statute. Accordingly, there was no reason why the Court should abandon the phrase in framing its Rules. The question whether the Court was sitting or not was one of fact.

M. Anzilotti had said that the phrase in Article 66 of the Statute referred to the judicial vacations. It had therefore to be considered whether Article 66 of the revised Statute could refer only to the vacations. But Article 66 of the revised Statute did not add the words " during the vacations ". It would be wrong, therefore, to read into the revised Statute restrictions which were not made by those who had framed it.

Moreover, to interpret Article 66 in this way would not be very logical. That article dealt with a special matter: the selection of the international organisations or States, etc., which might be able to furnish the Court with information on a particular question. That was not so important a matter that it would be necessary to convene the Court to deal with it; it was one which the President could decide.

There were also other considerations which justified the conclusion that Article 66 of the revised Statute was designed to reproduce the exact terms of the old Article 73 of the Rules [1] and incorporate them in the revised Statute.

On page 96 of the Minutes of the Committee of Jurists of 1929 [2] was reproduced the letter from the Government of the United States of America to the Secretary-General of the League of Nations. In that letter, Mr. Kellogg mentioned the question of Eastern Carelia and referred to the decision of the Court in regard to that question, which was favourable to the American point of view. He added (p. 97):

> " The ruling of the Court in the Eastern Carelia case and the Rules of the Court are also subject to change at any time. For these reasons, without further enquiry into the practicability of the suggestions, it appears ", etc.

Thus Mr. Kellogg had expressed the hope that the Court would firmly establish the precedent created by its ruling in regard to the Eastern Carelia question.

Furthermore, in the same collection of minutes was the following passage from the report of MM. Fromageot and Politis (p. 125):

> " 20. — *Advisory Opinions.*
>
> " The present Statute contains no explicit reference to advisory opinions. The Court has been compelled by circumstances to remedy this omission to a certain extent in Articles 71, 72, 73 and 74 of the Rules of Court.
>
> " The Committee considers that the essential parts of these provisions should be transferred to the Statute of the Court in order to give them a permanent character, which seems particularly desirable to-day in view of the special circumstances attending the possible accession of the Statute of the Court.
>
> " . . . . . "

It was also stated that there was no great difference between advisory opinions upon disputes and contentious cases, and that all provisions in regard to the latter would also apply to the former.

Accordingly, the object of inserting this provision of the Rules in the Statute was to give the United States the safeguard for which they asked in Mr. Kellogg's letter.

It could not therefore be said that, because the text of the Rules had been embodied in the Statute, that text must now be differently construed. To do so would be contrary both to the intention of the United States and to that of the Conference of the signatory States.[1]

Again, Article 66 of the Statute should be considered in relation to Article 23. The interpretation which M. Negulesco regarded as wrong might conceivably be correct if Article 23 of the Statute said that the Court would always be sitting except during the vacations. But Article 23 only said: " *La Cour reste toujours en fonctions* " (" The Court shall remain permanently in session "), which was not the same thing.

Finally, the last paragraph of Article 23 said:

> " Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court."

The system now obtaining, therefore, was that, when the Court had no case before it, the judges might return to their own countries, provided that they remained constantly at the Court's disposal. Accordingly, if members of the Court might disperse, it was impossible to say that the Court was sitting, because the expression " if the Court is not sitting " referred to a situation of fact. It simply meant that the quorum of members of the Court necessary to enable the Court to take decisions was not assembled.

At the previous meeting, Jonkheer van Eysinga had observed that Article 66 of the Statute related to a special question: that of advisory opinions. M. Negulesco thought that the distinction between opinions on a " question " and those on " disputes " should be borne in mind; the latter were regarded as actual contentious cases, and the provisions of Article 31 of the Statute had to be applied to them.

In 1926, a proposal made by MM. Anzilotti, Huber and Beichmann, to the effect that Article 31 of the Statute should be applied in the case of opinions upon disputes, led to a discussion which showed that the authors of the proposal held that an opinion upon a dispute should be assimilated to a contentious case.[2] The same views were to be found in a report upon the terms of Article 71, paragraph 2, which was signed by MM. Anzilotti, Loder and Moore.[3] The Court itself had also adopted and confirmed this view in the Customs Union case.[4]

It was therefore impossible to contend that there was no connection between advisory procedure and contentious procedure. Moreover, the question seemed a theoretical one, for the expression " if the Court is not sitting " referred to a situation of fact.

M. Negulesco therefore asked the President to re-submit

[1] 1931 Rules.

[2] Adhesion of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice. Letter from the U.S.A. Government to the Secretary-General of the League of Nations (document C.114.M.40.1929.V).

[1] Geneva, September 1929.

[2] D 2, A., pp. 185-194.

[3] E 4, pp. 72-78.

[4] A/B 41, pp. 88-91.

to the Court the text which he had proposed at the last meeting.[1]

The PRESIDENT, after taking the opinion of members of the Court, noted that there was no opposition to M. Negulesco's proposal that the discussion should be re-opened upon paragraph 5 of Article 38, which had been adopted on February 19th, subject to drafting.

M. GUERRERO, Vice-President, observed that M. Negulesco had cited Article 66 of the Statute to prove that the expression " the Court is not sitting " was to be found in the Statute itself and that, consequently, the use of the same expression in the Rules would not be inconsistent with the Statute.

Article 66, however, which had been taken from the Rules of Court, must be construed in accordance with the context —that was a fundamental principle. The interpretation placed upon the expression by M. Negulesco had been quite sound before the coming into force of the revised Statute. When the Court had merely one ordinary session and extraordinary sessions had to be convened by the President, there had obviously been times when the Court had not been sitting.

But now, Article 23 of the revised Statute placed the Court in a different position. The significance of the phrase " *La Cour reste toujours en fonctions* " was made clear by the corresponding passage in the English version of the same article: " The Court shall remain permanently in session. . . ". The obvious conclusion was that the Court must remain in session permanently.

Furthermore, Larousse's dictionary defined the French word " *session* " as follows: " Session, time during which a deliberative body remains assembled ". Could the Court remain assembled if its members were dispersed in different countries ?

Of course, that was not to say that, when the Court had no cases before it, judges must remain at The Hague. They could go away, with the permission of the President, and provided that they were always ready at once to return on receiving a summons.

It seemed therefore better to avoid using the expression " if the Court is not sitting " in the Rules.

Probably the best thing to do would be to adopt M. Anzilotti's proposal and to say that orders were made by the President and not by the Court.

M. ANZILOTTI asked M. Negulesco what precisely was the meaning attached by him to the expression " if the Court is not sitting " under the régime of the revised Statute.

Under the old Statute, the expression meant that the Court was not in session; now there were no more sessions: there was a judicial year and periods of vacations. Everyone agreed that during vacations the Court could only be convened as an exceptional measure to deal with an urgent case. At any other time, however, the Court could be convened at any moment.

In these circumstances, if the expression " if the Court is not sitting " were to be retained, what would its precise meaning be ?

M. NEGULESCO thought it best to begin by considering the question " when is the Court sitting ".

The answer was that the Court was sitting when it was assembled and when there was a quorum present. If there was no quorum, the Court would not be sitting.

Accepting this definition, the conclusion was that the Court would not be sitting when the judges were not assembled to constitute a quorum. That corresponded exactly to Article 23 of the Statute: judges were at the disposal of the Court; consequently, when they were not at The Hague to constitute a quorum, the Court was not sitting.

The Vice-President had referred to the English text, which said that the Court was permanently in session. Even interpreting the English text as M. Guerrero did, one was led to a conclusion contrary to that which he advocated. For if the Court was permanently in session, that meant that the judges must never leave The Hague.

Even if the English text bore a different meaning from the French text, the sound rule of interpretation was to take the meaning which would fit both versions. Applying this rule, it was the meaning of the French text which they must take. Moreover, if the English text, with the meaning attached to it by M. Guerrero, were taken, the result would be that judges would be obliged always to remain at The Hague. M. Guerrero, however, did not desire that, as he was himself convinced that that had not been the intention of the Committee of Jurists and of the Conference of 1929.

M. URRUTIA observed that the solution reached by the Court in regard to this question would be of great importance because the expression " the Court is not sitting " occurred in several articles. M. Negulesco considered that the expression " the Court is sitting at The Hague " might also have a narrow meaning, referring only to the fact of the judges being assembled to adjudicate upon a particular case. In that sense, it could not be said that the Court was sitting when the judges were not at The Hague. Thus, the expression " the Court is sitting " in the strict sense meant that the judges were assembled. Under the régime of the old Statute, there were times when the Court was in session but was not sitting: nevertheless, the session continued.

Though the new Statute said that the Court would be in session the whole year, that did not prevent there being not only vacations but also interruptions in the Court's work. Whether the Court functioned depended mainly on whether cases were brought before it. If for a fairly long period the Court received no cases, how could it be said that the Court must go on sitting, awaiting the submission of cases ?

Lord Phillimore had already pointed out this objection to placing judges under a strict obligation to remain permanently at The Hague.[1]

When the Statute said that the Court remained *toujours en fonctions*, that did not mean that the Court must always sit. The dictionary of the *Académie française* defined the word " *fonctions* " as follows: " Action taken to carry out duties attaching to a post ". In this case, this action consisted, so far as the judges were concerned, in remaining permanently at the disposal of the Court. And when the revised Statute said that the Court remained *toujours en fonctions*, that meant in effect that the judges must always be at the disposal of the Court, since the Court might be convened at any moment.

M. Urrutia, referring to the minutes of the Committee of Jurists of 1929, recalled what he had said before that Committee.

On page 42 occurred the following passage:

" Mr. ROOT thought that M. Fromageot's proposals [2]

[1] Meeting of 19.II.36, p. 123.

[1] Minutes of the Committee of Jurists of 1920, pp. 186-187.

[2] These proposals were worded as follows:

" The members of the Permanent Court shall devote themselves exclusively to this high function and may not exercise any other functions. It shall not, however, be incompatible with this provision for them to be members of the Permanent Court of Arbitration under the Convention of 1907 or to sit as arbitrators under the terms of a submission to arbitration or a convention."

might give rise to a somewhat dangerous situation. The Committee had already agreed upon certain new restrictions to the conduct of those who accepted election to judgeships in the Permanent Court, the intention of those restrictions being that the judges should devote themselves entirely to the Court's work, as, indeed, they might very properly be expected to do. Moreover, it had been agreed that the judges should be in a position to reach The Hague at very short notice and that the duration of their vacations should be decided by the Court."

Again, on page 43:

"M. URRUTIA thought that the changes of system which had already been adopted would suffice. It would be found, in practice, that a judge would be obliged to devote the whole of his time, except his holidays, to the work of the Court. M. Urrutia held the same views as Mr. Root. Any modification in the present system whereby residence at The Hague would be obligatory would entail more serious disadvantages than the possible advantages to be anticipated. In view of the large volume of business which the Court might in future expect, it would be quite impossible for a judge to bind himself to the exercise of any other profession such as that of teaching."

At the time, the view taken by Mr. Root and by M. Urrutia, which had not been gainsaid by any member of the Committee, had been that all judges must devote themselves to the service of the Court and abstain from engaging in any other profession, but that they would not be bound constantly to remain at The Hague, provided that they could comply with every summons to attend.

Finally, on page 56 of the same minutes was the following passage:

"The CHAIRMAN requested M. Osusky to submit a text for the re-drafting of Article 32,[1] especially taking into account the observations which M. Osusky had himself presented.

"M. POLITIS observed that the Committee should first agree on some general principles before asking M. Osusky to draft a text. He would state his personal view on the question. Under the new organisation which the Committee had adopted, it was anticipated that the Court would have seven months' work a year and three months' vacation; there remained two other months, which would be covered by various public holidays, travelling and so forth. The average number of days, therefore, on which the Court might be expected to work would be about 210. . . ."

On the basis thus indicated by M. Politis, the President had requested M. Osusky to prepare a draft, which had been adopted.[2]

These texts defined the meaning of the Statute and explained the intentions of the framers of the amendments made in the Statute.

M. Negulesco had pointed out that the revised Statute used the expression "the Court is not sitting"; could it still be maintained that the Court should not use the same expression in the Rules? And the fact that these words occurred in an article dealing with advisory opinions did not rule out the possibility that, in the intention of the authors, the revised Statute referred to a pure question of fact, that was to say, that there might be periods, other than vacations, when the Court would not sit.

For this reason, M. Urrutia hoped that, wherever in the draft under discussion the expression "the Court is not sitting" occurred, it would be retained.

Count ROSTWOROWSKI thought that, in judging the plan of Article 38,[1] paragraph 5 should not be considered by itself, but should be read in conjunction with the preceding paragraphs.

The first draft made a condition: that the Court should not be sitting. It was clear that, if this condition were not fulfilled, the decision would be given by the full Court.

The present paragraph 2 began by laying down a principle—namely, that orders were made by the Court. Then paragraph 5 provided for an exception—a deviation from this principle. But the wording of paragraph 5 was altogether unsatisfactory from this point of view, because, in providing for the exception, it omitted any reference to the circumstances justifying it. The Court should therefore now consider the re-insertion of a reference to these circumstances in paragraph 5.

Personally, Count Rostworowski was in favour of giving the President the widest possible powers, but these powers must be legally defined; the President exercised the powers of the Court under certain conditions, but not under unspecified conditions.

Again, M. Anzilotti was right in asking that the meaning of the expression "the Court is not sitting" should be clearly indicated. M. Negulesco had said that this expression meant that the Court was not assembled; it was purely a question of fact. It had then been asked whether the situation contemplated by the expression "the Court is not sitting" was not the same as the situation when the Court was in vacation.

Count Rostworowski thought that the expression "the Court is not sitting" related purely and simply to a situation of fact, and had no legal significance. The proof of this was that, even during the judicial vacations, the Court could always be summoned to sit. Accordingly, there was no direct connection between the fact of not being assembled and the judicial vacations.

That being so, there was no objection, provided the meaning of the expression "the Court is not sitting" was clearly indicated, to employing in the Rules these words, which were, moreover, to be found in the Statute itself.

Baron ROLIN-JAEQUEMYNS thought it would be correct to say that the Court were agreed that, even outside the vacations, the Court could not always be assembled.

On the other hand, opinion was divided as to the meaning to be attributed to the words "the Court is not sitting".

In these circumstances, it would be better not to use this expression in the Rules.

M. ANZILOTTI was able to agree with M. Urrutia that it was not the intention of the Statute to oblige members of the Court to reside permanently at The Hague and that there were periods during which the Court could only be convened in exceptional circumstances, namely, the judicial vacations. But outside these periods, the Court could be convened at any moment.

From this it followed that, whenever there was something to be attended to which was within the domain of the Court, the latter must be convened. Accordingly, if the making of orders for the fixing of time-limits was

[1] See D 1, 2nd edition, p. 15.
[2] Minutes of the Committee of Jurists of 1929, p. 72.

[1] See text, p. 120.

included in the powers of the Court, the Court would have to be convened whenever such an order had to be made.

The question whether, whenever the Statute conferred some power on the Court, it meant that that power was to be exercised by the Court itself, or whether there were cases in which the Court was at liberty to delegate it to the President under Article 30 of the Statute, was an entirely different question. It was a question of the interpretation of the Statute, and could only be settled in connection with each particular power. For his part, M. Anzilotti was of opinion that there were cases in which the Statute, though it spoke of the Court, did not oblige the Court itself to exercise the particular power in question, but left it free to provide in the Rules that that power would be exercised by the President. In no case, however, could this delegation of powers to the President result from the fact that the Court " was not sitting ".

M. NAGAOKA saw no advantage in retaining the expression " the Court will not sit " (*la Cour ne siège pas*) in paragraph 2 of Article 25 of the revised Rules,[1] where it had been inserted. It would be better to say " in the absence of a special resolution of the Court to the contrary ".

M. GUERRERO, Vice-President, did not think that the use of the expression " if the Court is not sitting " overcame the difficulties which it was sought to avoid.

Would it not be better to have a paragraph providing that the Court could decide to suspend its session ? This decision would be taken when the work to be done had been completed.

If an article of this kind were included in the Rules, they might, in articles which at present contained the proviso " if the Court is not sitting ", say: " the Court, or the President during judicial vacations and during periods when the session is suspended, may . . .".

M. FROMAGEOT recognised that Article 66 of the revised Statute expressly provided for the possibility that the Court might very well not be sitting and that in that case the President would fix time-limits. Paragraph 2 of Article 66 of the revised Statute said: " The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organisation considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question . . . within a time-limit to be fixed by the President. . . ." Having regard to the fact that the object of inserting Articles 66 and 67 in the revised Statute had been to assimilate advisory procedure to contentious procedure, it was to be presumed that the articles relating to advisory opinions really represented the intentions of the framers of the revised Statute and that the position was identical in advisory and contentious proceedings; accordingly, if the Court was not sitting, the President would make orders for the conduct of the case.

With regard to the question whether this provision was exceptional, it was reasonable to presume that the fact that the case was one for advisory opinion would not render the fact of the Court's not sitting exceptional.

Similarly, the view that the expression " the Court is not sitting " should apply exclusively to the judicial vacations was also untenable. Article 23 of the revised Statute, when it said that the Court remained *toujours en fonctions*, meant that it was the duty of judges always to be at the Court's disposal; the interpretation of this article had been given in the course of the preparation of the revised Statute—from the records of which M. Urrutia had already read an extract—and in particular at the meeting on March 14th, 1929 (Minutes of the Committee of Jurists, March 11th to 19th, 1929, 7th meeting, p. 42), when it had been stated [1] that it had been agreed that " judges should be in a position to reach The Hague at very short notice ", implying apparently that judges were at liberty not to reside there; moreover, on many occasions had it been repeated that there was no obligation to reside at The Hague under the régime of the revised Statute. Again, in the minutes of the fourth public sitting on September 6th, 1929, of the Conference on the revision of the Statute (Minutes, p. 39; statement of M. Politis), a similar observation was to be found. The question had been raised what exactly was meant by the words: " *la Cour reste toujours en fonctions* ". Did it mean that all members of the Court were obliged to make The Hague their permanent residence, or could they remain in their own homes awaiting a summons to attend the Court in case of necessity ? The answer had been as follows:

> " It was explained that, when it was stated that the Court should remain permanently in session and its members should be permanently at the disposal of the Court, unless on regular leave, that meant that, if they foresaw there would be no business, they might leave The Hague. But they might only do so if they were absolutely certain that there would be no business during their contemplated absence, and if they did not go too far away, so that the President might recall them by telegram if he desired their presence.
>
> " When the draft had been prepared, an endeavour had been made to indicate a minimum—namely, that a judge must be at The Hague forty-eight hours after the President had summoned him. But, on reflection, it had been decided that it was impossible to fix too rigid a period. That a judge should be three days' journey away from The Hague, for instance, would not be inadmissible. The judge must be at the disposal of the Court when the latter called upon him, but that did not imply compulsory residence at The Hague when there was nothing to do."

It was therefore clearly established that there were times when judges were perfectly justified in not being at The Hague. Their only obligation was to be in a position to reach there at short notice. That was the duty of judges under Article 23 of the revised Statute, neither more nor less.

For the rest, to speak of the Court sitting or not sitting was a pure statement of fact and had nothing to do with the question whether the Court was or was not on vacation. The Court might happen to sit during a judicial vacation, and on the other hand it might not be sitting at periods other than the vacations. The words " the Court is not sitting " could not therefore be construed as equivalent to saying that the Court was on vacation; that would be an exaggerated and incorrect inference from a fact which had nothing to do with the existence of judicial vacations.

There remained the question raised by M. Anzilotti—namely, how far the Court could delegate its powers to the President; for the Court were agreed that, when judges were not at The Hague, the President must be able, in certain circumstances, to perform the functions which the

[1] See meeting of 14.11.36, p. 64.

[1] By Mr. Root.

Court would perform if the members were assembled. At the moment the question was confined to the matters dealt with in Article 38—that was to say, simply the question of orders fixing time-limits in the proceedings. They were not therefore here concerned with the other cases in which it was natural that the President should be empowered to act alone, for instance, in regard to purely administrative or routine questions, as opposed to questions which must be decided by the Court itself and in respect of which it could not reasonably delegate its powers to the President.

In the particular case, therefore, of orders in regard to the proceedings, was it or was it not reasonable that the President should act instead of, and on behalf of, the Court, or was it essential that decisions should always be taken by the Court itself ? Hitherto, the practice of the Court had been that, in the absence of the judges, the President had made such orders. Was there now any reason which necessitated the modification of this practice ? Had it proved open to objections ? Not in the least; on the contrary, this practice appeared to have given satisfaction; it should therefore be maintained.

Summarising, M. Fromageot said that the addition of the words " if the Court is not sitting " in paragraph 5 of Article 38 of the Rules was useful; they indicated in what circumstances an exception might be made to the general principle laid down in the preceding paragraphs of Article 38 and what the condition was upon which the exception was made dependent; that condition " if the Court is not sitting " referred to a question of fact—namely, the absence of the judges from The Hague—and in making provision for such absence, the Rules did not contravene the Statute.

M. Fromageot therefore would vote for the addition of the words " if the Court is not sitting " to the text of paragraph 5 of Article 38. For the rest, he suggested that the paragraph might be worded as follows:

> " If the Court is not sitting, and without prejudice to any decisions taken by the Court, having regard to the circumstances, the orders to be made by the Court under this article are made by the President."

Jonkheer VAN EYSINGA could not accept M. Urrutia's interpretation of Article 23 of the revised Statute.

Members of the Court had always been at the disposal of the Court even under the old Statute; directly the President summoned them to attend an extraordinary session, they were bound to come to The Hague. The words "*la Cour reste toujours en fonctions*", however, were meant to introduce something new. If that expression in the revised Statute really amounted to saying that members of the Court were always at the disposal of the Court, paragraph 1 of Article 23 of the Statute might have read as follows: " Members of the Court are always at the disposal of the Court except during the judicial vacations." But that was not correct, because the phrase at the end of paragraph 3 of the same article meant that judges were also at the disposal of the Court during the vacations. This had been very clearly stated in the Report of the Committee of Jurists of 1929 (p. 113):

" Apart from exceptional cases, such as that of illness or other good reason for absence, the judges must be permanently at the disposal of the Court. It is to be understood that this principle applies even during the judicial vacations."

This showed that the expression "*reste toujours en fonctions*" was not equivalent to " shall always be at the disposal of the Court ".

Count ROSTWOROWSKI recognised the importance of the question raised by M. Anzilotti—namely, whether the President was bound, when the Court was not assembled, to convene it for the purpose of making an order. But once the Court had decided that it preferred to delegate its powers to the President, the only question remaining to be considered in regard to paragraph 5 was the question of drafting, because the legal question was decided.

The words " if the Court is not sitting " referred to a pure question of fact; it was the condition upon which the delegation of powers provided for in paragraph 5 was made dependent.

M. ANZILOTTI emphasised that his objection related to the question whether, under the present Statute (revised), the Court could transfer its powers to the President because it was not sitting. He was thinking, in particular, of Article 48 of the Statute.

M. FROMAGEOT once more observed that hitherto the President had made orders for the conduct of the case when the Court had not been assembled. No matter what the circumstances were which led to the judges not being at The Hague, the nature of the orders to be made was the same; and hitherto the Court had seen no objection to allowing the President to act alone. There seemed no reason for discontinuing this practice. The importance of the step to be taken was what they had to consider.

M. ANZILOTTI agreed that, so far as the first three paragraphs of Article 38 were concerned, it was merely a question of ascertaining the wishes of the parties, of considering the requirements of the Court's work and of making an order simply based on these considerations. With regard to paragraph 4, however, he made reservations.

The PRESIDENT, before taking a vote, wished to make a statement with regard to his own vote. At the very first sitting on February 1st, 1936,[1] he had stated that, upon mature reflection, he had come to the conclusion that it would be a good thing to retain the expression " if the Court is not sitting " in the revised Rules; and that expression occurred fifteen or sixteen times. Since that time, no argument had been presented which had altered his opinion; accordingly, he would vote for the retention of the phrase " if the Court is not sitting ". It referred to a pure question of fact and should be interpreted in conjunction with its context. In Article 38 of the Rules[2], the proper interpretation was as follows: paragraph 2 gave the Court power to make orders, and the effect of paragraph 5 was that, if the members of the Court were not assembled at The Hague and themselves able to make the order, the President might do so.

Jonkheer VAN EYSINGA noted what the President had said, but observed that, though the terms of the proposed provision were identical with those of paragraph 3 of the existing Article 33,[3] the import of the words " if the Court is not sitting " was, in his opinion, modified as a result of the coming into force of the new Article 23 of the Court's Statute.

The PRESIDENT put the following question to the Court:

> " Does the Court adopt the following text for paragraph 5 of Article 38:
>
> > " ' If the Court is not sitting and without prejudice to any subsequent decision of the Court, its powers under this article shall be exercised by the President ' ? "

By six votes to four, the Court answered the question in the affirmative.

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[1] D 2, A. 3, p. 466.
[2] See text, p. 120.
[3] 1931 Rules.

M. FROMAGEOT considered that this vote did not preclude the modification of the wording and referred to that proposed by him.

The REGISTRAR drew attention to the phrase ". . . and without prejudice to any decisions taken by the Court having regard to the circumstances" in the text thus proposed. The old text said: ". . . without prejudice to any subsequent decision of the Court . . ."; that meant that, notwithstanding a decision by the President fixing certain time-limits, the Court, when it met, could *ex officio* modify the times thus fixed; it was a warning to the parties that they should not consider the time-limits finally fixed until the Court had been able to meet. That, however, did not imply that the parties had a sort of right of appeal to the Court from the decisions of the President. The new wording therefore would involve a change in the substance of the provision.

M. FROMAGEOT did not press his proposal and the PRESIDENT declared the text which he had already put to the vote adopted with a minor change in the French text to which there was no objection.

The REGISTRAR observed that paragraphs 3 and 4 of Article 38 had been reserved. *Inter alia*, Baron Rolin-Jaequemyns had proposed the deletion of the words "*par elle*" in the second line of paragraph 4 (in English: "which have been fixed" instead of "which it has fixed"), and that paragraph 3 should be amended so as to make it clear that that paragraph covered not only orders made by the Court but also those made by the President. Finally, there was a decision to be taken regarding the use of the word "*entrepris*" (taken) in paragraph 4.

The PRESIDENT recalled that the Court had adopted paragraph 4 of Article 38 "subject to drafting". The best course would be for the time being to leave that provision; later on, all the articles would be referred to a committee which would consider them very carefully from the point of view of their wording, and any omissions or errors.

It was decided accordingly.

The President declared Article 38 adopted in second reading.

11.III.36.*

Article 37. — Final Adoption.

The Drafting Committee proposed no change in the French text, except that, in paragraph 4, it suggested the deletion of the words "*par elle*", so that the text would run: "*la Cour peut prolonger les délais fixés*" (the Court may extend time-limits which *have been* fixed). It also proposed to replace the word "*entrepris*" by "*fait*".

In paragraph 2 of the English text, it was proposed to render "*notamment*" by "*inter alia*", instead of "in particular".

The whole of Article 37, as thus amended, was finally *adopted*.

ARTICLE 38 *(Article 33, Paragraph 1, old Rules).*

TIME-LIMITS (FIXING OF)

19.V.34.*

Discussed as Article 33.

. . . . . .

M. ANZILOTTI observed that the present text of Article 33[1] began by laying down a general rule to which much importance was to be attached and which provided that the Court was to fix time-limits by assigning a definite date for the completion of each act of procedure. This rule, in its general form, had disappeared in the new text,[2] which certainly mentioned precise dates, but only in paragraph 2 and quite incidentally.

The PRESIDENT said that he did not appreciate the difference between the two texts. He suggested that the question should be taken up again later.

22.V.34.

See under Article 37, pp. 112-115 for discussion of Article 33, old Rules (Articles 37 and 38 of Rules of 11.III.36).

23.V.34.**

Discussed as Article 33 bis.

> "Time-limits for the completion of the various acts of procedure shall be fixed by the Court or by the President by the assignment of definite dates."

The PRESIDENT said that the Co-ordination Commission had had a long discussion upon a text drafted by M. Fromageot and which, in addition to a sentence corresponding to the above text, included provisions concerning the calculation of time-limits. The Commission, however, had not seen fit to recommend the adoption of M. Fromageot's text by the Court for the following reasons:

In the first place, the Court, in 1922, at the preliminary session, had not adopted a proposal by Mr. Moore [1] to the same effect.

Further, notwithstanding the details contained in M. Fromageot's draft, the Commission had found that in reality that draft was not complete: if they embarked upon a definition of terms, they must lay down exactly what a week, a month or a year meant.

Again, when the Court was construing an agreement between Governments, it should hesitate to substitute provisions of its Rules for the rule of interpretation requiring that an attempt should first be made to ascertain the intentions of the parties.

Finally, the Commission had been of opinion that the question was not of sufficient importance to require detailed regulation. Apart from Article 61 of the Statute, there was perhaps only one treaty fixing a time-limit for the institution of proceedings.

M. ANZILOTTI thought that the wording proposed by the Commission was less clear than the first paragraph of the old Article 33.

The PRESIDENT took a vote on Article 33 *bis* worded as follows, in order to take into account M. Anzilotti's observation:

"The Court or the President shall fix time-limits by

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* D 2, A. 3, p. 45.
** *Ibid.*, p. 63.
[1] 1931 Rules.
[2] See p. 111, meeting of 19.V.34, under Article 37.

* D 2, A. 3, p. 729.
[1] See D 2, p. 131.

assigning a definite date for the completion of the various acts of procedure."

Upon a vote being taken, this text was unanimously adopted.

1.VI.34.*

Discussed as Article 33 bis.

The PRESIDENT next turned to Article 33 *bis*.

He observed that the Co-ordination Commission had shortened the text adopted by the Court.

They had thought that the words "the Court or the President" were really superfluous, the paragraph being intended simply to lay down that time-limits were to be fixed by assigning a definite date.

M. FROMAGEOT remarked that the words "the Court or the President" indicated that this was a distinct rule. Article 33 *bis*, being separate from Article 33, must be complete in itself.

Jonkheer VAN EYSINGA thought that, since Article 33 *bis* was included as a separate article, it would perhaps be better to restore the words omitted by the Co-ordination Commission.

Baron ROLIN-JAEQUEMYNS saw no reason for embodying this rule in a separate article. It might very well be joined to Article 33, which dealt with time-limits. But if it was kept as a separate article, it must be stated that time-limits were fixed by the Court or the President.

M. ANZILOTTI thought that the question of time-limits was sufficiently important to be dealt with in a separate article. Nevertheless, he would not oppose the inclusion of Article 33 *bis* in Article 33.

M. FROMAGEOT proposed the following wording:

"Time-limits which are fixed by the Court, or by the President if the Court is not sitting, shall be determined by assigning a definite date for the completion of the various acts of procedure."

The PRESIDENT first of all took a vote on the question whether it was necessary to devote a separate article to this rule.

By seven votes to five, the Court decided to keep Article 33 *bis* as a separate article.

M. ANZILOTTI suggested the following wording: "The Court, or the President if the Court is not sitting, shall fix time-limits by assigning a definite . . .".

The PRESIDENT said that the text proposed by M. Anzilotti was the same as that which the Court itself had adopted and which the Co-ordination Commission had thought it better to amend by deleting the words: "the Court or the President".

He took a vote on this text, which was adopted by ten votes to two.

4.IV.35.

See under Article 37, pp. 118-119, for discussion of arrangement of Articles 38 and 39 (Articles 37 and 38 of Rules of 11.III.36).

10.IV.35.*

Discussed as Article 39. — First Reading.

The PRESIDENT submitted to the Court the following text proposed for Article 39 by the Drafting Committee, to which that article, and also Article 38, had been referred for final drafting:

"Time-limits shall be fixed by assigning a definite date for the completion of the various acts of procedure."

He pointed out that the Committee had deleted the words: "by the Court, or by the President if the Court is not sitting", which appeared in the text adopted by the Court. The object of this simplification was to show clearly that the only purpose of Article 39 was to indicate the method by which the Court fixed the time-limits, namely by assigning a definite date and not by specifying a certain number of days, weeks or months. The alteration also offered the advantage of removing any appearance of contradiction between paragraph 5 of Article 38 and Article 39, a point which had given rise to criticism at an earlier meeting.

The PRESIDENT noted that the Court accepted the new text proposed by the Drafting Committee for Article 39, which was adopted in first reading.

19.II.36.

For discussion of Article 38 (Article 39 of the draft) in connection with Article 37 (Article 38 of the draft) see under Article 37, pp. 120-122.

Second Reading and Final Adoption.

The article was adopted unchanged in second reading on 20.II.36 and finally *adopted* with the number 38 on 11.III.36.

ARTICLE 39 *(Article 37, Paragraphs 1-4, old Rules).*

LANGUAGES USED IN THE DOCUMENTS OF THE WRITTEN PROCEDURE; TRANSLATION OF DOCUMENTS

25.V.34.**

Discussed as Article 37.

Text submitted by the Co-ordination Commission.[1]

"(1) When a case is brought before the Court for judgment or advisory opinion, the documents constituting the written procedure shall be drawn up either in French or in English.

"(2) If, in a case submitted to the Court for judgment, the parties are agreed that the whole proceedings shall be conducted in one only of the official languages of the Court, the documents constituting the written procedure shall be drawn up in that language.

"(3) Should the use of a language other than French or English be authorised by the Court, a translation into French or into English shall be appended to each of the documents constituting the written procedure.

"(4) In the case of voluminous documents, the Court, or the President if the Court is not sitting, may

* D 2, A. 3, p. 145.
** *Ibid.*, pp. 79-83.
[1] See D 2, A. 3, p. 869.

* D 2, A. 3, pp. 463-464.

sanction the submission of translations of portions of documents only."

The PRESIDENT observed that the words in the above text relating to advisory opinions would have to be deleted.

He then pointed out that the wording proposed by the Commission differed from the existing text, in particular, in stating the general rule first, and the exception in the second place. Furthermore, the Commission proposed to omit the penultimate paragraph of the existing Article 37, namely:

> " The Registrar shall not be bound to make translations of documents submitted in accordance with the above rules."

M. ANZILOTTI suggested that, in the first paragraph, the word " *doivent* " (shall) should be replaced by " *peuvent* " (may). The Statute laid down that the official languages of the Court were English and French. It should be made clear that either French or English might be used, and all idea of an obligation should be eliminated.

The PRESIDENT said that in that case it would be better to abide by the existing text: " *les pièces de procédure* sont *présentées* . . .".

M. URRUTIA was not sure if anything was said in regard to the language in which judgments should be delivered. If not, would it not be better to bring Article 37 of the Rules entirely into harmony with Article 39 of the Statute ? In this connection, he pointed out that the revised Statute laid down that the Court might authorise the use of an unofficial language at the request of *any* party.

The PRESIDENT pointed out that Article 37 came in the section of the Rules entitled " Procedure ".

M. URRUTIA asked whether the question of the language in which judgment was to be delivered was dealt with in the part of the Rules relating to judgments.

The PRESIDENT replied in the negative. Everything necessary on that subject was said in the Statute.

M. URRUTIA said that the point he had in mind was the necessity for bringing the Rules into conformity with the Statute.

Jonkheer VAN EYSINGA pointed out that it was perhaps expedient that the article prescribing the manner in which the parties were to submit their documents should go into details which were not necessary in regard to the judgment.

The REGISTRAR pointed out that, according to Article 39 of the Statute, " the official languages of the Court shall be French and English ". The article then went on to explain what that signified in regard to judgments, but it said nothing in regard to the documents constituting the written procedure. It was for that reason that an article had been inserted in the Rules giving indications in regard to the latter documents, corresponding to what was laid down in Article 39 of the Statute in regard to judgments.

Baron ROLIN-JAEQUEMYNS wished the words " for judgment " to be retained; for the latter part of Article 37 concerned special agreements.

M. GUERRERO, Vice-President, pointed out that Article 37 was concerned with all cases submitted to the Court—both contentious and advisory cases.

On the other hand, in Article 39, a distinction was made between cases introduced by special agreement and those introduced by application.

Baron ROLIN-JAEQUEMYNS understood that objection, but thought it would be necessary to say: " when a contentious case is brought before the Court . . .".

M. FROMAGEOT thought it would meet Baron Rolin-Jaequemyns' difficulty if the text were to run: " whether by application (*requête*) or by special agreement . . .".

Baron ROLIN-JAEQUEMYNS said that would satisfy him.

M. GUERRERO, Vice-President, said that, if the word " *requête* " were introduced, the article would cover advisory procedure also.

The PRESIDENT said he was not in favour of this addition, which would make it possible to argue that the article did not cover interventions, objections, etc., in the case of which a " *requête* " was not necessary.

M. ANZILOTTI asked whether it would not be better to go back to the wording of the existing Article 37:

> " In the absence of an agreement with regard to the language to be employed, documents shall be submitted in French or in English."

Having thus established the general rule, they could go on to consider the case of an agreement between the parties.

Baron ROLIN-JAEQUEMYNS said he agreed.

The PRESIDENT said that, if they adopted M. Anzilotti's suggestion, the new Article 37 would be in the following terms:

> " (1) In the absence of an agreement with regard to the language to be employed, the documents constituting the written procedure shall be submitted in French or in English.
>
> " (2) If the parties are agreed that the whole proceedings shall be conducted either in French or in English, the documents constituting the written procedure shall be submitted only in the language chosen by the parties."

M. GUERRERO, Vice-President, thought that, to avoid any misunderstanding, they should alter the wording of the first paragraph and say: " In the absence of an agreement settling which of the two official languages is to be employed. . ."

Baron ROLIN-JAEQUEMYNS was not opposed to this suggestion, but thought the text should begin as follows: " The documents constituting the written procedure shall be drawn up either in French or in English." Then they could go on: " In the absence of an agreement. . ."

The PRESIDENT read a text submitted by Baron Rolin-Jaequemyns in the following terms:

> " 1. The documents constituting the written procedure shall be submitted either in French or in English.
>
> " 2. Nevertheless, if the parties are agreed that the whole proceedings shall be conducted in one only of the official languages of the Court, the documents constituting the written procedure shall be drawn up only in that language."

M. ANZILOTTI felt some hesitation in regard to this wording. The idea of Article 39 of the Statute was that *either* of the official languages might be used, but that, if there were an agreement between the parties, one *or* other of the languages would be selected. It was only as an exception that the article envisaged the case in which, in the absence of agreement, the parties resumed their liberty. It was for that reason that the existing Article 37 began by considering the case where there was agreement

—that being the normal case, according to Article 39 of the Statute. In these circumstances, and having regard to all the aspects of the question, he would prefer to retain the existing text without any change.

The PRESIDENT put the text proposed by Baron Rolin-Jaequemyns to the vote.

This text was rejected by eight votes against four.

The PRESIDENT declared that the text of the existing Rules was accordingly maintained.

The PRESIDENT went on to paragraph 3, worded as follows:

> " Should the use of a language other than French or English be authorised by the Court, a translation into French or into English shall be attached to each of the documents constituting the written procedure."

M. ANZILOTTI said that the words " authorised by the Court " raised the question whether it was the text in the foreign language or the translation thereof which was to be considered as the original.

The PRESIDENT declared that, as no objection had been formulated, paragraph 3 of the existing Rule was *provisionally* adopted.

M. ANZILOTTI reserved his right to return to the point that he had raised. He did not think it desirable that a document in a language other than an official language could be regarded as the original.

The PRESIDENT observed that the Co-ordination Commission proposed to omit the fourth paragraph of the existing Article 37, namely:

> " The Registrar shall not be bound to make translations of documents submitted in accordance with the above rules."

That text presented a danger, because it might be argued *a contrario* that the Registrar was bound to have translations made of documents not submitted in accordance with the above rules.

Moreover, after twelve years' experience, it seemed no longer necessary to retain a clause which was designed to guard the Registrar against unreasonable demands by the parties, since, in the meantime, a sufficient jurisprudence had been built up.

M. FROMAGEOT feared that, if this clause were deleted, after having been in existence, the agents might draw misleading conclusions from its omission.

The REGISTRAR, in reply to M. ANZILOTTI, said that it might be important in a given suit to furnish the Court with documents written in original languages with which the Court was perhaps not acquainted. In such a case, the provision in paragraph 4 meant that, if the foreign language in question were not approved by the Court, a translation must be made by the Registry—which would, indeed, be perfectly normal. But as such cases would be rare, it was of little importance from that point of view whether the clause were retained or omitted.

With regard to the question, raised by M. Anzilotti, as to which version of a document should be regarded as the original text, the Registrar recalled that the Court, on several occasions, when it had allowed counsel or a witness to use a language other than French or English, had decided to treat the translation into French or English of the speech or evidence as the original version.[1]

[1] *Cf.* E 3, p. 201.

The PRESIDENT having once more remarked that the Co-ordination Commission proposed the deletion of the paragraph in question, M. GUERRERO said that he would like to maintain it. In his view, the fact that the Rules said that the Registrar was not bound to have a translation made did not amount to a prohibition. The Registrar was at liberty to have this translation made in cases where he saw the possibility of doing so. The paragraph might therefore be useful, and in any case there was no objection to it.

The PRESIDENT said that the Court really had before it three proposals: first the text of the Second Committee, to which Baron Rolin-Jaequemyns had drawn attention. This text was as follows:

> " The Registrar shall not be bound to prepare translations of documents of the written proceedings."

Then there was the proposal of the Co-ordination Commission that the paragraph should be deleted.

Lastly, there was the proposal to retain the existing text.

M. GUERRERO, Vice-President, with reference to the proposal of the Second Committee, asked whether, when a document of the written proceedings was submitted in English, the Registrar was not bound to have a French translation made.

The PRESIDENT replied that he was not; nevertheless, in practice, translations were often made for the convenience of some judges.

Count ROSTWOROWSKI did not understand the words: " in accordance with the above rules ", and thought it preferable to delete them and to say, with reference to the third paragraph: " documents submitted *in this way* ".

The PRESIDENT asked whether there would be any objection to the combination of paragraphs 3 and 4.

M. URRUTIA observed that the words "in accordance with the above rules ", which referred to all the foregoing paragraphs, meant more particularly that the Registrar was not bound to have translated into English documents submitted in French and *vice versa*. Moreover, that was in accordance with established practice—*e.g.*, in the case concerning the European Commission of the Danube.

The REGISTRAR thought that, by combining paragraphs 3 and 4, they would very much restrict the scope and import of paragraph 4. As M. Urrutia had just said, the most practical example was a case where a Government asked for a translation into English of documents presented in French. At present, if a translation had already been made for the use of members of the Court, it was supplied unofficially to such a Government, with the observation that the Registry accepted no responsibility for it. It was doubtful if the same method could be followed if the amendment consisting in combining paragraphs 3 and 4 were adopted.

The PRESIDENT asked Baron Rolin-Jaequemyns if he wished a vote taken on the text proposed by the Second Committee.

Baron ROLIN-JAEQUEMYNS would have preferred to amend the text of Article 37 in accordance with the Second Committee's proposal.

The PRESIDENT took the opinion of the Court on the Co-ordination Commission's proposal to delete paragraph 4.

By nine votes to three, the Court decided not to delete the paragraph.

The PRESIDENT took a vote on the text proposed by the Second Committee:

> " The Registrar shall not be bound to make translations of documents of the written proceedings. "

By nine votes to three, the Second Committee's text was adopted.

The PRESIDENT said that this text would accordingly replace the fourth paragraph of the existing rule.

(For discussion at this meeting of paragraph 5 of Article 37 (old Rules), see p. 142 under Article 43 to which that paragraph was transferred.)

1.VI.34.*

Discussed as Article 37.

The PRESIDENT next turned to Article 37, which was drafted as follows:

> " 1. Should the parties agree that the proceedings shall be conducted in French or in English, the documents constituting the written procedure shall be submitted only in the language adopted by the parties.
>
> " 2. In the absence of an agreement with regard to the language to be employed, the documents shall be submitted in French or in English.
>
> " 3. Should the use of a language other than French or English be authorised, a translation into French or into English shall be attached to the original of each document submitted.
>
> " 4. The Registrar shall not be bound to make translations of the documents of the written proceedings."

He observed that the first, second and third paragraphs were reproduced from the existing Rules.

Count ROSTWOROWSKI was afraid that the first paragraph was somewhat ambiguous. It said: " Should the parties agree that the proceedings shall be conducted in French or in English [*soit en français, soit en anglais*] . . .". That seemed to imply an agreement that the documents of the written proceedings should be submitted in one or other of these two languages. But what was meant was an agreement as to the use of one language only. Accordingly, they should say that the proceedings would be in French *or* in English.

M. ANZILOTTI thought it would suffice to say: " that the proceedings shall be conducted wholly in French or wholly in English . . .".

The PRESIDENT, observing that M. Anzilotti's proposal met with no objection, declared paragraph 1 adopted in that form.

He recalled that, for paragraphs 2 and 3, the Court had decided to keep to the text of the existing Rules.

There being no observations with regard to paragraphs 2 and 3, these paragraphs were adopted.

The President declared paragraph 4 adopted.

He recalled that paragraph 5 of Article 37 of the existing Rules had been transferred to another article, in accordance with a decision of the Court.

Article 37 was thus adopted as a whole.[1]

4.IV.35.*

Discussed as Article 40.

The PRESIDENT opened the discussion on Article 40, which, in accordance with the decision already taken,[2] was to be transferred to the group of general provisions, the section " Written proceedings " beginning with Article 41.

M. ANZILOTTI agreed to the placing of Article 40 among the general provisions; but he thought in that case that either it should be amended so as to make it also applicable to oral proceedings, or else that Article 58 of the Drafting Committee's text (and of the Rules of 11.III.36) should be transferred to the same place.

The PRESIDENT, in that case, would prefer to leave Article 40 in the section relating to written proceedings.

It was decided accordingly.

First and Second Readings and Final Adoption.

The article was adopted in first reading as Article 40 on 5.IV.35 and in second reading on 20.II.36. On 11.III.36 it was finally *adopted* with the number 39.

ARTICLE 40

(Paragraph 1: Paragraphs 1 and 2 of old Article 34; Paragraphs 2, 3 and 4: new; Paragraph 5: Paragraph 3 of old Article 34; Paragraph 6: new.)

DOCUMENTS OF THE WRITTEN PROCEDURE

22.V.34.**

Discussed as Article 34.

The PRESIDENT observed that Article 34, which the Court had now reached, contained, in the draft proposed by the Co-ordination Commission, provisions which were not to be found in the existing Rules, but which were nevertheless in accordance with the Court's practice. This draft was as follows:

> " 1. The originals of all documents of the written proceedings in a case submitted to the Court either for judgment or for advisory opinion shall be signed by the agent or by the representative and presented to the Court, accompanied by fifty printed copies bearing the printed signature of the agent or representative.
>
> " 2. Whenever, in accordance with the Court's practice, a copy of a document of the written proceedings is communicated to a Government, or if a party, under Article 43, paragraph 4, of the Statute, is entitled to receive a certified copy of a document of procedure,

* D 2, A. 3, p. 148.
** *Ibid.*, pp. 52-54.

* D 2, A. 3, pp. 434-435.
[1] The text thus adopted with the amendment indicated is the same as that of the Rules of 11.III.36.
[2] Earlier at the same meeting during discussion on arrangement of articles (see Explanatory Note, p. VII, and D 2, A. 3, pp. 428-429).

the Registrar shall certify that the document is a true copy of the original filed with the Court.

" 3. All documents of the written proceedings in a case shall be dated, but when a document must be filed or a proceeding taken by a certain date, the date of registration of the document in the Registry shall be considered as the material date.

" 4. If, in virtue of an arrangement between the agent of a Government in a particular case and the Registrar of the Court, the printing of a document intended for submission to the Court is carried out under the supervision of the Registrar, the text shall be communicated in sufficient time to enable the printed document to be filed before the expiration of any time-limit applicable to the said document.

" 5. Whenever, under the present rule, a document must be filed in a number of copies which is laid down beforehand, the President may require additional copies to be supplied.

" 6. The correction of an error in a document filed shall be permissible at any time, with the consent of the other party or interested Government, or with the authorisation of the Court."

The President added that the words " or representative " which occurred twice in the first paragraph were to be deleted.

M. ANZILOTTI raised the question whether the words " in accordance with the Court's practice " in paragraph 2 should be retained.

The PRESIDENT said that, as explained in the report,[1] this expression had been inserted for reasons connected with advisory procedure.

These reasons had now disappeared, but another remained: there was no provision in the Statute or Rules requiring the communication to Governments of a copy of a preliminary objection which was not regarded as instituting fresh proceedings.

M. ANZILOTTI pointed out that the copies referred to in this paragraph had to be certified by the Registrar. Could they not find a formula laying down this rule in general terms ?

M. URRUTIA considered that the essential point was to make it quite clear that every document of the written procedure which had to be communicated to a Government should be certified by the Registrar as a true copy. In those circumstances, there was no need to refer to the Court's practice.

M. SCHÜCKING referred to the commentary accompanying the text and proposed that, since the Court had decided to leave the question of advisory opinions on one side, the text should simply read: " When a copy of a document of procedure . . ."

M. FROMAGEOT doubted whether it was necessary to retain the words " to a Government " in the same paragraph.

The PRESIDENT, having regard to the various suggestions made, proposed the following text:

" When a copy of a document of the written proceedings is communicated to a party under Article 43, paragraph 4, of the Statute. . . ."

M. ANZILOTTI thought that they should not limit their consideration to cases falling under Article 43 of the Statute. Supposing, for instance, that a State, desirous of intervening in a case, asked for a copy of a document of the proceedings, would it be entitled to obtain a copy certified as correct ?

The PRESIDENT answered in the affirmative.

M. ANZILOTTI observed that the ten copies prescribed by Article 34 of the present Rules were certified as correct by the Governments; that had been decided in order to avoid requiring the Registrar to ascertain that the documents were correct copies of the originals. Now it was proposed that the certificate should be given by the Registrar himself. Was this alteration desirable ?

The REGISTRAR pointed out that the documents in question were documents of the written proceedings. There were two possibilities: the documents would be printed either by the parties, or else by the Registry; but, in any case, they would be printed.

In order to certify a copy of a printed text as correct, one had to satisfy oneself that the copy which was considered as the original, and which was duly signed, was of the same impression as the other copies, and that it contained no manuscript corrections. This was something that could be ascertained in a fairly short time. That was why the Registrar had not thought it necessary to make any objection to the new clause. It must be observed, however, that the clause would result in making it impossible any longer to accept a typewritten text as an original, as was the present practice.

The PRESIDENT proposed the following text for paragraph 2:

" When a copy of a document of the written proceedings is communicated to the other party under Article 43, paragraph 4, of the Statute, the Registrar shall certify that the document is a true copy of the original text filed with the Court."

M. ANZILOTTI considered that, in every case when a document was communicated by the Registry, it must be certified as correct by the Registrar. Why, then, should they confine themselves to legislating for the case arising under paragraph 4 of Article 43 ?

After a brief exchange of views, the PRESIDENT declared that the draft he had just read was adopted, and went on to paragraph 3.

M. ANZILOTTI felt some doubt as to the possibility of reconciling this clause with the provision that had been already adopted in regard to time-limits.

The text which was proposed adopted the date of the registration of a document in the Registry as the material date.

At the same time, they were considering the insertion of an article providing that time-limits should expire at midnight. But a document submitted at that time would, presumably, not be registered till next day, and then the filing would not have been accomplished within the time-limit.

M. FROMAGEOT thought that the difficulty might be avoided if mention were made of the date and time of the filing of a document.

The word " material " (" *pertinente* ") did not seem to him very suitable.

Baron ROLIN-JAEQUEMYNS thought that what was necessary, for the moment, was to bring in both the length of the appointed time-limit and the official date of the filing.

The REGISTRAR observed that it was laid down that the

[1] See D 2, A. 3, p. 868.

original copy had to be accompanied by fifty other copies. He had some doubts as to whether it was necessary that these fifty copies should arrive within the time-limit laid down for the filing of the original. Experience showed that that was a question of great practical importance, and one that it might be useful to decide, if it was intended, as appeared, to be stricter than in the past in regard to the observance of time-limits.

M. ANZILOTTI wondered if it were really necessary for them to confirm a practice, in regard to the printing of documents of the written proceedings by the Registry, which had grown up alongside the Rules of Court.

The PRESIDENT explained that the Registrar had shown that the existing practice was to the advantage of the Court. The object of this paragraph was merely to make it clear that, if a document has to be printed by the Registry, the text must be filed within a certain time.

M. FROMAGEOT, while having no objection to this method in itself, considered that a provision of that kind would be out of place in the Rules.

M. GUERRERO, Vice-President, thought that this clause would be useful to Governments which were not conversant with the procedure before the Court, and which might not know how they were to get their documents printed.

M. FROMAGEOT said that, in any case, he would prefer that the text should be worded as follows:

> " Arrangements may be made between a Government's agent and the Registrar for the printing of a document intended for the Court. In such a case the document must be filed in sufficient time . . .", etc.

The PRESIDENT said that the paragraph would be referred back to the Co-ordination Commission, and went on, first to paragraph 5, which he declared to be adopted, as no judge had raised any objection, and next to paragraph 6.

M. ANZILOTTI said that the powers bestowed on the Court by this paragraph should also be conferred on the President, if the Court was not sitting.

The PRESIDENT declared that the Court adopted this paragraph, with the inclusion of M. Anzilotti's amendment.

1.VI.34.*

Discussed as Article 34.

The PRESIDENT next turned to Article 34.

The text proposed by the Co-ordination Commission was as follows:

> " 1. The original of every document of the written proceedings shall be signed by the agent and transmitted to the Court accompanied by fifty printed copies bearing the signature of the agent in print.
>
> " 2. When a copy of a document of the written proceedings is communicated to the other party, under Article 43, paragraph 4, of the Statute, the Registrar shall certify that it is a correct copy of the original filed with the Court.
>
> " 3. All documents of the written proceedings shall be dated; but when a document has to be filed by a certain date, it is the date of the receipt of the document by the Registry which will be regarded by the Court as the material date.
>
> " 4. If the agent of a party requests the Registry to undertake, at the cost of the Government which he represents, the printing of a document intended for submission to the Court, the Registrar may undertake this task. In such case, however, the text must be transmitted to the Registrar in sufficient time to enable the printed document to be filed before the expiry of any time-limit which may apply to it.
>
> " 5. When, under this article, a document has to be filed in a number of copies fixed in advance, the President may require additional copies to be supplied.
>
> " 6. The correction of an error in a document which has been filed is permissible at any time with the consent of the other party, or by leave of the Court, or of the President if the Court is not sitting."

With reference to paragraph 1, the Co-ordination Commission, in order to avoid using the word " communicate " in a sense other than that possessed by it in Article 40 of the Statute, had put the word " transmit ".

The PRESIDENT noted that there was no objection to the use of this word.

With regard to paragraph 2, the Co-ordination Commission had not thought it necessary to modify the text unanimously adopted by the Court.

The same applied to paragraphs 3, 4, 5 and 6.

In the circumstances, he regarded Article 34, which he had read, as adopted as a whole.

26.II.35.

See under Article 67, p. 280, for a reference to Article 34 (Article 40 of the Rules of 11.III.36) in connection with Article 66 (6) (Article 67 of the Rules of 11.III.36).

5.IV.35.

Adopted as Article 41 in First Reading.

The article was adopted in first reading with the text given above (meeting of 1.VI.34).

20.II.36.*

Discussed as Article 41. — Second Reading.

Paragraph 1.

The PRESIDENT opened the discussion on paragraph 1.

Jonkheer VAN EYSINGA, in order that the same wording might be used throughout, wished to substitute " filed with the Court " for " transmitted to the Court " in paragraphs 1 and 4.

The PRESIDENT, noting that there was no objection to this suggestion of Jonkheer van Eysinga, declared it adopted in regard to paragraph 1.

The text of this paragraph was adopted, the words " transmitted to " being replaced by " filed with ".

Paragraph 2.

The PRESIDENT declared paragraph 2 adopted.

Paragraph 3.

Count ROSTWOROWSKI wished the word " but " in the second line of this paragraph to be deleted, as it seemed superfluous.

M. FROMAGEOT agreed, as the phrase following the word " but " constituted a further explanation of the preceding provision, but not a limitation placed upon it.

* D 2, A. 3, p. 146.

* D 2, A. 3, pp. 602-604.

The PRESIDENT noted that the Court accepted Count Rostworowski's proposal. In consequence of the deletion of the word " but ", the semi-colon would be replaced by a full-stop and the second sentence would begin with the word " When ".

Thus amended, paragraph 3 was adopted.

Paragraph 4.

The PRESIDENT proposed the following new draft for paragraph 4:

> " If the Registrar, at the request of the agent of a party, undertakes, at the cost of the Government which this agent represents, the printing of a document intended for submission to the Court, the text must be transmitted to the Registry in sufficient time to enable the printed document to be filed before the expiry of any time-limit which may apply to it."

Jonkheer VAN EYSINGA was prepared to accept the text proposed by the President; he merely asked that the words " *transmise à la Cour* " (for submission to the Court) should be replaced by " *déposée près la Cour* " (to be filed with the Court).

Baron ROLIN-JAEQUEMYNS proposed to say " *le Greffier fait procéder* " (the Registrar arranges for) instead of " *le Greffier procède* " (the Registrar undertakes).

There being no further observations, the PRESIDENT declared the text proposed by him for paragraph 4 of Article 41, with the amendments suggested by Jonkheer van Eysinga and Baron Rolin-Jaequemyns, adopted by the Court.

Paragraph 5.

The PRESIDENT declared paragraph 5 adopted without modification.

Paragraph 6.

Jonkheer VAN EYSINGA proposed to substitute the words " during the judicial vacations " for the words " if the Court is not sitting ". The principle of the question was so important that this proposal must be submitted.

M. ANZILOTTI recalled that the Court had deleted Article 75 of the Rules in force,[1] according to which " the Court or the President if the Court is not sitting " could correct an error in any order, judgment or opinion arising from a slip or accidental omission.

The PRESIDENT observed that the scope of paragraph 6 of Article 41, which had been adopted in first reading, was much more limited.

M. NAGAOKA raised the question whether the Court could permit a correction of this kind in the case of a very serious error and when the other party did not give its consent.

The PRESIDENT observed that, if the Court considered the amendment too important, it would refuse permission.

Baron ROLIN-JAEQUEMYNS would prefer this paragraph not to be included in Article 41. He proposed that it should be deleted.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to replace the words ' if the Court is not sitting ' at the end of paragraph 6 of Article 41 by the words ' during the judicial vacations ' ? "

By eight votes to one, with one abstention, the Court answered the question in the negative.

The PRESIDENT asked the Court whether they desired to adopt paragraph 6 of Article 41.

M. GUERRERO, Vice-President, pointed out that Baron Rolin-Jaequemyns had just proposed its deletion; personally he supported this proposal. For in so far as concerned a clerical error the matter was of no importance. On the other hand, in the case of more serious errors, it was hard to see how the President or the Court could assume a responsibility which should rest on the person who had made the error.

21.II.36.*

Discussed as Article 41. — Second Reading (continued).

Paragraph 6.

The PRESIDENT requested the Court to continue the examination of this paragraph.

He recalled that the text had its origin in a proposal by the Second Committee, in the following terms: [1]

> " The correction of an error in a document submitted to the Court is permissible at any time, subject to the consent of the other party or of the Government concerned, and by leave of the Court."

That proposal, submitted by the Co-ordination Commission to the Court, had been accepted by the latter, together with an amendment submitted by M. Anzilotti, according to which the same powers should be vested in the President [2] in periods during which the Court was not sitting.

Moreover, paragraph 3 of Article 60 of the revised Rules made a similar provision, enabling errors in stenographic reports of speeches to be corrected.

M. ANZILOTTI proposed to insert the adjective " clerical " before the word " error ", in the first line of the text under discussion.

M. GUERRERO, Vice-President, said that, at the last meeting, he had supported Baron Rolin-Jaequemyns' motion for the omission of this paragraph. Indeed, if the correction of clerical errors was all that was contemplated, that took place as a matter of course, and the paragraph was not really necessary. But if the errors calling for correction were more serious, or other than clerical, he did not see how the Court or the President could authorise their rectification, if the other party did not concur.

The PRESIDENT suggested that, if this paragraph were omitted, it might be difficult for the Court to authorise even a simple correction in a document of the written procedure, once it had been filed.

M. ANZILOTTI, after considering the question in all its aspects, favoured the maintenance of this paragraph. It was impossible to prevent a party which had allowed an error to slip into a document of the written proceedings from correcting it in the oral proceedings, even if the Court, the President, or the other party were opposed to a clerical correction in the document.

[1] See Explanatory Note, pp. VIII-IX, and full discussion, D 2, A. 3, pp. 457-459; for text see 1931 Rules.

* D 2, A. 3, pp. 605-609.

[1] See D 2, A. 3, p. 766.

[2] See p. 136.

Moreover, in some cases, it might be unfortunate to allow an error to stand in a written document—for instance, a numerical error in a demand for damages. The paragraph under discussion was therefore of a certain use.

It ought, however, to be made clear that this clause covered the correction only of clerical errors, and did not extend to corrections which would alter the original purport of the passage, or give a different explanation.

The REGISTRAR pointed out that, if the Court proposed, henceforward, not to allow a party to make corrections of this kind, it would be necessary to say so expressly in the Rules, because corrections had been allowed hitherto.[1]

M. FROMAGEOT also thought that it might be useful to have a clause in the Rules enabling errors that had been made in a document to be rectified. But, instead of laying down that such corrections might be made with the assent of the other party, or by leave of the Court, would it not be better to say that the corrections were always permissible, subject to the right of the other party to object, in which case the Court would decide ?

As a rule, if the error were merely clerical, the other party would not contest the right to correct it. But if the correction entailed certain consequences in the presentation of the case, it was obvious that the other party was best situated to judge whether it should accept the correction, or contest it. M. Fromageot would therefore propose the following text:

> " The correction by a party of an error in a document which it has filed is permissible at any time, subject to the right of the other party to dispute the correction; *should it do so, the Court will decide.*"

The PRESIDENT observed that this text would produce the same effect as that under discussion, if it also empowered the Court to refuse leave to make a correction, even if the other party did not contest it.

M. FROMAGEOT explained that, in his view, if the two parties concurred, the Court would not intervene at all; it would only act when a dispute arising between the two parties in regard to a correction had to be settled.

The PRESIDENT, though he would prefer the Court's supervision to be wider in scope, was prepared to accept M. Fromageot's proposal.

M. ANZILOTTI asked M. Fromageot whether, according to the text he had proposed, the other party could contest the right to make a correction at all, or if it could only challenge the accuracy of the proposed correction.

M. FROMAGEOT considered that the right to make a correction ensued from the Rules; it was only the correction itself that could be challenged.

The PRESIDENT considered that the Court should retain the fullest possible powers of supervision in this matter. It might happen that leave to make a correction would be asked for late in the proceedings and that, for that reason, the other party might not make any objection. But if the Court thought that the right of correction was being abused, it might decline to give leave.

Baron ROLIN-JAEQUEMYNS thought that would be going further than the existing text, which said: " is permissible at any time with the consent of the other party *or* by leave of the Court...". According to that wording, the consent of the other party would suffice to enable the correction to be made. This article, however, was concerned merely with clerical errors and, that being so, what was the use of it ? Either the corrections would be of no account and, if so, the paragraph would have no object; or they would be more important and, in that case, the question would certainly be debated by the parties in the oral proceedings.

M. GUERRERO, Vice-President, asked if the paragraph would really serve any useful purpose. Surely a party always possessed the right to challenge the accuracy of a fact.

M. FROMAGEOT explained the object of the clause: it might happen that, in a Memorial, a party had admitted some allegation made by the other party—*e.g.*, the accuracy of a piece of evidence—but that, subsequently, it corrected this admission and said, for instance: " The fact which I admitted as correct is not the same fact as has been adduced by the other party." In such a case, did not the other party possess an established right in regard to what had been allowed or admitted, on the first occasion, by the first party ? That was the situation he had contemplated in his text. As regards clerical errors, neither the Court nor the other party would contest the right to rectify errors of that kind.

M. GUERRERO, Vice-President, feared that the Court would be committing itself too far if it decided a dispute about the correction of an error. The justice of a rectification asked for, but disputed, might subsequently be established, and that would put the Court in an embarrassing position.

M. FROMAGEOT pointed out that the Court's decision, if it made one, need not necessarily be given at once. It might be announced in the judgment.

Baron ROLIN-JAEQUEMYNS admitted that this was so, but thought that, in that case, paragraph 6 of Article 41 served no purpose.

Jonkheer VAN EYSINGA did not think this clause was intended to provide for cases other than those of errors which had been left in the documents of the written proceedings. The Court's practice allowed the correction of such errors. If the clause were now omitted, this might give the impression that the Court intended to modify that practice.

The PRESIDENT said that there were several proposals before the Court. He would put M. Anzilotti's proposal to the vote first: namely, to insert the word " clerical " in the text submitted as paragraph 6.

Baron ROLIN-JAEQUEMYNS considered that this addition reduced the significance of this paragraph to very little; he would, however, vote against the insertion of the paragraph in the Rules, as he thought it to be of no use.

The PRESIDENT, after consulting the Court, said it appeared that M. Anzilotti's proposal was not opposed; the word " clerical " would therefore be inserted in the text before the word " error ".

He then opened the discussion on M. Fromageot's proposal, which was in the following terms:

> " The correction by a party of a clerical error in a document which it has filed is permissible at any time, under the Court's supervision, subject to the right of the other party to dispute the correction. . . ."

M. FROMAGEOT said he accepted the addition of the word " clerical "; but, as the effect of this would be to deprive his text of much of its utility, he withdrew his proposal.

[1] See, for instance, C 67, pp. 4113, 4115.

He hoped, however, that, in the text of the Rules, the words " under the Court's supervision " would be substituted for " by leave of the Court ".

The PRESIDENT put the following question to the vote:

" Does the Court adopt paragraph 6 of Article 41, as amended by the insertion of the word ' clerical ' ? "

M. ANZILOTTI said that he would vote in the affirmative, but with a reservation in regard to the words " if the Court is not sitting ". M. Anzilotti could accept that phrase, in this place, because the Court had already given a decision on the point; but it did not satisfy him: he would prefer that the President should have the powers in question in all cases.

M. GUERRERO, Vice-President, said that he would vote for the omission of this paragraph because, so far as clerical errors were concerned, it was a matter of course that a party could correct them. There was therefore no object in the clause.

Jonkheer VAN EYSINGA would vote in the affirmative, subject, however, to a reservation in regard to the words " if the Court is not sitting ", which did not satisfy him.

By eight votes against two, the Court answered the President's question in the affirmative.

The PRESIDENT declared that paragraph 6 of Article 41 was adopted, with the addition of the word " clerical ".

Paragraph 6.

Baron ROLIN-JAEQUEMYNS wished to suggest an amendment to the text adopted for paragraph 6 of Article 41. As it was only a question of clerical errors, the provision for the intervention of the Court or of the President appeared superfluous. The words " . . . or by leave of the Court, or of the President if the Court is not sitting " might be omitted.

The PRESIDENT put Baron Rolin-Jaequemyns' proposal to the vote.

By seven votes against three, the Court decided against the omission of the above-mentioned words.

M. ANZILOTTI thought that, as it was a question only of clerical errors, the President's consent ought to be sufficient. It would suffice to say, simply:

" The correction of a clerical error . . . is permissible at any time with the consent of the other party, or by leave of the President."

M. FROMAGEOT concurred in M. Anzilotti's opinion; he would, however, prefer the phrase " under the supervision of . . ." rather than " by leave of . . .".

M. ANZILOTTI emphasised that the object of this part of the paragraph was to prevent any unreasonable difficulties from being made by a party. Personally, he would prefer the words: " or by leave of the President ".

The PRESIDENT put to the vote the proposal to omit the words " of the Court ", after the word " leave ", and also the words " if the Court is not sitting ", in paragraph 6 of Article 41.

The Court decided to omit the above words by six votes against four.

As no other amendment was proposed, the PRESIDENT put the following question to the Court:

" Does the Court adopt paragraph 6 of Article 41, as thus amended ? "

The Court answered the question unanimously in the affirmative.

The article was adopted in second reading.

11.III.36.*

Article 40. — Final Adoption.

The PRESIDENT said that the Drafting Committee proposed no change in the French text.

In the English text of paragraph 6, he said that the Committee had adopted the expression " the correction of a *slip or error* " to render " *erreur matérielle* ".

The whole of Article 40, as thus amended, was finally *adopted.*

ARTICLE 41 *(Article 39, old Rules).*

ORDER FOR THE PRESENTATION OF THE DOCUMENTS OF THE WRITTEN PROCEDURE

28.V.34.*

Discussed as Article 39.

The PRESIDENT invited the Court to examine Article 39, for which the Co-ordination Commission had proposed the following text:

" 1. When proceedings have been instituted by means of a special agreement, and subject to the provisions of paragraphs 2 and 3 of Article 33 of the Rules of Court, the following documents may be presented in the order stated below:

" A Case submitted by each party within the same limit of time;

" A Counter-Case submitted by each party within the same limit of time;

" A Reply submitted by each party within the same limit of time.

" 2. When proceedings are instituted by means of an application, and subject to paragraphs 2 and 3 of Article 33 of the Rules, the documents shall be presented in the order stated below:

" The Case by the applicant;

" The Counter-Case by the respondent;

" The Reply by the applicant;

" The Rejoinder by the respondent."

The President pointed out that the Co-ordination Commission's text was almost identical with that of the existing Rules; however, in the second line, the words " and subject to the provisions of paragraphs 2 and 3 of Article 33 of the Rules " had been substituted for the words: " provided that no agreement to the contrary has been concluded between the parties ", in order to avoid any possible contradiction.

He added that M. Fromageot had proposed a new arrangement of the subject-matter of Articles 39 and 40, which he had subdivided into four articles, those numbered 39 and 40 corresponding generally to the two paragraphs

* D 2, A. 3, pp. 97-99.

* D 2, A. 3, p. 730.

of the present Article 39. The text proposed by M. Fromageot for Article 39 was as follows:

> " When proceedings have been instituted by special agreement, the procedure shall be as follows: failing an agreement between the parties, each party shall submit simultaneously a Case containing a statement of the facts and the law which it alleges in support of its claims, and on which it bases its conclusions. This shall be followed by the submission in the same manner of a Counter-Case, and, finally, of a Reply."

M. FROMAGEOT pointed out that paragraph 1 of Article 39, as proposed by the Co-ordination Commission, repeated the words: " by each party within the same limit of time ", with reference to each document, as was also done by the existing text. As the object of the article was merely to lay down that, unless otherwise provided in the special agreement, the documents must be submitted simultaneously, he doubted whether the repetition was necessary, and whether it could not be replaced by a single formula applying to the different steps that had to be taken.

M. FROMAGEOT pointed out that the existing Rules provided, in one and the same Article 39, for two different cases: that of a special agreement and that of an application. In his view, those two cases should be dealt with separately in two different articles.

The PRESIDENT thought that it would be rather difficult to reconcile M. Fromageot's proposal, which involved a rearrangement of the subject-matter of Articles 39 and 40 of the Rules, with Article 33 as adopted by the Court.

M. ANZILOTTI said that he would have preferred to see the Rules altered as little as possible. As, however, the Court had chosen an entirely different policy, and was recasting nearly all the articles in such a way as to produce a new set of Rules, he would, if necessary, vote in favour of M. Fromageot's proposal, which he considered reasonable.

M. FROMAGEOT said that he had made two proposals, the second of which involved subdividing Article 39 in order to deal separately with the order in-which documents were to be filed according as proceedings were instituted by special agreement or by application. His first proposal sought to replace paragraph 1 of the existing Rules by a new text designed to show that the documents had to be submitted simultaneously.

M. ANZILOTTI asked if it would not suffice to say: " shall submit *on the same date* ", instead of " *within the same* limit of time ". The word " simultaneous " appeared to him more rigid than what was intended.

M. FROMAGEOT thought that the words " shall submit on the same date " were open to the same criticism. As regards the expression: " within the same limit of time ", he did not think it would exclude the idea of successive time-limits, and that was the important point.

The REGISTRAR recalled that in 1922 the different possible alternatives had been discussed. It was then considered that the formula which was finally adopted gave the least opening for misunderstandings, having regard to the fact that another article (Article 33) said that the Court fixed time-limits by assigning a definite date for the completion of the various acts of procedure. On that occasion, the expression " simultaneously " had been deliberately rejected. According to the Court's practice, a party might submit a document of the written procedure at any time whatever before the expiry of the time-limit; but in case of what was known as simultaneous procedure, the document was not distributed until the corresponding document of the opposing party had been received.

The PRESIDENT said that the Court was, indeed, bound to ensure that the documents were distributed simultaneously, but it could not ensure the simultaneous reception of the documents.

M. GUERRERO, Vice-President, thought that for greater clarity the article might be worded as follows:

> " When proceedings are instituted by special agreement, the procedure shall be as follows: a common date shall be fixed on which each of the parties shall submit a Case. . . ."

For it was the fixing of the date, and not necessarily the submission of the Case, which was common to the two parties.

The PRESIDENT observed that the fixing of the time-limit was dealt with in Articles 33 and 33 *bis*.

Jonkheer VAN EYSINGA thought that M. Fromageot had not sufficiently taken paragraphs 2 and 3 of Article 33 into account in his text. For, according to those two paragraphs, account had to be taken only *as far as possible* of any agreement concluded between the parties. On the contrary, M. Fromageot's text left the final decision to the parties.

M. FROMAGEOT said that, if his draft was considered too absolute, the difficulty might be overcome by inserting the words: " subject to paragraphs 2 and 3 of Article 33 ".

The PRESIDENT observed that what M. Fromageot now proposed was to replace the Commission's draft of the first paragraph of Article 39 by the following text:

> " When proceedings have been instituted by special agreement, the procedure shall be as follows: failing an agreement between the parties, and subject to paragraphs 2 and 3 of Article 33 of the Rules, each party shall submit simultaneously a Case containing a statement of the facts and the law which it alleges in support of its claims, and on which it bases its conclusions. This shall be followed by the submission, in the same manner, of a Counter-Case, and, finally, of a Reply."

He put the above text to the vote.

The text was rejected by eight votes against four.

The PRESIDENT then put Article 39, as proposed by the Co-ordination Commission, to the vote. The article was unanimously adopted.

1.VI.34.*

Discussed as Article 39.

Article 39 of the Rules. " 1. If proceedings are instituted by means of a special agreement, the following documents may, subject to the provisions of paragraphs 2 and 3 of Article 33 of the Rules, be presented in the order stated below:

" A Memorial submitted by each party within the same time-limit;

" A Counter-Memorial submitted by each party within the same time-limit;

" A Reply submitted by each party within the same time-limit.

" 2. If proceedings are instituted by means of an application, the documents shall, subject to para-

* D 2, A. 3, pp. 150-151.

graphs 2 and 3 of Article 33 of the Rules, be presented in the order stated below:

" The Memorial by the applicant;
" The Counter-Memorial by the respondent;
" The Reply by the applicant;
" The Rejoinder by the respondent."

The PRESIDENT recalled that the text submitted for this article was the same as that of the existing Rules, save that the words " . . . subject to the provisions of paragraphs 2 and 3 of Article 33 of the Rules . . .". were substituted for: " provided that no agreement to the contrary has been concluded between the parties ".

First and Second Readings and Final Adoption.

The article was adopted in first reading on 5.IV.35 as Article 42, with one slight purely verbal change in the above text of 1.VI.34, the number of the article mentioned in paragraphs 1 and 2 being also changed. It was adopted in second reading on 21.II.36 and finally *adopted* with no further change as Article 41, on 11.III.36.

ARTICLE 42 *(Article 40, Paragraph 1, Nos. 1, 2 and 3, and Paragraph 2, Nos. 1, 2, 3 and part of 4, old Rules).*

CONTENTS OF THE MEMORIAL AND OF THE COUNTER-MEMORIAL

28.V.34.*

Discussed as Article 40, paragraphs 1 and 2.

The PRESIDENT opened the discussion on Article 40, as drafted by the Co-ordination Commission:

" 1. Cases shall contain a statement of the facts on which the claim is based; a statement of law, and a statement of the conclusions of the party concerned.

" 2. Counter-Cases shall contain: the affirmation or contestation of the facts stated in the Case; a statement of additional facts, if any; observations concerning the statement of law in the Case, and a statement of law presented on behalf of the party which submits the Counter-Case; and the conclusions of the latter party. When proceedings have been instituted by special agreement, these conclusions may include counter-claims in so far as the latter come within the Court's jurisdiction." [1]

[Paragraphs 3, 4, 5 and 6 of this draft, which were transferred to a separate article immediately following, and the discussion relating to these paragraphs, will be found under Article 43, pp. 143-145.]

The PRESIDENT observed that, except for certain additions, and the omission of the numbering of the points to be included in the Case and Counter-Case, the above text corresponded to Article 40 of the existing Rules.

M. URRUTIA pointed out that at the beginning of the article the words " of the party concerned " had been added. Was this addition, he asked, of any value ? Would not the party concerned invariably be the party that was pleading ?

The PRESIDENT, after having consulted the members of the Court, saw no objection to the omission of these words.

In regard to paragraph 2, which dealt with Counter-Cases, the President pointed out that the Co-ordination Commission had proposed to add: " observations concerning the statement of law in the Case ". Those words were intended to fill what appeared to be a gap in the existing text.

[Here follows reference to paragraphs 3 to 6: see p. 143.]

M. ANZILOTTI said that the only object of the article was to let the agents know what they had to put in their Cases and Counter-Cases. From that point of view, he preferred the text already in force, as it gave a very clear enumeration of the different points of the Case and Counter-Case. Moreover, he observed that the article could at best only serve as an indication: for instance, a statement of the law would only be necessary if the issue was a point of law.

. . . . . .

The PRESIDENT said that, subject to the amendments which had been approved, Article 40 could be considered adopted as a whole.

1.VI.34.*

Discussed as Article 40, paragraphs 1 and 2.

The PRESIDENT turned next to Article 40, which was as follows:

" 1. A Memorial shall contain: a statement of the facts on which the claim is based, a statement of law and the submissions.

" 2. A Counter-Memorial shall contain: the admission or denial of the facts stated in the Memorial, a statement of additional facts, if any, observations concerning the statement of law in the Memorial, a statement of law presented on behalf of the party filing the Counter-Memorial, and the submissions of this party."

[Paragraphs 3, 4 and 5, and the discussion relating to them will be found under Article 43, p. 145.]

The PRESIDENT observed that paragraphs 1, 2 (and 3) were submitted to the Co-ordination Commission in the form in which they had been adopted by the Court. From the point of view of drafting, however, he observed that the first paragraph ended with the words: " and the submissions ", whereas the second paragraph ended with the words: " and the submissions of this party ". Was it necessary to make this distinction, and could not the words " of this party " be deleted in paragraph 2 ?

M. FROMAGEOT agreed. He also proposed, in the preceding phrase, to substitute: " a statement of law in answer thereto ", for: " . . . a statement of law presented on behalf of the party filing the Counter-Memorial ".

The PRESIDENT was afraid that the words " *en réponse* " (in answer thereto) would not indicate sufficiently clearly that what was meant was the statement of law submitted by the party setting out its own point of view.

M. ANZILOTTI suggested: " *ainsi que son exposé de droit et ses conclusions* " (its statement of law and its submissions).

M. ADATCI thought it would suffice to delete the words " of this party " in the second paragraph of the Co-ordination Commission's text.

* D 2, A. 3, pp. 99-100 and 104.

[1] On 29.V.34, the Court decided to have a separate article dealing with Counter-Claims, and the last sentence of paragraph 2 was deleted. See under Article 63, p. 266.

* D 2, A. 3, pp. 151-152.

The PRESIDENT took a vote on the question whether the words: " of this party ", at the end of paragraph 2 of Article 40, should be deleted or retained; eight votes were recorded in favour of deletion and four of retention. These words were accordingly deleted.

The PRESIDENT took a vote on M. Fromageot's proposal that the words " a statement of law presented on behalf of the party filing the Counter-Memorial " in paragraph 2 should be replaced by: " a statement of law in answer thereto ".

The proposal was adopted by seven votes to five.

The PRESIDENT noted that there were no further observations in regard to paragraph 2 of Article 40.

The PRESIDENT declared Article 40 adopted, as thus amended.

First Reading.

On 5.IV.35, the article was adopted in first reading with the number 43 and with the following two paragraphs only (the remainder of the article having become Article 44) [1]:

" 1. A Memorial shall contain: a statement of the facts on which the claim is based, a statement of law, and the submissions.

" 2. A Counter-Memorial shall contain: the admission or denial of the facts stated in the Memorial; additional facts, if any; observations concerning the statement of law in the Memorial; a statement of law in answer thereto, and the submissions."

Second Reading and Final Adoption.

The article was adopted unchanged in second reading on 21.II.36 and was finally *adopted* with a slight correction in the English text (" . . . any additional facts, if necessary . . . ", instead of " additional facts, if any ") and with the number 42, on 11.III.36.

ARTICLE 43 *(Article 40, Paragraph 1, No. 4, and Paragraph 2, No. 5, and Article 37, Paragraphs 4 and 5, old Rules, with a New Paragraph).*

DOCUMENTS IN SUPPORT OF THE MEMORIAL AND OF THE COUNTER-MEMORIAL, AND THEIR TRANSLATION

25.V.34.*

Discussed as Article 37, Paragraph 5 (old Rules).

The PRESIDENT invited the Court to consider the next paragraph: [1]

" In the case of voluminous documents, the Court, or the President if the Court is not sitting, may sanction the submission of translations of portions of documents only."

The Co-ordination Commission proposed the deletion of the words " at the request of the party concerned ", which appeared in the existing text, but which, having regard to the word " sanction ", seemed superfluous.

M. FROMAGEOT asked which party was meant by the " party concerned ".

Jonkheer VAN EYSINGA thought it meant the party which would have to make the translation.

M. ANZILOTTI pointed out that the documents in question were documents submitted by the party on its own responsibility. It was for the party to decide whether it must present the documents *in extenso* or whether it might only present a portion, subject to the right of the Court and the other party to call for the whole. The Court must abstain from any interference in matters concerning the parties' interests.

The REGISTRAR thought that the case contemplated by the article was as follows: a party wished to produce an extract from a more voluminous document. From the point of view of the Court, however, it was preferable that the party should submit the whole document, though it need only furnish a translation of those extracts which it thought relevant. If the rule criticised by M. Anzilotti did not exist, the party would only present these extracts; this would prevent the Court from ascertaining whether they required supplementing.

The PRESIDENT observed that this paragraph presupposed that a complete text had been presented in the original language. The paragraph dealt only with translations.

M. FROMAGEOT thought that in reality the important point was not the request of the party concerned, but whether the other party objected.

The PRESIDENT pointed out that the text which was being criticised was really that of the existing Rules.

M. ANZILOTTI quite appreciated this. What he took exception to was the actual principle embodied in that text. He would therefore be very much inclined to delete the paragraph, for he feared that any interference by the Court might involve serious consequences.

M. GUERRERO, Vice-President, wished on the contrary to maintain it. The Court had already adopted a paragraph imposing on a party using a language other than the official languages an obligation to submit a translation of its documents of procedure. Accordingly, it seemed necessary to make an exception enabling the Court to sanction the translation of portions of documents only, because otherwise parties would regard themselves as bound to present complete translations of documents, and this would often be an unnecessarily onerous task.

M. WANG would also prefer the retention of the paragraph in question. He thought that it was the word " sanction " which gave rise to M. Anzilotti's scruples. They might be removed by the adoption of a wording something like this:

" Translations of portions of documents only may be submitted by the parties subject to any subsequent decision of the Court."

This wording would leave the initiative and responsibility with the party, as M. Anzilotti wished.

M. GUERRERO, Vice-President, was of the same opinion; he emphasised the importance of the principle that, in case of opposition by the other party, the Court might adopt a decision contrary to that which it had adopted in the first instance.

* D 2, A. 3, pp. 83-84.

[1] Paragraph 5 of old Article 37—subsequently transferred to Article 43.

[1] See under Article 43, pp. 145-146, remarks by Jonkheer van Eysinga.

The PRESIDENT proposed to refer the paragraph back to the Co-ordination Commission, which would be asked to prepare a new text based on M. Wang's suggestion.

This was agreed to.

28.V.34.*

Discussed as Article 40, Paragraphs 3-6 (draft).

The PRESIDENT opened the discussion on Article 40, as drafted by the Co-ordination Commission:

[Paragraphs 1 and 2 of this draft, which became Article 43 of the draft adopted in first reading and Article 42 of the final text, and the discussion relating to these paragraphs will be found under Article 42, p. 141.]

"3. A copy of every document cited in a Case or a Counter-Case, or adduced in support of the arguments set forth in the documents constituting the written proceedings, must be attached to the Case or Counter-Case in question; a list of such documents shall be given after the conclusions.

"4. Should any of these documents be very bulky, only the relevant extracts need be reproduced, but in such a case a copy of the complete document must, if possible, be communicated to the Registrar for the use of the Court and of the other party, unless the said document has been published, or is generally available.

"5. Any document filed as an annex which is in a language other than French or English, must be accompanied by a translation into one of the official languages of the Court.

"6. Paragraphs 3, 4 and 5 of the present article shall also apply to all the other documents constituting the written proceedings."

The PRESIDENT observed that, except for certain additions, and the omission of the numbering of the points to be included in the Case and Counter-Case, the above text corresponded to Article 40 of the existing Rules.

[Here follows a reference to paragraphs 1 and 2, see p. 141.]

Paragraph 3 was also an amplification of the present provisions. The Co-ordination Commission had proposed a new paragraph 4, which was in conformity with the existing practice. Experience had shown the need for the proposed paragraph 5, which was also new. Finally, paragraph 6 of the draft text filled a gap in the existing Rules.

M. ANZILOTTI said that the only object of the article was to let the agents know what they had to put in their Cases and Counter-Cases. From that point of view, he preferred the text already in force, as it gave a very clear enumeration of the different points of the Case and Counter-Case. Moreover, he observed that the article could at best serve only as an indication: for instance, a statement of the law would be necessary only if the issue was a point of law.

M. Anzilotti, referring to paragraph 3, admitted that if a document was relied on it must be submitted; but he questioned whether, if a document was merely cited, it was always necessary to require it to be filed.

The PRESIDENT, after consulting the members of the Co-ordination Commission, said that the latter saw no objection to saying "relied on" instead of "cited".

The President said that, in those circumstances, the text had better run as follows:

"A copy of every document adduced in a Case or Counter-Case in support of the arguments...."

Baron ROLIN-JAEQUEMYNS feared that that might be going too far. Suppose that one party adduced "the well-known provisions" of a given treaty without actually citing them, need the whole text really be produced?

The PRESIDENT thought all that was necessary was to make it clear in the Rules that, if frequent reference was made in a Case to a given article, for instance, of the Treaty of Versailles, it was desirable that the article should be given in the actual text of the Case.

Jonkheer VAN EYSINGA pointed out that the proposed wording was designed to remedy a situation which had often caused difficulties to the Court. The aim was therefore an excellent one, and the only question was whether other terms might, with advantage, be used in place of those proposed.

M. ANZILOTTI understood that Baron Rolin-Jaequemyns' idea was that the party which referred to a document should bear the sole responsibility for producing or not producing the text—except in the case of an international treaty, of which the Court must, of course, be deemed to be cognisant.

M. URRUTIA asked whether, in practice, the Court had not always called for copies of documents adduced or cited in a Case, if they were not already attached thereto.

The PRESIDENT admitted that this had been the practice, but thought it better that the document should be attached to the Case from the outset.

M. URRUTIA feared that this requirement might result in the submission of very voluminous Cases.

The PRESIDENT thought that, even if it made the Cases more bulky, it was better that the documents in support should be attached to the Case.

M. FROMAGEOT drew a distinction between documents in support *(pièces justificatives)* and texts that were cited. It was reasonable to expect that all documents in support and also texts actually cited should be attached to the Case; but one would not expect the whole of a legal code, a treaty, or a legal treatise, to be so attached. He feared that the word "documents" might be held to include the latter also. He thought that the word "text" would be sufficiently restrictive.

M. GUERRERO, Vice-President, supported this proposal. What was essential for the members of the Court was to have before them the evidence submitted by the parties. The citing of other texts might be of assistance, but it was not necessary to enable the Court to give its decision.

The PRESIDENT understood the term "evidence" to mean "documents in support".

The PRESIDENT read the following draft, which might be substituted for paragraph 3 of the Co-ordination Commission's text:

"A copy of every document in support of the arguments set forth in a Case or a Counter-Case must be attached to the Case or Counter-Case in question. A list of these documents shall be given after the conclusions."

The above text, he said, expressed M. Urrutia's suggestion.

Baron ROLIN-JAEQUEMYNS was quite prepared to accept

* D.2, A. 3, pp. 99-104.

M. Urrutia's text, provided that, if it were adopted, it would not become impossible to add any additional words —*e.g.* to regulate the submission of documents or texts other than documents in support.

The PRESIDENT said that Baron Rolin-Jaequemyns would be perfectly free to submit an amendment on that point later on.

The PRESIDENT then put M. Urrutia's proposal to the vote, and it was unanimously adopted.

Baron ROLIN-JAEQUEMYNS suggested that a clause might be added empowering the Court to ask the parties for copies of any documents cited or adduced in the Case or Counter-Case.

The PRESIDENT drew attention to Article 49 of the Statute, according to which: " The Court may, even before the hearing begins, call upon the agents to produce any documents . . .".

Baron ROLIN-JAEQUEMYNS thought that, to avoid confusion, it would be wise to make a reference to Article 49 of the Statute in the text under discussion, merely for the guidance of the agents. They might say, for instance:

> " In addition to the above-mentioned copies of the documents adduced, a party may attach to its Case copies of any documents adduced or cited in the said Case."

Jonkheer VAN EYSINGA feared that a distinction between certain documents of which copies " must " be attached to the documents constituting the written procedure, and other documents of which copies " may " be attached thereto, might be in conflict with Article 43, paragraph 2, of the Statute.

M. ANZILOTTI thought that what they were really trying to do was to make a recommendation to the agents. He himself was not in favour of putting recommendations in the Rules. If, however, they wished to do so, it would be better to do it clearly. They might, for instance, add a sentence in the following terms: " It is recommended that copies . . . should be attached to the Memorial . . .", etc.

The PRESIDENT considered that the text already adopted by the Court was adequate. He read a new wording, drafted by M. Fromageot:

> " Copies of all documents in support of the arguments set forth in the Case, or Counter-Case, shall be attached thereto; a list of such documents shall be given after the conclusions."

The President thought he might consider paragraph 3 of Article 40, thus amended, as adopted.

(This was agreed to.)

The PRESIDENT asked the Court to discuss paragraph 4 of the same article.

M. ANZILOTTI thought it undesirable for the Court to assume the responsibility of authorising the partial submission of documents; that responsibility should always be borne by the party concerned. The latter was free to argue that the extract which it had given was relevant, but it was not for the Court to say so. He suggested providing that, if, owing to the bulk of one of the documents, an extract thereof was submitted, the whole document must be communicated to the Registrar.

The PRESIDENT proposed the following text to give effect to M. Anzilotti's suggestion:

> " If, owing to the bulk of one of these documents, extracts only thereof are attached, a complete copy of the document must if possible be communicated to the Registrar for the use of the other party, unless the document has been published and is generally available."

Baron ROLIN-JAEQUEMYNS thought it most necessary to provide for the possibility of the original document being submitted, in which case a copy of it would no longer be required. He therefore moved to insert, in the proposed text, the words: " . . . a copy, in the absence of the document itself ".

The PRESIDENT understood that paragraph 4 of Article 40 would, in that case, run as follows:

> " If, owing to the bulk of any of these documents, portions of them only are attached, the complete document, or a complete copy thereof, shall, if possible, be communicated to the Registrar.. . ."

The Co-ordination Commission would give any finishing touches to the wording of the paragraph.

M. FROMAGEOT thought that, if paragraph 4 were adopted in that form, something would be needed to link it to paragraph 3, which prescribed that full texts of the documents were to be attached; and the word " however " should be added to emphasise the restriction to the general rule effected by paragraph 4.

The PRESIDENT declared that paragraphs 3 and 4 were adopted in the above form, subject to drafting improvements.

Paragraph 5.

M. ANZILOTTI asked the President for an assurance that this paragraph did not prejudge the question whether, in the eyes of the Court, the original text of a document was the text in the language in which it was submitted, or the translation of it into an official language.

The PRESIDENT gave the required assurance.

M. GUERRERO, Vice-President, asked if this clause did not duplicate the provisions of Article 37,[1] paragraph 3, already adopted by the Court.

The PRESIDENT thought that the two articles had different cases in view; Article 37 provided for the case of a language other than French or English being used for the whole proceedings.

M. GUERRERO, Vice-President, recalled that Article 37 provided equally for the presentation of bulky documents.

The REGISTRAR pointed out that, in Article 37, the first four paragraphs were concerned only with documents actually forming part of the written procedure; whereas the fifth paragraph dealt with documents in support. This fifth paragraph might therefore be transposed and combined with the fifth paragraph of Article 40.

M. GUERRERO, Vice-President, thought it would be well to refer the text back to the Co-ordination Commission, in order that the latter might make sure that there was no overlapping.

M. FROMAGEOT wished to replace the words: " every document included among the annexes . . .", by " produced to the Court ". For a document might be produced to the Court without being included in the annexes. Accordingly, it should be stated in the Rules that whenever a document was submitted to the Court, whether in the annexes or at the hearing, or at any other time, such document must be produced in one of the two official languages.

[1] Article 37 old Rules = Article 39 of the Rules of 11.III.36.

The PRESIDENT considered that this observation could be met by means of an addition to Article 44 *bis* (Article 48 of the Rules of 11.III.36).

He declared that paragraph 5 of Article 40 was adopted, subject to its reference to the Co-ordination Commission, which was to consider its wording and that of paragraph 5 of Article 37 with a view to avoiding any overlapping.

Paragraph 6.

M. ANZILOTTI raised the question whether, as a result of the changes made in the wording, there was not some inconsistency between paragraph 3 of Article 40 and the rule embodied in Article 35 (Article 32 of the Rules of 11.III.36) with regard to applications.

Jonkheer VAN EYSINGA did not think that, according to the Statute, Article 43 of which was the decisive provision, the application was a document of the written proceedings.

M. ANZILOTTI thought that, notwithstanding that article, it was difficult to regard the application otherwise than as an act of the procedure.

M. GUERRERO, Vice-President, observed that the first order fixing the time-limits was also one of the documents of the written proceedings.

The REGISTRAR pointed out that the Court had adopted Articles 34 (Article 40 of the Rules of 11.III.36) and 35, which were based on the idea that the Case was the first document of the written proceedings.

M. ANZILOTTI simply wished to avoid any possible inconsistency. He therefore asked the Registrar to read the relevant provision.

The REGISTRAR read paragraph 2 of Article 35 as drafted by the Co-ordination Commission on the basis of the decisions of the Court.[1]

As M. ANZILOTTI did not press the point, the PRESIDENT said that, subject to the amendments which had been approved, Article 40 could be considered adopted as a whole.

1.VI.34.*

Discussed as Article 40, Paragraphs 3-5 (draft): cf. also Article 37, Paragraph 5 (old Rules).

The PRESIDENT turned next to Article 40, which was as follows:

[Paragraphs 1 and 2, and the discussion relating to them, will be found under Article 42, pp. 141-142.]

"3. A copy of every document adduced in a Memorial or Counter-Memorial in support of the arguments set forth therein must be attached to the Memorial or Counter-Memorial in question; a list of such documents shall be given after the submissions. If, owing to one of these documents being of considerable length, only extracts from it are attached, the document itself, or a complete copy of it, must if possible be communicated to the Registrar for the use of the Court and of the other party, unless the document had been published and is of a public character.

"4. Any document filed as an annex which is in a language other than French or English must be accompanied by a translation into one of the official languages of the Court. Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, subject to any subsequent decision by the Court, or, if it is not sitting, by the President.

"5. Paragraphs 3, 4 and 5 of the present article shall also apply to all the other documents of the written proceedings."

The PRESIDENT observed that paragraphs (1, 2 and) 3 were submitted to the Co-ordination Commission in the form in which they had been adopted by the Court.

[Here follows a reference to paragraphs 1 and 2, see p. 141.]

The PRESIDENT noted that there were no further observations in regard to paragraphs (2), 4 and 5 of Article 40.

Baron ROLIN-JAEQUEMYNS observed that, in No. 5 of Article 40, reference was made to "paragraphs 3, 4 and 5 of the present article . . .". Undoubtedly it should be paragraphs 3 and 4.

The PRESIDENT agreed and declared Article 40 adopted, as thus amended.

10.IV.35.

Discussed as Article 44 (Paragraphs 3, 4 and 5 of old Article 40).[1]

Adopted in first reading with the following text:

"1. A copy of every document in support of the arguments set forth therein must be attached to the Memorial or Counter-Memorial in question; a list of such documents shall be given after the submissions. If, on account of the length of a document, extracts only are attached, the document itself or a complete copy of it, must, if possible, and unless the document has been published and is of a public character, be communicated to the Registrar for the use of the Court and of the other party.

"2. Any document filed as an annex which is in a language other than French or English must be accompanied by a translation into one of the official languages of the Court. Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, but subject to any subsequent decision by the Court or, if it is not sitting, by the President.

"3. Paragraphs 1 and 2 of the present article shall apply also to all other documents of the written proceedings."

21.II.36.*

Discussed as Article 44. — Second Reading.

Paragraph 1.

Paragraph 1 was adopted.

Paragraph 2.

Jonkheer VAN EYSINGA observed, in regard to this paragraph, that in many of the articles it was possible to trace the different stages of the work of revision. But in some cases there was a gap, because the Drafting Committee had not submitted a written report at the end of the first reading, giving the reasons for the changes it had made.[2] For instance, it was impossible, in the case

* D 2, A. 3, pp. 151-152.

[1] See note 3, p. 96 (meeting of 31.V.34).

* D 2, A. 3, pp. 609-611.

[1] See remarks of Jonkheer van Eysinga at the meeting of 21.II.36, below.

[2] *Cf.* D 2, A. 3, pp. 929 *et sqq.*

of the present article, to perceive why the subject-matter of the old Article 40 had been divided between two new Articles, 43 and 44.

Seeing that it was of importance, for the future, to be able to trace the reasons for any changes made, and to follow the evolution of the texts through the different stages of revision, it seemed desirable that the Drafting Committee, which would be formed at the end of the second reading, should submit as detailed a report as possible upon its work.

The PRESIDENT thought it would be easy to meet Jonkheer van Eysinga's wish. It would suffice if the Drafting Committee that would be appointed to give final form to the text resulting from the second reading made a detailed verbal report on the texts which it submitted.

Jonkheer VAN EYSINGA admitted the advantages of the method which the President had just proposed, but he asked that, in connection with the text resulting from the first reading of the Rules in 1935, a note should be inserted in the Preface of the volume of minutes explaining to the reader why there were certain unavoidable gaps in the history of the texts adopted.

He further drew attention to the words in the second sentence of paragraph 2 of Article 44: " Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, but subject to any subsequent decision by the Court, or, if it is not sitting, by the President."

Those words might raise a question which it would be difficult to decide. It would therefore be better, in place of the words " or, if it is not sitting, by the President ", to say: " or, during the judicial vacations, by the President ".

Baron ROLIN-JAEQUEMYNS proposed simply to say: " subject to any subsequent decision of the Court ", for it would be better that the President should not have to intervene in so delicate a matter.

The PRESIDENT said he believed that Baron Rolin-Jaequemyns' amendment related only to the paragraph now under discussion, and not to the question of principle implied by the words " if it is not sitting ".

M. GUERRERO, Vice-President, would prefer, for his part, that the text should read: " subject to any subsequent decision by the President or the Court ". Two cases might indeed arise; either the decision would be taken as soon as the documents had been filed—and in that case, it might be taken by the President—or it would be taken later on by the Court, when the latter was assembled, at any time during the proceedings. It must therefore be possible for the decision to be taken either by the President or by the Court.

Jonkheer VAN EYSINGA observed that a similar formula had been proposed in connection with other articles.[1] It had been recognised that it would be difficult to entrust the same function to two distinct authorities.

The PRESIDENT noted that the Vice-President's proposal was to replace all the words after " any subsequent decision " by the words: " by the President or by the Court ".

He asked the Court to vote on the Vice-President's proposal, viz.:

> " Is the Court in favour of substituting the words ' by the President or by the Court ' for all the words after ' subsequent decision ' ? "

By eight votes against two, the Court rejected this proposal.

The PRESIDENT asked the Court to vote on the following question, proposed by Baron Rolin-Jaequemyns:

> " Is the Court in favour of omitting the words ' or, if it is not sitting, by the President ' ? "

By eight votes against two, the Court answered the question in the negative.

The PRESIDENT asked the Court to vote on Jonkheer van Eysinga's proposal:

> " Does the Court decide to substitute the words ' or, during the judicial vacations, by the President ' for the words ' or, if it is not sitting, by the President ' ? "

By seven votes against two, with one abstention, the Court rejected this proposal.

As no other observation was offered, the PRESIDENT noted that paragraph 2 was adopted without amendment.

Paragraph 3.

The PRESIDENT mentioned that the Registrar had suggested substituting the words " to the other " for the words " to all other ".

The REGISTRAR explained that the first paragraph made mention of the Memorial and the Counter-Memorial, and that the third paragraph had been inserted with the sole object of taking into account also the Reply and the Rejoinder.

The PRESIDENT noted that this suggestion was not opposed, and declared that, paragraph 3 being adopted as thus amended, Article 44 as a whole was accordingly adopted in second reading.

Final Adoption.

The article was finally adopted on 11.III.36 as number 43, with a minor verbal change in the English text of paragraph 2: ". . . subject, however, to . . .", instead of " but subject to ".

ARTICLE 44 *(Article 42, old Rules).*

COMMUNICATION OF DOCUMENTS OF THE WRITTEN PROCEDURE

29.V.34.*

Discussed as Article 42.

Article 42. — " 1. The Registrar shall forward copies of all the documents in the case, as he receives them, to each of the members of the Court, and to the parties or Governments concerned, as also to international organisations admitted to participate in certain proceedings.

" 2. The Court, or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the documents in a particular case submitted for the Court's judgment at the disposal

* D 2, A. 3, pp. 119-120.

[1] See pp. 152 and 157-158.

of the Government of any State which is entitled to appear before the Court.

" 3. In the same way, the Court, or the President, may, with the consent of the parties, authorise the documents of the written proceedings in regard to a particular case submitted for the Court's judgment to be made accessible to the public before the termination of the case."

The PRESIDENT said that the words: " as also to international organisations admitted to participate in certain proceedings ", which were an addition to the existing text of Article 42 of the Rules, would have to be omitted.

M. GUERRERO, Vice-President, thought that, if these words were omitted, it would be better to retain the existing Article 42.

The PRESIDENT pointed out that there was another change: the Co-ordination Commission proposed to say " judges " instead of " members of the Court "; for it was necessary to include judges *ad hoc*.

M. URRUTIA pointed out that there was another alteration; the existing Article 42 said: " a copy or copies of all documents ", whereas the Drafting Committee proposed: " copies of all documents ". He preferred the latter text.

The REGISTRAR explained the reason for the wording of the present text: it was true that each judge received one copy, but it was also true that the parties received at least seven copies.

M. ANZILOTTI said he preferred the present text. Speaking generally, he wondered if it would not be possible to retain the whole of the existing Article 42.

The PRESIDENT asked M. Anzilotti if he saw any objection to putting the word " judges " in place of the words " members of the Court ".

M. ANZILOTTI answered in the negative.

The PRESIDENT observed that what M. Anzilotti was asking was that the text proposed by the Co-ordination Commission for Article 42, paragraph 1, should be replaced by the text of the existing rule, subject, however, to the word " judges " being used instead of " members of the Court ", and subject to some change in the wording: " one or more copies ".

This proposal was put to the vote, and was adopted by ten votes against one, with one abstention.

The PRESIDENT invited the Court to discuss paragraph 2 of Article 42. The Co-ordination Commission had proposed a slight alteration of substance in the existing text. The effect was to extend the application of the article to documents of the written proceedings other than Cases and Counter-Cases. That extension was in accordance with the Court's practice. The President added that there was a relation between this paragraph and the right of intervention.

Finally, he observed that the words " submitted for the Court's judgment " would have to be omitted.

The President having invited the Court to express its opinion on the Co-ordination Commission's text, declared that paragraph 2 of Article 42 was unanimously adopted.

The PRESIDENT then went on to paragraph 3, and said it would be necessary to omit the words: " submitted for the Court's judgment ".

As there was no opposition to this clause, he declared the third paragraph of Article 42 to be adopted.

1.VI.34.

Discussed as Article 42.

Article 42 of the Rules. " 1. The Registrar shall forward copies of all the documents in the case, as he receives them, to the judges and to the parties.

" 2. The Court, or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the documents of the written proceedings in a particular case at the disposal of the Government of any State which is entitled to appear before the Court.

" 3. In the same way, the Court, or the President, may, with the consent of the parties, authorise the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case."

The PRESIDENT observed that, there being no objection to the text submitted to the Court, that text was adopted.

5.IV.35.

Adopted in First Reading as Article 45.

There being no observations, the article was adopted in first reading with the following text:

" 1. The Registrar shall forward to the judges and to the parties copies of all the documents in the case, as and when he receives them.

" 2. The Court, or the President if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the documents of the written proceedings in a particular case at the disposal of the Government of any State which is entitled to appear before the Court.

" 3. In the same way, the Court, or the President may, with the consent of the parties, authorise the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case."

21.II.36.*

Discussed in Second Reading as Article 45.

Paragraph 1.

As no observations were offered, the PRESIDENT declared paragraph 1 adopted.

Paragraph 2.

Jonkheer VAN EYSINGA proposed to substitute the words " during the judicial vacations " for " if the Court is not sitting ". This provision referred to measures which might be of some political importance.

In reply to a question by the President as to the practice followed in the case envisaged by this article, the REGISTRAR pointed out that the text provided for the case of a Government which was contemplating intervention, and which submitted a request to the Court for the Memorial to be communicated to it. This request was conveyed to the parties, who expressed their opinions in writing, and when the Court was in possession of their replies, it took its decision. The procedure was therefore entirely a written one. In practice, a request of this sort had never been the subject of oral debate.[1]

The PRESIDENT considered that, in these circumstances,

* D 2, A. 3, pp. 611-613.

[1] See, for instance, C 67, p. 4089.

the text needed amendment, for the word " hearing " might lead to misunderstandings.

M. GUERRERO, Vice-President, thought that, to meet the President's wish, it would suffice to substitute the word " consulting " for " hearing ".

M. NAGAOKA asked if the text intentionally spoke of " any State which is entitled to appear before the Court ", without any mention of the Members of the League of Nations.

The REGISTRAR said that, as a fact, there was a certain lack of consistency in the terminology of the Rules, which in most cases used the phrase " States or Members of the League of Nations ", or similar expressions. In regard to the clause under discussion, which dated from 1922, it was no doubt worded in that way because it dealt with interventions, and because Articles 62 and 63 of the Statute referred, in that connection, only to States entitled to appear before the Court. The Court, when adopting its Rules, probably did not feel justified in giving a generic interpretation in them of the term " State " as used in Articles 62 and 63 of the Statute, and thought that it would be wiser to leave any such interpretation to the future, when it could be effected with regard to specific cases.

M. NAGAOKA feared that the field of application of the clause would be entirely different if the Court did not add the words " Members of the League of Nations ". The text might give the impression that there were some States among the Members of the League of Nations to which paragraph 2 of Article 45 did not apply. M. Nagaoka thought that there was a gap here which it would be better to fill.

M. NEGULESCO was of the same opinion; he drew the Court's attention to Article 66 of the revised Statute, which laid down:

> " The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court."

The PRESIDENT did not believe that this clause, which had been in force since the foundation of the Court, had ever given rise to difficulties.

The PRESIDENT asked the Court to vote on Jonkheer van Eysinga's proposal to substitute the words " during the judicial vacations " for " if the Court is not sitting " in paragraph 2.

By seven votes against two, with one abstention, the Court rejected this amendment.

The PRESIDENT proposed to insert the word " consulting " in place of " hearing " and the words " decide that . . . should " in place of " order . . . to ".

M. FROMAGEOT asked the President to put the proposal to insert the word " consulting " to the vote first.

By nine votes against one, the Court decided to insert " consulting " in place of " hearing ".

Baron ROLIN-JAEQUEMYNS said that he had voted against the proposal because, in his view, it was not a case of consulting the parties. The latter were heard, but they were not consulted by the President or the Court.

After an exchange of views between the President, M. Fromageot, Baron Rolin-Jaequemyns and M. Urrutia, the PRESIDENT noted that his proposal to substitute the words " decide that . . . should " for the words " order . . . to " was not opposed. The text would accordingly run as follows: " The Court . . . may, after consulting the parties, decide that the Registrar should hold . . .".

This was agreed to.

As no other observation was offered, the President declared that paragraph 2 was adopted.

Paragraph 3.

Count ROSTWOROWSKI pointed out that the customary formula: " the Court, or the President if the Court is not sitting ", did not occur in this paragraph. Were the words " *de même* " (" In the same way ") used in place of that formula, or did they mean " In the same case " or " In the same circumstances " ?

M. FROMAGEOT proposed, having regard to the English text of the existing article, to use the phrase " *dans les mêmes conditions* " (" In the same way ").

Count ROSTWOROWSKI said he would prefer to repeat in paragraph 3 the formula used in paragraph 2: " The Court, or the President if the Court is not sitting . . .", which he thought was clearer.

Jonkheer VAN EYSINGA observed that the third paragraph spoke of the consent of the parties, whereas the second paragraph spoke only of consulting the parties. What, he asked, was the reason for this difference of language ?

M. ANZILOTTI said it was due to the difference between the cases. In the first case, there was a possibility of intervening—*i.e.*, exercising a right. In the second case, it was purely a question of expediency. The documents would in any case be published eventually. If it was thought desirable to make them public immediately, it was natural to ask the parties for their consent.

Jonkheer VAN EYSINGA considered that, in view of the distinction that M. Anzilotti had pointed out, it would be better not to use the phrase "*dans les mêmes conditions* " (" In the same way "), but to use the clearer formula proposed by Count Rostworowski: " if the Court is not sitting . . .", whatever might be the objection attaching, in general, to that expression.

The PRESIDENT asked the Court if it decided to replace the words " In the same way, the Court or the President may . . ." in the first line of the third paragraph by the words " The Court, or the President if the Court is not sitting, may. . . ."

By six votes against two, with two abstentions, the Court answered the question in the affirmative.

The PRESIDENT declared that paragraph 3 of Article 45, as thus amended, was adopted, and that Article 45 as a whole was adopted in second reading.

11.III.36.*

Article 44. — Final Adoption.

In paragraph 2, the Drafting Committee proposed the addition of the words: ". . . *de tout* Membre de la Société des Nations ou *Etat* ".

As regards the English text, it was proposed to use the words " after obtaining the views of the parties . . ." and, as in the French text, to insert the words " any Member of the League of Nations or ".

The article, as thus amended, was finally *adopted.*

* D 2, A. 3, p. 730.

ARTICLE 45 *(New Article).*

(This Article was not discussed in First Reading.)

CASE READY FOR HEARING

22.II.36.*

Discussed as Article 46 (referred to in the text as the " new " Article 46, as opposed to the Article 46 of the first reading, which is combined with Article 47 to form Article 47 of the Rules in force).

ORAL PROCEEDINGS

Article 46.[1]

The PRESIDENT called on the Court to begin the examination of the " Oral Proceedings " section beginning with Article 46.

The REGISTRAR drew attention, before the Court examined this article, to a question which it had reserved for discussion—namely, what was the exact meaning of " *en état* " (" ready for hearing ").[2]

The PRESIDENT asked M. Urrutia, who had raised this question, to give his views.

M. URRUTIA recalled that M. Fromageot had proposed a definition for insertion at the end of the written proceedings section.

The REGISTRAR said that M. Fromageot's proposal had consisted in the combination of the contents of Articles 46 and 47 under the number 47, and the transference of the number 46 to the end of the " Written Proceedings " section, the suggested definition being inserted in the new Article 46.

The PRESIDENT asked whether the Court thought it necessary to insert this definition of the words " *en état* " in the Rules. The corresponding English text was " ready for hearing ". That expression was so clear that it seemed unnecessary to insert a definition.

M. URRUTIA thought he remembered that the Court had agreed that a definition of the words " *en état* " would be, if not necessary, at all events useful, and that the idea had been to insert an article at the end of the written proceedings providing this definition.

The suggestion would then be to begin the " Oral Proceedings " section with the provision concerning the fixing of the date for the commencement of those proceedings.

The PRESIDENT thought that M. Urrutia's point would be met by simply inserting the following new Article 46 at the end of the " Written Proceedings " section: " Upon the termination of the written proceedings, the case becomes ready for hearing." Then would follow the heading " Oral Proceedings "; and Articles 46 and 47 of the draft under consideration would be combined to form Article 47.

M. URRUTIA agreed.

The PRESIDENT, whilst waiting for the text of this proposal to be circulated to the Court, observed that the text of Article 46, which the Court was now considering, was the outcome of a proposal made by the Vice-President and adopted by the Court after an exhaustive discussion.[3] It had been placed at the beginning of the " Oral Proceedings " section upon the suggestion of M. Anzilotti.

Count ROSTWOROWSKI raised the question whether, if the Court adopted the proposed new article to the effect that a case became ready for hearing upon the conclusion of the written proceedings, the words " after the last document of the written proceedings has been filed " would not become superfluous. It would suffice to say: " The date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting."

M. ANZILOTTI saw no objection to retaining the existing text, or if thought preferable, to deleting the last words " after the last document of the written proceedings has been filed ", repeating perhaps, in that case, " when a case is ready for hearing ".

Count ROSTWOROWSKI thought that in any case the latter part of the article was unnecessary.

The PRESIDENT nevertheless saw a certain advantage in retaining it, because it indicated that, up to the moment of the termination of the written proceedings, the Court meant to remain free to fix the date for the oral proceedings.

Baron ROLIN-JAEQUEMYNS pointed out that, if the Court introduced a new Article 46 to the effect that, upon the termination of the written proceedings, the case became ready for hearing, the words " after the last document of the written proceedings has been filed " would cease to serve any purpose; for this last document would necessarily have been filed.

M. NAGAOKA also thought that, if the words "ready for hearing " were repeated, as M. Anzilotti had proposed, at the beginning of the " Oral Proceedings " section, a reader who did not at once grasp their meaning would very easily find the definition of them just above.

M. GUERRERO, Vice-President, observed that a reader who wanted to know when the commencement of the oral proceedings was fixed, would obtain that information from the article as it stood: the commencement of the oral proceedings was fixed when the written proceedings were concluded. It therefore seemed unnecessary to alter the article.

Baron ROLIN-JAEQUEMYNS explained that his proposal for the deletion in Article 46 of the words " after the last document of the written proceedings has been filed " presumed that the new Article 46 would be adopted. He considered that article superfluous, but, if the Court adopted it, the words " after the last document has been filed " should be deleted.

The PRESIDENT put the following question to the Court:

> " Does the Court adopt the following provision for addition to the ' Written proceedings ' section: ' Upon the termination of the written proceedings the case becomes ready for hearing ' ? "

The Court, by nine votes to one, answered the question in the affirmative.

Article 46 (M. Fromageot's new draft) was adopted in second reading.

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* D 2 A. 3, pp. 613-615.

[1] See p. 163 for text of Article 46 (47, paragraph 1, of the Rules of 11.III.36) adopted in first reading.

[2] Meeting of 15.II.36, p. 156.

[3] See under Article 47 (Article 41 of the old Rules), pp. 159-160.

11.III.36.*

Article 45. — Final Adoption.

The Drafting Committee considered that they should say: " . . . *l'affaire* se trouve *en état* ", instead of " devient *en état* ". The same change had been made in the English text by substituting " *is* ready " for " *becomes* ready ".

Article 45, as thus amended, was finally *adopted*.

ARTICLE 46 *(Article 28, Paragraphs 2 and 5, old Rules).*

ORDER IN WHICH THE COURT WILL TAKE CASES

29.V.34 and 5.II.35.

See under Article 47, pp. 160 and 161-163, for discussion of old Article 28, paragraphs 2 and 5, of which subsequently became Article 46, in connection with Article 41 *bis* (Article 47 of the Rules of 11.III.36).

First Reading.

On 4.III.35, paragraphs 2, (3, 4) [1] and 5 of the old Article 28 were approved in their existing form [2] (subject to a slight change ensuing from the transfer of paragraph 1 to Article 20); and on 3.IV.35, the article was adopted in first reading.[3]

14.II.36.**

Discussed as Article 28.

The PRESIDENT opened the discussion on Article 28 of the Rules, which dealt with the order in which the Court would take cases submitted to it. Members had before them the text adopted in first reading, together with such modifications as seemed made necessary by the entry into force of the revised Statute.[4]

M. FROMAGEOT wished to observe that, from a drafting point of view, it would be desirable to substitute the more appropriate word " judgment " for the word " decision " in the second paragraph.

The PRESIDENT said that, when the Court had completed its study of all the articles of the Rules, he would ask them to agree to the examination of the whole of the text from the point of view of drafting by a small committee. If the word " judgment " instead of " decision " was adopted here, the same changes would have to be made in other articles.

M. GUERRERO, Vice-President, proposed that the words " for decision or for an advisory opinion ", in paragraph 2 of Article 28, should be deleted.

M. ANZILOTTI saw no objection; the word " cases " *(affaires)* was a term which would cover both advisory opinions and contentious cases.

The PRESIDENT approved M. Guerrero's suggestion: Article 28 covered all the Court's judicial business, whether contentious or otherwise.

The REGISTRAR remarked that a similar amendment had already been made in paragraph 1 of Article 28.

The PRESIDENT noted that the Court was in favour of the Vice-President's suggestion to delete the words " for decision or for an advisory opinion" in paragraph 2 of Article 28.

M. ANZILOTTI would prefer in paragraph 1 to say: " *l'ordre dans lequel la Cour* traite *les affaires* " (instead of " *traitera* ").

It was decided accordingly.

The PRESIDENT asked the Court to come to a decision in regard to the last words of paragraph 2 of Article 28, which ran as follows:

> " If the Court is not sitting, adjournments may in such cases be granted by the President."

Personally, he thought it would be desirable to give this power to the President, in order to avoid either delaying the decision, or needlessly convening the members of the Court.

Jonkheer VAN EYSINGA considered that the decision in question was of considerable importance because it might react on other cases. Since the Court was always in session *(en fonctions)*, would it not be better for it to take this decision itself ? Moreover, that would be consistent with the first paragraph.

M. ANZILOTTI asked what sort of a postponement was contemplated by paragraph 2. Was it simply a question of the postponement of the hearings ?

The REGISTRAR observed that an adjournment of the latter kind was provided for in Article 47 of the revised Rules.[1] Article 28 provided for an adjournment which involved the taking of cases in an order different from that in which they were entered in the General List, the parties to a particular case having requested the Court to take it after certain other cases, although, according to the General List, it would have priority over them.

M. ANZILOTTI, in that case, was anxious that Article 28 should be more clearly worded.

M. FROMAGEOT was afraid that ambiguity arose from the use of the term " *remise* ". The word " *ajournement* " would perhaps remove the ambiguity.

The REGISTRAR, with regard to terminology, wished to remark that in the General List there was a heading (XIV) entitled " *Remises* " (Adjournments). If the terminology of Article 28 were altered, this might lead to confusion.

M. FROMAGEOT pointed out that, even admitting that,

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* D 2, A. 3, p. 730.

** D 2, A. 3, pp. 547-553.

[1] Paragraphs 3 and 4 were subsequently suppressed.

[2] 1931 Rules.

[3] For the text presented for second reading (*i.e.*, the text adopted in first reading with modifications considered necessary on the entry into force of the revised Statute), see footnote 4 below. The actual text adopted at first reading in 1935 will be found in D 2, A. 3, pp. 951-952.

[4] This text was as follows:

" 1 [old paragraph 2]. The order in which the Court will take cases submitted to it is determined by the position which they occupy in the General List, subject to the priority resulting from Article 61 of the present Rules or accorded by the Court to a particular case in exceptional circumstances.

" 2 [old paragraph 5]. Adjournments which are applied for in cases which are submitted to the Court for decision or for advisory opinion and are ready for hearing may be granted by the Court in case of need. If the Court is not sitting, adjournments may in such cases be granted by the President."

[Old paragraphs 3 and 4 suppressed].

[1] For text adopted in first reading, see p. 163.

as remarked by Jonkheer van Eysinga, the adjournment of a particular case might react on other cases, paragraph 2 of Article 28 involved no risk, because it was not provided that, if the Court was not sitting, the President would in all circumstances grant adjournments. There was nothing to prevent the President from convening the Court if he thought the question sufficiently important.

Jonkheer VAN EYSINGA observed that, nevertheless, the difference between the two paragraphs remained.

The PRESIDENT thought that, if the Court adopted Jonkheer van Eysinga's suggestion, it would have to meet to decide on a request for adjournment, even if the request were made by one party without being objected to by the other.

M. GUERRERO, Vice-President, proposed that the words " if the Court is not sitting " should be deleted, thus empowering the President alone to grant adjournments. Then, if the President were alone at The Hague, he could grant them. If the judges were assembled, the President would probably not use his power and would ask the Court to decide the question.

Jonkheer VAN EYSINGA asked whether adjournments were ever granted by order.

The REGISTRAR said that, since the provision concerning adjournments had been inserted in the Rules in 1931, it had never in practice been applied.

The PRESIDENT observed that there were several proposals before the Court. The whole of paragraph 2 of Article 28 would have to be deleted in order to meet M. Anzilotti's wishes. On the other hand, Jonkheer van Eysinga suggested the deletion of the last sentence, and the Vice-President the deletion of the words " if the Court is not sitting ".

M. NAGAOKA proposed that, if the words " if the Court is not sitting " were deleted, the words " if necessary " should be added at the beginning of the last sentence. Then the President could take the necessary action when the effect of granting an adjournment would not be very great; perhaps that would satisfy Jonkheer van Eysinga.

The PRESIDENT pointed out that, if the whole paragraph were to be deleted, that would have the effect of widening the scope of the words: " in exceptional circumstances " in paragraph 1 of the article, but, on the other hand, would preclude the President from granting adjournments.

He took a vote on M. Guerrero's proposal for the deletion of the words " if the Court is not sitting " in paragraph 2 of Article 28.

Four votes were recorded in favour of the proposal and four against, with one abstention.

The PRESIDENT gave his casting vote in favour of the retention of the words " if the Court is not sitting " in paragraph 2 of Article 28; he observed at the same time that, when there were only nine members present, abstention from voting made things rather difficult.

M. ANZILOTTI said that he could vote for the maintenance of the existing text.

Jonkheer VAN EYSINGA, with reference to the possibility mentioned by the President—namely, the deletion of the whole of paragraph 2 of Article 28—suggested that, if that were done, paragraph 1 might be worded as follows: " The order in which the Court will take cases submitted to it is determined by the position which they occupy in the General List, *subject to any decisions which the Court may take* in exceptional circumstances." He observed that this wording would cover both adjournments and the granting of priority to a particular case.

M. GUERRERO, Vice-President, with regard to the retention of the words " if the Court is not sitting ", remarked that, since he believed that the Court would always be sitting, except during the judicial vacations, this decision meant that, except during these vacations, the President would be obliged to summon the members of the Court to give a decision upon a request for an adjournment.

The PRESIDENT did not altogether agree with this interpretation. He was anxious to avoid committing the Court to a definite interpretation of the words " if the Court is not sitting ". It was an elastic phrase which must be construed in conjunction with the context in which it appeared. It was not certain that it was possible to argue *a contrario* from the terms of Article 25 of the Rules, [1] which laid down that the Court did not sit during vacations.

M. NEGULESCO thought that the expression " the Court sits at The Hague " had a dual signification: in a wider sense it meant that the seat of the Court was at The Hague, that the President and the Registrar were always there, and that a case could be submitted to the Court at any moment. In this wider sense, the Court was always sitting at The Hague, and Article 22 of the Statute proclaimed that principle.

But the expression " the Court sits at The Hague " could also be understood in a narrower sense, referring solely to occasions when the judges were assembled to adjudicate on a particular case. From that point of view, it could scarcely be said that the Court was sitting when the judges were not at The Hague.

The expression " if the Court is not sitting " was the negative form of the expression " if the Court is sitting " in the strict sense of the words.

M. ANZILOTTI recalled that he had already repeatedly laid stress on the difficulty resulting from the fact that there was no precise interpretation of the words " if the Court is not sitting ". In the paragraph under consideration, the use of the phrase might perhaps be avoided by giving the President power to make the requisite order even when the Court was sitting. The only question to be decided was whether the Court was entitled to adopt this course.

Count ROSTWOROWSKI pointed out that it was impossible to give the same powers—as the Vice-President's proposal would do—to two authorities, without saying in what circumstances each was to use them. He preferred M. Anzilotti's proposal, since it appointed only one authority to perform a particular function.

The PRESIDENT wondered whether the difficulties might not be avoided by adopting M. Nagaoka's proposal.

M. URRUTIA saw no objection to retaining the wording of the old Rules, which, moreover, the Court had just decided to do.

M. NAGAOKA considered that the expression " if the Court is not sitting " should be left for each judge to construe for himself. But he was afraid that most readers, having regard to Article 25, would understand the expression as referring to the judicial vacations. That was why it would be much better to delete these words at the end of paragraph 2 of Article 28.

The PRESIDENT asked whether, from the point of view

[1] The President referred to the text of Article 25 adopted on February 11th, 1936. This text was subsequently modified; see p. 64.

of practice, it would not be better to have as elastic a text as possible, and to delete any expressions which might have the effect of tying their hands. In this connection, he drew attention in the second paragraph to the words " The Court . . .", which excluded the President.

Furthermore, if the Court wished to have an elastic wording, they might adopt that proposed by M. Nagaoka, to the effect that the President would " if necessary " grant adjournments, without specifying the circumstances in which the President might act.

Jonkheer VAN EYSINGA observed that the Court seemed inclined to use expressions open to different interpretations, which perhaps facilitated the drafting of a text, but which would undoubtedly lead to difficulties in practice. This applied to the words " if necessary " proposed by M. Nagaoka and also to the expression suggested by the Vice-President. M. Guerrero's idea was that, when alone, the President would grant an adjournment, and that when the Court was present, he could consult it. He would, however, consult it unofficially, and the Court would be exercising a power derived neither from the Statute nor the Rules. It was essential to draw up rules free from any ambiguity.

M. ANZILOTTI agreed with Jonkheer van Eysinga that the texts contemplated by the Court lent themselves to different interpretations. Unlike Jonkheer van Eysinga, however, he thought that the fact that the President had power to grant adjournments would not prevent *him from taking the step of consulting the Court*. The President would act, but on the advice of the Court.

The PRESIDENT said that, in the Registrar's opinion, it would be desirable, in paragraph 1 of Article 28 of the President's text, to insert, after the words: " the order in which the Court will take cases which have been submitted to it ", the words " and which are ready for hearing ".

The REGISTRAR observed that the Court could only take cases which were ready for hearing. Accordingly, what had to be laid down was the order in which the Court would deal with cases ready for hearing. This was clearly brought out in the old version of Article 28. But when this version had been altered to bring it into harmony with the revised Statute, the relevant passage had not been reproduced. In the Registrar's opinion, this was an accidental omission which should merely be corrected.

The PRESIDENT admitted that the Court took only cases which were ready for hearing, but held nevertheless that there was no need to insert these words in paragraph 1.

He asked whether the Court wished to vote on the first paragraph of Article 28 of the text distributed as a basis for discussion.

Jonkheer VAN EYSINGA recalled that he had suggested that the beginning of paragraph 1 should be drafted as follows:

> " Subject to any decisions which the Court may take in exceptional circumstances. . . ."

This would cover the granting either of priority or of an adjournment, and paragraph 2 would become superfluous.

The PRESIDENT observed that this draft would entirely preclude the President from acting when the Court was not sitting, and that did not seem to be the wish of the Court.

M. NEGULESCO thought that a more elastic wording should be adopted—*e.g.*, that of the President or of M. Nagaoka.

Count ROSTWOROWSKI suggested the following addition to paragraph 2: " if the Court is not sitting, *or in exceptional circumstances* ". With this wording, it would be for the President to decide whether the circumstances justified him in granting an adjournment himself. In any case, Count Rostworowski desired the retention of the words " *if the Court is not sitting* ".

M. GUERRERO, Vice-President, said that he could not support M. Nagaoka's proposal because the expression " if necessary " would leave the situation ambiguous. It was impossible to foresee all the possibilities covered by that expression.

M. Guerrero therefore reverted to his proposal to adopt paragraph 2 of Article 28, simply omitting the words " if the Court is not sitting ". With this amendment it would be certain that the Court would not have to assemble to grant an adjournment even at a time other than during the judicial vacations.

The PRESIDENT recalled that, with regard to paragraph 1 of Article 28, *the Court had before it the text submitted* by himself and the suggestion made by the Registrar, who thought it necessary to add the words " and which are ready for hearing ".

M. ANZILOTTI did not see precisely wherein, if these words were added, the difference between the first and second paragraphs would lie, since in both cases the point was to determine the order in which cases ready for hearing would be taken.

The REGISTRAR said that paragraph 1 contemplated a decision to be taken upon a request made by the parties to a case which was not at the head of the General List, to the effect that their case should be given priority. Paragraph 2 contemplated a request by the parties to a case at the head of the General List to the effect that their case should be put back after one or two or all other cases ready for hearing. In the latter paragraph, therefore, the request would be designed to have exactly the opposite effect to the request contemplated in the first paragraph.

M. ANZILOTTI gathered that paragraph 1 enabled the Court, when there were several cases simultaneously ready for hearing, to take a particular case before others which preceded it in the General List, and that paragraph 2 enabled it to put back a case ready for hearing, which preceded other cases—also ready—in the General List, until after those cases. If that was so, M. Anzilotti thought this should be expressed more clearly; he even wondered whether, if that was the import of the article, it was really required.

The REGISTRAR said that this was an article which had been inserted in 1931 on the initiative of some members of the Court,[1] and that consequently it was not for him to defend it. He wished, however, to observe that, according to the minutes, the object of the first part of paragraph 1 was to protect the Court from any accusation of arbitrary decisions in regard to the order in which it took cases simultaneously ready for hearing. This order was, save for exceptions, laid down beforehand in the General List, which was specially created for the purpose; the exceptions, moreover, were not very important.

The PRESIDENT asked whether the Court was in favour of the addition of the words " and which are ready for hearing " after the words " The order in which the Court

[1] D 2, A. 2, pp. 289, 292, 293, 295 (text), and 107-112, 117-121 (discussion).

will take cases which have been submitted to it " in paragraph 1 of Article 28.

By five votes to one, with three abstentions, the Court decided to add the words " and which are ready for hearing ".

The PRESIDENT, holding that it would be better to reflect before voting on paragraph 1 of Article 28 as a whole, passed to the second paragraph of the article.

He said that the Registrar had handed him a new draft for this paragraph running as follows:

> " If the parties to a case which is ready for hearing request that this case should be taken after one or more cases which are also ready for hearing and which follow it in the General List, the adjournment sought may be granted by the Court in case of need. If the Court is not sitting, the adjournment may be granted by the President."

The President observed that this draft implied that the request was made by both parties, whereas paragraph 2 of the President's text did not necessarily presuppose that the request came from both parties.

M. NAGAOKA considered that, if both parties agreed to make the request for an adjournment, there could be no objection to the President's granting it. If, on the other hand, the parties disagreed, the question would be more delicate, and the Court should decide.

M. ANZILOTTI would be inclined to accept the Registrar's draft if it were supplemented so as also to cover a case where the parties were not in agreement. For his part, he would give the President power to grant an adjournment if the parties were agreed, and to leave the decision to the Court if they were not. Of course, in that case, the words " if the Court is not sitting " at the end of the paragraph would have to come out.

The PRESIDENT thought that the Court would think it better to postpone consideration of paragraph 2 of Article 28, in order to allow M. Anzilotti to submit a text. He would also like to take the opinion of the Court once more on the Vice-President's proposal, as the vote already taken [1] had resulted in a tie, but before doing so he would prefer to await the return of Baron Rolin-Jaequemyns. With regard to the substance of M. Anzilotti's proposal, he would at once point out that, if the Court accepted it, the judges would always have to be summoned to decide whether an adjournment was to be granted when it was sought by one party only.

Jonkheer VAN EYSINGA suggested that, if only one party asked for an adjournment, the President could always ask the other party if it agreed.

Count ROSTWOROWSKI would be glad if M. Anzilotti would submit a text of his proposal to the effect that, when the parties asked for an adjournment in agreement, the President might grant it, but that if the parties were not agreed, the Court would have to decide whether an adjournment should be granted.

The REGISTRAR drew M. Anzilotti's attention to the discussions which had taken place in 1931 on the same subject (pp. 107 *et sqq.* of the volume of Minutes of 1931). On that occasion, the original proposal, made by M. Fromageot, covered only the case where the parties were in agreement; M. Anzilotti had then raised the question as to what would happen if the request for an adjournment were made by one party only; and Baron Rolin-Jaequemyns had drafted a text embodying the idea which M. Anzilotti now suggested.

[1] P. 151.

15.II.36.*

Discussed as Article 28. — Second Reading.

The PRESIDENT said that the Court had before it three new drafts for Article 28.

First, there was Jonkheer van Eysinga's proposal (Annex 6): a new draft for Article 28 and the transference of the article to the position occupied by Article 46; the proposal was as follows:

> " Article 28 relates to cases ready for hearing—*i.e.*, to cases in which the written proceedings are terminated and the oral proceedings about to begin. That being so, Article 28 should be placed in the position of Article 46, which would then become Article 46 *bis*.
>
> " In that case, however, the very general power given to the Court by Article 47—*i.e.*, the power to postpone the commencement of the oral proceedings in such a case—would also seem to be fully adequate to cover the possible granting of priority or of an adjournment provided for in Article 28.
>
> " It would seem that Article 28, if transposed to the position of Article 46, might be worded as follows:
>
> " ' Subject to the priority resulting from Article 61 of the present Rules and to the terms of Article 47, the order in which the Court will take cases which are ready for hearing is determined by the position which they occupy in the General List.' "

Secondly, there was a draft proposed by M. Anzilotti, basing the order in which cases were taken by the Court upon the position occupied by them in the General List; it read:

> " The order in which the Court will take cases submitted to it and which are ready for hearing is determined by the position which they occupy in the General List, subject to the priority resulting from Article 61 of the present Rules.
>
> " Nevertheless, the Court may, at the request of the parties and in exceptional circumstances, decide to take a case which is ready for hearing in priority to other cases which are also ready and which precede it in the General List.
>
> " If the parties to a case which is ready for hearing are agreed in asking for the case to be taken after other cases which follow it in the General List, the President may grant the adjournment asked for. If the parties are not in agreement, the President will submit the question to the Court."

Lastly, there was a draft prepared by M. Fromageot, taking as a basis the order in which cases became ready for hearing:

> " Subject to the priority resulting from Article 61 of the present Rules, cases submitted to the Court will be taken in the order in which they become ready for hearing.
>
> " Nevertheless, the Court may, in exceptional circumstances, decide to take a case in priority to other cases which have become ready for hearing earlier.
>
> " If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing, the President will

* D 2, A. 3, pp. 553-565.

grant such an adjournment in case of need; if the parties are not in agreement, the President decides whether or not to submit the question to the Court."

The President asked the authors of these proposals to give their reasons for making them.

Jonkheer VAN EYSINGA recalled that, at the previous sitting, it had been pointed out that Article 28 was concerned only with cases ready for hearing. When a case was ready for hearing, the oral proceedings began. Accordingly a provision of this kind should come at the beginning of the Rules concerning oral proceedings—*i.e.*, in the position occupied by Article 46. In the second place, Article 47, as adopted in first reading, said that, if occasion arose, the Court, or the President if the Court was not sitting, would decide that the commencement or continuance of the hearings was to be postponed. But the postponement of the opening of the hearing in a particular case was precisely the point dealt with in Article 28. If there were two cases ready for hearing and the hearing of the first was postponed, the second would become the first. Accordingly, the terms of Article 47 would cover both cases: the granting of an adjournment and the conceding of priority. Article 28 therefore, having been transferred to the position of Article 46, need only say that, subject to the priority resulting from Article 61 and to the provisions of Article 47, the order in which the Court took cases ready for hearing was determined by the position which they occupied in the General List.

M. ANZILOTTI said that his proposal, which did not differ very widely from that of M. Fromageot, was mainly intended to render clearer the wording of the present Article 28. What was required was to lay down a general rule regarding the order in which cases would be taken and then to indicate the exceptions to this rule which might be made, either by way of bringing forward cases which, according to the normal order, should come after other cases, or, on the other hand, by way of postponing cases which according to the normal order should have been taken earlier.

In the first paragraph, the proposed text retained as it stood the principle embodied in the draft already adopted by the Court on the previous day.[1] This principle differed from that set out in the first paragraph of M. Fromageot's text, which, instead of taking the position occupied by cases in the General List as its basis, took into account only the order in which cases became ready for hearing. M. Anzilotti, however, would have no difficulty in accepting M. Fromageot's formula, provided that it were added that the order in which several cases ready for hearing would be taken would be determined by their respective positions in the General List. In reality the Court would take cases as they became ready for hearing. But if several cases were ready, there must be some objective criterion to decide the order in which they would be taken, and he thought this criterion should be their position in the General List.

The second paragraph of M. Anzilotti's proposal enabled the Court to bring forward a case which, according to the normal order, should be taken later. As in such circumstances the interests of parties would also enter into consideration, the decision must rest with the Court; and these parties would not merely be the parties to the case in question, but also the parties to other cases which would be affected by the granting of priority to the particular case.

[1] P. 153.

The last paragraph of M. Anzilotti's text provided that if, in the case of an adjournment, the parties were not agreed, the President would submit the question to the Court: in M. Anzilotti's view, when the parties were not in agreement, the decision must always be given by the Court. According, on the other hand, to M. Fromageot's text, the President would in that case be free either to decide the matter himself or to refer it to the Court.

M. FROMAGEOT, with reference to Jonkheer van Eysinga's proposal, said that Article 47 presupposed that the Court was dealing with a case ready for hearing and was considering a purely practical question, in a certain sense of minor importance, arising at the moment—namely, whether the hearings should commence or be continued upon a certain day. What Article 28 was concerned with was the order in which the Court took cases. Whether the Court would begin the hearings on a certain date, or whether the hearings should be suspended for a few days was an entirely different question. In M. Fromageot's opinion, therefore, Article 28 could not be transferred to the section dealing with the oral proceedings.

With regard to the main difference between his text and that of M. Anzilotti, M. Fromageot observed that several cases might quite well be ready for hearing at the same time, but that did not mean that they had become ready on the same day; there would therefore be no object in referring to the position which they occupied in the General List; an adequate practical criterion would be afforded by taking cases according to the dates on which they became ready for hearing.

With regard to the third paragraph, M. Fromageot considered it preferable to say that, in principle, the President would grant adjournments, but that, if the parties were not in agreement and the question was a particularly delicate one, the President would consider whether the occasion warranted the convocation of the Court to decide the matter. If the Court were to leave the President to decide whether the difficulty was such that it was really worth while summoning the judges, the Rules would have the elasticity requisite for the smooth working of the Court. Moreover, there was nothing to prevent the President from consulting his colleagues, if necessary, by telegram or otherwise.

Count ROSTWOROWSKI considered that Jonkheer van Eysinga's proposal established an unnecessary link with the oral proceedings, for the fact that the written proceedings were completed did not prove that the oral proceedings were about to begin. There might be no oral proceedings, and the word "*traiter*" (take) might mean deliberation upon the documents presented.

M. GUERRERO, Vice-President, said that, upon reflection, he preferred M. Anzilotti's text for the first paragraph to that of M. Fromageot. The order in which cases were to be taken should be determined by the order of entry in the General List, subject of course to the Court's right in special circumstances to alter this order. As an example of such special circumstances, M. Guerrero supposed that two cases became ready for hearing six weeks before the judicial vacations and one of them was so straightforward that the Court was certain to be able to finish it before the vacation, whereas the other would entail lengthy hearings. In view of this special circumstance, the Court might give priority to the simple case, even if it were lower in the General List than the other, in order to avoid the possibility of the examination of the more complicated case being interrupted by the judicial vacation. On the

other hand, he thought they might take M. Fromageot's second paragraph.

With regard to the third paragraph, M. Guerrero also preferred M. Fromageot's proposal. The disagreement between the parties might be so easy to settle that the President could take the responsibility of granting or refusing the adjournment sought. If, however, the question was a delicate one, he would refer it to the Court.

The PRESIDENT asked M. Anzilotti if he would accept the second paragraph of M. Fromageot's text; the difference between that text and his own was that the latter limited the Court's right to give priority to cases in which a request to that effect was made by the parties.

M. ANZILOTTI did not think it possible to alter the order of cases in this way if the parties to the case brought forward had not asked that this should be done, or if they opposed it.

M. GUERRERO, Vice-President, saw nothing in the Statute which precluded the Court from arranging the order in which it took cases to suit its convenience. Of course, before deciding as to the order in which cases would be taken, the parties to the case to be taken first would be asked if they could be ready by a certain date.

The PRESIDENT was sure that the Court would always do all in its power to meet the wishes expressed by parties, but thought it was better not to have too rigid a rule. He recalled that the parties which came before the Court were Governments, and that some special consideration must be shown them.

Jonkheer VAN EYSINGA, replying to the observations of M. Fromageot, Count Rostworowski and M. Guerrero, said that he continued to think that the proper place for the provisions contained in Article 28 was in Article 46, and that to say that Article 47 was not applicable in this connection would unduly restrict the scope of that article. Nevertheless, since the same idea could be expressed in different ways, and in order to save the time of the Court, Jonkheer van Eysinga thought it would be more conducive to the progress of the discussions if he were simply to withdraw his suggestion.

The PRESIDENT observed that, in that case, the Court had now to decide between the principles of M. Anzilotti's draft and those of M. Fromageot's draft in regard to the order in which it would deal with cases before it.

The REGISTRAR wished, in this connection, to recall that since the adoption, in 1931, of M. Fromageot's proposal for the establishment of the new General List,[1] the question was perhaps no longer an entirely open one. For M. Fromageot, in explaining his proposal at that time, had said, *inter alia*, that " the List should be a list of all cases, entered in the order of their submission, and its object was to prevent unjustified preference being given to one case over another "; he had added that " his object in proposing the creation of a General List was to prevent its being possible to give one case precedence over another which had been entered higher in the List ".

The General List had therefore been instituted for the purpose of settling the order in which the Court would take cases. If this system were now to be abandoned, the Court might, having regard to what had been said in 1931, expose itself to the reproach of resorting to arbitrary methods, and also the reproach—less serious, it was true—of rendering the General List purposeless.

The question also arose whether, if M. Fromageot's first paragraph were adopted, the two other paragraphs would not become superfluous. For if the Court adopted the system according to which the order in which cases were taken would depend exclusively upon the dates on which they became ready for hearing, it could always determine the precedence of cases by fixing the date of the completion of the written proceedings and by applying Article 47, without having to consider the granting of adjournments or of priority. It must be borne in mind that parties could always ask for an extension of time-limits, and that they almost always made use of this right. Accordingly, the moment at which any particular case would be taken would be entirely dependent upon the pleasure of the Court and of parties to other pending cases which had nothing to do with the particular case. It was, however, doubtful if that was consistent with the legitimate wish of States to know approximately when—unforeseen circumstances excepted—the case in which they were concerned would come before the Court.

Baron ROLIN-JAEQUEMYNS, observing that the drafts of MM. Anzilotti and Fromageot dealt only with the order in which cases would be heard, did not understand why Jonkheer van Eysinga had withdrawn his proposal, which seemed clear and sound. In any case, when these drafts referred to the consent of the parties, that of course meant the parties to the case which was to be given priority; perhaps to avoid any ambiguity, that had better be expressly stated.

M. ANZILOTTI remarked that there might be no oral proceedings.[1] In that case, the meaning of this text would be that the Court would deliberate upon the case when ready.

The PRESIDENT thought that, in view of Baron Rolin-Jaequemyns' remarks, it would perhaps be better to vote on Jonkheer van Eysinga's proposal. He put the following question to the Court:

> " Does the Court decide to transfer the rule concerning the order in which the Court will take cases ready for hearing to the section relating to the oral proceedings ? "

By eight votes to two, the Court decided against this transfer.[2]

The PRESIDENT said that he had voted against the transfer because, as explained by M. Anzilotti, there might be no oral proceedings.

He said that the Court must now choose between the drafts of MM. Anzilotti and Fromageot.

M. ANZILOTTI considered that the two texts might be combined. The Registrar had prepared a draft which did so:

> " The Court will take . . . cases which have been submitted to it in the order in which they become ready for hearing.
>
> " If several cases are ready at the same time, it will take them . . . in the order of their entry in the General List."

The PRESIDENT distributed the Registrar's draft, which ran as follows:

> " The Court will examine the merits of cases which have been submitted to it as and when they become ready for hearing.

[1] D 2, A. 2, pp. 96 *et sqq.*

[1] *Cf.* Article 72 as adopted in first reading, see p. 305 of this volume.

[2] *Cf.* the proposal of the Drafting Committee—adopted by the Court (p. 159, meeting of 10.III.36)—to transfer Article 28 to become Article 46.

" If several cases are ready for hearing at the same time, it will, subject to the terms of the following paragraph, take them in the order of their entry in the General List.

" The Court may, in exceptional circumstances, decide to take a case which is ready for hearing in priority to other cases which are ready for hearing and which precede it in the General List.

" If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing and which follow it in the General List, the President ", etc.

M. FROMAGEOT asked the meaning of the word " *simultanément* " (at the same time). Did it mean " on the same date " ?

The REGISTRAR said that he had in mind the situation where, either after finishing an important case or after a period of vacation, the Court had before it several cases which had become ready in the meantime. When it was able to begin a new case, it would, of these cases, first take that which had precedence according to the order in which they had been entered in the General List.

Jonkheer VAN EYSINGA approved the draft proposed by the Registrar.

The PRESIDENT said that he had at one time thought of a wording more elastic than that proposed to the Court:

" If several cases are ready for hearing, the President fixes the order in which they will be taken, having regard as far as possible to the order in which they have been entered in the General List."

He observed that the President was in close touch not only with the parties in the case which was to be brought forward, but also with those in cases which would be put back.

M. FROMAGEOT thought that, whilst maintaining the principle that the Court would take cases in the order in which they became ready, account might be taken of M. Anzilotti's proposal and of the Registrar's observations by adding the following to the first paragraph of his (M. Fromageot's) text: " having regard to the order of their entry in the General List ".

The PRESIDENT said that the effect of M. Fromageot's suggestion was much the same as that of the suggestion he himself had just made. Sir Cecil Hurst pointed out that a decision might have to be taken during a vacation, for if two or three cases became ready for hearing during the summer vacation, the President would probably have to inform the persons responsible for the conduct of one of these cases that it would be taken when the Court reassembled. The President would give his decision having regard as far as possible to the order in which the cases ready for hearing had been entered in the General List.

Sir Cecil Hurst therefore could accept M. Fromageot's text if it were understood that the President, and not the Court, would decide the order in which cases would be taken.

M. ANZILOTTI accepted the idea of combining the first paragraph of M. Fromageot's proposal with the first paragraph of his own, thus saying, first, that cases would be taken in the order in which they became ready for hearing and, secondly, that when several cases were ready, the order of taking them would be determined by their position in the General List. He was afraid, however, that the wording just suggested by M. Fromageot to convey this idea would not be readily understood.

M. FROMAGEOT, in these circumstances, suggested the following wording:

" Subject to the priority resulting from Article 61 of the present Rules, the Court will take cases which have been submitted to it in the order in which they become ready for hearing.

" When several cases are ready for hearing, the order in which they will be taken is settled by the position which they occupy in the General List."

Then would follow the provision to the effect that the Court could, in exceptional cases, decide to give a case priority over others ready for hearing.

The PRESIDENT, in order to facilitate voting, decided to have M. Fromageot's text distributed.

The REGISTRAR said that he had been asked why, in the text which he had drafted, he had substituted the words " the Court will examine *the merits* " for the reservation at the outset of MM. Anzilotti's and Fromageot's drafts. The reason was that the Registrar had come to the conclusion that a request for the indication of interim measures of protection was not a " case "; it was an incident in a case; this was borne out by the fact that the Court gave its decision upon a request of this kind by an order and not by a judgment. That was why it had seemed to him that the reservation, which, moreover, was already made in Article 61, was not quite appropriate in Article 28, which concerned the order in which " cases " would be taken.

M. ANZILOTTI was not sure if he shared this view: a request for the indication of interim measures was certainly an incident, but it was not a mere point of procedure.

M. URRUTIA drew the Court's attention to the fact that Article 28 of the Rules adopted in 1922 did not speak of cases " ready for hearing ", but of cases " in regard to which the written proceedings are concluded ". This phrase, less technical in character, was clearer. Would it not therefore be well to insert in Article 28 something to the effect that " cases are ready for hearing when the written proceedings are concluded " ?

M. FROMAGEOT considered that the definition proposed by M. Urrutia might be inserted at the end of the chapter concerning the written proceedings. They might, for instance, say: " Upon the termination of the written proceedings a case is said to be ready for hearing."

The PRESIDENT thought that the best place in the Rules would be at the end of Article 42, which dealt with the various documents of the written proceedings.

The REGISTRAR recalled that Article 41 of the Rules in force—now transferred to the " Oral Proceedings " section and numbered 46—was previously one of the last articles of the " Written Proceedings " section, and ran as follows:

" Upon the termination of the written proceedings . . . the President . . . shall fix a date for the commencement of the oral proceedings."

This article might be re-transferred to the " Written Proceedings" section and might be made to read: " Upon the termination of the written proceedings, a case is ready for hearing and the Court. . ."

M. FROMAGEOT suggested combining Articles 46 and 47 under No. 47, transferring the number 46 to the " Written Proceedings " section, and inserting the desired definition under that number.

The PRESIDENT thought it would not be difficult to give effect to M. Urrutia's wish,[1] but that, if a definition of the term " ready for hearing " were inserted in the Rules, it would be difficult to use the term in articles preceding the definition.

Reverting to Article 28, he read M. Fromageot's revised text:

> " Subject to the priority resulting from Article 61 of the present Rules, cases submitted to the Court will be taken in the order in which they become ready for hearing. When several cases are ready for hearing, the order in which they will be taken is determined by the position which they occupy in the General List.
>
> " Nevertheless, the Court may, in exceptional circumstances, decide to take a case in priority to other cases which have become ready for hearing earlier, or which precede it in the General List.
>
> " If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing, or which follow it in the General List, the President will grant such an adjournment in case of need. If the parties are not in agreement, the President decides whether or not to submit the question to the Court. "

M. ANZILOTTI, in paragraphs 2 and 3, wished the word " or " in the expression " ready for hearing or which precede (follow) " to be replaced by " and ".

M. FROMAGEOT agreed that, as the question of priority could only arise in connection with other cases already ready for hearing, it would be better to say " and ".

M. NEGULESCO remarked that, in the first paragraph, the expression " subject to the priority . . ." gave the impression that, as between a number of cases, the order in which they were taken was settled by the time at which they became ready for hearing. In the second sentence of the same paragraph, however, it was stated that, as between a number of cases, " the order in which they will be taken is settled by the position which they occupy in the General List ". Thus, the second sentence seemed to introduce a system contrary to that of the first sentence. In point of fact, the first sentence assumed that there was only one case ready for hearing, whereas the second dealt with the possibility of there being several cases ready.

In these circumstances, it would be better to take the Registrar's wording for the first sentence, substituting, however, the words " the Court will take cases . . ." for the words " the Court will examine the merits . . .". Then the second sentence of M. Fromageot's text might be taken. His proposal really amounted to the deletion of the words " subject to the priority resulting from Article 61 of the Rules ", which led to confusion.

M. ANZILOTTI explained that the words " subject to . . . Article 61 of the Rules " were simply intended to indicate that requests for interim measures of protection had priority automatically without the need for any decision by the Court.

The PRESIDENT added that the giving of priority to a request for the indication of interim measures of protection implied that there was at least one case which must be taken after that request.

The President put the following question to the Court:

> " Does the Court adopt the first paragraph of M. Fromageot's revised text ? "

The Court unanimously answered the question in the affirmative.

The PRESIDENT opened the discussion on paragraph 2 of the revised text proposed by M. Fromageot.

Baron ROLIN-JAEQUEMYNS proposed that the word " nevertheless " should be deleted, as it might seem to attribute special importance to this paragraph as constituting an exception, whereas paragraph 3 likewise constituted an exception.

M. FROMAGEOT would prefer to retain this word. The reason why he had not added it to the third paragraph was because the latter was not an exception to the paragraph preceding it.

M. NAGAOKA thought that, in order to give paragraph 2 somewhat greater flexibility, it would be better to say " special circumstances " instead of " exceptional circumstances ".

M. GUERRERO, Vice-President, agreed with M. Nagaoka, but was not sure whether paragraph 2 in its present form did not imply that it must be the Court which decided to give priority to a case. Was not the intention rather to empower the President to do this ? That being so, they should say: " Nevertheless, the President may, in special circumstances, decide. . . ."

The PRESIDENT considered that, with the text as proposed by M. Fromageot, it would be difficult for a decision of this kind to be taken during a judicial vacation.

M. ANZILOTTI said that he had intentionally drafted the text to mean that the decision must be given by the Court; for the decision in question was one in which the interests of third parties must be taken into account.

M. GUERRERO, Vice-President, was afraid that a provision of this kind would hamper the smooth working of the Court, particularly during judicial vacations.

M. FROMAGEOT thought that, in practice, a question of priority would no doubt be raised and could be settled before the Court entered on its vacation. The position was different in the case of a request for an adjournment which might crop up unexpectedly; that was why it seemed reasonable that the President should act in the latter case.

M. URRUTIA could not imagine a decision giving priority to one case over another unless both cases were ready for hearing. When the Court dispersed for a vacation, the cases might not yet be ready. For that reason, it would be better to allow the President to give a decision on the point.

The PRESIDENT asked whether there was any objection to the substitution of the word " special " for the word " exceptional " as suggested by M. Nagaoka.

There being no objection, this suggestion was adopted.

The PRESIDENT put the following question to the Court:

> " Does the Court adopt the following text for the beginning of paragraph 2 of M. Fromageot's revised text:
>
> " ' Nevertheless the President may, in special circumstances, decide to give a case . . . ' ? "

M. ANZILOTTI said that he would be obliged to vote against this paragraph, as also against the following one. There was no question of a request by the parties in paragraph 2; nor was it even presupposed that they agreed. Accordingly, even if the parties disagreed, the President could decide to bring a case forward. The Statute, however,

[1] See Article 45 of the Rules of March 11th, 1936.

did not give the Court power to entrust the President with the settlement of differences between parties.

The PRESIDENT, in view of M. Anzilotti's opposition, modified his question as follows:

> " Does the Court decide to entrust to the President the power given to the Court by the second paragraph under discussion ? "

M. NAGAOKA observed that there might be cases in which the consequences would be so serious that it was impossible to delegate this power to the President. Without, however, going so far as to substitute the words " the President " for " the Court ", it would be desirable to empower the President to settle simple cases. M. Nagaoka therefore proposed the following: " The Court, *or (éventuellement)* the President, as the case may be, may. . . ."

M. NEGULESCO considered that paragraph 2 was closely bound up with paragraph 3. The wording of paragraph 3 of M. Fromageot's text entirely satisfied him, and he thought that it might be a good thing to adopt the same plan in paragraph 2; for the priority contemplated in paragraph 2 was the reverse of the adjournment contemplated in paragraph 3.

M. ANZILOTTI was afraid that the solutions suggested by MM. Nagaoka and Negulesco would not suffice to overcome his scruples. Full powers might be given to the President when the parties were agreed, but if they were not, the Court must decide; that, at any rate, was the sense in which he thought that the Statute must be construed.

The PRESIDENT wondered whether it would not be possible here to use a phrase which appeared in Article 33 of the Rules in force (Article 38 of the revised Rules [1]):

> " *If the Court is not sitting*, the powers conferred upon it by this article shall be exercised by the President, *subject to any subsequent decision of the Court.*"

A President would not lightly expose himself to the risk of having his decision subsequently reversed by the Court.

M. FROMAGEOT considered that the situation contemplated in Article 28 was not comparable with that contemplated in Article 38, since an adjournment would be granted once and for all, whereas time-limits could be modified. In the case of Article 28, the Court's decision would be too late.

M. GUERRERO, Vice-President, thought that, as Article 30 of the Statute gave the Court the right to frame rules for regulating its procedure (. . . *exerce ses attributions*), it could delegate its powers to the President. Nevertheless, since there seemed some opposition to his amendment, M. Guerrero would withdraw it.

Baron ROLIN-JAEQUEMYNS recalled that M. Nagaoka had proposed the words: " The Court, or (*éventuellement*) the President, as the case may be, may . . ." That wording seemed to him satisfactory. The Court could rely on the President, who, when questions of principle or serious difficulties were raised, would not fail to arrange for the decision to be taken by the Court.

M. GUERRERO, Vice-President, explained that the main object of his amendment had been to overcome certain obstacles to the smooth working of the Court which would result from the application of M. Fromageot's paragraph 2, not only during judicial vacations, but also if there were difficulties in assembling a quorum.

[1] Article 37 of the Rules of 11.III.36, see p. 120 for text adopted in first reading.

M. FROMAGEOT gathered that the provision, as at present drafted, was thought too rigid and suggested the following draft for paragraph 2:

> " Nevertheless the President may, in special circumstances and if the parties are in agreement, decide to give a case priority over other cases which become ready for hearing earlier and which precede it in the General List. Failing agreement between the parties, the decision rests with the Court."

The PRESIDENT proposed the addition to the second paragraph, as worded in M. Fromageot's revised text, of the words: " Nevertheless the Court, *or, during the judicial vacations, the President,* may . . ." It was unnecessary to mention periods outside the judicial vacations, because at such periods the President was entitled to summon the members of the Court, even for an unimportant question.

M. ANZILOTTI feared the repercussions of the addition proposed by the President on several other articles. With regard to the most recent wording suggested by M. Fromageot for paragraph 2, he could accept it, but if it were adopted, paragraph 3 must be correspondingly amended.

Jonkheer VAN EYSINGA observed that, in the circumstances contemplated by paragraph 2, it would be necessary to consider not only the standpoint of the " parties " to the case which was put forward, but also the parties to cases which were as a result adjourned. It would be better to keep to the wording of M. Fromageot's revised text.

M. ANZILOTTI proposed that they should say " *les intéressés* " (" those concerned ").

M. GUERRERO, Vice-President, observing that M. Fromageot's new proposal would oblige the Court to consult the parties—perhaps the parties to several cases already ready for hearing—said that he could not accept this new text. He would prefer the retention of the text which left the decision in regard to the grant of priority to the Court alone.

M. NEGULESCO wanted the phrase used at the end of the third paragraph to be embodied in the second paragraph, which would accordingly read:

> " Nevertheless the President may, in special circumstances and if the parties are in agreement, decide to give a case priority over other cases which become ready for hearing earlier and which precede it in the General List; in the absence of agreement between the parties, the President decides whether the question should be submitted to the Court."

M. ANZILOTTI was afraid he could not accept this text.

M. NAGAOKA asked whether, in M. Negulesco's view, this text referred only to the parties to the case which obtained priority, or to the parties of all other cases ready for hearing. The situation contemplated in paragraph 2 was different from that contemplated in paragraph 3, because, when an adjournment was granted, the parties to other cases ready for hearing were not affected.

The PRESIDENT considered that M. Negulesco's proposal was incomplete, because it did not supply the answer to the question what would happen if the body most directly interested in an advisory case to which priority was to be granted was the Council of the League of Nations. He took a vote on the text proposed by M. Negulesco.

By six votes to four, this text was rejected.

The PRESIDENT invited the Court to consider the proposal consisting in the addition of the words " or, during the

judicial vacations, the President " to paragraph 2 of M. Fromageot's text.

M. URRUTIA wished to observe that, if this proposal were adopted, the Court would be faced with certain difficulties in framing other articles of the Rules.

The PRESIDENT, who shared M. Urrutia's opinion, explained that the object of his proposal was solely to avoid the use of the expression " if the Court is not sitting ".

He put the following question to the Court:

> " Does the Court decide to add the words ' or, during the judicial vacations, the President' in paragraph 2 of M. Fromageot's revised text ? "

By seven votes to three, the Court decided against this addition.

The PRESIDENT asked the Court whether they would accept the draft suggested by M. Fromageot for paragraph 2 (see preceding page).

M. GUERRERO, Vice-President, stated that he would vote against this draft, because it made an important change in the article originally projected and because it obliged the President to consult not only the parties to the case in question, but also the parties to all cases ready for hearing.

Baron ROLIN-JAEQUEMYNS said that he also would vote against this text because he thought it dangerous to bring in the question of agreement between the parties.

By six votes to four, the Court decided against this text.

The PRESIDENT put the following question to the Court:

> " Does the Court adopt the following draft for paragraph 2 of the proposed text (the text circulated):
>
> " ' Nevertheless, the Court may in special circumstances decide to take a case in priority to other cases which have become ready for hearing earlier and which precede it in the General List ' ? "

M. ANZILOTTI, on a suggestion of the Registrar, observed that the word " *antérieurement* " (" earlier ") seemed superfluous and might even lead to misunderstanding.[1]

By five votes to four, with one abstention, the Court adopted paragraph 2.

The PRESIDENT took a vote on paragraph 3 of the revised text proposed by M. Fromageot:

> " If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing and which follow it in the General List, the President will grant such an adjournment in case of need. If the parties are not in agreement, the President decides whether or not to submit the question to the Court."

By eight votes to two, the Court adopted this text.

The article was adopted in second reading.

10.III.36.*

Article 28 of the first reading (Article 28, paragraphs 2 and 5, of the old Rules) transferred to become Article 46 of the Rules of 11.III.36.

The Drafting Committee also suggested the transfer of an article (No. 28) which had previously been included in Section 2 of Heading I: " Working of the Court ". This article concerned the order in which the Court would take cases. The Drafting Committee proposed to transfer it to the section concerning the written proceedings, and it would there become Article 46. Another reason for this transfer was the criticism which had been expressed in regard to the use of the expression " ready for hearing " in Article 28, whereas no definition of that expression was to be found until Article 45[1]. The proposal of the Drafting Committee was that the old Article 28 should be transferred so as to follow immediately after the article containing a definition of the expression " ready for hearing ".

. . . . . .

The PRESIDENT noted that there were no objections to the proposed transfer of Article 28.

11.III.36.**

Article 46. — Final Adoption.

The PRESIDENT recalled that this was the old Article 28 and said that, in the second paragraph, the Drafting Committee proposed to delete the word " *antérieurement* " (earlier); in the third paragraph, the Committee proposed to say: " *Le Président* peut *accorder cette remise* " (the President may grant such an adjournment) instead of " *accorde s'il y a lieu . . .* ".

The whole of Article 46, as thus amended, was finally *adopted*.

ARTICLE 47 *(Article 41, old Rules, with new Second Paragraph).*

COMMENCEMENT OF THE ORAL PROCEEDINGS AND POSTPONEMENT OF HEARINGS

29.V.34.*

Paragraph 1, discussed as Article 41 (old Rules).

The PRESIDENT turned next to Article 41. He recalled that, in the existing Rules, Article 41 ran as follows:

> " Upon the termination of the written proceedings the Court, or the President, if the Court is not sitting, shall fix a date for the commencement of the oral proceedings."

As the Court had adopted a sentence in the new text of Article 33[2] which seemed to overlap Article 41, the co-ordination Commission proposed the deletion of the latter article. The President observed that in any case the wording of Article 41 had given rise to doubt as to whether the commencement of the oral proceedings must not be fixed immediately upon the presentation of the last document of the written proceedings.

M. ANZILOTTI asked whether, henceforth, having regard to the terms of Article 33, the date of the hearing would be fixed in the order regulating the procedure.

The PRESIDENT thought that this could be done separately.

M. FROMAGEOT considered that the contents of Article 41 were not superfluous, notwithstanding the terms

* D 2, A. 3, pp. 117-119 and 122.
[1] See below, meeting of 11.III.36.
[2] Article 37 of Rules of 11.III.36.

* D 2, A. 3, pp. 709, 710 (extracts).
** *Ibid.*, p. 730.
[1] See Article 45, p. 149.

of paragraph 2 of Article 33; for the Court could only fix the date for the commencement of the oral proceedings upon the termination of the written proceedings.

The REGISTRAR observed that this article had given rise to two interpretations. The first, which had long prevailed, was based on the English text: " Upon the termination of the written proceedings . . .", and was to the effect that as soon as the written proceedings were terminated, that was to say directly the last document had been filed, the date of the first hearing must be fixed. Recently another interpretation had been adopted, simply to the effect that the commencement of the oral proceedings could not be fixed until after the filing of the last document of the written proceedings—an interpretation which corresponded to the French text of the article.

M. FROMAGEOT asked whether, at present, the date for the commencement of the oral proceedings was fixed by order.

The PRESIDENT replied in the negative.

M. FROMAGEOT, in that case, asked that Article 41 should be maintained, though the English text should be amended if it was obscure.

M. GUERRERO, Vice-President, wondered whether, in order to overcome the difficulties mentioned, Article 41 might not be drafted as follows:

> " The date for the commencement of the oral proceedings shall be fixed by the Court, or the President, if the Court is not sitting, after the presentation of the last document of the written proceedings."

M. FROMAGEOT observed that the reference here was to the end of the written proceedings. Upon the termination of those proceedings, the Court was to fix the oral proceedings. An article beginning with the words " the date for the commencement of the oral proceedings " would therefore be liable to be misunderstood.

The PRESIDENT raised the question whether the article was in any way necessary. In regard to everything except the hearings on the merits, the fixing of public hearings was covered by the Court's general powers.

The REGISTRAR observed that in practice the rule had proved useful. Parties often wanted at the beginning of a case to know the probable date of the hearings. Hitherto it had been possible to meet their wish because, thanks to Article 41, they could be told that any indications given at that stage were purely provisional, as the actual date could only be fixed upon the termination of the written proceedings. Such unofficial guidance could not have been given if there had been any fear of a misunderstanding on the part of the parties.

Baron ROLIN-JAEQUEMYNS thought it would be necessary to revise paragraph 2 of Article 33, which might lead to a misunderstanding.

The PRESIDENT recalled the text proposed by M. Guerrero to replace Article 41 (see above).

M. ANZILOTTI asked M. Guerrero whether this article could not be transferred to the beginning of the chapter relating to oral procedure.

M. GUERRERO, Vice-President, whilst observing that this article referred to the termination of the written proceedings and the commencement of the oral proceedings, accepted this suggestion.[1]

[1] On 1.VI.34 the President stated that it had been decided that the article should be thus transferred. See also p. 267 under Article 63.

The PRESIDENT took a vote on M. Guerrero's text.

It was adopted by eleven votes to one.

The PRESIDENT said that he had voted against the proposal because, in his view, it was a mistake to include in the Rules a special article regarding oral proceedings on the merits, whereas there was no rule concerning the fixing of hearings in regard to any other matters upon which the Court had to accord the parties a hearing. In any case, the President considered that the decision just taken by the Court would oblige it to refer back to a phrase in Article 33, paragraph 2, *in fine*. He thought that the last phrase of the paragraph overlapped the text just adopted and should be deleted.[1]

The Court agreed, and the words in question were deleted.

Paragraph 2, discussed as Article 41 bis.

The PRESIDENT turned to the Co-ordination Commission's proposal for the adoption of an article repeating, with regard to *ajournements*, what was laid down at the end of Article 28 with regard to postponements. The proposed text was as follows:

> " La Cour prévoit, s'il y a lieu, des ajournements dans les affaires qui lui sont soumises pour décision ou pour avis consultatif. Ces ajournements peuvent être accordés par le Président si la Cour ne siège pas."
>
> (Adjournments in cases submitted to the Court for decision or for advisory opinion may be ordered by the Court in case of need. If the Court is not sitting, such adjournments may be granted by the President.)

M. ANZILOTTI wanted to know why the words " *La Cour accorde* " had been replaced by the words " *La Cour prévoit* ".

The PRESIDENT explained that sometimes the initiative was taken by the Court itself.

M. FROMAGEOT suggested the words: " *La Cour prononce* ", which would cover both a case where the Court " granted " an *ajournement* and a case where it acted *proprio motu*. He also wanted to know why the word *ajournements* was used and not *remises*.

The PRESIDENT recalled that Article 28, paragraph 5[2], dealt with *remises*, and that the word had a special meaning in that rule.

There was nothing in the Rules regarding simple *ajournements*. The President held that an *ajournement* was a decision of the Court taken, for instance, on a Friday to resume the hearing on a Tuesday.

M. FROMAGEOT thought that would be a *remise*.

The REGISTRAR explained that he had understood Article 28, paragraph 5, to refer to a case where, there being several suits ready for hearing and the order in which they should be taken being determined by the General List, the Court decided to modify this order. An *ajournement*, on the contrary, would be a postponement either of the continuation of the written proceedings or of the hearings, involving no change in the list.

M. URRUTIA doubted whether it was possible to give an opinion on the proposed Article 41 *bis* before examining paragraph 5 of Article 28.

M. FROMAGEOT said that if it was an " adjournment " that was envisaged, he thought this clause ought to come

[1] See under Article 37, p. 117, for text of Article 33, paragraph 2, adopted on 23.V.34.

[2] Article 46 of Rules of 11.III.36.

among those dealing with oral procedure.

The PRESIDENT said that the remainder of the discussion on Article 41 *bis* would be deferred until the Court came to the clauses relating to oral procedure.

M. ANZILOTTI said he understood that Article 28, including paragraph 5 of that article, would remain as it stood.

The PRESIDENT agreed that this was so.

. . . . . .

The PRESIDENT proposed that the Court should revert to the proposed new article numbered 41 *bis*.

He explained that it was simply a question of a new rule regarding what were described in English as " adjournments ". He asked the Court if they thought the inclusion of an article concerning the Court's power to order adjournments was desirable. If so, the question remained what was the best word to use in the French text.

M. ANZILOTTI gathered from what the Registrar had already said that there might be an adjournment either in the written or in the oral proceedings.

The REGISTRAR thought that that was so.

M. GUERRERO, Vice-President, saw no necessity for mentioning in the Rules a power indubitably possessed by the Court.

The PRESIDENT, however, thought it better to say something in the Rules. Of course, the Court had full power to adjourn; but, in relation to the parties, it would be easier for it to take a decision of this kind if there were some definite rule covering the point.

M. GUERRERO, Vice-President, wondered whether they might not have an article covering adjournments and postponements in general, and saying that the Court could order them in all circumstances.

M. ANZILOTTI considered that if, as he thought, the text under discussion referred only to adjournments or postponements during the oral proceedings, some form of words should be put making this quite clear.

Baron ROLIN-JAEQUEMYNS thought that Article 33 of the general provisions sufficed. If the Court could extend time-limits in the written proceedings, it could also order adjournments.

The PRESIDENT feared that the rule referred to would, at best, only cover the written proceedings.

He said that he would try, before the next meeting, to find a form of words which would satisfy all members of the Court.

M. FROMAGEOT thought that a form of words should be found which would be in harmony with the last paragraph of Article 28, as construed, according to the Registrar, in practice.

5.II.35.*

Discussed as Article 41.

The PRESIDENT recalled the discussion,[1] in May 1934, upon Article 41 of the Rules, an article which was at present included in the chapter relating to written proceedings.

The Court had decided, on May 29th, 1934, to transfer to the chapter concerning oral proceedings the following text, proposed by M. Guerrero and adopted by the Court:

> " The date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting, after the last document of the written proceedings has been filed."

Jonkheer VAN EYSINGA would have preferred to leave this provision in its present position, as it marked the end of the written proceedings.

M. FROMAGEOT thought that the text adopted marked the beginning of the oral proceedings rather than the end of the written proceedings.

After an exchange of views between the President, Jonkheer van Eysinga, MM. Anzilotti and Fromageot, concerning the proper position for Article 41, the PRESIDENT took a vote on the following question:

> " Does the Court wish Article 41, as adopted on May 29th, 1934, to be placed in the section of the Rules relating to oral proceedings ? "

By six votes to four, the Court answered in the affirmative.

Discussed as Article 41 bis.

The PRESIDENT read the following passage from the minutes of the discussion upon this article in May 1934:

> " The President said that the remainder of the discussion on Article 41 *bis* would be deferred until the Court came to the clauses relating to oral procedure."

He recalled that all paragraphs of Article 28 of the Rules had been regarded as connected with the question of the General List. The last paragraph but one of the article was as follows:

> " If, in the course of a session, a case submitted to the Court, either for decision or for an advisory opinion, becomes ready for hearing, it shall be entered in the session list, unless the Court decides to the contrary."

The President pointed out that this system resulted from the Statute: in general, and subject to the control of the Court, cases were taken in the order in which they appeared in the General List.

He drew attention to the last paragraph in Article 28:

> " Adjournments, which are applied for in cases which are submitted to the Court for decision or for advisory opinion and are ready for hearing, may be granted by the Court in case of need. If the Court is not sitting, adjournments may in such cases be granted by the President."

He added that this provision had always been regarded as referring to the alteration of the position of a case in the General List. As the Co-ordination Commission had observed,[1] there was, on the other hand, no provision in the Rules concerning simple adjournments, which did not affect the position of cases in the General List. That was why the Commission had proposed the inclusion of an Article 41 *bis* mentioning the Court's right to grant such adjournments.

The question now to be settled by the Court was whether a provision concerning such adjournments should be inserted in the Rules.

M. FROMAGEOT, in reply to a question put by M. Anzilotti, explained that in the French Code of civil procedure the

* D 2, A. 3, pp. 175-178.

[1] Pp. 159-161.

[1] P. 160.

word "*ajournement*" meant an injunction to a party to appear before the Court within a certain time. Thus, the Code of civil procedure contained a chapter entitled "*Des ajournements*", and it dealt with "*exploits d'ajournements*", a term equivalent to "*assignation*" (writ of summons).

The PRESIDENT thought that in that case it would be better not to use the word "*ajournement*".

M. FROMAGEOT pointed out that the last paragraph of Article 28 of the Rules provided that the Court might, if need be, grant "*remises*" (adjournments) which had been applied for. That, in M. Fromageot's view, referred to the case where the parties asked the Court not to hear them upon the date already fixed, but to hear them at some later date.

The PRESIDENT considered that Article 28 referred either to the transfer of a suit which was ready for hearing from one session to another (that was the subject of paragraph 4) or the case (dealt with in paragraph 5) in which several suits were ready for hearing at the same time, and the Court decided to modify the order in which they appeared in the General List. It was in the latter sense that paragraph 5 would seem to have been understood at the session in May 1934.[1]

M. FROMAGEOT said that the provision in Article 28 appeared solely to have in view a case where the parties, in the course of one session, asked for a postponement either to a later date in the same session or to another session.

There was, moreover, something not altogether clear in Article 28. The last paragraph but one said: "If, in the course of a session . . ."; and the last paragraph said: "Adjournments . . . may be granted by the Court in case of need . . ." If one read these two paragraphs together, one gathered that what was meant was a postponement from one session to another. If, on the contrary, the last paragraph were taken by itself, that might very well mean a mere adjournment from one day to another during the same session.

The PRESIDENT observed that the right to fix the date for the commencement of the oral proceedings also implied the right to alter that date. It was therefore Article 41[2] which implied the power to grant an adjournment of the opening of the oral proceedings.[3]

M. URRUTIA saw no reason why Article 41 *bis* should be placed as a distinct article in the chapter concerning oral proceedings, instead of being included as a paragraph of Article 28.

The PRESIDENT pointed out that the Rules were divided into chapters, headings and sections. It would be unsatisfactory to have to hunt for a provision concerning the adjournment of hearings in an article belonging to a section dealing with the working of the Court.

Jonkheer VAN EYSINGA thought that, if it were desired to include a provision of this kind in the Rules, Article 28 was not the right place for it.

Article 33[4], however, also concerned the oral proceedings, since it spoke of "the various acts of procedure". Would not that article suffice? Its fourth paragraph began: "The Court may extend time-limits which it has fixed." Did not that also cover adjournments?

[1] P. 160.
[2] Of the 1931 Rules.
[3] For the whole of this matter, *cf.* D 2, A. 2, pp. 107-112, 122.
[4] Article 37 of the Rules of 11.III.36. For text adopted on 1.VI.34, see pp. 117-118.

The PRESIDENT recalled that the practice of the Court was to deal with all matters covered by Article 33 by means of orders.

M. ANZILOTTI observed that the Co-ordination Commission's proposal had in view only adjournments which might occur during the oral proceedings, and that the circumstances contemplated by Article 28 were different.

He took a case where a suit became ready for hearing at the end of a session, for instance on the day on which that session was to be closed. According to paragraph 4 of Article 28, that suit should be entered in the session list. Nevertheless, the parties would need some time to study the case and prepare for the oral proceedings; should the Court, even if it had no other work in prospect, remain in session until the hearings could be begun? It was in view of a case of this kind that the idea of a "*remise*" (postponement) had originated, but in the course of the discussion the idea had become generalised and formulated in a manner going beyond the circumstances in view of which it had been conceived.[1]

Count ROSTWOROWSKI thought that the circumstances contemplated by M. Anzilotti were covered by the end of paragraph 4 of Article 28 of the Rules: ". . . a case . . . shall be entered in the session list, unless the Court decides to the contrary". The Court, in the circumstances suggested by M. Anzilotti, could perfectly well say that it did not consider itself obliged to continue in session, that, though under the general rule the case should be entered in the list, it—the Court—in the circumstances had decided to the contrary.

M. FROMAGEOT asked if it was not possible simply to add to the fourth paragraph of Article 28: ". . . in the absence of a contrary decision by the Court, *which may, in case of need, postpone the case to a subsequent session*". That would provide for one possible contingency.

As regards the second contingency, that of a change in the order of the cases in the session list, it was sufficiently regulated by paragraph 5 of Article 28.

There was still a third contingency, as follows: A case was entered in the session list, and the parties asked for an adjournment from one day to another. This adjournment must be granted by the Court; accordingly, there must be a rule authorising it to do so. This rule should be included in the chapter concerning oral proceedings and might be couched in terms similar to those of the last paragraph of the existing Article 28.

M. URRUTIA observed that, in paragraph 5 of Article 28, there was a provision to the effect that an adjournment could be granted by the President if the Court was not sitting; that part of paragraph 5 must be retained.

M. FROMAGEOT said that, if the parties asked that the case should be postponed to a later session, paragraph 4 of Article 28 would be the clause applicable. If, on the other hand, the parties simply asked for an adjournment from one day to another, paragraph 5 would be the clause applicable; and it might happen that the Court was not sitting.

Baron ROLIN-JAEQUEMYNS thought that all that was required was said in Article 28 and that it was unnecessary to add an Article 41 *bis*, unless Article 28 was altered. That article was under an entirely general heading and was equally applicable to written and oral proceedings.

The PRESIDENT took a vote on the following question:

"Does the Court wish to mention the right to

[1] D 2, A. 2, pp. 107 *et sqq.*

grant adjournments in the chapter concerning oral proceedings ? "

By seven votes to three, the Court answered the question in the affirmative.

M. GUERRERO, Vice-President, proposed that the formulation of the proposed rule should be referred to the Drafting Committee.

The PRESIDENT gathered that all members of the Court were agreed that in drafting the text a word should be used which did not necessarily imply that an adjournment must be asked for by the parties.

That being understood, the President said that the choice of the wording might be left to the Drafting Committee.

6.II.35.*

Discussed as Article 41 bis.

Statement by Jonkheer van Eysinga concerning Articles 41 and 41 bis *of the Rules.*

Jonkheer VAN EYSINGA recalled that, at the previous sitting, he had repeatedly drawn the Court's attention to Article 33 of the Rules as it had been adopted by the Court in first reading in May 1934.[1]

On re-reading the minutes of the session in May 1934, and in particular the remarks of Baron Rolin-Jaequemyns,[2] he had felt it desirable to revert to this point, without however re-opening the discussion upon Articles 41 and 41 *bis*.

Article 41 concerned the fixing of the date of the commencement of the oral proceedings; Article 41 *bis* dealt with " adjournments " in connection with the oral proceedings. Article 33, however, both in the text at present in force and in that adopted in May 1934, was general in its application: it covered the whole of the proceedings and also therefore the fixing of the date for the commencement of the oral proceedings.

That was why the Co-ordination Commission had thought it unnecessary to retain Article 41.[3] The Court, however, had not taken this view; it had wished to retain Article 41 because Article 33 contemplated the making of orders and because no order was made in connection with the fixing of the date for the commencement of oral proceedings. But if no order was required in that case, an express provision to that effect should be included in the Rules. Unless that were done, Article 41 would be governed by Article 33.

In the same connection, Article 41 *bis*, which dealt merely with the adjournment of dates already fixed, was likewise unnecessary, for Article 33 itself provided for the extension of time-limits, and this covered the granting of adjournments.

Jonkheer van Eysinga wished to ask the Drafting Committee, when the time came, to bear in mind what he had just said.

The PRESIDENT said that the Court noted Jonkheer van Eysinga's statement, and that he would himself carefully go into the question. The Drafting Committee would submit a draft to the Court.

For the moment, he thought it would suffice to recall that, at its session in May 1934, the Court had deleted, precisely in order to avoid the overlapping pointed out by Jonkheer van Eysinga, the words in Article 33 prescribing that the date for the commencement of the oral proceedings should be fixed by order.[1]

5.IV.35.

First Reading.

Article 47 was adopted in first reading as Articles 46 and 47, with the following text:

Article 46. " The date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting, after the last document of the written proceedings has been filed."

Article 47. " If occasion should arise, the Court, or the President if the Court is not sitting, will decide that the commencement or continuance of the oral proceedings shall be postponed."

14.II.36.

See under Article 46, p. 150, for reference to Article 47 during the discussion of Article 28 (Article 46 of the Rules of 11.III.36).

15.II.36.

See under Article 46, pp. 153-156 for references to Articles 46 and 47 (Article 47 of the Rules of 11.III.36) during the discussion of Article 28 (Article 46 of the Rules of 11.III.36).

22.II.36.*

Articles 46 and 47 (First Reading) combined to form Article 47 in Second Reading.

See under Article 45, p. 149, for decision to combine Articles 46 and 47 (47 of the Rules of 11.III.36) in connection with the adoption of the " new " Article 46 (45 of the Rules of 11.III.36).

. . . . . .

The PRESIDENT next turned to the rule which had originally been number 46 and was now to become paragraph 1 of Article 47 of the section " Oral Proceedings ".

Article 47, New Paragraph 1.

He read paragraph 1 of the new Article 47, which was as follows:

" The date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting, after the last document of the written proceedings has been filed."

At the request of Jonkheer van Eysinga, the PRESIDENT said that, in taking a vote on the text, he would reserve Jonkheer van Eysinga's right to propose an amendment to replace the words " if the Court is not sitting ".

M. ANZILOTTI wished the same right to be reserved to him.

M. NAGAOKA thought that, before voting on the text of the article, the Court should first come to a decision regarding the proposal previously made by M. Anzilotti.[2]

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* D 2, A. 3, p. 179.
[1] See p. 117-118.
[2] See p. 161.
[3] D 2, A. 3, p. 871.

* D 2, A. 3, pp. 615-617.
[1] P. 160.
[2] P. 149.

M. FROMAGEOT understood that this proposal was to delete the words " after the last document of the written proceedings has been filed ", and to add at the beginning of the article: " When the case is ready for hearing."

The PRESIDENT said that he would be compelled to vote against this proposal because there would be a danger of its re-introducing a difficulty arising out of the original text. That text gave the impression that when a case was ready for hearing—*i.e.*, when the written proceedings were terminated—the date for the commencement of the oral proceedings must be fixed without delay. It was in order to overcome this difficulty that the Court had adopted the more flexible wording of the text now before the Court.[1]

The President asked the Court whether they adopted the following text for Article 47, paragraph 1:

> " When a case is ready for hearing, the date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting."

The result of the vote was as follows: five votes in favour of the text and five against.

The PRESIDENT asked the Court's permission to reflect before giving his casting vote.

Count ROSTWOROWSKI said that he had voted in favour of the text because, whichever wording was adopted—" after the last document has been filed " or " when the case is ready for hearing "—the Court was always at liberty to select the time for the commencement of the oral proceedings.

The REGISTRAR thought he recollected that the difficulty mentioned by the President had its origin in the English text, which used the word " upon ", which was equivalent to " *dès que* ", and stress had been laid on that text.

Count ROSTWOROWSKI proposed that they should say: " Après (after) que l'affaire est en état " (When a case has become ready for hearing).

M. ANZILOTTI said that he had voted in favour of the proposed wording because it took up the matter precisely where the preceding article left it.

The PRESIDENT then put the following question to the Court (Jonkheer van Eysinga's proposal):

> " Does the Court decide to replace the words ' if the Court is not sitting ' by the words ' during the judicial vacations ' ? "

By eight votes to one, with one abstention, the Court answered the question in the negative.

M. ANZILOTTI said that, in his opinion, power to fix the date for the commencement of the oral proceedings should be given to the President, and no mention made of the Court, because it was simply a question of directing the work of the Court. It seemed unnecessary to summon the Court for this purpose.

The PRESIDENT gathered that, if the Court adopted this suggestion for the first paragraph of Article 47, M. Anzilotti would make the same proposal with regard to paragraph 2.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to delete the words ' by the Court or ' and ' if the Court is not sitting ' in paragraph 1 of Article 47 ? "

[1] Pp. 159-160.

Baron ROLIN-JAEQUEMYNS stated that he would vote for M. Anzilotti's proposal because he wished to eliminate the expression " or if the Court is not sitting " from the articles where it occurred.

By seven votes to three, the Court answered the question put by the President in the negative.

Jonkheer VAN EYSINGA suggested that the vote concerning the proposal to replace the words " after the last document of the written proceedings has been filed ", in paragraph 1, by the words " when the case is ready for hearing " should be reconsidered; he personally had voted in favour of the retention of the former words because he had been influenced by the difficulties alluded to by the President; but these apparently related only to the English text.

Count ROSTWOROWSKI said that he was in favour of a fresh vote on this point, but wished the wording voted upon to be: " When a case has become ready for hearing " *(après que l'affaire est en état)*.

The PRESIDENT, noting that there was no opposition to the proposal to hold a fresh vote, put the following question to the Court:

> " Does the Court decide to adopt the following text for paragraph 1 of Article 47:
>
> > " ' When a case has become ready for hearing, the date for the commencement of the oral proceedings shall be fixed by the Court or by the President if the Court is not sitting ' ? "

The Court unanimously answered the question in the affirmative.

Article 47, Paragraph 2.

The PRESIDENT opened the discussion on paragraph 2 of Article 47[1].

M. ANZILOTTI, though he did not ask for a vote, wished to emphasise that, in his opinion, the words " the Court or . . . if the Court is not sitting " in this paragraph should be deleted.

Jonkheer VAN EYSINGA proposed that the words " during the judicial vacations " should be substituted for " if the Court is not sitting ".

The PRESIDENT first asked the Court if they adopted the text.

The Court adopted paragraph 2 of Article 47 unanimously—but with three reservations.

The PRESIDENT next put the following question:

> " Does the Court decide to substitute the words ' during the judicial vacations ' for the words ' if the Court is not sitting ' in this paragraph ? "

By eight votes to one, with one abstention, the Court answered the question in the negative.

The PRESIDENT thought that, in the text just adopted, the words " *la Cour* " in the expression " *si la Cour ne siège pas* ", might be replaced by the word " *elle* ".

It was decided accordingly and the article was adopted in second reading.

[1] See p. 163, for text adopted as the only paragraph of Article 47 in first reading.

11.III.36.*

Article 47. — Final Adoption.

In paragraph 1 of Article 47, the Drafting Committee proposed to say: " When a case *is* ready for hearing " instead of " *has become* ready ".

In paragraph 2, the Committee proposed no change in the French, but wished to render the words " *s'il y a lieu* " by the word " may " in the English text.

Article 47, as a whole, was finally *adopted* with these amendments.

ARTICLE 48 *(New Article).*

PRODUCTION OF NEW DOCUMENTS AFTER TERMINATION OF WRITTEN PROCEEDINGS

30.V.34**

Discussed as Article 44 bis.

The PRESIDENT asked the Court to discuss Article 44 *bis*, for which the following text was proposed by the Co-ordination Commission:

> " 1. After the closure of the written proceedings, no further documents may be submitted to the Court save with the consent of the other party or Government concerned, or with the authorisation of the Court. The consent of the other party or Government concerned shall be presumed if no opposition is made to the production of the document.
>
> " 2. Should an agent or counsel, when presenting oral observations to the Court, make use of a document which is not attached to the documents of the written proceedings, copies of the document in question must be filed in order that they may be communicated to the members of the Court and to the other party. This rule shall not apply to documents that have been published and are generally available, unless the Court should order the production of copies of such documents.
>
> " 3. A party or a Government concerned shall not produce a document so late in the oral proceedings that the agent or counsel of the other party or Government concerned is unable to comment upon the said document, unless the Court decides to give the said agent or counsel an opportunity for commenting upon it."

M. SCHÜCKING felt that there were three possible situations which had to be distinguished; but this had not been done in the proposed text.

The first situation was the following: a party submitted a new document, after the closure of the written, but before the beginning of the oral proceedings; the Registry communicated the new document to the other party, which would thus be in a position to comment on it during the oral pleadings after investigating its authenticity and its contents; in that case, he questioned whether it was necessary to require the consent of the last-named party to its production.

It did not seem clear whether the first paragraph of the proposed article was meant only for the case of documents submitted to the Registry in the interval between the closure of the written and the opening of the oral proceedings. If that was the intention, the text did not appear quite satisfactory; for it might convey the impression that, even after the contents of the document had been debated in the oral proceedings, the other party, realising that the document was dangerous to its case, would be entitled to declare, at the last moment of the oral proceedings, that it refused the required consent.

The second situation which might arise was that in which a party submitted, or made use of, a new document during the oral proceedings. In that contingency, the proposed text only laid down that the party must supply the Court with copies of the new document; but the consent of the other party was surely assumed, in that case also.

Whether it was so or not, M. Schücking considered this case very complex; for if a new document were cited during the pleadings, and if the other party subsequently refused to consent to its production, the document would have already produced its effect on the mind of the judges, who would find it difficult to ignore it altogether.

That led one to think it might be desirable that the new document should, in all cases, be communicated to the other party before being read at the hearing, or distributed to the members of the Court. In that case the consent of the other party to the use of the belated document might usefully be required. But that would be a departure from the present practice of the Court, according to which the documents of one party were communicated to the other parties through the Registry.

The third contingency was that of a party submitting a document when the Court had already commenced its deliberations. He rather doubted whether the submission of a document at that stage—though it had been allowed in a particular case—was really consistent with the fundamental principles of the proceedings before the Court. He recognised, however, that the question was more complex than appeared at first sight. For if the Court decided to refuse, at that stage of the proceedings, to accept a document which the party in question had just discovered, would it not be opening the door to a request for revision ? Perhaps, however, it would be possible to restrict the right of parties to submit new documents after the close of the pleadings to cases in which the Court itself demanded the document, or in which the party had already referred to the contents of the document, or, finally, to cases in which the other party had expressly agreed to the production of the document.

In any case, M. Schücking could not agree that the proposed text furnished a satisfactory solution to all the points he had just raised.

M. GUERRERO, Vice-President, considered that the production of evidence was one of the most important questions in proceedings before the Court. In regard to the points raised by M. Schücking, he thought it would be unwise to fix the closure of the written proceedings as the latest moment for the free submission of documents.

The applicant might, indeed, only realise the necessity for submitting a particular document after studying the last document of the respondent's written proceedings; and it would not be fair, in those circumstances, to refuse it the right to submit it without the other party's consent. Or again, one of the parties might find it necessary, during the first part of the oral proceedings, to submit a new document, as a result of something said by the other party

* D 2, A. 3, pp. 730-731.
** *Ibid.*, pp. 122-132.

in the course of its pleadings. It seemed clear that the Court should accept such a document, subject always to its duty of preventing any unjustifiable delay in the submission of documents. For it was to the Court's advantage to be acquainted with all the evidence, so that it might give judgment with a full knowledge of the facts.

If it was thought necessary to fix a time-limit for the free submission of documents, it would appear better to take a *via media;* for instance, they might say: "... after the first phase of the pleadings"—*i.e.*, when the applicant party had made its first oral statement and the other party had replied thereto.

Should fresh documents be submitted after that time-limit, the Court would not fail, in the interests of true justice, to give the other party an opportunity of commenting on them.

Count ROSTWOROWSKI considered that the Court should choose between two systems: the first would be to leave the entire responsibility for the submission of documents to the parties; the second would be to allow some initiative to the Court in the production of evidence, by empowering it to demand the production of a document, *proprio motu.* The article as proposed by the Co-ordination Commission made no provision for the case of a document being produced because it was called for by the Court. Yet the Statute appeared to intend the Court to play a very active part in the production of evidence.

The PRESIDENT explained that the Co-ordination Commission's idea, in proposing the first paragraph of Article 44 *bis*, was to fill a gap in the existing Rules, which indeed laid down that documents in support must be attached to the Case (Counter-Case), but did not make it clear that documents which were known to the party must, if possible, be submitted during the written proceedings. Where that was not possible, the Court could always authorise the submission of a document at a later stage. But there was a risk to the party, and the first paragraph drew attention to this.

The President added that Article 49 of the Statute gave the Court full power to call for the production of any document, at any stage of the proceedings.

M. URRUTIA considered that the new Article 44 *bis* constituted an interpretation of Article 52 of the Statute, as meaning that proofs and evidence must be submitted during the written proceedings.

M. ANZILOTTI suggested that Article 52 related solely to oral proceedings.

The PRESIDENT said that, according to Article 52 of the Statute, if the new document were submitted with the consent of the other party, the Court was not even entitled to refuse it; if such consent was not given, the Court might accept it or refuse it. In his view, that provision was in harmony with the first paragraph of the proposed Article 44 *bis*.

M. ANZILOTTI thought that the attitude of the Court towards this question should be as little formal as possible. From that standpoint, he considered the Vice-President's proposal eminently practical, as it would allow the free submission of documents during the first phase of the oral proceedings also; for the periods of the reply and the rejoinder, they might envisage a clause prescribing that the consent of the other party, or, failing this, the leave of the Court, must be obtained.

M. Anzilotti further drew attention to the provisions of Article 61 of the Statute concerning the revision of the Court's judgments, and asked what would be the situation if the Court, after refusing leave to a party to submit a document that had been discovered at the last moment, had to deal, later on, with a request for revision based on this very document. Would the Court be bound to reject the request, on the ground that the document was known before the judgment was given? He thought that, to avoid difficult situations, the Court should adopt the most liberal attitude possible in regard to this matter. In his view, the question turned on the respective importance of the written and oral proceedings. Though he recognised that, before an international Court, the written proceedings were more important than would be the case before a national court, he would like to see more importance attributed to the oral proceedings before the Court, which should not be a mere repetition of the written memorials.

M. GUERRERO pointed out that his suggestion would, in the first place, make it possible to accept documents which a party, in good faith, did not present until the first phase of the oral proceedings; and, secondly, it would enable the Court to prevent an abuse of the Rule—*e.g.*, if a party submitted a document late without adequate reason, the Court might allow the other side a period in which to rebut its contents.

M. SCHÜCKING feared that, if they laid down in the Rules, as suggested by the Vice-President, that a party might always submit new documents during the first phase of the pleadings without the consent of the other party, that might be regarded, in some measure, as an invitation to the parties to keep back the more important documents until the oral proceedings.

M. URRUTIA thought it was essential to discuss paragraph 1 of the proposed article in conjunction with the succeeding paragraphs.

For his own part, he saw no difficulty in accepting the principle laid down in paragraph 1, provided that the parties were left free, as was done in paragraph 2, to submit documents, subject to certain conditions, at the time of the pleadings, and provided that, as laid down in paragraph 3, a party might exercise that right at any time up to the end of the oral proceedings.

Baron ROLIN-JAEQUEMYNS asked whether, in the opinion of the authors of the draft, paragraph 2 provided for the case of an agent making use of a new document, although the conditions set forth in paragraph 1 were not fulfilled.

M. FROMAGEOT considered that the drafting of Article 44 *bis* seemed unsatisfactory. Comparing paragraph 1 with paragraph 2, it appeared that, if the new document was presented after the written proceedings and before the commencement of the oral proceedings, the consent of the other party or the sanction of the Court was required, but that, if it was presented during the oral proceedings, all that was required was the distribution of a certain number of copies.

Paragraph 3 also laid down a somewhat vague condition.

M. Fromageot wished to draw a distinction between the acceptance of a new document and the conditions which might attach to that acceptance—namely, either the sanction of the Court or, more particularly, the communication of the document to the other party. In the written proceedings, it was quite natural that the communication to the other party of documents in support attached to the Case or Counter-Case and distributed to the Court by the Registry should also be undertaken by the latter. But he was not sure whether, after the written

proceedings had been terminated, it was a sound method to lay down that the communication of a document to the other party was to be preceded by its filing with the Registry—*i.e.* with the Court. The result was that the Registry and the Court had cognisance of the document before the party to which it was communicated and which might not consent to its production. A judge could not entirely disregard a document which had perhaps convinced him. At the oral proceedings, M. Fromageot held that no document should actually be produced or laid before the Court without having been first communicated—before being filed with the Registry—to the other party by the party desiring to produce it.

Jonkheer VAN EYSINGA had regarded the proposed article as an attempt to deal with the difficulties often encountered by the Court when documents had been produced at a time when it could reasonably be questioned whether their production was not too late. But perhaps the proposal was somewhat inelastic, and perhaps the Vice-President's suggestion contained features meriting attention.

Of course, they must set out from the principle that documents in support of the respective contentions must be produced in the written proceedings. But, that principle having been laid down, as was done in Article 43 of the Statute and Article 40 of the Rules, exceptions to it were necessary in two different sets of circumstances. In the first place, it might happen that, in the oral proceedings, fresh arguments were put forward which called for fresh arguments on the other side to rebut them, and these might entail the production of fresh documents. In the next place, it was always possible that a new document would exert such an influence that it might even necessitate revision of the proceedings. After alluding to the principle, the article might mention these two exceptional cases in which new documents might justifiably be produced as late as the conclusion of the first pleadings; only when that moment arrived would it be necessary for the other party or the Court to have a say in the matter. On the other hand, new facts might be freely adduced at any time up to the delivery of the judgment in virtue of Article 61 of the Statute, to which M. Anzilotti had referred.

M. SCHÜCKING thought that the simplest plan would be to refer the article back to the Co-ordination Commission, which should, however, first of all be acquainted with the ideas of the majority of the Court. For instance, it had been suggested that the party which desired to adduce a fresh document in the oral proceedings should communicate that document directly to the other side, in order that the latter might, if it desired, object before the judges were acquainted with the contents of the document. The Co-ordination Commission must know the views of the Court on this point.

The PRESIDENT observed that the Court had before it a motion proposed by the Vice-President and supported by M. Anzilotti.

M. GUERRERO, Vice-President, recalled that this proposal was intended to fix the time-limit for the production of evidence at the beginning of the oral proceedings— *i.e.* after the applicant's first speech and the respondent's answer. By fixing the time referred to in Article 52 of the Statute thus, they would, on the one hand, avoid any excessive strictness and, on the other, dispose of the difficulties experienced by the Court in the past.

M. FROMAGEOT considered that to fix a limit part-way through the oral proceedings would be a compromise, but that this was not a matter for compromise. A time-limit should be fixed at the termination of the written proceedings or, in the case of documents *bona fide* discovered by a Government at the last moment, at the conclusion of the oral proceedings. Care must be exercised to avoid the danger of a possible application for revision.

M. NEGULESCO thought that a document might be produced at any stage of the proceedings. Article 61 of the Statute showed that a document might be produced up to the time of delivery of judgment. But certain principles must be laid down: the production of documents at the discretion of the respective parties should only be possible up to the end of the written proceedings. Later, they should be able to produce documents only with the consent of the other party. In the event of an objection, the Court would decide.

These were the three ideas which, in M. Negulesco's view, should be brought out in drafting a text for Article 44 *bis*.

M. FROMAGEOT still had doubts regarding the communication of documents from one party to the other through the Court.

M. ANZILOTTI asked whether there was not a provision laying down that this was to be done through the Registry.

The REGISTRAR said that there was: Article 43 of the Statute.

M. FROMAGEOT considered that Article 43 of the Statute applied only to the written proceedings.

The PRESIDENT would have preferred the first paragraph of the proposed article to be purely and simply rejected rather than adopted in the form proposed by the Vice-President, which, in the President's opinion, would entail unforeseen consequences. He feared that the rule, if adopted in this form, would not preclude the production of documents intentionally held back, the very possibility which the proposed article was intended to prevent.

Jonkheer VAN EYSINGA having referred to the suggestion made by him with a view to defining the idea put forward by the Vice-President, a suggestion with which he hoped the President would agree, the PRESIDENT asked Jonkheer van Eysinga to draft a text embodying this suggestion. Jonkheer VAN EYSINGA agreed to do so and read the following text:

> "Nevertheless, should new arguments advanced by one party in the course of the first statements at the oral proceedings oblige the other party to produce new written evidence or documents, it may do so without first obtaining the consent of the other party or the sanction of the Court. The same shall apply should the other party discover, before delivery of judgment, a document which is new in the sense of Article 61 of the Statute."

M. ANZILOTTI wondered what was meant by "new arguments". The expression seemed to him vague. He also recalled the difficulty arising from the fact that some documents which, in the written proceedings, might in all good faith be regarded as irrelevant and unimportant might perhaps assume importance as a result of the hearing of witnesses, of expert enquiries or of a visit of inspection. This consideration seemed to point to the fact that a hard-and-fast line drawn between the written and oral proceedings might in some cases lead to difficulties or even to injustice.

Jonkheer VAN EYSINGA observed that, in the event of a dispute as to whether certain arguments were or were not "new", the decision would rest with the Court.

The PRESIDENT asked Jonkheer van Eysinga whether

he would agree to the addition at the end of his draft of the words: " In case of doubt, the decision shall rest with the Court."

Jonkheer VAN EYSINGA agreed to this.

Baron ROLIN-JAEQUEMYNS said that Jonkheer van Eysinga's text could be applied only if the decision rested with the Court. He thought the Court should have the widest possible powers, but these powers seemed to be limited by the proposed text, as the Court would intervene only in case of doubt.

The PRESIDENT proposed that the Court should first vote on the substance of the Vice-President's proposal, which was that in paragraph 1 of Article 44 *bis* of the Co-ordination Commission's text, the words " after the termination of the written proceedings " should be replaced by: " after the completion of the first two oral statements . . .".

Baron ROLIN-JAEQUEMYNS proposed that they should say: " before the Replies ". It might happen that there were two counsel speaking on behalf of the same party.

M. ANZILOTTI, in that case, would be in favour of saying: " after the termination of the oral proceedings ".

The PRESIDENT asked the Vice-President if he agreed to these suggestions.

M. GUERRERO, Vice-President, replied that he did, but at the same time referred to what he had already said in explanation of his amendment. He added that, if the Court accepted a new document, it should re-open the hearing in regard to that document.

M. FROMAGEOT feared that the text proposed by the Vice-President would encourage agents to produce their most convincing evidence only at the very last moment, and he preferred the Co-ordination Commission's text.

M. ANZILOTTI would be sorry if the right to present new documents during the oral proceedings were not recognised. He would not, however, propose an amendment, as the Court did not seem to share his view.

M. WANG had understood the Vice-President's motion to be as follows: that paragraph 1 of the proposed Article 44 *bis* should be maintained, but that the Vice-President's proposal should constitute an exception to the rule laid down in that paragraph.

M. GUERRERO, Vice-President, agreed that that was so.

M. ADATCI said that, being in favour of the compromise suggested by Jonkheer van Eysinga, he would vote against the Vice-President's motion.

M. FROMAGEOT, in principle, would prefer the text of the Co-ordination Commission for the first paragraph, but with the following addition: " save with the consent of the other party *to which the new document shall have previously been communicated* "; he also considered that the passage in the paragraph relating to the presumption of consent was too vague.

M. Fromageot would be in favour of deleting most of the Co-ordination Commission's second paragraph.

M. ANZILOTTI was afraid that it would be difficult at present to vote upon a text. But the Vice-President had raised a question of principle upon which the Court might perhaps vote. The question could be formulated as follows:

> " Is the Court of opinion that, after the termination of the written proceedings, no further written evidence should be accepted, save with the consent of the other party or with the sanction of the Court ? "

If the principle were adopted, the Co-ordination Commission could work out the final text.

M. GUERRERO, Vice-President, agreed with M. Anzilotti. But, in order to make it quite clear what the vote was about, it should be stated that it related to the principle laid down in Article 44 *bis*.

The PRESIDENT raised the question whether, if the Court answered the question in the negative, it would be obliged to add something to the text of Article 44 *bis*.

M. ANZILOTTI thought that, in that case, either the Vice-President's proposal or that of Jonkheer van Eysinga would then come up for consideration.

The PRESIDENT thought that, as some members of the Court seemed to think that it would be better not to touch the existing Rule, the Court might first vote on that point. Accordingly, he asked whether the Court was in favour of maintaining the text of the existing Rules, in so far as concerned the point under discussion.

By nine votes to three, the Court answered the question in the affirmative.

The PRESIDENT then repeated M. Anzilotti's motion, which was as follows:

> " Is the Court of opinion that, after the termination of the written proceedings, no further written evidence should be accepted, save with the consent of the other party or with the sanction of the Court ? "

M. URRUTIA asked M. Anzilotti whether his motion contained an implicit reference to Article 61 of the Statute.

M. ANZILOTTI having replied in the affirmative, M. URRUTIA said that he would vote against the motion, since an affirmative answer would, in his view, be inconsistent with the Statute.

The PRESIDENT took a vote on M. Anzilotti's question.

The Court answered it in the affirmative by seven votes to five.

M. ANZILOTTI proposed that the text should be referred back to the Co-ordination Commission, or that M. Fromageot should be asked to work out a new draft.

M. NEGULESCO thought that the Co-ordination Commission might usefully draw up a new text, in which effect would be given to the decisions that had just been adopted.

The PRESIDENT, though not desirous of putting more work on the Co-ordination Commission, hoped that it would see its way to frame a clause such as would satisfy, if not the whole, at any rate the great majority of the Court.

No objection having been offered, he declared that the Co-ordination Commission was requested to reconsider its text.

Article 44 bis, *Paragraph 2.*

The PRESIDENT opened the discussion on the second paragraph of Article 44 *bis*, which was based on the assumption that the document in question had been regularly produced — in other words, that it had been produced with the authorisation of the Court, or with the consent of the other party.

Count ROSTWOROWSKI thought that the wording of this text should make it clear that paragraph 2 was dependent on paragraph 1.

M. SCHÜCKING thought there was a contradiction between paragraph 2 and paragraph 1. Paragraph 2 laid down that the documents must be filed with the Registry in order to be communicated to the other party; but, according to

paragraph 1, the consent of the other party had to be obtained before the document was submitted to the Court.

The PRESIDENT asked what the Court's practice had been in recent proceedings.

The REGISTRAR said that, if the party concerned submitted a new document in duplicate, one copy was forthwith transmitted to the other party, with a mention that it was only a provisional copy. The second copy was used by the Registry for the reproduction of the document. A certain number of the copies thus reproduced, duly certified as correct, were then transmitted as official copies to the other party, at the same time as to the judges.

If the party in question had filed the document in one copy only, an analogous procedure was observed.

In all cases, the opposing party had cognisance of the document before—though sometimes very shortly before—it was seen by the members of the Court.

M. SCHÜCKING and M. FROMAGEOT thought that, in spite of the explanations just given in regard to the practice, there was a contradiction between paragraphs 1 and 2 in Article 44 *bis*.

The PRESIDENT said that, in the light of the experience gained in the Eastern Greenland case, the Second Committee had proposed, for Article 44 *bis*, two paragraphs [1] almost identical with those now submitted by the Co-ordination Commission; some improvements had, however, been introduced in the latter texts, out of regard to the Court's judgment in the Peter Pázmány case.

M. FROMAGEOT said that, in conjunction with the question dealt with in paragraph 2—which was of a purely material nature—they had to consider a much graver point which had not yet been dealt with; namely, the case in which one party demanded that the other party should submit a particular document. How far, he asked, was the Court able to compel its production ?

The PRESIDENT observed that that question had been discussed in the first report of the Second Committee.

M. URRUTIA feared that it would be very difficult for the Court to make rigid rules.

It would be better to be content with the terms of Article 52 of the Statute and leave the Court free to refuse any document submitted without the consent of the other party—in other words, to ignore it for the purposes of its decision.

The PRESIDENT gathered that M. Urrutia was, in consequence, in favour of omitting paragraph 2.

M. URRUTIA replied in the affirmative; he would also favour the omission of paragraph 3.

The PRESIDENT asked the Registrar if the omission, purely and simply, of paragraph 2 would cause him any difficulty.

The REGISTRAR said he did not think so; the existing practice would be continued. At the worst, there would be a certain lack of symmetry; for, in regard to documents submitted with Cases and Counter-Cases, various details had already been laid down—*e.g.*, in regard to languages and certificates—whereas, in the case of documents submitted during the oral proceedings, these details had been reserved for this very Article 44 *bis*. It would, however, be quite possible to proceed, by making analogous application of the existing Rules.

M. ANZILOTTI was prepared to agree to the omission of this paragraph. It would, however, be necessary to say somewhere in Article 44 *bis* what procedure had to be followed in order to obtain the consent of the other party, or the decision of the Court.

M. FROMAGEOT thought that something would have to be added in the first paragraph to elucidate the meaning; they might say, for instance: " . . . save with the consent of the other party, to which the document must have been previously communicated ".

Baron ROLIN-JAEQUEMYNS thought that this suggestion should be referred to the Co-ordination Commission.

The PRESIDENT pointed out that, if the Court wished the Co-ordination Commission to review the text of Article 44 *bis*, it must give some guidance to the Commission.

Baron ROLIN-JAEQUEMYNS observed that a decision had already been adopted in regard to paragraph 1; and the discussion on paragraph 2 had shown clearly that, in the Court's opinion, that paragraph was merely a supplement to paragraph 1, intended to explain its working.

The PRESIDENT said that, as regards paragraph 1, in view of what the Court had decided, the Co-ordination Commission would do its best to find a formula that would satisfy most of the members; but, if that was found impossible, the Commission would leave the article as it stood.

M. SCHÜCKING pointed out that M. Fromageot had suggested omitting paragraph 2 of the article, while adding words to paragraph 1, which would run: " . . . the consent of the other party, to which the document must be communicated immediately . . .", in other words, providing that the communication would only take place between the parties.

Jonkheer VAN EYSINGA thought it would be highly imprudent to do anything to weaken a principle which was one of the corner-stones of the Court's jurisdiction—namely, that, before the Court, any contact between the parties must take place through the Registrar, pursuant to Article 43 of the Statute, which precluded any direct communication between them.

M. SCHÜCKING pointed out that Article 43 of the Statute referred only to the written proceedings.

Jonkheer VAN EYSINGA said that it referred, primarily, to the written proceedings, but that it also contemplated the oral proceedings. Moreover, this was a principle that had never been called in question.

M. FROMAGEOT thought that, for the sake of clarity, the Rules should lay down that any new document that it was proposed to submit should first be filed with the Registry, and then communicated by the Registry to the other party; the latter would either give or refuse its consent; and then the Court would decide.

The PRESIDENT considered that it might, indeed, be undesirable for the Court to examine a document before it had been formally admitted.

M. GUERRERO, Vice-President, thought that the members of the Court would, in any case, inevitably have to become acquainted with the document, either because the party concerned had given its consent to its production, or because it had refused its consent; for, in the latter case, the Court would certainly be compelled to examine the document in order to decide whether to give or refuse its authorisation.

The PRESIDENT thought that, after the discussion which

[1] See D 2, A. 3, p. 770.

had just taken place, the Court could decide on the question of the omission of paragraph 2 of Article 44 *bis*.

He put the *retention* of the said paragraph to the vote.

By eleven votes against one, it was decided to omit the second paragraph proposed by the Co-ordination Commission for Article 44 *bis*. MM. Negulesco, Anzilotti, Fromageot, Count Rostworowski, Baron Rolin-Jaequemyns and M. Guerrero said they had voted against the retention of the paragraph on the understanding that paragraph 1 would be amplified.

6.11.35.*

Discussed as Article 44 bis.

The PRESIDENT observed that lengthy discussions had taken place in the previous year regarding Article 44 *bis*. The discussion had resulted in a number of decisions, and in particular the adoption in principle [1] of the first paragraph of the text proposed by the Co-ordination Commission [2] and the deletion of the second paragraph of that text.[3] The third paragraph, however, had not been discussed and no final draft had been adopted.

M. SCHÜCKING, observing that Article 44 *bis* related to evidence, thought that it would be better to deal first in the Rules with the course of the oral proceedings in general, dealing with evidence only after Article 46 of the Rules, and then to group together all provisions relating to this subject.

M. FROMAGEOT agreed. He added that evidence was either written and documentary evidence, or oral; of oral evidence some might be the evidence of witnesses. It would be a good thing to say in one and the same provision that, after the termination of the written proceedings—and even during the oral proceedings if the necessity arose—if a party wished to produce a new document it might do so, but subject to the condition that this new document must be communicated beforehand to the other party and to the Court. Finally, it would be well to state that, if a party intended to call witnesses, experts or any other persons able to furnish oral information or explanations, it must give notice of such intention a certain time before the commencement of the oral proceedings.

All these rules should be grouped together instead of being scattered, as was at present the case, amongst various articles relating to different matters.

M. SCHÜCKING proposed in this connection that the discussion of Article 44 *bis* should be postponed until after Article 46 had been discussed, since the latter article, he considered, dealt with what might be described as the normal oral procedure.

M. NEGULESCO observed that M. Schücking and M. Fromageot had raised a question of principle. The existing Rules appeared to confuse the taking of evidence and the oral pleadings. According to the codes of procedure of the different countries, however, parties were able to submit their oral evidence after the termination of the written proceedings, and when all the evidence had been produced the parties were convoked to appear in open court to argue the merits of the case. It was no doubt true that, during the course of the hearings, additional evidence might either be called for by the Court *proprio motu*, or be produced by the representatives of the parties; but that was no reason why the Rules should not follow a more logical arrangement: first should come the provisions relating to evidence, and next the provisions concerning the oral proceedings.

Jonkheer VAN EYSINGA thought that it might be conceded that the ideal procedure would be one in which each party would attach to its memorials in the written proceedings all documents on which it intended to rely, and would produce a list of witnesses before the hearing, where such witnesses were heard immediately, and in which the Court would not open the oral argument until after having read all documents and heard all witnesses.

This, however, was not the system provided for in the Statute, and the Court could not modify the Statute by means of the Rules. Articles 48, 49, 50 and 51 of the Statute did not establish a clear demarcation between the stage of oral argument and that of the production of written and oral evidence; on the contrary, it prescribed that evidence might be produced during the oral argument.

M. GUERRERO, Vice-President, had gathered that M. Schücking's idea was that all articles concerning the production of evidence should be grouped together in order to make it easier for a party to refer to the necessary data when seeking to ascertain how evidence should be submitted. He shared this view and suggested that the Drafting Committee should be asked, in conjunction with M. Schücking, to prepare a draft on these lines.

M. FROMAGEOT drew Jonkheer van Eysinga's attention to a distinction to be drawn between the duties of parties and the powers of the Court in connection with the taking of evidence. What the Statute did was to provide that the Court could at any time call for additional evidence. Besides this power of the Court, however, there was the duty of parties to produce their evidence; M. Fromageot thought that the present discussion mainly concerned the moment at which they should do so.

In regard to this, it was certain that it was impossible strictly to apply the idea that all evidence must be produced before the oral argument of a case, because even in the course of that argument parties might be called upon to produce fresh evidence, not merely to meet a request by the Court, but also as a result of the arguments of the other side. Accordingly, it could not be laid down that, once the oral proceedings had begun, no further evidence could be produced; on the other hand, it should be laid down that, if in the course of the oral argument a party considered that a new document should be produced, such document could be produced only if it had been communicated beforehand to the Court and the other party.

M. NEGULESCO said that his remarks related to the duty of parties to support their statements by evidence; such evidence should, in his view, be furnished before the commencement of the hearing. It was clear that additional evidence could be produced, even after the opening of the oral proceedings, but such evidence might be refused admission in virtue of Article 52 of the Statute.

The PRESIDENT thought that the system provided for in the Statute and Rules was the only one appropriate to an international tribunal such as the Court, where, save in exceptional cases, evidence would be furnished by the parties in written form. And the system of the Statute (more especially Article 43) was that evidence would in principle be in writing, the production of oral evidence being additional and optional.

M. NEGULESCO pointed out that, under Article 47 of the

* D 2, A. 3, pp. 180-182 and 187-188.

[1] P. 168.

[2] P. 165.

[3] See above.

Rules,[1] each party must inform the Court and the other parties, in sufficient time before the opening of the oral proceedings, of all evidence which it intended to produce. This provision, he thought, was incomplete: was the Court to decide before the oral proceedings whether evidence which it was proposed to produce was admissible or not? Was it bound to hear witnesses which a party proposed to call, even if the evidence in question was not relevant? And if the Court was bound to hear a witness if the parties were agreed that he should be called, what was the situation if they disagreed? His own opinion was that the Court would have to decide by an order made under Article 48 of the Statute.

M. ANZILOTTI observed that the Court had purposely reserved an entirely free hand for itself to hear the parties before or after the production of the different forms of evidence.[2]

The PRESIDENT noted that M. Schücking's proposal that Article 44 *bis* should not be discussed until after Article 46 (Article 47 of the Rules of 11.III.36) was adopted.

. . . . . .

Discussed as Article 44 bis.

The PRESIDENT asked M. Schücking if he also desired to reserve Article 47.

M. SCHÜCKING answered in the affirmative. In his view, the Court should now go on to discuss the articles concerning evidence. The first of these was Article 44 *bis*.

The PRESIDENT pointed out that the Drafting Committee had not yet framed the text of this article.

M. FROMAGEOT observed that there were some points which had already been touched upon, but which it would be useful to decide before drawing up the text. First, there was the question of allowing agents and counsel to submit evidence, which they desired to produce during the hearing, after the close of the written proceedings. Next, there was the question of the forms and conditions governing the submission of new documents in this way.

The PRESIDENT pointed out that these questions had been debated at length by the Second Committee, the Co-ordination Commission and the Court itself in May 1934 and had been the subject of decisions; he asked if the Court desired to re-open questions which it had dealt with in May.

M. FROMAGEOT said he did not wish to re-open questions which the Court had settled by its vote; but he was uncertain whether, as things now stood, it was possible for a written document to be submitted to the Court after the closure of the written proceedings.

Baron ROLIN-JAEQUEMYNS, referring to the documents relating to the work undertaken in May 1934, said he believed that, as things now stood, it was possible, subject to certain conditions, to file new documents even after the closure of the oral proceedings.

M. FROMAGEOT proposed to take as a starting-point the following text, which the Court adopted in 1934 on M. Anzilotti's motion:

> "The Court is of opinion that, after the termination of the written proceedings, no further written evidence shall be accepted, save with the consent of the other party or with the sanction of the Court."[1]

M. SCHÜCKING pointed out that, in 1934, the Court had adopted the first paragraph of Article 44 *bis* in principle and had deleted the second paragraph. They should now, therefore, examine the third paragraph.

M. Schücking proposed to omit this paragraph and to add to the first paragraph the following words, which were a reproduction of the second part of paragraph 3:[2]

> "The Court will give its sanction if the document has not been submitted too late to allow the agent or counsel of the other party an opportunity of commenting on it, provided always that the Court may decide to afford such opportunity to the said agent or counsel."

The PRESIDENT would prefer that the sentence should begin in the negative form. It might read: "The Court will not give its sanction if the document has been submitted too late. . . ."

The REGISTRAR observed that the Court had power to authorise the party to produce a fresh document, but at the same time to allow the other party an opportunity of commenting on the document. Consequently, the question whether it was "too late" was one for the Court to decide; it was a subjective condition. If the Court desired to take the course suggested by the President, they would have to adopt a slightly different wording, something, for instance, on the following lines: "The Court will not grant such sanction without at the same time giving the other party an opportunity of offering comments."

M. SCHÜCKING thought that it would really be necessary to insert this idea in the first paragraph, and to delete the first words of paragraph 3.

M. GUERRERO, Vice-President, desired, on the contrary, to maintain the distinction between paragraphs 1 and 3 of Article 44 *bis*, seeing that they related to two perfectly distinct cases, namely: in the first place, the filing of a document at the beginning of the oral proceedings; and, in the second place, its submission when it was manifestly too late.

M. SCHÜCKING said that the text of the first paragraph appeared really to cover both cases.

The PRESIDENT asked M. Schücking to draw up a text which might serve as a basis of discussion at the next meeting.

7.II.35.*

Discussed as Article 44 bis.

The PRESIDENT said that the Drafting Committee had met on the previous day to consider the amended text of Article 44 *bis* drafted by M. Schücking. The Court had now to examine the text prepared by the Committee, which was as follows:

> "Except as provided in the following paragraph, no new document may be submitted to the Court after the termination of the written proceedings save with the consent of the other party. The party desiring to produce the new document shall file the original or a certified copy thereof with the Registry, which will be responsible for communicating it to the other party and will inform the Court. The other party shall be held

[1] *I.e.*, the article of the old Rules bearing this number (Article 49 of the Rules of 11.III.36).

[2] Article 45 of the old Rules. *Cf.* Series D 2, pp. 142, 208 (*sub* Article 46) (Article 50 of the Rules of 11.III.36).

* D 2, A. 3, pp. 188-199.

[1] P. 168.

[2] P. 165.

to have given its consent if it does not lodge an objection to the production of the document.

"If this consent is not given, the Court may either refuse to allow or sanction the production of the new document. The Court shall not sanction the production of the new document without giving the other party an opportunity of commenting upon it."

The President explained that the Drafting Committee had endeavoured in this text to meet all the views which had been expressed in the course of the lengthy discussions in May 1934, whilst of necessity being mindful of Anglo-American opinion, since the rules of evidence were not the same under the Anglo-Saxon system of law as under Continental law.

He asked M. Schücking to comment on the text.

M. SCHÜCKING said that the draft presented by the Drafting Committee was divided into two paragraphs, corresponding to two different sets of circumstances.

The first began by laying down the rule that no new document might be presented to the Court after the termination of the written proceedings save with the consent of the other party; it covered the case where such consent was given.

There were three periods to be considered: the first extended from the end of the written proceedings to the beginning of the oral proceedings; the second corresponded to the actual hearings; and the third began at the conclusion of the hearings and continued during the Court's deliberation.

The Drafting Committee had decided to apply the same rule to these three periods. At a previous discussion, [1] the Court had already considered whether it was possible to rely on a document submitted during the deliberation. It had decided that this was possible, because it might happen that the nature of this document was such that, if the Court refused to accept it, an application for revision could be based thereon (Article 61 of the Statute). The Drafting Committee, however, had not explicitly mentioned this possibility; it was covered by the words: "after the termination of the written proceedings".

The expression used in the text was "*nouveau document*", and not "*pièce justificative*", because it was a question of evidence. The word "*document*" had a technical meaning in law and meant an instrument to be relied on to establish facts. The expression "*pièces justificatives*", on the other hand, was much wider. For instance, the citation of an authority on international law came under the heading of a "*pièce justificative*" but not of a "*document*" in the sense in which that word was used in this article. [2]

The second sentence of the first paragraph indicated the course to be followed by a party when submitting a document after the termination of the written proceedings. The question whether the party concerned should communicate the document direct to the other side had been exhaustively considered. The Committee had adopted the view previously expressed by Jonkheer van Eysinga [3] to the effect that, in proceedings before the Court, there was no direct communication between the parties and had held that an agent desiring to transmit a document to the other side must do so through the Registry. This principle had been stated in the following sentence:

"The party desiring to produce the new document shall file the original or a certified copy thereof with the Registry, which will be responsible for communicating it to the other party and will inform the Court."

Two views had been expressed in the Drafting Committee concerning the communication of the new document to judges. One view had been that any document filed with the Registry must be at once communicated to the judges. The other view had been that there should not be immediate communication to judges, so that they would not be acquainted with the document and should not be influenced by it, in case the document were not accepted as a result of the other party's refusal to consent and of the withholding of the Court's sanction.

In the course of a previous discussion [1], the Vice-President had said that there could be no objection to all judges seeing new documents because they would do so in any case, for either the other party would give its consent or it would refuse to do so, in which case the Court would have to consider whether or not to sanction the production of the document. It had, however, been observed in the Drafting Committee that there were yet other possibilities. For instance, the party wishing to produce the document might prefer to withdraw it if the other party refused its consent, in which case it would no doubt be better that the judges should not have seen it.

That was why the Drafting Committee had thought it important to make it possible for the Court to refuse to accept the new document without having seen its contents. With this object in view, the Committee had refrained from prescribing in paragraph 1 that the Registrar should at once communicate the new document to judges and had simply provided that the Registry should inform the Court of the submission of the document.

The third sentence of paragraph 1 was as follows:

"The other party shall be held to have given its consent if it does not lodge an objection to the production of the document."

This meant that it was not necessary for the other party expressly to give its consent. There might be reasons preventing an agent from formally accepting a new document, though not necessarily obliging him to refuse to do so. It was therefore better to provide for the possibility of tacit consent.

The Committee had of course considered whether it was necessary to fix a time-limit for express or tacit consent. It had, however, seemed to the Committee impossible to lay down hard-and-fast times in the Rules, because that was a question which would always depend on the circumstances of the case. The Committee thought that this point could be decided in each case on the basis of the principle of *tempus utile*. In making provision for tacit consent, the Committee had not been satisfied with a mere presumption; it had created a *præsumptio juris et de jure* by saying that the other party shall be "held to have given its consent".

The second paragraph of the text dealt with the case where the other party had not consented. It was provided that in that case the Court could either refuse to allow or sanction the production of the new document. If, before deciding, the Court wished to see the new document, it might order the Registry to communicate it to it; but it could likewise disallow the new document without seeing it, and the same held good if the Court wished to sanction the production of the new document. The text therefore possessed considerable flexibility. If, however, the other party

[1] Pp. 165-166.
[2] *Cf.* Series A/B 61, p. 216.
[3] P. 169.

[1] P. 169.

had not given its consent and the Court nevertheless sanctioned the production of the document, it was provided in the last sentence of the paragraph that the Court must always give the other party an opportunity of commenting on the document produced.

Baron ROLIN-JAEQUEMYNS in general approved the text. For his part, he did not attach much importance to the use of the word "*document*" rather than "*pièce*", though he thought it better in any case always to use the same term.

He thought, however, that the meaning of the words "The Registry will inform the Court" required further definition. According to the interpretation given by M. Schücking, the Registrar was to examine the document, communicate it to the other party and, after having apprised the Court of this, to keep it by him pending instructions from the Court.

He thought, however, that, when a new document was communicated to the other party, all the judges should see it. Moreover, they would automatically do so in any circumstances save in the quite exceptional case where the party which had produced the new document itself withdrew it upon an objection being recorded by the other side. In that case also, moreover, it would be desirable for the Court to see it in order that judges might know with what object it had been produced.

If the words "will inform the Court" meant that the document would not be communicated to judges, Baron Rolin-Jaequemyns could not accept the proposed text.

The PRESIDENT explained that the Drafting Committee had tried to find a wording with sufficient flexibility to cover all possible cases and to enable the Court in each case to arrive at an appropriate solution. The Court must above all be left sufficient latitude to be able to short-circuit the possible bad faith of a party, which might, for instance, try without justification to delay as much as possible the moment at which it produced an important document. The proposed draft made it possible in such circumstances to refuse to accept the document— that was to say to inflict a penalty—without having seen it.

Another possible case was where the other party refused its consent because it held that the document was irrelevant. The draft enabled the Court in that case to see the document before deciding.

Lastly, the Drafting Committee had tried to keep in mind the Anglo-American system with regard to evidence as well as the system prevailing on the Continent of Europe. If the article did not stress the fact that the Court had power in all circumstances to reject the document without first examining it, it would give rise to misgivings in Anglo-American legal opinion, which was much more strict in regard to evidence than Continental opinion.

Baron ROLIN-JAEQUEMYNS said that, with regard to the substance of the question, it would be impossible for him as a judge to decide as to the relevance of a document without seeing it. In such a case he would always demand the production of the document.

It was possible to imagine a system according to which, at a certain stage of the proceedings, no fresh document might be produced. But in a Court like this, a greater latitude must be allowed. And it was essential that judges should be acquainted with all that happened.

The PRESIDENT asked Baron Rolin-Jaequemyns whether, in his view, a decision by the Court, not upon the relevance of a document but upon the question whether it had been produced too late, also necessitated seeing the document.

Baron ROLIN-JAEQUEMYNS thought that judges could not decide whether a document had been produced too late without seeing it.

M. GUERRERO, Vice-President, made some reservations regarding the principle of tacit consent to the production of a new document.

If the Court agreed that the fact that no objection was lodged to the production of a document was to be regarded as equivalent to consent, M. Guerrero thought that a time-limit should be fixed. Of course, it was difficult to fix this time, since the other party almost always had to inform its Government and undertake researches. Just because of this very difficulty, however, it would perhaps be prudent not to envisage tacit consent. M. Guerrero therefore proposed the deletion of the sentence concerning it.

The PRESIDENT said that the Drafting Committee had relied on the experience of the Court. He requested the Registrar to give some indications as to what that experience had been.

The REGISTRAR said that experience had shown that it was really indispensable to be able clearly to tell the parties whether they were expected expressly to give their consent or to enter an objection, as the case might be. In practice, when a new document was submitted, it nearly always happened that the other side came to ask what it ought to do, this depending on how the Court interpreted Article 52 of the Statute. In actual fact, the Court had always accepted a new document if no objection was lodged. This practice had been confirmed by one or two recent judgments.[1]

When a document was produced during a hearing, the usual course was to wait and see what the other party would say on receiving the text. If it said nothing, the Court accepted the document on the ground that tacit consent had been given. Until when was it necessary to wait? That was the time-limit question, but that question had never given rise to difficulties, because there were always circumstances indicating sufficiently clearly what was the latest moment at which the other party should have lodged an objection if it meant to do so. For the rest, if there had been any doubt on this point, either the other party had of its own accord said that it would prefer to wait until a certain day before deciding, or else the Court had put a question to it.

Summarising, the Registrar thought that the only points clearly brought out by practice were, first, the necessity for informing the parties whether the absence of an objection was equivalent to consent or whether the absence of consent was equivalent to an objection, and, secondly, the unimportance of a time-limit.

M. URRUTIA recalled that the Court had already, on a motion[2] by M. Anzilotti, taken a vote to the effect that no new document might be produced after the written proceedings, save with the consent of the other party or of the Court. The question was therefore settled.

In the Committee's draft, the passage: "If this consent is not given, the Court may either refuse to allow or sanction the production of the new document. The Court shall not sanction the production of the new document without giving the other party an opportunity of commenting upon it", was an innovation upon the proposals of the Co-ordination Commission. In any case, M. Urrutia was afraid that this text would lead to complications because, if the other party did not give its consent, argument would

[1] A/B 53 and 61.
[2] P. 168.

be necessary upon the question whether the document should or should not be allowed. Moreover, the result would be that the new document would have produced its effect even if it were subsequently disallowed. The party producing it would thus have already attained the object which it had had in view.

The PRESIDENT pointed out that the last sentence of the second paragraph was an innovation only in the sense that it re-introduced the idea contained in the third paragraph of the Co-ordination Commission's text.[1]

M. ANZILOTTI observed that the argument contemplated by the last sentence would relate to the document itself, as the question of the admissibility of the document would have been already decided by the Court. There was no question of argument upon the question of admissibility.

M. FROMAGEOT said that the idea was that, in giving its sanction to the party producing the document, the Court at the same time gave the other party an opportunity to comment on the document.

Baron ROLIN-JAEQUEMYNS, like M. Urrutia and Jonkheer van Eysinga, had, on the contrary, understood that, according to the Committee's text, the Court would not sanction the production of the document without having heard the other party on the subject.

The PRESIDENT recalled that, in the Greenland case, one of the parties had wished to produce a new document when the stage of the oral rejoinder had been reached. Unless the Court had allowed a supplementary oral statement, counsel for the other party would have had no opportunity of commenting on this document. The decision taken by the Court on February 3rd, 1933, was as follows:[2]

> " The Court, in view of Article 52 of the Statute:
> " (1) Reserves the right, if necessary, to refuse all or some of the fresh documents produced by the Danish Agent in the course of his oral reply, and the fresh documents already produced by the Norwegian Agent in his oral rejoinder or enumerated in the list annexed to M. Rygh's letter to M. Steglich-Petersen, dated February 3rd, 1933, a copy of which letter was communicated to the Court;
> " (2) Reserves the right to furnish the Danish Agent with an opportunity to make observations on the fresh documents produced by Norway in her oral rejoinder."

The President pointed out that the object of the last sentence of the text of the Drafting Committee [3] was to provide the other party with the assurance that, if the Court allowed the document, it would in any case be able to submit observations on that document.

M. FROMAGEOT thought that, in this connection, the text might be amended as follows:

> " The Court, on sanctioning the production of the new document, shall give the other party an opportunity of commenting upon it."

Baron ROLIN-JAEQUEMYNS proposed the following:

> " If the Court sanctions the production of the new document, it shall. . .", etc.

Count ROSTWOROWSKI gathered that M. Anzilotti's idea was that the Court would first give its sanction—that was to say, declare the document admissible—and only thereafter pass upon the merits of the document. He agreed on this point. But the view had also been expressed that there must first be argument upon the substance of the document, and that only thereafter should the Court decide whether it sanctioned the production of the document.

M. ANZILOTTI confirmed that there might first be argument upon the admissibility of the document, that argument bearing only upon the actual question whether the document had not been produced too late. If the Court came to the conclusion that the document could be produced, it must—this was the second argument—allow the other party to submit its observations.

Baron ROLIN-JAEQUEMYNS, like M. Urrutia, was prepared to accept the meaning as thus defined, but this must be expressed in the text.

Baron Rolin-Jaequemyns also reverted to the question of the time-limit for the consent of the other party. With regard to this, he suggested the desirability of giving the President power to ask the party concerned why it was producing the new document and to forbid it to make use of this document until the other party had expressed its views on the subject.

The PRESIDENT considered that, with regard to documents produced during the hearings, there was no difficulty, because it was always possible for the President to ask the other side if it objected or not.

The difficulty arose with regard to the period before the commencement of the oral proceedings. But even in that case it was always dangerous to fix a time-limit.

Baron ROLIN-JAEQUEMYNS repeated his proposal that the last three lines of the first paragraph of the Drafting Committee's text should be deleted.

Jonkheer VAN EYSINGA understood in theory the desire to fix a time-limit, but observed that, from this point of view, the deletion of the last sentence of paragraph 1 would be of no use so long as the second paragraph began with the words: " If this consent is not given ". Speaking generally and having regard to the constant contact maintained between the President and the parties, he did not think it necessary to fix a time-limit.

M. ANZILOTTI pointed out that the other party might escape the operation of the tacit consent clause by making a reservation.

Report to accompany the Final Text of the Rules.

Jonkheer VAN EYSINGA added that, if the other party maintained silence, the President could always intervene.

Speaking of the observations made during the discussion in progress which showed that there might be two different interpretations of the last sentence of the second paragraph of the proposed text, Jonkheer van Eysinga thought it would be desirable that the final text of the revised articles of the Rules should be accompanied by a report explaining their meaning. He recalled that the Co-ordination Commission had already adopted this course [1].

The PRESIDENT observed that the Rules were made under Article 30 of the Statute, but that that article made no mention of the preparation of a report, which would therefore have no authority.

He asked Jonkheer van Eysinga to prepare a note to develop his idea. In any case a discussion on the subject would be premature at the moment.

Article 44 bis.

M. GUERRERO, Vice-President, considered that the pro-

[1] See p. 165.
[2] See C 66, p. 2615; A/B 53, p. 25.
[3] See pp. 171-172.

[1] D 2, A. 3, pp. 862 *et sqq.*

vision contained in the second paragraph of the proposed text was one of the most important upon which the Court had to decide.

A document of great importance for the Court's decision upon the merits of a case might be produced at the beginning of the oral proceedings. The filing of this important document at that moment might be due to the fact that the party had found it impossible to produce it earlier. Nevertheless, the other party might see fit to avail itself of its right to withhold its consent. How in that case could the Court decide either to reject or accept the document without having heard the parties argue the point ? Would the Drafting Committee agree to embody the following sentence in the second paragraph of Article 44 *bis*:

> " If this consent is not given, the Court, after hearing the parties, may either refuse to allow or sanction the production of the new document " ?

M. NEGULESCO said that he was in substantial agreement with the text before the Court, but wished to make some observations.

In the first place, he asked whether the Drafting Committee meant the word " *document* " used in its draft to bear the same meaning as the word " *pièce* " used by the Co-ordination Commission in its draft. Would it not be better to keep to the expression used in Article 43 of the Statute: " *pièces et documents* " (papers and documents) ?

Secondly, M. Negulesco thought that the Registrar should be responsible for communicating the document not only to the other party but also to judges; the latter should not merely be informed, they should receive the actual document.

In the next place, M. Negulesco thought that the Court should not decide as to the admissibility of a document without giving a hearing to the party objecting to the production of it. M. Negulesco thought that the latter party should be summoned to appear before the Court to state the grounds for its objection.

In M. Negulesco's opinion, a special procedure should be laid down for the taking of evidence before the Court; in this connection, reference should be made to Article 48 of the Statute, under which the Court made orders for the conduct of the case. It might be provided that, when a document was produced and the other party objected, the Court would make an order after hearing the parties. This system would enable the Court to avoid the sudden production at a hearing of documents which should remain secret. It would also avert the necessity for giving decisions on such questions of evidence in the judgment.

This system would enable the representatives of the parties to know what documents had been accepted by the Court, at the time of the oral conclusions. If the opposite method were adopted, according to which the Court might decide whether the documents were submitted too late in its final judgment, the representatives of the parties would be in a difficult position and would be compelled to submit subsidiary conclusions in respect of the documents filed after the proper time.

M. SCHÜCKING, replying to M. Negulesco's first point, referred to the explanations given by him at the beginning of the sitting. He also referred to the following passage in the Court's judgment in the Peter Pázmány University case:

> " The Court, in adjudicating upon this request, after deliberation, confined itself to the statement that it had before it no new document within the meaning of Article 52 of the Statute and that, consequently, it was not called upon to take a decision. When Article 52 speaks of ' *documents nouveaux* ' (' further . . . written evidence '), it means documentary evidence. And, by denying that he had produced any new documents, the Agent for the Czechoslovak Government doubtless meant to indicate that he did not intend the texts which he had cited to be regarded as evidence." [1]

In practice, therefore, it had seemed expedient to draw a distinction between evidence and newspapers, reports, quotations, etc., by means of which a party sought not to establish a fact, but merely to support its legal opinion.

The PRESIDENT, in regard to M. Negulesco's second point concerning the communication of documents to judges, referred to the explanations which he had given to Baron Rolin-Jaequemyns and designed to show that, in many cases, the question of the admissibility or inadmissibility of a document could be decided without the Court's seeing the document. That was true not only in the case of documents produced too late, but also, for instance, in a case where a party sought to produce extracts from secret documents and when the other side objected on this ground.

The President observed that this also bore upon M. Negulesco's third point. In this connection, he said that, at the time of the 1926 revision, M. Huber had proposed the addition to the Rules of the following provision (Article 33 *bis*):

> " States or Members of the League of Nations which are parties to a dispute or which furnish information to the Court in the course of advisory procedure shall be held solely responsible for the production of any particular document and for any statement made on their behalf during the proceedings. Should one of the parties submit or mention a document which the other party considers as secret, or should it make statements which the other party regards as bearing upon documents or facts which should remain secret, the party concerned may demand that the proceedings shall be conducted in private in conformity with Article 46 of the Statute. The Court, when deciding upon the request that the proceedings shall be secret, shall at the same time decide whether the evidence in question is admissible." [2]

In reply to a question from the President, the REGISTRAR said that this proposal had been rejected, because it had been held at the time that the Court could adopt the course proposed without laying down a positive rule regarding it.[3]

The PRESIDENT, with regard to M. Negulesco's fourth point, said that the Court sometimes gave its decision immediately regarding the acceptance of new documents, and that sometimes it embodied its decision in the judgment. Would it really be sound to lay down that there must be an order in all cases ?

M. ANZILOTTI, whilst recognising that, under Article 48 of the Statute, the Court should, as a rule, make orders, recalled that it had sometimes given its decision at the hearing, leaving the making of the order until later.

The REGISTRAR said that the Court did not appear so far to have given its decision upon the admissibility of new documents by order. In most cases, its decisions had been quite informal.[4]

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[1] A/B 61, p. 216.
[2] D 2, A., pp. 251, 124.
[3] *Ibid.*, pp. 126 *et sqq.*, 132.
[4] The orders made in certain cases in regard to evidence do not concern the admissibility of " new documents ". See A 7, p. 96; A 22, p. 14; A 23, pp. 38 *et sqq.*

M. SCHÜCKING observed that the Drafting Committee had not meant to make it possible to accept or reject documents without hearing the parties, and he accepted the Vice-President's proposal for the insertion in the text of the words: " after hearing the parties ". But if the Court had heard the views of the parties concerning the question of the admissibility of a new document, it would be inadvisable to leave them in doubt throughout the remainder of the proceedings whether the production of the document was to be allowed or not. It would therefore be better if the Court were to give its decision in the form of an order, without waiting until judgment was delivered.

The PRESIDENT thought that it was desirable to provide for the possibility of making an order, but was doubtful whether it was wise to make an order necessary in all cases.

Jonkheer VAN EYSINGA drew attention to the connection between M. Negulesco's fourth point and the text of Article 33 (Article 37 of the Rules of 11.III.36), paragraph 2, already adopted by the Court.[1] That paragraph said: " In the light of the information obtained by the President, the Court will make orders for the conduct of the case." That article was entirely general and involved no exceptions. It would probably be necessary to return to Article 33, and the Court could then consider the point in question.

M. URRUTIA remarked that the wording arrived at by the Drafting Committee did not preclude the possibility of hearing the parties or of making an order. If the Court found that it was dealing with a document of great importance, there was nothing to prevent its giving the parties a hearing. Nor was there anything to prevent the making of an order in a case where that course was desirable. But it would be extraordinary to compel the Court to hear the parties in regard to any document whatsoever and to make an order as to the admissibility of a document of no importance.

The PRESIDENT mentioned an additional reason in favour of M. Guerrero's proposal. The proposed provision had the indirect advantage of preventing a party from lodging an objection on trivial grounds, since it would receive warning from the Rules that it would have to make good its objection in open Court.

With regard to the making of an order, the President said that it was clear that, under Article 48 of the Statute, the Court could always give its decision in the form of an order. The President would prefer to leave it to the Court to make the best use of the power already possessed by it under the Statute.

M. GUERRERO, Vice-President, said that the President had quite rightly pointed out the reason why it would be better to tell the parties that they would be called upon to argue in open Court if they refused to consent to the production of a document. Furthermore, a decision in regard to the admissibility of evidence was a matter of sufficient importance to make it desirable that the Court, before giving that decision, should hear the reasons adduced by the parties, on the one hand, to justify the late submission of a document and, on the other, for withholding consent to its production. For the rest, the explanations to be given by the parties would not be likely to involve a lengthy argument occupying the Court's time for a whole day.

With regard to M. Negulesco's last suggestion, it seemed better to leave things as they were, so that the Court could either simply give a decision or make an order, according to circumstances.

M. Guerrero thought that the Drafting Committee had done well to omit the word " *pièces* " and only to keep the word " *documents* ", by which was meant documents constituting evidence. What were described generically as " *pièces* "—*i.e.*, newspapers, legal opinions, doctrines—could be produced at any time.

The Court might therefore approve Article 44 *bis* as drafted by the Committee, with the addition of a few words providing for the possibility of hearing the parties.

The PRESIDENT, after ascertaining that there were no further observations, took a vote on the following question concerning the adoption of M. Guerrero's proposal:

> " Does the Court approve the insertion of the words: '*after hearing the parties*' in the second paragraph (first line) of the text proposed for Article 44 *bis* ? "

The Court answered the question in the affirmative by nine votes to one.

The PRESIDENT next took a vote on the amendment to the last sentence of paragraph 2, consisting in the replacement of the existing text by the words:

> " If the Court sanctions the production of the new document, it shall give the other party an opportunity of commenting upon it."

The proposal was unanimously adopted.

The PRESIDENT then proposed that the Court should vote on the following motion:

> " Does the Court adopt the proposed Article 44 *bis* submitted by the Drafting Committee with the amendments already adopted by it to paragraph 2 ? "

Baron ROLIN-JAEQUEMYNS recalled that he had proposed that the first paragraph of the proposed article should be amended by deleting the words " . . . and will inform the Court ", at the end of the second sentence, and the whole of the last sentence.

The words " and will inform the Court ", in his opinion, concerned the internal arrangements of the Court, and he thought it unnecessary to say anything on the subject in the Rules, which were for the use of the parties.

The REGISTRAR observed that, if these words were deleted, the point would be governed by Article 42 of the Rules, which provided as follows:[1] " The Registrar shall forward to each of the members of the Court and to the parties a copy of all documents in the case as he receives them." If no special provision were inserted here respecting new documents, these would be automatically communicated to judges.

Count ROSTWOROWSKI had gathered from the explanations of M. Schücking that the meaning of these words was that the text of the new document would not be automatically communicated to the Court. According, on the other hand, to what the President had said, the phrase made it possible to inform the Court without communicating the text of the document to it, but would also allow the text to be communicated.

It would be a good thing, in Count Rostworowski's opinion, before adopting the proposed text, to decide precisely how it was to be interpreted.

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[1] For text, see pp. 117-118, meeting of 1.VI.34.

[1] In the old Rules. *Cf.* text on pp. 146-147, meeting of 1.VI.34 (Article 44 of the Rules of 11.III.36).

The PRESIDENT thought that, with the amendment proposed by the Vice-President and adopted by the Court, the judges would hear the parties before receiving the text of the document from the Registrar. Sir Cecil Hurst thought that, as soon as a document had been communicated to the judges, it had been produced.

M. ANZILOTTI had understood that it would depend on the Court whether the question of the acceptance of a new document was to be decided without seeing the document—because the Court considered that there were reasons independent of its contents justifying the rejection of the document—or after seeing the document—because the Court considered that its decision must be based on the contents of the document. In the first place, therefore, the Registrar would simply inform the Court of the presentation of the document; later, the Court would or would not ask to see the document. But the Court could not require the text of the document to be communicated to it immediately.

M. SCHÜCKING understood the text as meaning that, at first, before the other side had indicated what attitude it meant to adopt, the Court could not require the Registrar to communicate the document to it. But directly the other side's attitude was known, the Court could give instructions for the document to be communicated to it.

The PRESIDENT took a vote on Baron Rolin-Jaequemyns' proposal that the words " and will inform the Court ", at the end of the second sentence of the first paragraph of the Drafting Committee's text, should be deleted.

By six votes to four, the Court decided against the deletion of these words.

The PRESIDENT took a vote on Baron Rolin-Jaequemyns' second proposal for the deletion of the last sentence of paragraph 1 of the same text.

By eight votes to two, the Court decided against the deletion of this sentence.

The PRESIDENT asked the Court whether they approved the proposed Article 44 *bis* submitted by the Drafting Committee, with the amendments already adopted.

By nine votes to one, the Court approved the article.

Grouping together of Articles relating to Evidence.

The PRESIDENT recalled that, at the sitting on the previous day, one member of the Court, supported by several others, had suggested that all articles of the Rules relating to the taking of evidence during the oral proceedings should be grouped together in a section to be placed in the chapter devoted to the oral proceedings. The Drafting Committee had considered this question.

He suggested that, now that Article 44 *bis* had been adopted, the Court might examine the relevant articles of the Rules in the following order:

I. Articles relating to witnesses: Articles 47, 49, 50, 51 and 52 (Articles 49, 56, 53, paragraph 2, 53, paragraph 1, and 55 of the Rules of 11.III.36).

II. Article 48 (Article 54 of the Rules of 11.III.36), which gave the Court power to call for the production of any evidence on matters of fact and was not confined to witnesses.

III. Article 53 (Article 57, paragraph 2, of the Rules of 11.III.36), which concerned expert enquiries.

IV. Article 45 (Article 50 of the Rules of 11.III.36), which concerned the question whether evidence would be taken before or after the oral pleadings.

(Agreed.)

The PRESIDENT said that, as a result, at the next sitting the Court would begin by discussing Article 47 (Article 49 of the Rules of 11.III.36).

8.II.35.

See under Article 49, pp. 179-181, for references to Article 44 *bis* (48 of the Rules of 11.III.36) during discussion on Article 47 (49 of the Rules of 11.III.36). See also p. 182 for discussion of question of " *pièces justificatives* " in connection with Article 47.

First Reading.

On 5.IV.35, Article 44 *bis* was adopted in first reading as Article 48 [1] with the following text:

" 1. Except as provided in the following paragraph, no new document may be submitted to the Court after the termination of the written proceedings save with the consent of the other party. The party desiring to produce the new document shall file the original or a certified copy thereof with the Registry, which will be responsible for communicating it to the other party and will inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.

" 2. If this consent is not given, the Court, after hearing the parties, may either refuse to allow the production or may sanction the production of the new document. If the Court sanctions the production of the new document, an opportunity shall be given to the other party of commenting upon it."

Second Reading and Final Adoption.

On 22.II.36, Article 48 was adopted in second reading and, on 11.III.36, it was finally *adopted* with the text approved in first reading unchanged.

24.II.36.

See under Article 49, pp. 191 *et sqq.*, for discussion of Article 48 in connection with Article 49.

ARTICLE 49 *(Article 47, old Rules, with New Paragraph).*

NOTIFICATION CONCERNING EVIDENCE TO BE PRODUCED

6.II.35.

See under Article 48, pp. 170-171, for a reference to Article 47 (49 of the Rules of 11.III.36) during discussion on Article 44 *bis* (48 of Rules of 11.III.36).

8.II.35.* *Discussed as Article 47.*

The PRESIDENT opened the discussion on the text of Article 47 proposed by the Co-ordination Commission: [2]

" In sufficient time before the opening of the oral proceedings, each party shall inform the Court of the names, christian names, description and residence of

* D 2, A. 3, pp. 200-209.

[1] See Explanatory Note, p. VIII, for discussion of arrangement of the articles of the oral proceedings and, in particular, position of Article 48 on 5.IV.35.

[2] D 2, A. 3, p. 873.

witnesses whom it desires to be heard; it shall further give a general indication of the point or points to which the evidence is to refer."

There was little difference, the President observed, between this draft and the present text of the article.

M. FROMAGEOT suggested that this article should cover not only the witnesses, but also the experts or other persons whom it was proposed to call. Some words might be added to the following effect: ". . . witnesses, *experts or other persons* whom it desires to be heard . . .". And later on: ". . . the evidence *or statements* ".

M. ANZILOTTI pointed out that the Co-ordination Commission's text had omitted the words " all evidence which it intends to produce ", which were to be found in the existing text. It would appear that the article now related solely to the evidence of witnesses.

The present article had the advantage of generally envisaging the possibility of producing evidence without particularising the forms of evidence. Neither the Rules nor the Statute gave any information as to the forms of evidence; that was left vague, which was an advantage in the present stage of international procedure. It was impossible to be sure that the only evidence which it might be desired to produce during the oral proceedings would be the evidence of witnesses; there might be evidence by experts, visits to the spot, inspections, or perhaps interrogations.

The Court had therefore the choice of two methods: either to be content with a general formula in Article 47, or to particularise every kind of evidence which was admissible before the Court, and, after referring to the evidence of witnesses, to mention other kinds of evidence; but there they would encounter difficulties.

The PRESIDENT observed that the Co-ordination Commission had taken Article 43 of the Statute as its starting-point.

The object of the change in Article 47 of the Rules was not to weaken the principle laid down in the Statute; and the intention of the authors of the Statute appeared to have been that written evidence should be annexed to the documents of the written proceedings, whereas during the oral debates it was a question only of " hearing evidence "—*i.e.*, of oral evidence.

M. ANZILOTTI said that visits to the spot or inspections were not, properly speaking, either oral evidence or written evidence.

M. GUERRERO, Vice-President, was not sure if he perceived the difficulties mentioned by M. Anzilotti. Article 47 seemed merely to indicate the special procedure for the hearing of witnesses. The only addition called for in Article 47 was to insert the word " experts " after " witnesses ". The Court would thus be acting in harmony with Article 43 of the Statute, which provided for the hearing of witnesses and experts, and there would be no need of a special article for experts.

M. NEGULESCO thought that the Court should retain Article 47 in its existing form. That article laid down, as regards evidence, the system contemplated by the authors of that text in 1922. The records of the discussions in 1922 contained the following passage: [1]

> " M. NYHOLM asked to which of the two main systems the Drafting Committee had intended to give preference, the system whereby evidence was produced with the permission of the Court, or the system whereby any evidence produced by the parties was admitted.
>
> " Lord FINLAY explained that the Drafting Committee had adopted the second system, which was the English system, save that in England it was not even necessary to state the names of the witnesses."

In 1926, the question was again raised by M. Huber, who made the following proposal: [1]

> " The Court's attitude in the Mavrommatis case [2] appears, therefore, to be entirely in conformity with the requirements of the jurisdiction which it exercises: the parties are free to present any evidence that they see fit, and the Court is entirely free to take it into account in so far as it regards such evidence as relevant.
>
> " . . . . . .
>
> " It follows from the foregoing considerations that the Court should abstain from inserting provisions in its Rules to govern the admissibility of evidence."

Article 47 raised a question which had been stated by M. Nyholm in 1922, and answered by Lord Finlay and later on by M. Huber. The question was whether it was sufficient for the Court that an applicant should say to it: " That is the evidence I propose to call ", and whether the Court should be bound by the wishes of a party as regards the evidence to be produced.

Another system would be that whereby evidence produced must be admitted by the Court.

Finally, there was a third system—which M. Negulesco favoured—namely, that, when a party asked to produce certain evidence, the Court must grant the request, if the other side did not oppose it; if the other party disputed the admissibility of the evidence, the Court would have to give an interim decision on this point by an order or a judgment.

The PRESIDENT feared that the question of principle just raised by M. Negulesco was outside the scope of Article 47. In deciding on the wording of that article, they must avoid weakening the provisions of the Statute and other clauses of the Rules—especially Article 40—which obliged the parties to annex to the written proceedings the evidence on which they proposed to base their conclusions. To hold that Article 47 contemplated not only additional evidence by witnesses, but all forms of evidence which a party proposed to produce, would be to introduce an idea in conflict with the principle set forth in the Statute and in Article 40 of the Rules.

M. FROMAGEOT considered that Article 47 of the existing Rules was quite comprehensible if it related to oral evidence; but, if it related to written evidence, it was no longer clear.

M. ANZILOTTI did not believe that Article 47 related to documentary evidence; the Rules of Court laid down that the documents were to be annexed to the written proceedings. The article did, as a fact, speak of all evidence which it was intended to produce during the oral proceedings, apart from the documents of the written proceedings; that was a drafting error, and nothing more. On the other hand, if it was now sought to confine the evidence which might be admitted in the oral proceedings to the statements of witnesses, the scope of the article would be unduly restricted.

M. FROMAGEOT considered that visits to the spot and interrogations relating to facts were preliminary steps *(méthodes d'instruction)* ultimating in proofs which were neither evidence of witnesses nor written evidence.

[1] D 2, p. 142.

[1] D 2, A., p. 250.

[2] E 3, p. 211; C 7—II, p. 10.

M. ANZILOTTI said he agreed with what M. Fromageot had said in regard to preliminary steps (*procédure d'instruction*); but, in proceedings before the Court, there was no separate preparatory stage, as in proceedings before certain national Courts. There were written proceedings, in the course of which written evidence was produced; and oral proceedings, during which other evidence was produced.

M. SCHÜCKING was not in favour of dividing all forms of evidence into two categories, written evidence and oral evidence. The Continental laws of procedure did not recognise this distinction.

M. ANZILOTTI pointed out that the forms of evidence referred to in Article 47 were those for which the Court's presence was requisite. Anything in the way of documentary evidence, in the true sense of the term, must be annexed to the written proceedings. But there were forms of evidence for which the presence of the Court was required, and that was what Article 47 was intended to cover.

Jonkheer VAN EYSINGA observed that the question of written evidence was already legislated for in Article 40, and that Article 47 therefore applied only to evidence of witnesses; but the Co-ordination Commission had perhaps gone too far in another direction by omitting the words " all evidence ". It might be advisable to insert words in Article 47 to the following effect: " Subject to the provisions of Article 40, paragraph 2, and of Article 44 *bis* ", and then go on with the words of the existing Article 47: " all evidence which it intends to produce " must be communicated by the party before " the opening of the oral proceedings ".

There was still one point which had not been dealt with by the Co-ordination Commission or provided for by Article 47. Since the Court had adopted an Article 44 *bis*, which said in detail what Article 52 of the Statute had said in very general terms—namely, that any evidence in the form of documents produced after a certain time might be refused by the Court—it seemed desirable to consider whether for the sake of symmetry an article should not be drawn up concerning the evidence of witnesses, on the same lines as Article 44 *bis*, which was concerned only with documents.

The PRESIDENT requested Jonkheer van Eysinga to submit a text giving effect to this proposal.

M. GUERRERO, Vice-President, supported Jonkheer van Eysinga's suggestion that the Court should retain Article 47 of the existing Rules, which contained the words " all evidence ", but should preface that article with some words which would exclude those documents that must be presented during the written proceedings.

M. URRUTIA referred to the minutes of the discussion on Article 47 during the revision of the Rules in 1926 [1]. On that occasion, it had been considered necessary to say: " *tous les moyens de preuve* ", because Articles 44, 48 and 54 of the Statute (in the French text) made use of the same words. The principle that the parties must be free to produce any evidence which they considered necessary was recognised by the Statute.

M. Urrutia preferred therefore that the portion of Article 47 which proclaimed that principle should be retained —namely, the words: " in sufficient time before the opening of the oral proceedings, each party shall inform the Court . . . of all evidence which it intends to produce ".

[1] D 2, A. (The exact reference has not been found.)

The PRESIDENT suggested that the point raised by M. Fromageot, concerning the omission of any mention of experts in Article 47, should be left on one side for the moment. The members of the Court would have no objection to the wording of Article 47 being made wide enough to include experts.

As regards oral evidence and other forms of evidence, the Court must not forget that it had no experience to guide it. In practice, Article 47 had been regarded as applying only to oral evidence. However, the Court had only heard evidence by witnesses on one occasion during its whole existence.

If Article 47 were regarded from the point of view of written evidence, he would observe that the Court had not insisted on the observance of this article by the parties. In nearly all the contentious cases, the parties had produced documents after the close of the written proceedings, and Article 47 had not been invoked to prevent this.

In the Registrar's report, circulated in June 1933,[1] the following passage occurred in regard to Article 47:

> " Only exceptionally have parties communicated beforehand a list of documents which they intended to produce at the hearings,[2] and the Court has never asked for the production of such a list."

If the Court interpreted Article 47 of the Rules as covering more than the oral evidence of witnesses, it seemed difficult to account for the failure of the Court to take any steps for the enforcement of the article.

M. NEGULESCO thought the text proposed by the Co-ordination Commission for Article 47 was too rigid. It ought to provide for all forms of evidence.

M. SCHÜCKING considered that the Court should accept the Vice-President's suggestion: namely, to maintain the text of Article 47 in its existing form, but to insert references to Articles 40 and 44 *bis*.

M. GUERRERO, Vice-President, said it would suffice to begin Article 47 with the words: " Except as provided in Article 44 *bis*, each party shall inform the Court and the other parties in sufficient time before the opening of the oral proceedings of any other evidence. ... ." The question would be settled by the insertion of the word " *other* ".

M. ANZILOTTI said that Article 47 had always been construed as relating, not to documentary evidence, but to evidence produced before the Court, or through the intervention of the latter, in those cases where the Court's co-operation was requisite—for instance, the hearing of witnesses, seeing that it was the Court which had to hear them. That was the essential distinction: the evidence referred to in Article 47 was evidence which had to be called for, or admitted, by the Court.

The PRESIDENT thought that M. Anzilotti had just indicated a path by which they could reach agreement.

Baron ROLIN-JAEQUEMYNS thought that the chief cause of the difficulties lay in the Court's adoption of Article 44 *bis*, which established a new rule.

The Court might retain Article 47, but it would be obliged to bring it into harmony with Articles 48 [3] and 44 *bis*,[4] and, in order to do this, it must introduce the word " other ", as had been proposed by the Vice-President.

The PRESIDENT asked M. Anzilotti to propose a text

[1] D 2, A. 3, p. 859, note 2.
[2] *Cf.* for instance C 67, pp. 4136-4138.
[3] Existing (*i.e.*, Article 54 of the Rules of 11.III.36).
[4] New (Article 48 of Rules of 11.III.36).

which might serve as a basis for the Court to vote upon.

M. ANZILOTTI considered that the wording proposed by the Vice-President might be utilised: " Without prejudice to the provisions of [such and such articles], each party shall inform the Court in sufficient time before the opening of the oral proceedings . . .", etc. The distinction which he had just drawn was too theoretical to be embodied in an article.

The PRESIDENT said it appeared from the minutes of 1922 and 1926, which M. Negulesco had just read, that the Court had made a selection among the systems proposed to it. The Court was entitled to call for additional evidence, but the parties possessed a similar right.

Baron ROLIN-JAEQUEMYNS asked whether, if one of the parties claimed the right to produce evidence by calling an additional witness, the Court could refuse such a request. The Rules said nothing on that point.

M. ANZILOTTI pointed out that, in practice, the Court had always shown a desire to exercise a certain control even over requests made by the parties. If the parties had agreed together, no question could arise. But one party might wish to call witnesses to give evidence which the other party regarded as irrelevant. On that point there was only Article 52 of the Statute. The Rules said nothing about it, and that, in his view, was an advantage. In this question, in which the Court had no experience to guide it, the less it was fettered the better.

M. GUERRERO agreed with M. Anzilotti's definition of the production of evidence at the time of the written proceedings, and his distinction between the production of evidence solely by the initiative of a party and its production where the Court's co-operation was requisite. But perhaps, indeed, it was not possible to introduce so theoretical a distinction into the Rules.

M. SCHÜCKING thought it desirable that the two following questions should be clearly separated: (1) At what moment must the parties communicate the schedule of evidence which they desired the Court to receive? (2) What are the legal consequences of a party's claim to produce evidence before the Court?

It was the second of these two questions which was the more important. But that question did not affect Article 47. For the construction which M. Anzilotti had placed on Article 47 made it unnecessary for the Court to insert a reservation regarding Article 44 *bis* in that article, since, according to M. Anzilotti's interpretation, documentary evidence was not covered by Article 47.

One could not, however, be sure in advance that the Governments would interpret Article 47 in the same way as M. Anzilotti and the Court. For that reason, it would be better to insert the reservation proposed by the Vice-President at the beginning of Article 47, in order to point out that documentary evidence had already been dealt with elsewhere.

Jonkheer VAN EYSINGA observed that, when he had proposed inserting a reservation at the beginning of Article 47, he had explained that the reservation would also have to mention Article 40, paragraph 3,[1] which read: " A copy of every document adduced in a Memorial or Counter-Memorial, in support of the arguments set forth therein, must be attached to the Memorial or Counter-Memorial in question."

In this way, they would meet M. Schücking's observation that Article 44 *bis* related only to documents in the strict sense of the term. Article 40 had a wider scope, and for that reason it must be mentioned.

The PRESIDENT thought it possible that this wording might lead to a change in the Court's practice. If so, it would be desirable to make a slight alteration in Article 47. The Court might use the Co-ordination Commission's text,[1] adding a few words so as to cover the points referred to by the Vice-President and M. Anzilotti:

> " In sufficient time before the opening of the oral proceedings, each party shall inform the Court of the names, christian names, description and residence of witnesses whom it desires to be heard, and of evidence not provided for in Articles 40 and 44 *bis*."

Baron ROLIN-JAEQUEMYNS considered that Article 47 was an exception to Article 40. It would be better, therefore, not to refer to the latter. Article 44 *bis*, on the other hand, must be mentioned, because there was no conflict between that article and Article 47.

M. FROMAGEOT considered that, before referring the matter to the Drafting Committee, the Court must first clearly indicate its opinion. According to the proposed text, the Court was going to be more exacting in regard to *pièces justificatives*, which were not *documents*, than in regard to *documents* so called. For, as regards the latter, Article 44 *bis* allowed them to be presented even during the Court's deliberations, subject to the assent of the other party and to the Court's approval. According to the text proposed for Article 47, evidence other than *documents* could not be submitted unless notice of it had been given before the opening of the oral proceedings.

M. ANZILOTTI said that, if he remembered rightly, the Court, when making rules in regard to these *documents*, had allowed complete liberty so far as concerned *pièces* which were not *documents*. The word " *document* " had been employed in order to confine the regulation expressly to documentary evidence.

If mention were made in Article 47 of all forms of evidence which it was intended to employ, except the documentary evidence provided for in Article 44 *bis*, the object would appear to be attained. In laying down that each party must indicate before the opening of the oral proceedings the evidence which it proposed to adduce, the Court would not be depriving a party of its right to propose the production of certain evidence, if it should appear necessary to do so, during the oral proceedings.

M. FROMAGEOT considered that, in these circumstances, the following addition might be made to Article 47:

> " . . . the evidence *which it desires to ask the Court to take (de procéder)* ".

The object of those words was to give effect to M. Anzilotti's idea—namely, that Article 47 applied only to evidence in regard to which the Court's intervention was necessary. If they inserted those words, there would be no need to begin the article with a reservation.

Jonkheer VAN EYSINGA observed that they must not lose sight of Articles 40 and 44 *bis*. But the text which had just been proposed made no reservation in regard to those articles.

M. FROMAGEOT thought that, if they made such a reservation in the article, it would create a special situation

[1] New wording; see p. 145, meeting of 1.VI.34.

[1] Pp. 177-178 (beginning of this meeting).

for " *documents* ", and, further, they would oblige the parties to notify in advance, before the oral proceedings, all the other pieces of written, but non-documentary, evidence which they intended to employ. That was not, however, the present practice. On the other hand, if a text were adopted relating solely to evidence in regard to which the Court's intervention was requisite, this disadvantage could be avoided.

In the first place, anything which was not a " *document* " could always be presented; and, secondly, all forms of evidence (" *moyens de preuve* ") in regard to which the Court's intervention was requisite would form the subject of a separate clause.

M. ANZILOTTI pointed out that the phrase " ask the Court to take " implied that it was the Court which would take the evidence. It would be necessary to have other articles referring to witnesses, expert opinions, etc. The meaning of the words would be explained by the subsequent articles. Thus, they would have an article dealing with documentary evidence; then would follow the articles referring to evidence which the Court had to take, in particular the evidence of witnesses.

The PRESIDENT asked the Court to vote on the Co-ordination Commission's text, amplified as follows:

> " In sufficient time before the opening of the oral proceedings, each party shall inform the Court of the names, christian names, description and residence of witnesses whom it desires to be heard; it shall also indicate in general terms the point or points to which the evidence of witnesses must relate, and the evidence which it desires to ask the Court to take."

M. FROMAGEOT, leaving aside the question of the actual wording, thought it would be better to include one of these texts in Article 47 itself, and not to place it in a separate Article 47 *bis*. The article would then clearly cover both the case where evidence was produced before the oral proceedings and the action to be taken by the Court if it was produced during the hearings.

The PRESIDENT proposed, for the time being, to confine the discussion to the first part of Article 47.

He feared lest, as a result of the present discussion, a change might be made in the Court's practice, especially if a schedule of *pièces justificatives* had to be submitted.

M. URRUTIA would prefer a separate article concerning the names, christian names, description and residence of the witnesses.

Jonkheer VAN EYSINGA considered that two paragraphs would suffice, instead of two separate articles.

The PRESIDENT suggested that the Court should disregard the Co-ordination Commission's text and adopt the following wording, which reproduced the article in the existing Rules with a slight addition:

> " In sufficient time before the opening of the oral proceedings, each party shall inform the Court and the other parties of all evidence which it intends to ask the Court to take, together with the names, christian names, description and residence of witnesses whom it desires to be heard."

M. FROMAGEOT said that he could vote in favour of the first part of this clause, which was of a general character, but he objected to the addition of the last phrase, which related to a particular case.

M. NEGULESCO also asked that the text should be divided.

The PRESIDENT asked the Court to vote on the following text:

> " In sufficient time before the opening of the oral proceedings, each party shall inform the Court and the other parties of all evidence which it desires the Court to take."

Jonkheer VAN EYSINGA observed that the text drawn up by the Co-ordination Commission did not oblige the parties to communicate their evidence to the other parties, but only to the Court, because it was through the Court that all notifications by one party to the other had to be made. He proposed to omit the words: " and the other parties ".

M. FROMAGEOT asked whether it would not be better to mention the other parties, otherwise the agents, in comparing the old and new texts, might be led to believe that henceforward the communication was only to be made to the Court. It would be better to make this point clear in the text.

Jonkheer VAN EYSINGA pointed out that, under Article 43 of the Statute, every document received by the Court was automatically communicated to the other party.

The PRESIDENT put the text which he had read to the vote, omitting the words: " and the other parties ".

The above text was unanimously adopted.

M. NEGULESCO asked whether, notwithstanding the vote which the Court had just taken, the question of the admissibility of evidence was still open.

The PRESIDENT answered in the affirmative.

He asked the Court whether it desired to add to the text it had just adopted a phrase referring to the names, christian names, description and residence of witnesses whom the party desired to be heard.

M. FROMAGEOT would prefer that other persons, such as experts, should be mentioned in addition to witnesses.

The PRESIDENT proposed the following text for the Court's approval:

> " It shall also inform the Court of the names, christian names, description and residence of the witnesses and experts whom it desires to be heard."

M. GUERRERO, Vice-President, asked whether, instead of using the word " experts ", it would not be better to say: " witnesses and any other persons whom the party desires to be heard ". The Court might, indeed, be asked to hear persons who were not, properly speaking, either witnesses or experts.

M. FROMAGEOT considered that, if the word " witness " was not intended to mean a person who gave oral evidence, it would be better to use the expression: " a witness, expert and any other person whose oral evidence *(déposition)* the party desired to be heard ".

Jonkheer VAN EYSINGA pointed out that, as Article 43 of the Statute made a distinction between witnesses and experts, the same distinction should be observed in the Rules.

M. NEGULESCO said that, if the clause proposed by the President was to be a continuation of the text already adopted, he could not vote for it. But if it was a separate text, he would be in favour of it.

The PRESIDENT said that that point was reserved, and asked the Court to vote on the text he had read.

This text was unanimously adopted.

The PRESIDENT said that the Court had still to decide

on the second clause of Article 47, which read as follows:

"It also indicates in general terms the point or points to which the evidence will relate."

Count ROSTWOROWSKI asked if the word "evidence" was not too restricted. Would it not be better to say "evidence and statements *(témoignage et déposition)*"?

The PRESIDENT believed that the Court regarded the word "*témoignage*" as applying solely to statements of witnesses. If that was so, it would be better to add the word "*déposition*". But in English the word "deposition" had a technical meaning; it was the written record of a witness's statement before the first judicial instance.

The President asked the Court to vote on the text he had read, the final drafting being reserved.

This text was unanimously adopted.

"*Pièces justificatives.*"

Count ROSTWOROWSKI said that there was still one question to be settled concerning *pièces justificatives*. Did the Court desire to treat them in the same way as "*documents*"? Or would it prefer to allow them to be freely produced, reserving its right to accept or refuse them? By using the word "*document*" in its strict meaning, the Court had regulated only the production of documents. The President had said that *pièces* must be produced during the written proceedings. But what would be done about a *pièce* that was produced at a later stage?

M. ANZILOTTI believed that it was the intention of the Court to allow the fullest liberty in regard to *pièces justificatives*. Besides, it would be almost impossible to make regulations concerning them.

Count ROSTWOROWSKI observed that the Court's opinion appeared to favour freedom in the production of *pièces justificatives*. It would be well to note in the minutes that the Court, by its silence, had intended to settle the question in that way.

M. GUERRERO, Vice-President, pointed out that the Court must also provide for the case in which it was desired to call a witness during the oral proceedings. In the course of the oral pleadings, a party might find it necessary to call witnesses to clear up a particular point. The party must not be told that it was impossible. Of course, the consent of the Court would be necessary.

The PRESIDENT observed that that question had been pointed out by Jonkheer van Eysinga, who had promised to submit a written text [1].

9.II.35.*

Discussed as Article 47, Article 47 bis *and Article 47* ter.

The PRESIDENT recalled that, at the previous meeting, he had asked Jonkheer van Eysinga to prepare a text concerning the calling of fresh witnesses in the course of the oral proceedings. He himself had also prepared a text on the same subject. Whereas, however, Jonkheer van Eysinga's draft constituted a new article, his own was simply a paragraph to be added to Article 47.

M. Negulesco, for his part, had submitted a new proposal to the Court, numbered *47 ter*, but it would seem to be better to discuss this proposal after Article 48.

Jonkheer van Eysinga's draft was as follows:

"*Article 47* bis. — The Court may sanction the calling of evidence after the commencement of the oral proceedings when a request to that effect is made; its decision shall be given after hearing the parties. If the Court gives its sanction, it will give the other party an opportunity of commenting upon the new evidence."

The President's draft was as follows:

"*Article 47, additional paragraph.* — In the absence of the information referred to in the second paragraph of this article, such evidence (including the oral evidence of witnesses) shall not be accepted after the commencement of the oral proceedings without the sanction of the Court, which will have regard as far as possible to any agreement between the parties."

M. Negulesco's proposal was as follows:

"*Article 47* ter. — The Court, or the President if the Court is not sitting, may, if the parties are in agreement, order witnesses to be heard, expert opinion to be taken or any other necessary evidence to be produced in order to establish the statements of one of the parties.

"In the absence of agreement between the parties, the Court will decide."

Finally, M. Fromageot had also handed in a draft:

"*Article 47. Add the following paragraph:* In the course of the oral proceedings, a request that evidence shall be taken may be submitted only with the consent of the other party."

M. ANZILOTTI observed that the drafts of Jonkheer van Eysinga and the President adopted the principle that, until the commencement of the oral proceedings, the production of evidence by the parties was a right. The Court, however, at the previous sitting had decided that this question had still to be considered, and it was to this question that M. Negulesco's draft related.

M. SCHÜCKING, like M. Anzilotti, thought that the Court should first examine this question. Several members of the Court held that, if a party gave notice, before the commencement of the oral proceedings, of a wish to produce certain evidence, the Court was always bound to hear that evidence. M. Schücking could not agree. It often happened that facts in regard to which a party wished to produce evidence were of no interest to the Court. In that case, the Court should not be obliged to hear that evidence. In any case, even if evidence were produced at the prescribed times, the Court should be able to refuse to hear it.

The PRESIDENT wished to draw a distinction between various kinds of evidence. In the first place, there was written evidence: this must be annexed to the documents of the written proceedings. If, for any reason, such evidence had not been filed, the Rules left open the possibility of adding it even after the termination of the written proceedings. But in that case the Statute laid down that the consent of the other party was required or, failing this, the sanction of the Court.

There was, however, evidence which could not be attached to the documents of the written proceedings, as M. Anzilotti had pointed out at the last sitting, because it required some action on the part of the Court. Such evidence

* D 2, A. 3, pp. 209-216.

[1] See p. 179.

must be mentioned by a party before the beginning of the oral proceedings. If it did not do so then but only later, the evidence could be taken only with the consent of the other party or the sanction of the Court.

Jonkheer VAN EYSINGA having explained his draft, M. ANZILOTTI observed that if, as held by the President, the Court's sanction became necessary after the beginning of the oral proceedings, the inference was that before that time it was unnecessary.

One possible system was—and this seemed to be the one envisaged by the Statute—that, provided its request was made in due form before the beginning of the oral proceedings, a party was entitled to call witnesses without the other party being entitled to object: the request must be granted as of right.

Another system—that adopted by M. Negulesco in his proposal—was that the parties might always ask to be allowed to produce any kind of evidence. If the parties were in agreement, the Court allowed the evidence; if not, the decision rested with the Court.

M. Negulesco's proposal, however, did not seem to be altogether consistent with the Court's procedure. In national systems of procedure there were numerous restrictions in regard to the various kinds of evidence; for instance, the evidence of witnesses was only accepted in certain circumstances. Before the Court, however, there could be no question of such restriction.

There was another aspect of the question in regard to which perhaps M. Anzilotti's views more nearly approached those of M. Negulesco. Supposing that one party proposed to establish certain facts, should not the other party be allowed to prove that these facts were irrelevant ?

M Anzilotti failed to see, however, how the Court could express an opinion on the relevance of evidence before it knew what the evidence was, and before hearing the case in which it was called.

M. NEGULESCO recalled that he had tacitly agreed to the postponement of consideration of his draft until after Article 48. In view, however, of the turn taken by the discussion, he thought it essential that the question raised by him should be dealt with before anything else.

Unlike the President and M. Anzilotti, M. Negulesco considered that if, before the opening of the oral proceedings, the Court allowed a party to produce any kind of evidence without reserving the possibility of refusing it, the consequences might be dangerous. A party might resort to delaying tactics, might call a very large number of witnesses or ask for their evidence to be taken locally.

M. Negulesco thought that the system proposed by him would leave the Court a measure of control over the parties which would avert these dangers. If the parties were in agreement, everything would be easy. If not, the decision would rest with the Court. The parties' rights would be fully safeguarded. If they had witnesses whom they wished to be heard, they would only have to supply a list of them to the Court, indicating at the same time the questions which they wished to be put to them. The Court would consider whether these questions were relevant and decide accordingly.

In view of the silence of the Statute, the Court could, under Article 30 of the Statute, make any rule which it considered appropriate.

The PRESIDENT was afraid that this system would entirely change the existing basis of the Rules.

M. NEGULESCO thought that his proposal was consistent with the Statute, which gave the Court control in regard to evidence.

M. SCHÜCKING thought that the question at present before the Court was to determine the legal consequences of notice by a party of its intention to produce certain evidence. The Rules were silent on the point. Some members of the Court thought that, if the evidence had been notified before the opening of the oral proceedings, the Court was bound to allow it to be produced.

According to M. Anzilotti, if the other side said that the evidence was irrelevant, the Court was not bound to hear that evidence, but it must take a decision. Even, however, if the parties were in agreement, why should the Court be obliged to hear evidence if it thought it was irrelevant ?

In regard to this point, M. Schücking differed from M. Negulesco, since the latter thought that the Court should decide only if the parties were not in agreement.

Baron ROLIN-JAEQUEMYNS wished the precise import of Article 47 of the Rules to be defined.

If, during the time elapsing between the end of the written proceedings and the beginning of the oral proceedings, a party asked to be allowed to establish some point by means of witnesses or expert opinion, could the Court refuse ? Were not the parties entitled under Article 47 to insist on the enquiry asked for ? If the Court agreed with this interpretation, the fact must be clearly stated.

The PRESIDENT observed that at present parties before the Court were Governments only. Was it theoretically possible to deny a Government the right of calling witnesses before the Court ? The Court was not in the same position as a municipal court. Article 43 of the Statute, in defining the oral proceedings, gave Governments precisely the same right to have certain facts presented by a witness as by counsel. For that reason, the President had always construed Article 47 as referring to the exercise of the right, given by Article 43 of the Statute, to place the necessary facts before the Court by means of witnesses.

Of course, the Court exercised absolute control and was thus able to direct the use made of the parties' right. Nevertheless, the Statute was quite explicit as to the right of parties to have witnesses heard. M. Negulesco had stressed the possible danger that the Court might find itself confronted with a party who wished to call innumerable witnesses. There was that risk. But, under the Statute, the basis of the Court's jurisdiction was agreement between the parties, who must therefore be presumed to be honest in their desire to get the dispute settled.

M. SCHÜCKING thought that a party could submit any evidence, but that the question was whether the Court would always be obliged to allow that evidence to be produced.

Baron ROLIN-JAEQUEMYNS held that, under Article 47 of the Rules, the Court must agree to hear any witness notified to it before the beginning of the oral proceedings. Article 47 of the Rules was based on Articles 49 and 52 of the Statute.

Jonkheer VAN EYSINGA recalled that, at the previous sitting, the Court had purposely left aside the question whether the parties were entitled to call whatever witnesses they wished.

Personally, he thought it better not to change the present system, which has been adopted in 1922. That system was explained as follows in the book entitled: *Statut et Règle-*

ment de la Cour permanente de Justice internationale — Eléments d'interprétation: [1]

[*Translation.*] " In the course of the discussion of Article 47, it was asked whether a party was entitled to call its witnesses without a special decision of the Court, even in the event of objection by the other party. It was held that, under the system adopted by the Rules, any witness could be examined by the party calling him without any special authority given by the Court in the form of an interlocutory judgment. Nevertheless, the Court had the right to interrupt any evidence which was irrelevant."

Furthermore, the suggested possibility that the hearings might be indefinitely prolonged by the action of the parties was guarded against by Article 54 of the Statute. The Court had the absolute right to close the hearing; and the President could always, if need be, declare the hearing at an end.

M. FROMAGEOT considered that, according to the Statute, the parties had an absolute right, before the opening of the oral proceedings, to settle, as they thought fit, what evidence they were going to produce, and consequently to call such witnesses or experts as they desired, subject, of course, to the President's power, in conducting the hearing, to prevent witnesses from embarking on matters irrelevant to the case.

On the other hand, once the oral proceedings had begun, the position was different. Under Article 52 of the Statute, the consent of the opposing party was necessary, and if the calling of new witnesses was not acquiesced in by the opposing party, the Court could refuse to hear these new witnesses.

The PRESIDENT gathered that M. Negulesco's idea was that a party should not be allowed to produce witnesses without the consent of the other side.

M. NEGULESCO agreed that the Statute mentioned certain kinds of evidence, but considered that it left the parties free to submit other kinds. That situation, however, involved some danger, for a party might submit some entirely new kind of evidence. Under the system proposed by M. Negulesco—which differed in that respect from that advocated by some other judges—the Court would not in such circumstances have its hands tied, and could refuse to accept such evidence unless the parties were in agreement.

M. FROMAGEOT thought that, if a Government considered that the statement of a witness on the spot or an inspection carried out locally constituted factors enabling proof to be established, it did not seem, as the Statute stood at present, that the Court had power to withhold its sanction.

M. GUERRERO, Vice-President, realised, like M. Negulesco, that applications to produce evidence might be misused by a party playing for time. But that was an exceptional case, and the Court could not legislate for exceptional cases.

If a case of the kind occurred, the Court had the means to deal with it. First of all, it had a right of control. In the next place it could, under Article 48 of the Statute, make all arrangements connected with the taking of evidence.

If a party asked permission to produce certain evidence before the oral proceedings, how could the Court refuse permission? It could not judge whether the evidence were good or bad.

On the other hand, Article 52 of the Statute gave the Court power to refuse to accept any oral evidence or new documents which a party wished to produce without the consent of the other side, once the time-limit fixed had been passed. It followed from the fact that the Court was empowered to accept or reject evidence presented after the time-limit that it was bound to accept evidence submitted before that time-limit. Article 52 therefore made the position clear.

In M. Guerrero's opinion, any evidence submitted or notified before the beginning of the oral proceedings must be accepted by the Court. Article 47, as adopted at the previous sitting, gave the parties this right. Moreover, in no case had the Court ever rejected evidence thus submitted.

It would therefore be better to keep Article 47 in its present form and to let it be made clear in the minutes that any party had the right to give notice of the production of new evidence before the opening of the oral proceedings.

With regard to the question whether such new evidence would or would not be regarded as relevant, that was quite another question.

M. URRUTIA also construed Article 47 as confirming the parties' absolute right to give notice of new evidence before the opening of the oral proceedings.

With regard to the question how evidence notified after the opening of the oral proceedings should be dealt with, M. Urrutia thought that the objection to Jonkheer van Eysinga's proposal was that it tended to restrict the rights of the parties. With regard to the written proceedings, the Court had recognised the principle laid down by the Statute that, if the parties were in agreement, any new document must be accepted. It was impossible to introduce a different principle for the oral proceedings. M. Negulesco's proposal was even more restrictive.

M. Urrutia would therefore prefer to see Sir Cecil Hurst's proposal adopted or that of M. Fromageot; his preference was to the latter.

M. ANZILOTTI was afraid that that proposal was not in accordance with the Statute. Under Article 52 of the Statute, the Court had the right to allow evidence even if the other party did not give its consent.

M. URRUTIA thought that the last paragraph of the President's draft contained a very restrictive clause. The sentence ". . . which will have regard as far as possible to any agreement between the parties" implied, in fact, that if there were an agreement between the parties the Court could not reject the evidence.

M. ANZILOTTI suggested the following wording: " In the absence of the information referred to in the second paragraph of this article, *and subject to an agreement between the parties*, such evidence . . . without the sanction of the Court." That would be quite consistent with the Statute.

The PRESIDENT thought that the Court should take a decision on the question of the rights of the parties, otherwise the whole of the provisions in the Rules concerning evidence would be liable to remain academic. He therefore proposed a vote on the following question:

> " Does the Court wish to lay down in its Rules that a party has no *right* (even if it follows the course prescribed by Article 47 of the Rules) to present to the Court the oral evidence of witnesses or other evidence requiring the intervention of the Court? "

M. ANZILOTTI asked whether a vote on this question would leave the text adopted at the previous meeting unaffected.

The PRESIDENT answered in the affirmative.

M. ANZILOTTI, who was convinced that the Statute had adopted the system of leaving the parties a free hand in

[1] Published (Berlin, 1934, Carl Heymanns Verlag) by the *Institut für ausl. öff. Recht und Völkerrecht.*

regard to evidence, thought that Article 47, as adopted by the Court, presented the advantage that it did not exclude the possibility of exceptional cases in which the admissibility of oral evidence was precluded—for example, in virtue of the special agreement—so that the other party might lodge an objection to it, and thus oblige the Court to give a decision on the point.

After an exchange of views with Jonkheer VAN EYSINGA and M. ANZILOTTI regarding the wording of his question, the PRESIDENT announced his intention of taking a vote on the question in the form in which he had couched it.

Count ROSTWOROWSKI, however, said that, in order to vote, he would have to make a reservation. If the intention was to lay down that parties had no *absolute* right, he would answer the question in the affirmative, because, in his opinion, the possession by a party of an absolute right was inconsistent with the control of the Court. But the expression " right " was so general that it was difficult to answer simply by yes or no.

The PRESIDENT explained that his object was to reserve the Court's right of control; what was meant, therefore, was the right of a party to ask permission to call witnesses, but always subject to the control of the Court.

M. FROMAGEOT observed that the President's question did not make a sufficiently clear distinction between the period before the beginning of the oral proceedings and the period following it. If the last part of the President's question referred to the need for the consent of the other party before a party could submit a request in the course of the oral proceedings for permission to produce evidence, he would be prepared to accept it.

The PRESIDENT would be prepared to add to his question the words: " the course prescribed by Article 47 of the Rules *as adopted on February 8th* ".

In reply to a question put by M. SCHÜCKING, the PRESIDENT observed that, if the Court answered the question as formulated in the negative, Article 47 as already adopted would hold good. He then took a vote on the following question:

> " Does the Court wish to lay down in its Rules that a party has no right (even if it follows the course prescribed by Article 47 of the Rules as adopted on February 8th) to present to the Court the oral evidence of witnesses or other evidence requiring the intervention of the Court ? "

By eight votes to two, the Court answered this question in the negative.

The PRESIDENT then observed that there were now three proposals before the Court: namely, those of Jonkheer van Eysinga, M. Fromageot and his own.

Jonkheer VAN EYSINGA said that M. Fromageot's proposal referred to the " consent of the other party ". Jonkheer van Eysinga had intentionally omitted reference to this consent in his text. It was necessary in Article 44 *bis*, which concerned documents which, perhaps, should not be seen by the Court; in the present case they were concerned only with the indication of a wish by one party to call a witness.

On the other hand, he had not wanted the Court to take its decision without having heard the parties. In the drafts proposed by the President and M. Fromageot, it should be added that, if the other side did not consent, the Court would decide after duly hearing the parties. Mention should also be made of the other party's right to comment on the merits of the new evidence.

Substantially, however, the three proposals had the same end in view.

The PRESIDENT observed that, if the following were added to M. van Eysinga's text: " the Court may . . . after the opening of the oral proceedings, when a request to that effect is made *without the consent of the other party* . . .", there would not, indeed, be much difference between the three texts.

M. FROMAGEOT thought that, apart from mere questions of wording, it would be well to insert one of these proposals in Article 47 itself and not as a separate Article 47 *bis*. The article would thus be clearly seen to deal, first, with the case of evidence presented before the oral proceedings, and, secondly, with the action incumbent on the Court if evidence were presented during the oral proceedings.

M. GUERRERO, Vice-President, thought that the three drafts were substantially similar. Personally, he preferred that of M. Fromageot, to which, however, he would add: " In the event of disagreement, the Court will decide after hearing the parties."

M. URRUTIA still felt some doubts in regard to an expression used in M. Fromageot's text. M. Fromageot proposed to say: " A request that evidence . . . *may only be submitted*. . . ." That was not the point in Article 52 of the Statute. The consent of the other party was not required to the submission of a request. A party could submit to the Court a request that evidence should be heard without the consent of the other side.

M. GUERRERO, Vice-President, pointed out that Article 52 of the Statute spoke of any document " that one party may desire to present ". Accordingly, the party had not yet presented the evidence; the same situation was contemplated in M. Fromageot's draft.

The PRESIDENT thought that it was the production of the evidence which required the consent of the party, not the request for permission to produce it.

Baron ROLIN-JAEQUEMYNS thought that the new paragraph in the text should begin with the words: " In the course of the oral proceedings ", and that after that the wording of Article 52 of the Statute should be followed as nearly as possible; for instance, they might say: " the Court may refuse to accept any evidence that one party may desire to present unless the other side consents; in case of disagreement the decision rests with the Court ".

The PRESIDENT said that, if no member of the Court opposed the principle underlying the three drafts, he would convene the Drafting Committee, which, with the assistance of Jonkheer van Eysinga, would prepare a draft for submission to the Court.

Baron ROLIN-JAEQUEMYNS having asked whether the Court should not, in any case, vote on the question of principle, the PRESIDENT took a vote on the following question:

> " Does the Court wish to embody in its Rules a clause providing that a request made during the oral proceedings for permission to produce evidence of the kind mentioned in Article 47 of the Rules as adopted on February 8th may be refused by the Court after hearing the parties if the other party has not given its consent ? "

The Court unanimously answered the question in the affirmative.

11.II.35.*

Discussed as Article 47.

Explanation in regard to a Vote.

M. NEGULESCO recalled that, at the end of the previous sitting he had, when a vote was taken in connection with Article 47, voted with M. Schücking against the majority of the Court. After reading the text, he had, however, realised that his vote did not represent his opinion.

M. Negulesco made the following declaration: The majority of the Court had reached the conclusion that, if a party gave notice of its intention to produce certain evidence, in conformity with Article 47 of the Rules of Court—*i.e.*, before the opening of the oral proceedings—the evidence must automatically be admitted; in other words, the Court was not entitled to say whether the evidence was legally admissible or relevant, even if the other party objected to its production. The Court, or the President if the Court was not in session, was bound to take the necessary steps for hearing the evidence. The evidence of witnesses, or of experts, or evidence taken on commission —the latter implying a devolution of powers and the relinquishment by the Court of its powers in favour of a national tribunal—must be admitted as of right. The Court naturally retained its right to appraise the evidence produced, but only after, not before, the production of the evidence.

The taking of evidence should be merely a consequence of the legal admissibility and the relevance of the evidence. Evidence which was legally inadmissible or irrelevant should not be taken; for otherwise the taking of evidence might be protracted, to the prejudice of the good administration of justice.

The system which he thus advocated was consistent with the terms of the Statute and with the spirit which had given it form.

The right of control which the Statute conferred upon the Court in regard to evidence did not extend only to the manner in which evidence had to be taken, but also to the previous consideration of its legal admissibility and its relevance.

How great were the powers which it was intended to confer on the Court in this respect was shown by the right with which the Court was invested of calling evidence, *proprio motu*. That power could not be reconciled with the theory that a party's right to produce evidence must be automatically admitted. In order to give effect to its right of ordering the production of evidence, *proprio motu*, the Court must have power to exclude evidence, or to postpone its production, even where notice of the intention to produce it had been given before the opening of the oral proceedings; and that system must apply to all evidence without distinction, for nowhere did the Statute differentiate between one kind of evidence and another.

Article 52 of the Statute, which had been invoked against the above system, was concerned with the belated submission of evidence and did not affect the Court's power to exclude evidence which was not belated, if it was inadmissible in law or irrelevant.

12.II.35.**

Discussed as Article 47.

The PRESIDENT said that the members of the Court had received the Drafting Committee's new text for Article 47 [1]. One of the members had been struck by a special point in the wording and wished to have an opportunity of examining it again.

For this reason, the President desired provisionally to reserve the examination of this article.

14.II.35.*

Discussed as Article 47.

Articles 47 and 53 (57, paragraph 2, of Rules of 11.III.36).

M. GUERRERO, Vice-President, observed that, according to the text for Article 53 adopted at the previous meeting [2] on the proposal of M. Fromageot, the intention appeared to have been to leave to the Court itself control over the production of evidence in the shape of an expert report, both in the case of a report ordered by the Court *proprio motu* and in that of a report asked for by one of the parties.

After mature reflection, the Vice-President, contrary to the view maintained by him during the discussion, now concurred in the Court's decision. He considered in fact that the Court must always retain control of the procedure, and that to give a party the right to demand the holding of an enquiry would be inconsistent with this principle.

This, however, led him to revert to Article 47, which had already been adopted. The reasons against giving a party an absolute right to demand an expert report also made it advisable not to give parties an absolute right to have witnesses examined. If, as seemed to be the case under Article 47, the Court gave parties a right, which it could not override, to call witnesses, when notice of the intention to do so was given before the opening of the oral proceedings, they must be given the same right with regard to other forms of evidence. Since, however, the Court had come to the conclusion that it must always retain control over its procedure, and that it must, before ordering an expert report asked for by a party, consider whether such report would be desirable or not, the same rule should apply with regard to the calling of witnesses, especially since an unlimited right to call witnesses might, in some cases, be employed purely to delay proceedings. Article 47 as adopted by the Court should therefore be reconsidered.

M. NEGULESCO said this view coincided with his own and with that of M. Schücking and Count Rostworowski.

The Court must adopt a uniform system with regard to evidence and must not allow its hands to be tied when a party asked for certain evidence to be taken. It must in every case consider whether the evidence desired was legally admissible and relevant, before accepting it. If the parties disagreed, the Court must decide.

M. ANZILOTTI was afraid that a serious misunderstanding had arisen. In point of fact, it did not seem to him that the Court had adopted two different rules, one for witnesses and the other for expert reports.

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* D 2, A. 3, p. 218.

** *Ibid.*, p. 228.

* D 2, A. 3, pp. 248-251.

[1] The text was as follows:

" In sufficient time before the opening of the oral proceedings, each party shall inform the Court of all evidence which it intends to ask the Court to take.

" After the commencement of the oral proceedings, a request that evidence should be taken shall not be granted without the consent of the other party; failing such consent, the decision will rest with the Court after hearing the parties.

" The party concerned shall notify the names, christian names, description and residence of witnesses or experts whom it desires to be heard. It shall also give a general indication of the point or points to which the evidence is to refer."

[2] See pp. 218-219.

Article 47 only related to evidence produced by a party itself. A party came before the Court and produced documents, called witnesses or experts who would be heard by the Court, or submitted an expert report on the results of an enquiry which it had itself ordered. The position was entirely different when a party approached the Court and asked it to make use of its power to order an enquiry or expert report. In the latter case, the enquiry or report would be one arranged for by the Court.

That was the essential difference between the two cases; and the rules were different because they related to different situations. M. Anzilotti was in favour of preserving this system, as it had already been applied with good results.

M. NEGULESCO explained that, as he understood the matter, the whole of the discussion had related to an expert report for which a party asked the Court, and which required the co-operation of the Court. He said that an expert report produced by a party and prepared by its own experts was not an expert report within the meaning of Article 50 of the Statute. That article contemplated an expert who was appointed by the Court *proprio motu* and who was responsible to the Court. An *ex parte* report might be submitted either in writing—in that case it was a document or *pièce*—or orally, in which case it was not an expert report but oral evidence in a broad sense.

Baron ROLIN-JAEQUEMYNS did not think that the decision taken by the Court in regard to Article 47 had modified the scope of the article, which still, as before, concerned such evidence as was produced by a party and which a party was entitled to adduce at any time before the beginning of the oral proceedings.

M. SCHÜCKING differentiated between four sets of circumstances in which an expert report might be produced.

The first case—an entirely hypothetical one—was where a party had taken the opinion of experts in its own country and presented their conclusions to the Court in the form of a document. That was not a true expert report and need not be considered by the Court at that stage of the discussion.

The second case was where a party itself called an expert to appear before the Court and asked the Court to hear his evidence. In that case, the question was whether the Court was or was not obliged to do so.

The third case was where a party informed the Court that it desired an expert appointed by the Court to be heard.

Finally, the fourth case was where the Court itself took the initiative of appointing an expert in order to obtain his report.

Two of these cases might be combined: a party might, in the course of the oral proceedings, point to the desirability of obtaining the opinion of an expert and the Court might then appoint one. This case could be assimilated to that in which the Court appointed an expert on its own initiative. The most important question, however, still remained: was the Court bound to hear an expert appointed by the party itself and called by it?

The Vice-President had expressed the view that, in such a case, the Court would not be bound to comply with the party's request. M. Schücking had always shared this view. If the Court had already arrived at the conclusion that an application was not well founded in law, it could not be obliged to hear witnesses or to hold enquiries on points of fact which, in view of the conclusion, were irrelevant.

If the opposite view prevailed, all kinds of evidence must be treated in the same way. The effect of this would be that a party, simply by lodging a request, would be able to compel the Court to undertake an inspection on the spot in a distant country, even if the Court considered this proceeding useless for the purpose of its decision, because the application was not held by the Court to be well founded in law.

M. GUERRERO, Vice-President, differed from Baron Rolin-Jaequemyns and thought that the Court had made an innovation by the adoption of the new draft of Article 47 of the Rules.

The existing Article 47 simply provided that a party was entitled to inform the Court what evidence it intended to adduce in the case, but did not lay down what action was to be taken on receipt of this information. The Article 47 which the Court had decided to adopt went further, for it obliged the parties to give the information before the opening of the oral proceedings and laid down the action to be taken thereon.

If a request was made before the oral proceedings, the Court was obliged to accept the evidence of witnesses. For it was clear that a provision to the effect that, once the oral proceedings had begun, a request for permission to produce evidence could only be granted with the consent of the other party implied that the Court was bound to allow evidence notified before the oral proceedings. The Court had therefore conferred a new right on the parties.

Moreover, in M. Guerrero's opinion, there was a lack of uniformity as between the provisions adopted in regard to witnesses and those adopted in regard to expert reports. Supposing that the Court had before it a dispute between two distant countries. If one of them, in the course of the written proceedings, were to ask the Court, in the first place, to hear the evidence of witnesses and, in the second place, to have an expert report made, what would the Court do? Under Article 47 (new), it would be obliged to make arrangements for the hearing of the witnesses. On the other hand, with regard to the expert report, the Court would, on the basis of the provision inserted in Article 53 (Article 57 of the Rules of 11.III.36) at the previous sitting, be at liberty to decide whether or not to have the report made. These two requests, both made by the same party, might therefore, according to the provisions adopted, receive different treatment.

M. ANZILOTTI thought that, in the example taken, the two cases were quite different: the witnesses would be produced by the party itself, whereas the expert report would have to be ordered by the Court at the request of the party.

The PRESIDENT, thinking that the divergent ideas expressed were probably the outcome of a different interpretation of certain provisions of the Statute, more particularly Articles 43, 49, 50 and 54, proposed that the Court should adjourn the discussion in progress and resume it after an exchange of views to be held on February 15th.

Note. — See under Article 50, p. 194, for reference to Article 47 (Article 49 of Rules of 11.III.36) in connection with Article 45 (Article 50 of Rules of 11.III.36) at the same meeting.

16.II.35.*

Discussed as Article 47.

The PRESIDENT recalled that the Court had received the text of Article 47, revised by the Drafting Committee

* D 2, A. 3, pp. 266-272.

with the assistance of M. Schücking. This text was as follows:

> " In sufficient time before the opening of the oral proceedings, each party shall inform the Court of all oral evidence of witnesses or experts which it intends to ask the Court to take.
>
> " After the opening of the oral proceedings, a request for permission to produce such evidence cannot be granted without the consent of the other party, unless the Court, after hearing the parties, decides otherwise.
>
> " The party concerned shall notify the names, christian names, description and residence of witnesses or experts whom it desires to be heard. It shall further give a general indication of the point or points to which the evidence is to refer."

He asked M. Fromageot to comment on this text.

M. FROMAGEOT said that, speaking generally, the new Article 47, like the old one, dealt mainly with the conditions governing the production of the oral evidence of witnesses or experts—the new text was expressly confined to such evidence—the time for the presentation of a request to the Court and the formalities necessary when a request was presented after the opening of the oral proceedings; those formalities involved a preliminary request for the consent of the other party, and, if that consent were refused, a decision of the Court given after hearing the parties. M. Fromageot observed that this system was very much the same as that already adopted by the Court in regard to documentary evidence. He added that it was difficult thoroughly to appreciate the aim of Article 47 unless one compared it with the terms of Article 45 (Article 50 of the Rules of 11.III.36) of the existing Rules, according to which, if a party asked the Court to hear witnesses, the Court, without refusing the request, could decide that it would first hear the case argued by the parties, though the parties would retain the right to comment on the evidence, the taking of which was thus proposed.

The hearings were, however, under the direction of the Court. In a particular case, the argument of the question of law might completely elucidate the dispute and render the hearing of witnesses unnecessary. In such a case, although theoretically it might be said that a party was entitled in any event to call its witnesses, a practical view of the matter must be taken, and it would be inconceivable that the Court should be unable, in the exercise of its power of direction, to inform a party that its evidence had, as a result of the argument of the case, ceased to serve any purpose. That could be described as an appraisement of the relevance of evidence. On the other hand, under the system of the existing Statute and rules of procedure, it was somewhat difficult to think of cases, such as were to be found in various systems of municipal law, where the evidence of a witness would be legally inadmissible.

M. GUERRERO, Vice-President, gathered that the new Article 47 related solely to the hearing of witnesses or experts. If that was so, the question arose how should the Court deal with a request received before the oral proceedings to the effect that it should arrange for an expert report.

M. FROMAGEOT thought that, if a party asked the Court to order an expert report, the Court would decide whether or not there was occasion to do so. When a party called a witness, it was producing evidence. But when a party asked the Court to order an expert report, there would really be no question of evidence until the expert had presented his report setting out his conclusions. The cases were therefore different.

The PRESIDENT thought that some provision must be included in the Rules informing a party desirous of having an expert report ordered how it should proceed. Article 53 (Article 57, paragraph 2, of the Rules of 11.III.36) of the Rules did not meet the case, though Article 50 of the Statute covered it.

M. GUERRERO, Vice-President, agreed with the President that a new article should be prepared regarding the action to be taken upon a request for an expert report made by a party before the oral proceedings. He thought that Article 53 of the Rules, like Article 50 of the Statute, covered only an expert report ordered by the Court *proprio motu*. In his opinion, a distinction should be drawn between a request from a party for permission to call an expert, whose statements were not evidence *(moyen de preuve)*, and a request for an actual expert report which would be given after hearing argument. He was under the impression, however, that the proposed Article 47 attached greater importance to the hearing of an expert than to a true expert report; for, according to the article, if a request were made by a party before the oral proceedings that an expert called by it should be heard, the Court was obliged to comply, whereas the ordering of an expert report to be given after hearing argument remained subject to the Court's decision.

In any case, M. Guerrero thought that the object of the existing Article 47 of the Rules was not to impose obligations on the Court but simply to fix times for the presentation of certain evidence. On the other hand, the new version seemed, in certain circumstances, to create an obligation on the part of the Court to hear witnesses or experts. This objection might be obviated by amending the second paragraph of the new text as follows:

> " After the opening of the oral procedure, a request for permission to produce such evidence cannot be *presented* without the consent of the other party."

This would leave the Court free to grant or refuse a request for the hearing of witnesses or experts, in the same way as it was free to grant or refuse a request that an expert report should be ordered.

M. Guerrero fully realised that his suggestion involved a modification of his previous attitude in regard to the hearing of witnesses presented before the oral proceedings.

M. NEGULESCO thought that the Drafting Committee's text had much in common with the ideas expressed by him and by M. Schücking and Count Rostworowski in the declaration made by them on February 11th, 1935. Nevertheless, the draft now submitted by the Drafting Committee was concerned solely with the hearing of witnesses and experts. It therefore reduced the scope of Article 47 of the Rules, since neither enquiries nor inspections on the spot were covered. The result was that the Court was obliged to hear witnesses and experts, even if the other party lodged an objection on the ground of inadmissibility or irrelevance, if notice was given before the oral proceedings.

Again, the new text seemed, if compared with the new Article 53,[1] to indicate that evidence of other kinds would only be sanctioned in virtue of an order made under Article 48 of the Statute. The Court would thus be establishing two different systems in regard to evidence. M. Negulesco was doubtful if that was admissible in law.

[1] See pp. 218-219.

In his view, if a party asked permission to produce evidence and the other party objected, the Court ought in any case to give a decision by order as to the admissibility in law and relevance of such evidence. Furthermore, according to the first paragraph of the proposed text, if a party had given notice before the opening of the oral proceedings of the witnesses it wished to call, the Court had nothing to say as to the admissibility in law or relevance of their evidence. On the other hand, in the second paragraph it was provided that, after the opening of the oral procedure, a request could only be sanctioned with the consent of the other side unless the Court decided otherwise. In other words, if a request for permission to call a witness or expert was made too late, the Court must decide. There were, however, cases where a party could not announce a witness before the oral procedure because only in the course of the oral procedure did it become necessary, as a result of the arguments of the other side, to ask permission to call him; but even in such a case, where the request could not be said to be presented too late, the Court would apparently, according to the proposed text, be able to decide as to the admissibility of the evidence. In M. Negulesco's opinion, the difference thus made in the treatment of these cases seemed inconsistent with the Statute.

M. FROMAGEOT did not, as M. Negulesco appeared to do, regard the proposed text of Article 47 as establishing more than one system in regard to evidence. Conditions were laid down regarding the time when a request for permission to call witnesses must be made, but the text did not establish one system for such evidence, and, side by side with it, another system for requests with regard to any other means of investigation such as enquiries or expert reports. If evidence was submitted within the prescribed times, the Court was bound to hear it; if it was submitted later, the Court decided whether to hear it or not, unless the other party's consent was obtained.

M. GUERRERO, Vice-President, thought it would be better if the Court remained free in both cases to accept or reject evidence.

M. FROMAGEOT pointed out to M. Guerrero that Article 45 (Article 50 of the Rules of 11.III.36) of the Rules satisfied all his scruples. The Court could not *de plano* reject a request, if made before the oral procedure, but it could have the case argued by the parties before accepting the evidence. If the argument of the case rendered the evidence superfluous, the party concerned would probably be the first to waive the point.

M. GUERRERO, Vice-President, observed that, as regards the utility of evidence, a party might take a different view from the Court even after the case had been argued. The essential point was that, if a party was entitled to call witnesses, it could not be deprived of this right because the argument of the case took place before the examination of witnesses.

M. Guerrero thought that the Court should be able to accept the following text, which covered all kinds of evidence:

> " In sufficient time before the opening of the oral procedure, each party shall inform the Court of *all* evidence which it intends to ask the Court to take.
>
> " After the opening of the oral procedure, a request for permission to produce evidence may be *presented* only with the consent of the other party. . . ."

Jonkheer VAN EYSINGA observed that it was necessary to exercise some caution, as the Court's experience was not very large. He did not think that the proposal of the Drafting Committee was calculated to modify the existing system with regard to evidence. He thought, however, that the adoption of the views of Count Rostworowski, MM. Schücking and Negulesco, to the effect that the production of evidence should be made dependent upon its admissibility in law and relevance, would lead to a change. For their proposal amounted to saying that, when a party asked permission to call witnesses, for instance, the Court must always first give a decision upon the request after considering whether the proposed evidence was legally admissible and relevant. He doubted, however, whether the Statute empowered the Court to modify the system laid down therein (Article 54), according to which, in both the oral and written proceedings, parties were free to " *faire valoir . . . tous les moyens de preuve qu'elles jugent utiles* " (. . . complete their presentation of the case). Moreover, Jonkheer van Eysinga found it difficult to visualise the possibility of evidence being legally inadmissible; for where were the rules of law governing the question of admissibility to be found ? And, generally, it would be very difficult for a judge to say *a priori*, in regard to the evidence of a particular witness, whether it was relevant or not.

M. ANZILOTTI pointed out that, underlying both the existing Article 47 and the new draft, was the fundamental distinction between evidence which a party produced itself on its own responsibility and evidence which required the co-operation of the Court. The free hand left to the parties by Article 52 of the Statute, as well as by Article 54, related only to evidence in the first category. Just as a party could submit any document without the Court being able to say that it would not accept it, so also it could call witnesses or experts who might be regarded as " living documents ". On the other hand, when the Court had, for instance, to arrange for an expert report, the principle was quite different: it was no longer a question of evidence produced by a party but of evidence which had to be obtained by the Court. The only evidence which a party could adduce as of right was that which it produced itself. In M. Anzilotti's view, the new version of Article 47, like the old, possessed all the necessary flexibility and did not even preclude the other party from lodging an objection, if in a particular case it had legal grounds for so doing. With regard to the question of relevance, it was impossible for the Court to decide without having first heard the evidence. Article 45 of the Rules, however, made it possible for the Court to direct that the parties should first of all argue the case.

M. GUERRERO, Vice-President, would prefer the existing Article 47 to the new text proposed for that article. He considered in fact that the new text made an innovation in Article 47; the text which he had suggested did not do so—it simply brought the Rules into line with the Statute.

M. SCHÜCKING could accept either the version of Article 47 proposed by the Vice-President or that of the Drafting Committee, provided that another article were added dealing with evidence other than that of witnesses or experts. Like M. Anzilotti, he considered that a distinction must be drawn between evidence produced by the parties and evidence obtained by the Court; for this distinction, though not made in the Statute, was made necessary by the very nature of things.

He recalled that, in the draft of the Committee of

Jurists, the last paragraph of the present Article 43 of the Statute was worded as follows:

> " The oral phase [of the proceedings] shall consist in the hearing of all persons, witnesses or experts, whom the Court decides to hear at the request of the parties." [1]

The proposal had therefore been that there should in every case be a special decision of the Court before a witness or expert was heard; this proposal had not been accepted.[2] Again, when the Rules were being drawn up, it had been observed that the system of allowing the parties a free hand in the production of evidence had been adopted, and, when the revision of the Rules was undertaken in 1926, this was the reason why it had not been considered desirable to make rules in regard to evidence. All this showed that, before the Court, it was, as a general rule, unnecessary to obtain special permission for the hearing of a witness or expert. There might, on the other hand, be special cases in which there must be a decision of the Court on the point, if the parties disagreed. At all events, a party's right to call a witness always remained a relative one, by reason of the Court's power of direction. The Court could not be compelled to hear witnesses in regard to facts which, in its view, were irrelevant. The position at the oral proceedings in regard to evidence was different from that in regard to documentary evidence in the written proceedings; for, during the hearings, the whole of the procedure must remain under the direction of the Court. From this point of view, Article 45 (Article 50 of the Rules of 11.III.36) of the Rules was most important, because, if the Court could cause the parties to argue a case before taking evidence and then inform a party that its evidence had become superfluous, that made it possible to grant very extensive rights to the parties. Of course, it must be understood, however, that the Court's right of control prevailed over the rights of the parties.

M. NEGULESCO replied to the objections to his point of view based on Articles 54 and 52 of the Statute.

In his opinion, Article 54 made no distinction between the evidence of witnesses and other evidence, and he held that that article pointed to the conclusion that any evidence announced before the opening of the oral procedure must be accepted. Furthermore, a careful examination of Article 52 of the Statute would show that it was concerned solely with the belated submission of evidence and not with its admissibility or relevance.

M. Negulesco thought that, in the event of disagreement between parties as to the legal admissibility or relevance of evidence, there should always be a decision of the Court, no matter what the evidence might be or when its production was announced. He could, however, also accept the wording proposed by the Vice-President, which he considered logical.

Count ROSTWOROWSKI wanted nothing inserted in the article under discussion which might weaken the Court's right to control the procedure, because that was the general principle dominating the whole question. Count Rostworowski, like M. Schücking and M. Negulesco, thought that this right of control applied in respect of all evidence and at all stages of the proceedings, both written and oral, though of course generally in rather exceptional cases.

M. GUERRERO, Vice-President, did not wish the distinction emphasised by M. Anzilotti between evidence directly produced by a party itself and evidence the production of which required the co-operation of the Court to be made in the Rules. He thought that that distinction had no legal basis. In his view, it would be a definite innovation, and it would be better that Article 47, which should be confined to fixing the time-limit for the presentation of evidence, should not contain anything which might prejudge the action of the Court in connection with evidence.

He therefore proposed that the article should be left in its existing form.

The PRESIDENT gathered that a solution which would be generally acceptable to all members of the Court would be to retain the existing text of Article 47. As a matter of fact, the Drafting Committee and, before it, the Co-ordination Commission, had never meant to abandon the essential features of that text, but simply to make certain improvements in it.

MM. ANZILOTTI, URRUTIA and FROMAGEOT approved this suggestion.

Baron ROLIN-JAEQUEMYNS also accepted it. Should the Court retain Article 47, however, he raised the question whether it would not be possible to make it cover experts as well as witnesses.

M. ANZILOTTI thought it probable that, at all events in the intention of the framers of the article, the word " witnesses " was already meant to cover experts called by the parties.

M. GUERRERO, Vice-President, did not altogether agree that the Court had not intended to introduce an innovation in Article 47. On the contrary, it had intended to lay down in the Rules that a party which had, before the opening of the oral procedure, indicated the evidence which it meant to produce, was entitled to have witnesses thus indicated heard by the Court; on the other hand, a witness not mentioned until after the opening of the oral procedure could not be heard without the consent of the other party, unless otherwise decided by the Court. It was because on reflection he had thought that this innovation went too far that he had wished the Court to reconsider Article 47.

The PRESIDENT took a vote on the following question:

> " Does the Court decide to retain the existing text of Article 47 of the Rules ? "

By nine votes to two, the Court decided in the affirmative.

The PRESIDENT declared that the existing text of Article 47 was maintained.

First Reading.

The article was adopted on 5.IV.35, with the number 49 and with the following text:

> " 1. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and, through the Registry, the other parties of all evidence which it intends to produce, together with the names, christian names, description and residence of witnesses and experts whom it desires to be heard.
>
> " 2. It shall further give a general indication of the point or points to which the evidence is to refer."

[1] Advisory Committee of Jurists. Minutes of the Meetings of the Committee, p. 341 (*the text is one adopted in the course of a meeting* as a " basis for the final wording ").

[2] *Ibid.*, p. 568, Article 6.

22.II.36.*

Article 49.[1]

M. FROMAGEOT said that, on reading Article 49 in the form proposed, he had been struck by the words " *Chaque partie fait connaitre* (Each party shall inform) tous moyens de preuve (of all evidence) *qu'elle entend produire.*" It had, however, just been stated in Article 48 that parties must not submit any new documents once the written proceedings had been concluded. It was difficult, without referring to the minutes of the work of revision, to grasp precisely what was contemplated by these two articles. Article 48 related only to documentary evidence; Article 49 only to oral evidence.

Again, since Article 49 dealt with oral evidence, it was natural to say: " shall inform . . . of the names, christian names, description and residence of witnesses and experts . . .". But it would be desirable to mention evidence other than documentary evidence which a party might ask the Court to take. A party might ask the Court to appoint experts or to order an expert enquiry; such a request did not really in itself constitute the production of evidence; the evidence would be the outcome of the expert enquiry or inspection carried out on the spot. Accordingly, the article should indicate the conditions under which parties might ask the Court to arrange for some such method of investigation which would produce evidence.

Having regard to the foregoing observations, paragraph 1 of Article 49 should refer solely to oral evidence, and any other evidence should be dealt with in a second paragraph. M. Fromageot accordingly proposed the following text:

> " *Article 49.* — 1. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and, through the Registry, the other parties of the names, christian names, description and residence of witnesses and experts whom it desires to be heard. It shall further give a general indication of the point or points to which the evidence is to refer.
>
> " 2. Similarly, it shall indicate all other evidence which it intends to produce or which it intends to request the Court to take, including any request for the holding of an expert enquiry."

24.II.36.**

Article 49. — Second Reading.

The PRESIDENT invited the Court to consider the new text by M. Fromageot for Article 49.[2]

M. FROMAGEOT said that, on reading the text of Article 49 as adopted by the Court in first reading—which incidentally corresponded word for word to the text of Article 47 of the old Rules — and on comparing it with Article 48, it was difficult to see how the two articles were reconcilable. For, according to Article 48 [3], a party could only file a new document with the consent of the other party, once the written proceedings were terminated. Article 49 said that " in sufficient time before the opening of the oral proceedings each party shall inform the Court . . . of all evidence *(tous moyens de preuve)* which it intends to produce . . .". This text would create uncertainty in the mind of a reader. In the course of the discussions in 1935[1], it had been explained that the words " all evidence " *(tous moyens de preuve)* referred to oral evidence and evidence other than documentary evidence. It would perhaps be desirable, in order to make the terms of Article 49 clearer, to adopt the wording proposed by him.

This text made it quite clear that paragraph 1 referred to oral evidence; on the other hand, paragraph 2 covered for instance a request that the Court should carry out an enquiry on the spot or obtain evidence in some other manner; the words " any other evidence " informed the reader that the evidence referred to was neither that contemplated by Article 48 nor that contemplated by paragraph 1 of Article 49.

The PRESIDENT considered that this new draft made no change in the substance of Article 49, but merely rendered its meaning clearer.

M. ANZILOTTI, whilst acknowledging the objection to the present text, questioned whether the text proposed for paragraph 2, beginning with " any other evidence which it intends to produce ", altogether overcame the difficulty. Might not these words also cover documents ?

M. FROMAGEOT recalled that documents were dealt with in Article 48, and that paragraph 1 of Article 49 dealt with oral evidence.

M. ANZILOTTI realised this, but was afraid that some ambiguity would still exist because the first paragraph of the proposed draft referred to witnesses and experts, while the second paragraph spoke of " any other evidence which it intends to produce ".

Jonkheer VAN EYSINGA, who agreed with M. Anzilotti, suggested that, to make the matter quite clear, the following words might be added: " 2. Similarly, it shall indicate any other *non-documentary* evidence . . ."; documentary evidence having been dealt with in Article 48.

Baron ROLIN-JAEQUEMYNS shared the doubts felt by M. Anzilotti and Jonkheer van Eysinga. But, in order to remove any ambiguity, he would prefer to repeat the expression used in Article 48, which spoke of " new documents ", and to say: " . . . any evidence other than the new documents referred to in Article 48 ".

M. FROMAGEOT suggested the following wording on the lines of Baron Rolin-Jaequemyns' observation.

> " 2. Similarly, it shall indicate all evidence, other than that referred to in Article 48 and in paragraph 1 of this article, which it intends to produce or which it intends to request the Court to take, including any request for the holding of an expert enquiry."

M. GUERRERO, Vice-President, in view of this modification, did not think it necessary to retain the words: " including any request for the holding of an expert enquiry ". An expert enquiry was covered by the words " all evidence other than . . .".

Count ROSTWOROWSKI was afraid it would be difficult to agree upon a definitive wording at the meeting. Would it not be better to reserve the question of wording and to have a final draft prepared on the basis of the suggestions made ? For his part, Count Rostworowski would suggest that, at the beginning of the sentence, there should be a reference to the exceptions dealt with in the preceding provisions. The final text might be submitted to the Court at a future sitting.

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* D 2, A. 3, p. 618.
** *Ibid.*, pp. 619-623.
[1] For text discussed, see p. 190, meeting of 5.IV.35.
[2] See above: meeting of 22.II.36.
[3] For text, see p. 177.

[1] Pp. 178 *et sqq.*

The PRESIDENT agreed with this proposal. He would also like the meaning of the expression "*dans les mêmes conditions*" (similarly) to be made clearer.

M. FROMAGEOT, on the basis of the suggestions made by M. Guerrero, Vice-President, proposed the following text:

"2. Similarly, and subject to the provisions of Article 48 of the preceding paragraph of this article, each party shall indicate all other evidence which it intends to produce or which it intends to request the Court to take, including any request for the holding of an expert enquiry."

Jonkheer VAN EYSINGA considered that further reflection was required before the drafting of the article was finally agreed upon. The expression "other evidence" did not seem to him quite clear.

The PRESIDENT asked the Court whether they were disposed to adopt Article 49, subject to possible improvements in its wording.

M. ANZILOTTI wanted to be sure that the text proposed, which followed Article 48, did not involve forfeiture of rights if its provisions were not complied with. For it might happen that the need to have recourse to some evidence of the kind contemplated in Article 49 would become apparent only in the course of the oral proceedings; it must therefore also be possible to call witnesses or experts, or to ask the Court to take steps to obtain evidence, even if no announcement or request to that effect had been made before the oral proceedings.

The PRESIDENT thought that the Court were agreed that this provision of the Rules was simply designed as a guide to lawyers responsible for the preparation of documents of the written proceedings or for the conduct of a case.

M. FROMAGEOT agreed that the text suggested by him did not involve forfeiture of rights.

M. GUERRERO, Vice-President, considered that, when non-compliance with a rule involved forfeiture of a right, the fact must be expressly stated, otherwise the penalty could not be enforced. The fact that the proposed Article 49 contained nothing to show that it was mandatory proved that it was purely directory.

Baron ROLIN-JAEQUEMYNS shared this view. The proposed text was clear: any evidence might be produced with the consent of the Court.

With regard to the wording, Baron Rolin-Jaequemyns would prefer to say: "Similarly, and apart from the evidence . . .", rather than "subject to the provisions . . .". For the preceding Article 48 dealt with written documentary evidence, and Article 49 with the evidence of witnesses. The text might therefore read: ". . . apart from the evidence referred to in Article 48 (documentary) and in paragraph 1 of Article 49 (oral), each party shall indicate . . .".

The PRESIDENT considered that Article 50 of the Statute sufficed to preclude any possibility of construing the rule as involving forfeiture of the right. Under Article 49 of the Rules, if a party asked permission to appoint an expert and if the other party objected, the Court could, if it thought fit, itself take the initiative of giving this permission.

M. ANZILOTTI said that the doubt to which he had alluded resulted, in his opinion, from a comparison of Articles 48 and 49 of the Rules. In the case of documents, provision was made for the submission of new documents; but as nothing of the kind was said with regard to the sorts of evidence referred to in Article 49, one might be led to suppose that an announcement or request, in respect of such evidence, must in any case be presented before the oral proceedings. If, however, the Court were agreed that that was not the construction to be placed on Article 49, M. Anzilotti would have no difficulty in accepting that article.

M. NEGULESCO considered that the principle that the Court could admit evidence *proprio motu* sufficed to establish that Article 49 did not involve forfeiture of rights.

Jonkheer VAN EYSINGA questioned whether the Court could accept this rule in such a general way. He thought that much would depend on the context in each case. Subject to this, he likewise considered that Article 49 did not involve forfeiture of rights.

The REGISTRAR referred to Article 3 of the Rules (already adopted) in regard to the presence of judges *ad hoc*. Without actually voting, members of the Court had come to an agreement to the following effect: though not expressly provided for in that article, forfeiture of the right in question was implied, but in special circumstances the Court might refrain from enforcing the principle. In this agreement therefore, which had been duly placed on record by the President, a construction differing from that now contemplated had been placed upon the fact that provision was made for a time-limit [1].

M. GUERRERO, Vice-President, did not consider that Article 3 constituted a true application of the principle of forfeiture of rights; it was merely presumed that the silence of the parties, after the lapse of a certain time, might be construed as a renunciation of the right conferred upon them by the article. If, however, the parties, after the expiration of this time, were to inform the Court of the reasons why they had not replied within the time-limit fixed, the Court would doubtless allow the designation of a judge *ad hoc*.

M. FROMAGEOT observed that the terms of Article 48 precluded any question of forfeiture of rights from arising in the case of documentary evidence. Only with regard to the oral evidence referred to in paragraph 2 of Article 49 was there any possibility of doubt. This doubt would be removed by adding to Article 49 a third paragraph to the following effect: "In the event of belated compliance with these provisions, the decision shall rest with the Court."

M. GUERRERO, Vice-President, was not in favour of inserting such a provision in Article 49, for time-limits were fixed in many articles, and it would become necessary to insert in all of them a new provision to eliminate the presumption of forfeiture of the rights involved. The terms of Article 49 were sufficiently clear as they stood.

M. URRUTIA thought that the question was disposed of by Article 49 of the Statute, which said: "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanation." In the event of a party urging the necessity of new evidence which had not been arranged for before the beginning of the oral proceedings, there was nothing to prevent the Court from using this power. The Court might overrule the request, but Article 49 empowered it to sanction the production of the new evidence.

There seemed, therefore, no need to add to Article 49 the third paragraph suggested by M. Fromageot.

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[1] Pp. 18 *et sqq.*

The PRESIDENT put the following question:

"Does the Court decide to add the following paragraph to Article 49: 'In the event of belated compliance with these provisions, the decision shall rest with the Court'?"

He said that, for his part, he would vote against this addition, because he would be reluctant to see—for the first time—a provision regarding belated action introduced into the Rules.

M. NAGAOKA said that, if the question were put to the vote, he would be obliged to abstain, as he did not wish to prejudice the fate of M. Fromageot's suggestion by his vote.

The PRESIDENT observed that the insertion of a new provision in the Rules required the support of a majority of the members of the Court present. If several judges intended not to vote, there was no point in taking a vote. Moreover, those members of the Court who thought Article 49 sufficiently clear probably saw no need for adding anything to it.

Count ROSTWOROWSKI thought it would suffice to record in the minutes that the Court considered that Article 49 did not involve any forfeiture of rights, and that the Court remained free at any time to admit evidence.

The PRESIDENT noted that none of the members of the Court opposed the recording of this view in the minutes.

Article 49 was therefore adopted, subject to drafting, in the following form:

"1. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and, through the Registry, the other parties, of the names, christian names, description and residence of witnesses and experts whom it desires to be heard. It shall further give a general indication of the point or points to which the evidence is to refer.

"2. Similarly, and subject to Article 48 and to the preceding paragraph of this article, each party shall indicate any other evidence which it intends to produce or which it intends to request the Court to take, including any request for the holding of an expert enquiry."

New draft of paragraph 3 rejected: article adopted in second reading.

11.III.36.*

Article 49. — Final Adoption.

In paragraph 2, the Drafting Committee proposed to add the words "of these Rules".

Baron ROLIN-JAEQUEMYNS observed that the end of Article 49 (French text) was badly drafted, as one appointed ("*désigne*") experts and not an expert enquiry ("*expertise*"). They might say: "*à fin d'expertise éventuelle*".

M. FROMAGEOT preferred "*aux fins d'une expertise éventuelle*", deleting the word "*désignation*".

The PRESIDENT declared this amendment adopted, and observed that it involved no change in the English text.

Article 49, as a whole, was finally *adopted* with these amendments.

ARTICLE 50 *(Article 45, old Rules).*

ORDER AS BETWEEN THE PRODUCTION OF ORAL EVIDENCE AND THE HEARING OF THE PARTIES

6.II.35.*

Discussed as Article 45.

The PRESIDENT read the text proposed by the Co-ordination Commission, which was worded as follows: [1]

"In suits in which the Court hears witnesses, it shall determine in each case whether the agents or counsel shall address the Court before or after the examination of witnesses; the parties shall, however, retain the right to comment on the evidence given."

This text was accompanied by the following report:

"The Commission has maintained the existing text of the Rules (the deletion of this article had been proposed by the Second Committee) save for an alteration of wording designed to make the position clear —*i.e.*, that the article can only apply to the oral evidence of witnesses."

He added that the necessity for producing written evidence additional to that accompanying the documents of procedure would in fact arise only in a case where one party was obliged to furnish an explanation or evidence to refute the arguments of the other side.

M. SCHÜCKING, for the reasons which he had already given, proposed, with M. FROMAGEOT's support, that Article 45 should not be examined until after Article 46.

Baron ROLIN-JAEQUEMYNS agreed with M. Schücking if the intention was to postpone the questions which concerned evidence with a view to grouping them in one or two articles; the Drafting Committee would judge where these articles should be inserted, and how they should be worded. But it would be a graver matter, in his opinion, if the Court's intention was to insert, after the chapters on written and oral procedure, a chapter on evidence which would cover both written and oral procedure. It would be wiser to deal first with the question of evidence in written proceedings and, next, in oral proceedings. The question which it was advisable to postpone for the time being was that of the provisions to be drawn up for insertion in the chapter on oral proceedings.

The PRESIDENT declared that M. Schücking's proposal to go on to Article 46 was adopted.

14.II.35.**

Discussed as Article 45.

The PRESIDENT opened the discussion on Article 45 of the Rules.

M. ANZILOTTI emphasised the importance of this article, which was closely bound up with the system of evidence adopted by the Statute and the existing Rules. It left the Court free to call on the parties to argue the case before the production of any particular evidence. This rule enabled the Court to refuse to accept evidence which would

* D 2, A. 3, pp. 182-183.
[1] *Ibid.*, p. 872.

* D 2, A. 3, p. 731.
** *Ibid.*, pp. 251-253.

be irrelevant. He recalled what had happened in the Chinn case: the enquiry asked for by one party would have been relevant only if the question of law had been decided in a certain way.[1]

M. NEGULESCO realised the utility of Article 45, though he confessed that it embodied a notion at variance with the ideas in regard to procedure generally prevailing on the Continent. The intention of the authors of the rule in 1922[2] had been to reckon with the possibility that new questions might arise in the course of the oral proceedings, or that the Court might feel a need for additional evidence. In that case, it could *proprio motu* take such new evidence after the pleadings and allow the parties to speak once more after the evidence had been taken. Though the article was useful in substance, its form required amendment in order that it should better convey the idea explained by M. Negulesco.

M. ANZILOTTI thought that M. Negulesco's explanation restricted the scope of the article, which was much more general. The Court must also have the right to say: Argue the merits first, and we shall then see if the evidence which it is proposed to bring is relevant or not.

The PRESIDENT recalled the changes which the Co-ordination Commission had proposed to make in the form of Article 45. The Co-ordination Commission's text was as follows (see above: meeting of 6.II.35).

The President gathered that Article 45 had been adopted in 1922 as a sort of combination of the procedure in Anglo-Saxon countries and that followed on the Continent.

M. ANZILOTTI said that that was so.

The PRESIDENT, after a short exchange of views, was satisfied that the Court was unanimously in favour of retaining the principle laid down in Article 45—*i.e.*, of retaining in the Rules a provision giving the Court the right in each case to decide whether the representative should argue the case before or after the production of the evidence.

With regard to the wording to be adopted, the Court had before it the existing text of the Rules and the Co-ordination Commission's proposal, which was designed to limit the application of the article to the oral evidence of witnesses.

M. NEGULESCO would prefer the existing text of the Rules.

M. GUERRERO, Vice-President, agreed: he thought there was no reason for restricting the application of this rule to oral evidence.

The PRESIDENT said that the English text of the article was very comprehensive: it covered documents annexed to the documents of the written proceedings—*i.e.*, documents enumerated in the list attached to the Case and Counter-Case. The French text seemed to impose a limitation; for the words "*après la présentation des divers moyens de preuve*" seemed to refer only to evidence produced for the first time after the end of the written proceedings.

Baron ROLIN-JAEQUEMYNS thought that both versions related only to the oral proceedings and to evidence which had not yet been produced at the opening of those proceedings.

The PRESIDENT gathered that the Court regarded this article as referring only to documents produced after the close of the written proceedings.

Jonkheer VAN EYSINGA agreed; for the article said: ". . . before or after the *production* of the evidence". In principle, all written evidence had, at this time, long since been produced. The article, therefore, could not refer to such documentary evidence.

Baron ROLIN-JAEQUEMYNS observed that of course all evidence which had not yet been produced was meant, and not merely documentary evidence. If, for instance, following upon an enquiry already carried out, a further enquiry was asked for, the Court would be entitled to invite the parties to argue the case before coming to a decision.

M. FROMAGEOT considered that the words meant: "all evidence not yet produced to the Court". If there were some slight obscurity, it resulted from the meaning apparently attached by the authors of the rule to the word "evidence" in the English text and from the use of the words "*présentation des divers moyens de preuve*" in the French text of the article. The word "evidence" seemed to have been used in the sense of "evidence of witnesses" (*témoignages*), whereas on the Continent the word "*preuve*" did not bear as its principal meaning "the evidence of witnesses".

However that might be, it would undoubtedly be regrettable to limit the scope of the article solely to the evidence of witnesses. Accordingly, it must be clearly stated that what was meant was all evidence which had not already been produced in the course of the written proceedings and which the parties might intend to produce during the oral proceedings.

The PRESIDENT thought that, if the Court took the same view as M. Fromageot, it would certainly be well to adopt a wording which would remove any possible doubt from the minds of lawyers who might be entrusted with the preparation of a case for submission to the Court.

M. ANZILOTTI thought that one way of removing any doubt might be to make Article 45 follow Article 47 in the Rules, so as to make it refer to the evidence mentioned in that article.

M. FROMAGEOT observed that the terms of Article 47 covered not only the evidence of witnesses but all other forms of evidence as well. Reserving the question of wording, Article 45 might be placed after Article 47, as suggested by M. Anzilotti.

The PRESIDENT gathered that the Court was agreed that the words: "*des divers moyens de preuve*" (evidence), in the last line but one of Article 45, did not include documents annexed to the documents of the written proceedings, and that Article 45 should be so worded as to avoid any inconsistency with Article 40 of the Rules.

The President observed, with regard to a point of detail in the wording of the article, that the words ". . . *la Cour statue . . .*" were used. He thought that the word "*statue*" did not always imply a judgment and that in this case, for instance, it simply meant "decide".

M. GUERRERO, Vice-President, agreed, but would like the word "*statue*" to be replaced by "*décide*". He also proposed to replace "the representatives of the parties" by "the parties".

Jonkheer VAN EYSINGA thought that the Drafting Committee might be left to settle the latter point. In his opinion, uniformity of expression was most desirable; the

[1] See A/B 63, pp. 69, 88.
[2] D 2, pp. 81 and 208; *cf.* also D 2, A., p. 115.

Court, in other articles, had used the expression: " agents, counsel or advocates ".

The PRESIDENT noted Jonkheer van Eysinga's suggestion that the preparation of a definitive draft might be left to the Drafting Committee, and recorded that the Court was unanimously in favour of retaining the article, the question of drafting being reserved.

Note. — See pp. 188-190 for references to Article 45 (50 of the Rules of 11.III.36) during the discussion on Article 47 (49 of the Rules of 11.III.36) on 16.II.35.

First and Second Readings and Final Adoption.

The article was adopted in first reading on 5.IV.35 with the number 50 and with the following text:

> " The Court shall determine whether the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given."

The article was read a second time on 21.II.36 and finally *adopted* unchanged on 11.III.36.

ARTICLE 51 *(Article 46, old Rules).*

ORDER IN WHICH THE AGENTS, COUNSEL OR ADVOCATES SHALL BE CALLED UPON TO SPEAK

6.II.35.*

Discussed as Article 46.

The PRESIDENT read the text proposed by the Co-ordination Commission, in the following terms: [1]

> " The Court shall in each case determine the number of counsel who are to be heard on behalf of each of the parties, interested Governments concerned, or international organisations, and the order in which agents and counsel shall be called upon to speak, having regard so far as possible to any agreement on the subject between the agents."

The PRESIDENT observed that the words " Governments concerned or international organisations " in this text would have to be omitted, as they referred to advisory opinions, which lay outside the scope of the present discussion.[2]

M. URRUTIA asked whether the term " counsel " could be understood to include advocates. The Co-ordination Commission's text made mention only of " counsel ".

The PRESIDENT observed that the answer to this question was to be found in the Co-ordination Commission's report, which said: [1]

> " The Commission desires to point out that, in the text which it has adopted, the words ' advocates and counsel ' have been replaced by ' counsel ', the latter word being understood in its wider sense."

Jonkheer VAN EYSINGA said that it was more particularly in view of advisory procedure, where representatives of international organisations might be heard, that this new terminology had been adopted. That was the reason given by the Co-ordination Commission in its report, which stated that:

> " This method makes it possible for the term ' counsel ' to cover also the representatives of the international organisations who may appear before the Court in advisory proceedings."

M. FROMAGEOT said he would prefer to leave the text of Article 46 of the existing Rules of Court as it stood, and continue to mention agents, advocates and counsel separately; for this distinction might not be superfluous having regard, for instance, to the different degree of authority that might attach to a statement by an agent, as compared with that of an advocate or counsel. Moreover, this text was clear and had not hitherto caused any difficulty.

On the other hand, the text proposed by the Co-ordination Commission made an important innovation in Article 46, by giving the Court power to determine the number of persons who were to speak on behalf of each party.

The PRESIDENT explained that the object of this clause was to bring the Rules into harmony with the practice of the Court.

M. FROMAGEOT had some doubts whether, in practice, the Court could forbid a party to produce as many speakers as it wished.

The REGISTRAR observed that, according to the Court's practice, not more than two statements were allowed on the question as a whole; but the presentation of these statements might be subdivided, at the discretion of the party concerned, among a number of persons.[1]

M. ANZILOTTI thought it was very desirable to retain the existing text, which was in harmony with the wording of the Statute, Article 54 of which said that: " When subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case . . ."

Moreover, he doubted whether it was desirable to seek, by a clause in the Rules, to restrict the number of persons who might speak on behalf of any party before the Court.

M. GUERRERO, Vice-President, saw no object in omitting the word " advocates "; indeed, it would be better to retain it in the Rules, so that the latter might be in harmony with the Statute. As regards the question concerning the number of speakers, M. Guerrero pointed out that there was nothing in the Statute which empowered the Court to limit their number, and he thought it would be a delicate matter to hamper the freedom of action of Governments appearing before the Court.

M. FROMAGEOT thought that, if the right was abused, the President could always draw the attention of the parties to the need for not unduly increasing the number of speakers and to the importance of avoiding repetitions. But that did not require to be stated in the Rules.

The PRESIDENT still had doubts on this point. His view was that, if it were indicated in the Rules, this might assist in enabling the parties to convince public opinion in their countries of the need for not unduly multiplying the number of advocates. Besides, the President's hands would be strengthened, should the occasion arise, by the presence of such a clause in the Rules.

M. URRUTIA would prefer to leave things as they were.

* D 2, A. 3, pp. 183-185.
[1] *Ibid.*, p. 872
[2] *Cf.* p. 85.

[1] *Cf.* D 2, A., p. 119; E 3, p. 207; C 69, pp. 17-18.

The Court might have to try issues so exceedingly complex that it might be necessary to leave the parties free to decide how many persons should speak on their behalf.

Jonkheer VAN EYSINGA observed that, in the text of Article 46 proposed by the Co-ordination Commission, the important words were: " having regard so far as possible to any agreement on the subject between the agents ". The Co-ordination Commission did not mean that the President could, in all circumstances, decide the matter in accordance with his own views; according to this text, the parties were expected, in principle, to determine the number of counsel. The text therefore possessed the necessary elasticity, and it added certain details which were not provided for in the Statute.

M. ANZILOTTI would prefer to leave the text as at present worded.

However, if it was thought desirable to insert a clause making it possible for the Court to restrict the number of advocates or counsel, the wording should be somewhat different from what was proposed. No doubt agreement between the parties was very important, as regards the order in which they were to speak. It would even be difficult to lay down—as the text appeared to do—that the Court need not abide by such an agreement. But the situation was different in regard to the number of advocates who were to address the Court, since the interests of the parties in that regard might be in conflict with one another: it would not, therefore, be practicable to make the Court's decision as to the number of speakers dependent on an agreement between the parties. To deal with this point, it would seem necessary to have a different form of text, the first paragraph of which might be the existing text, while the second could be worded as follows: " The Court may, having regard to the circumstances, restrict the number . . . " This would merely signify that the Court had a discretionary power which it might, in certain circumstances, employ irrespectively of any agreement between the parties.

The PRESIDENT put the following question to the Court:

> " Does the Court desire to retain Article 46 of the Rules in its existing form ?"

The Court answered in the affirmative by seven votes against two.

Baron ROLIN-JAEQUEMYNS agreed with the view that it would be dangerous to restrict the number of speakers at the beginning of the hearings. But, he asked, did not the Court possess the power to close the hearing when it considered that the case had been sufficiently explained ? Article 54 of the Statute laid down that:

> " When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed."

The PRESIDENT observed that Article 45 of the Statute laid down that the hearing was to be under the control of the President. That implied that the President exercised a certain control over the proceedings. But he could certainly not declare the hearing closed until all the parties had spoken.

5.IV.35.*

Article 51. — First Reading.

M. GUERRERO, Vice-President, was afraid that this text gave the impression that it referred to the order in which the agents, advocates and counsel of the same party should speak rather than to the order in which parties would be called upon to address the Court.

M. ANZILOTTI thought that a correct interpretation of this article was ensured by its closing words: " failing an agreement between the parties on the subject ".

M. WANG, in order to establish conformity between the text of Article 51 and that of Article 53, suggested that the order of the words " counsel " and " advocates " should be inverted.

After an exchange of views, the PRESIDENT put the following question to the Court:

> " Does the Court decide that, throughout the Rules, the following order should be adopted: ' agents ', ' counsel ', ' advocates ', and that the Registrar be instructed to carry out this decision ? "

By eleven votes to one, the Court answered the question in the affirmative.

M. ANZILOTTI having observed that, in the Rules, the words " counsel " and " advocates " were sometimes connected by " and " and sometimes by " or ", M. FROMAGEOT expressed the view that the latter conjunction should be used throughout, since " counsel " and " advocates " were in the Rules two different designations for the same persons.

There being no further observations, Article 51 as amended was adopted in first reading with the following text:

> " The order in which the agents, counsel or advocates shall be called upon to speak shall be determined by the Court, unless there is an agreement between the parties on the subject."

Second Reading and Final Adoption.

Article 51 was read a second time on 22.II.36 and finally *adopted* unchanged on 11.III.36.

ARTICLE 52 *(New Article).*

QUESTIONS PUT TO THE PARTIES DURING THE HEARING

4.II.35.*

Preliminary Discussion without an Article Number.

Proposal by M. Schücking.

M. SCHÜCKING wished to make a general observation regarding the section of the Rules devoted to the oral proceedings.

In his opinion, Article 44 *bis* dealt with a special question relating to evidence. Before taking this question, would it not therefore be better to discuss the course of the oral proceedings ?

In M. Schücking's view, there was a considerable hiatus in this section of the Rules: the functions of the President were not mentioned, whereas those of the Court and the Registrar were. It was simply laid down in Article 51

* D 2, A. 3, pp. 162-170.

* D 2, A. 3, p. 437.

that the President might put questions to witnesses. It was true that the President's powers in this connection were defined in the Statute itself, Article 45 of which provided that the hearing was to be under the control of the President.

Nevertheless, it was important that the powers of the President resulting from Article 45 of the Statute should be defined in the Rules. M. Schücking believed that the President's right to control hearings did not consist solely in giving the parties leave to address the Court: he could also exercise influence on the progress and subject-matter of the argument. It was, for instance, the Court's practice that the President should put questions to agents. But this very important practice was not mentioned in the Rules. The definition of the President's rights might be made the starting-point of a great improvement in procedure before the Court: the most modern law of procedure required that there should be permanent contact between a Court and the parties, and its chief preoccupation was the conduct of the case. The Court had already recognised by a Resolution [1] that the conduct of the case was entrusted to the President, including the right to put questions to the parties. It should naturally be added that all judges might also put questions, with the President's sanction. This twofold principle should be included in the Rules; a provision more or less to the following effect might be inserted:

> " In the exercise of his right to conduct the hearing, the President may put questions to the parties. Judges shall have the same right, subject to the President's permission. Should the President not give his permission, the decision shall rest with the Court."

This text was, however, only by way of a suggestion.

Jonkheer VAN EYSINGA thought that what M. Schücking wanted was to insert, with regard to the hearings, a provision similar to Article 33 which had already been adopted [2], to the effect that the President was to get into touch with the parties in order to settle the details of the written proceedings.

. . . . . .

M. GUERRERO, in connection with M. Schücking's proposal, suggested that, in general, whenever a new proposal was put forward, its author should submit a text which would first be considered by the Court and then referred to the Drafting Committee.

The PRESIDENT had not intended to suggest the appointment of an *ad hoc* committee for each question. His idea was that, as far as possible, each proposal should first form the subject of an exhaustive general discussion in the Court. Only if it were found to be necessary or desirable to appoint a special committee did he suggest that, instead of referring a question which had been considered by the Court to the Co-ordination Commission, a committee might be formed to deal with it.

For the moment, it would be a good thing if, as proposed by the Vice-President, M. Schücking would submit a draft of his suggestion.

M. SCHÜCKING submitted the following draft:

> " In the exercise of his right to conduct the hearing, the President may put questions to the parties. Judges shall have the same right subject to the President's permission. If in such a case the member of the Court concerned and the President disagree, the decision shall rest with the Court."

The PRESIDENT observed that M. Schücking was a member neither of the Second Committee nor of the Co-ordination Commission; if he were to be added to one of these Commissions for the purpose of the examination of his proposal, this would in fact be tantamount to appointing a special committee.

. . . . . .

M. Schücking's Proposal (Questions to be put to the Parties).

The PRESIDENT read the text proposed by M. Schücking (see above).

He recalled that, on February 20th, 1931, the Court had adopted a Resolution regarding practice,[1] the second paragraph of which concerned the putting of questions during speeches by counsel and ran as follows:

> " During counsel's speeches and before or after each interpretation, questions may be put to the speaker by individual judges after notifying the President. Questions must exclusively relate to the subject to which the argument is devoted at the moment. The President may either give his consent or request the judge concerned to postpone his question. Counsel will be reminded that he is at liberty to postpone his reply should he see fit."

He asked M. Schücking whether, in drafting his text, his intention had been to modify the Resolution of 1931.

M. SCHÜCKING said that the object of his proposal was simply to confirm by a provision in the Rules the practice according to which questions might be put to parties during the hearing. It was important that parties should be informed in the Rules of the right possessed by the President and judges to put questions.

M. ANZILOTTI was afraid he could not accept the text proposed by M. Schücking.

The first sentence gave the President the right to put questions to parties. But the control of the hearing would seem automatically to include this right.

The second sentence gave judges the same right, subject to the President's permission. It was clear that the questions referred to were no longer those concerned with the conduct of the proceedings; they were questions concerning the merits of the dispute. The consequences of this text would be that the President could prevent a judge from putting questions of this kind, though he would retain his right to put questions himself. But in this Court it seemed impossible to give the President such powers and to put him in a different position from that of the judges.

Open to still more serious objection was the last sentence which made the Court decide in the event of a difference of opinion having thus arisen between the President and a judge. This text implied that a judge would be obliged to inform the President beforehand of the question which he wished to put to parties. That in itself was a debatable point; but the position might become really embarrassing, perhaps even dangerous to the prestige of the Court, since it must not be forgotten that this would all take place in the public sitting.

In M. Anzilotti's view, therefore, it would be better to leave this matter to be governed by the Court's practice, as had been done hitherto.

M. GUERRERO, Vice-President, pointed out that the putting of a question might be inexpedient or likely to

[1] Resolution dated February 20th, 1931; D 2, A. 2, p. 300.
[2] See pp. 117-118, meeting of 1.VI.34.

[1] D 2, A. 2, p. 300.

prejudge the Court's decision. To avoid a danger of this kind, the best way would be to assemble the Court before the hearing and submit to it questions which judges might propose to put to the parties. Two cases might arise: either the Court would consider a question inexpedient, in which case in all probability the judge proposing it would withdraw it, or else the Court would approve it, and in that case, normally, the President would put the question in the name of the Court; the President might also allow the judge to take the responsibility of putting his question himself. In any case, it did not seem possible to compel judges to accept the President's discretion.

M. URRUTIA thought it would be better to rest content with the existing practice, which had given rise to no difficulties.

Jonkheer VAN EYSINGA agreed. He recalled that the Resolution regarding the Court's practice, adopted on February 20th, 1931, contained another provision to the effect that, before the hearings, the Court would meet to consider whether or not any questions should be put to the parties. This provision was in addition to that giving judges the possibility of putting questions which occurred to them during the actual course of the hearing.

The PRESIDENT observed that, before 1931, the President alone had the right to put questions in the name of the Court. The object of the Resolution adopted in 1931 had been to amend this practice in order to some extent to meet Anglo-Saxon ideas on the subject. Of course, the President's right to control the hearing must be preserved, but this right must not debar a judge from putting a question which he considered relevant.[1]

M. SCHÜCKING said that it was not his intention to propose any modification of the Court's existing practice. He had simply wanted to establish it by embodying it in the Rules.

It was a matter of interpreting the provision in the Statute giving the President control of the hearings. It followed automatically that the President could put questions to parties. But, whereas express provision for this had been made in the Rules with regard to the examination of witnesses, nothing was said as regards relations between the President and the parties themselves during the oral proceedings.

Count ROSTWOROWSKI thought that relations between the President and judges were a matter for internal arrangement, and proposed that M. Schücking should delete the last four lines of his text.

M. ANZILOTTI thought that even the first sentence of M. Schücking's text might give rise to difficulties.

As regards the right to put questions to parties, the President was on the same footing as other judges, except as regards control of the hearing in the strict sense of that expression. If the President had the right to obtain information, the other judges also possessed it, and it would be contrary to the Court's fundamental rules to give the President a privileged position.

But, since the hearing was under the President's control, it was natural that a judge, when he wished to put a question, should inform the President of his wish; and it was equally natural that the President should ask him to wait a little or to postpone his question till the next day. That was the practice, and it was impossible to go further.

Summarising the position, he said that the President would put questions to the parties relating to the conduct of the hearing. He would also put to them, in the name of the Court, any questions which the Court had decided to put. As regards questions put by judges personally, there should be no difference between the President and other judges.

M. GUERRERO, Vice-President, agreed with M. Anzilotti. To retain simply the first sentence would amount to saying that the right to put questions was linked to the right of conducting the hearing; in other words, that it belonged to the President alone. Accordingly, they must either reject M. Schücking's proposal or embody in the Rules the Resolution regarding the Court's practice adopted in 1931.

The PRESIDENT raised the question whether there would be any advantage in embodying in the Rules the 1931 Resolution, which had been adopted on the initiative of M. Fromageot.

M. SCHÜCKING thought that there would be, as parties were not as a rule very well acquainted with the Court's practice.

M. NEGULESCO wished to know whether, in M. Schücking's text, the permission to be given to a judge by the President referred to the actual substance of the proposed question or merely the expediency of the moment selected for putting it.

In M. Negulesco's opinion, all members of the Court, judges as well as the President, had the right to put questions to parties; but it might happen that the putting of a particular question at a particular moment would be likely to divert the discussion from the point at issue. The President, who conducted the hearing, must be judge as to the expediency of the moment selected for putting the question. M. Negulesco thought that, when M. Schücking had drafted his text, he had had this in mind when he had written that a question could be put only with the President's permission.

The PRESIDENT observed that, if M. Negulesco's point of view were adopted, it would follow that, when a judge wished to put a question, he would first have to state his question to the President.

M. GUERRERO, Vice-President, thought it would be better to make no reference to the President's permission, even with regard to the expediency of the moment selected for putting a question. He recalled that, according to the existing practice, when a judge wished to put a question, he informed the President of his intention, and the latter might answer that it would be better to postpone putting the question until the end of the sitting or until the next day.

The PRESIDENT thought he could safely say that members of the Court unanimously considered that the Resolution adopted in 1931 had given good results, and under that system every judge was at liberty to put questions.

M. FROMAGEOT thought there would be some advantage in mentioning in the Rules, on the one hand, the President's right, inherent in his control of the hearing, to put questions either in his personal capacity or on behalf of the Court, and, on the other hand, that every judge might put questions himself. Nevertheless, a judge should be able to put a question only after having referred it to the President, and whatever passed between the judge and the President remained entirely an internal matter.

In order to present the purport of his observations in writing, M. Fromageot submitted the following text:

> " During the hearing, which is under the control of the President, the latter may put questions to

[1] *Cf.* D 2, A. 2, pp. 212 *et sqq.* (especially p. 213).

parties either in the name of the Court, if it has requested him to do so, or on his own behalf.

" Every judge may also himself put questions to parties; nevertheless, he shall first apprise the President.

" In every case the President shall remind parties that they may answer either at once or subsequently."

M. GUERRERO, Vice-President, would agree to the inclusion in the Rules of a provision such as that proposed by M. Fromageot, but he wished to preserve the Resolution adopted by the Court in 1931, more especially because of the preliminary meeting mentioned therein before the opening of the hearing, at which meeting a judge would perhaps be able to obtain from his colleagues the information which he proposed to obtain by putting a question to the parties.

Jonkheer VAN EYSINGA, in principle, accepted M. Fromageot's text, but he wished the distinction drawn by M. Anzilotti between questions put to parties by the President in connection with the conduct of the hearing and questions concerning the actual merits of the case, to be preserved. In M. van Eysinga's opinion, M. Fromageot's wording was liable to result in confusion between these two categories of questions. He thought it would be better not to refer to the fact that " the hearing is under the control of the President ".

M. FROMAGEOT pointed out that control of the hearing also involved control in regard to the merits of the case, for example to prevent useless digressions. That was why he had mentioned in his text that the hearing was under the control of the President.

M. SCHÜCKING thought that the " control of the hearing " also enabled the President to ask a party to state its opinion on a particular point of law which had not been dealt with in the written memorials or oral pleadings.

M. URRUTIA, if a new provision was to be introduced into the Rules, was anxious that there should be no confusion between the right of the President or judges to put questions and the control of the hearing. In his view, these two matters were quite distinct. For that reason, he would have preferred the following text:

" The Court may put questions to parties through the President; judges have the same right after having given notice to the President."

M. ANZILOTTI and M. URRUTIA having expressed some doubt as to the expediency of introducing into the Rules the Resolution regarding the Court's practice, the PRESIDENT said that, at the beginning of the next sitting, he would submit a text upon which the Court might vote in order to decide this question of principle, among others.

Baron ROLIN-JAEQUEMYNS wished a distinction to be drawn between questions put by the President personally and those put by him in the name of the Court. He suggested a wording which would give him substantial satisfaction in this respect:

" During the hearing, which is under the control of the President, the latter may put questions in the name of the Court. He may also put questions *on his own behalf. Judges have the same right after* first apprising the President."

The PRESIDENT said that he would first ask the Court to decide the question whether a provision of this kind was to be inserted in the Rules. Having voted upon the question of principle, the Court would then proceed to consider the text.

5.II.35.*

Discussion on Draft Articles without a Number.

Questions to be put to the Parties.

The PRESIDENT recalled that, at the previous meeting, the Court had considered whether the right of the President and of judges to put questions to parties should be provided for in the Rules. Some doubts had been expressed as to the expediency of this. The Court would now have to vote on this question of principle.

After an exchange of views regarding the special characteristics of some national legal systems in this connection, M. FROMAGEOT recalled that, at the previous sitting, M. Schücking had said that it would be a good thing to state in the Rules that parties in their oral statements must not deviate from the actual issues.

M. Fromageot, after reflection, did not think personally that it would be either desirable or useful to introduce a provision of the kind.

With regard to the provision concerning the right of the President and judges to ask for explanations, that might be worded as follows:

" During the hearing, the President, acting either in the name of the Court, if the latter has requested him to do so, or on his own behalf, may put questions to the parties or ask them for explanations.

" Every judge may also put questions or ask for explanations; he shall, however, first apprise the President.

" In all cases, the parties shall be reminded that they have the option of answering either at once or on some later occasion."

M. ANZILOTTI would have preferred to allow the Resolution of 1931 to stand without embodying it in the Rules. M. Fromageot's text did nothing to alter his opinion on this point.

The PRESIDENT, referring to what M. Fromageot had said, suggested that the terms of the article in the Statute providing that the hearing was under the control of the President were wide enough to enable the President to prevent parties from going outside the question. Too much precision would involve a danger of argument *a contrario*.

M. SCHÜCKING, on the other hand, recalled that, at the previous meeting, some members of the Court had expressed doubts as to the meaning of Article 45 of the Statute in this connection. They thought that the article referred only to the formal aspect of the hearing, and not to the merits of the case. If the meaning of Article 45 was doubtful, would it not be well to define it in the Rules ?

Jonkheer VAN EYSINGA thought that M. Fromageot's text offered the advantage of clearly distinguishing between these two aspects of the conduct of the case. He, for his part, had not meant to express any doubts as to the interpretation of Article 45 of the Statute. As the President had said, the right to control the hearing enabled him to take steps to prevent parties from deviating from the point. The English text of Article 45 was, moreover, clearer than the French text. It would be better not to be more precise in order to avoid the possibility of argument *a contrario*.

It remained to decide whether it would be a good thing to embody the 1931 Resolution in the Rules. If that were done in the case of this Resolution, Jonkheer van Eysinga was afraid that the Court might find itself compelled to do the same with regard to other elements of its practice.

* D 2, A. 3, pp. 171-175.

The PRESIDENT asked the Court to vote on the following question:

> " Does the Court wish to insert in the Rules a provision concerning the President's right to ensure that parties do not introduce into their arguments questions irrelevant to the proceedings ? "

This question, on being put to the vote, was answered in the negative by nine votes to one.

The PRESIDENT next put the following question to the Court:

> " Does the Court wish to insert in the Rules a provision concerning the right of judges, including the President, to put questions to parties ? "

Jonkheer VAN EYSINGA, for the reasons given by him, proposed to add: " . . . to put questions to the parties *in regard to the merits of the case* ".

M. GUERRERO, Vice-President, considered that there was no doubt that the President alone had the right to put questions in connection with the conduct of the hearing. Inasmuch as the motion referred to the judges, however, only questions relating to the actual merits of the case could be meant.

Count ROSTWOROWSKI observed that questions put by the President or by judges must, as stated in the 1931 Resolution, relate to the parties' argument. He thought that, if this passage were added to the proposed question, Jonkheer van Eysinga's scruples would be met.

The PRESIDENT, having regard to this observation, proposed to formulate his question as follows:

> " Does the Court wish to insert in the Rules a provision concerning the right of judges, including the President, to put to speakers questions exclusively relating to the subject to which the argument is devoted at the moment ? "

M. URRUTIA thought that, theoretically, this insertion was sound, but that from a practical point of view it was open to objection. The fact that the 1931 Resolution was not included in the Rules enabled the Court more easily to modify its practice. The Court did not know what the future might bring forth. What he had in mind mainly was the question of judges *ad hoc*. For this reason, M. Urrutia would vote against the insertion of the 1931 Resolution in the Rules.

The PRESIDENT having put the latter of the above questions to the vote, the votes were equally divided.

The PRESIDENT said that he would like to reserve his casting vote.

In connection with the third paragraph of M. Fromageot's draft, he asked whether the expression " *In all cases*, parties shall be reminded that they have the option of answering either at once or on some later occasion " was to be understood literally.

M. FROMAGEOT and Baron ROLIN-JAEQUEMYNS explained that the wording of the paragraph really left the President and the parties an entirely free hand.

M. NEGULESCO, who shared the fears of MM. Urrutia and Anzilotti, thought it would be better to lay down that a judge desirous of putting a question should first communicate the terms of the question to the President, who might even be authorised to put the question on behalf of the judge.

For the rest, if the Court meant to maintain its present practice, M. Negulesco thought it should be embodied in the Rules, because the Statute contained no provision giving the judges the right to put questions, and the Court could not establish rules applying to parties by means of an internal regulation.

Moreover, the Court's practice did not merely allow judges to put questions, it also enabled speakers to postpone their answers. This custom, if known beforehand, might serve to reassure a speaker whose insufficient acquaintance with the Court's official languages might cause him apprehension at the idea of having to reply forthwith to questions put at the hearing by judges.

It would therefore be desirable to state in a provision of the Rules, not merely that the judges were entitled to put questions, but also that parties were not obliged to answer at once; and this was done by M Fromageot's draft.

M. ANZILOTTI, rather than oblige judges to submit a question which they desired to put for approval by the President, would prefer to leave the clause in the 1931 Resolution as it stood, because he had no wish either to restrict the freedom of judges or to impose on the President the too heavy responsibility of having to decide on the basis of a few hastily written lines whether a question which a judge wished to put was admissible.

M. FROMAGEOT pointed out that already, at present, a judge must apprise the President.

M. GUERRERO, Vice-President, thought that this fact sufficed to avert the dangers alluded to by MM. Anzilotti and Urrutia. M. Guerrero recalled that he had always thought that it should be stated in the Rules that the President, as well as judges, was entitled to put questions. Speakers must know that questions might be put to them in the course of the hearing, so that they would, if necessary, be ready to answer them. That was why he thought that the clause in the 1931 Resolution should be inserted in the Rules.

M. SCHÜCKING shared M. Guerrero's view. In making his proposal, he had had in mind the difficulty in which a speaker was placed owing to an inadequate acquaintance with the Court's official languages. When a country was appointing the agent to represent it before the Court, the knowledge that questions might be put to that agent by the judges might constitute a decisive consideration.

Count ROSTWOROWSKI wished to ask M. Negulesco whether he desired to amend his vote on the question in regard to which the President had reserved his casting vote.

The PRESIDENT asked M. Negulesco whether he proposed that a second vote should be taken.

M. NEGULESCO replied in the affirmative.

Jonkheer VAN EYSINGA gathered that M. Negulesco would be disposed to amend his vote provided that the provision was entirely altered. For to lay down that all questions had to be put through the President would be a fundamental change.

M. NEGULESCO said that he would agree to the insertion of the 1931 Resolution in the Rules, provided that it was laid down that judges must apprise the President before putting questions to parties.

M. ANZILOTTI said that he had understood the phrase: " A judge shall first apprise the President " to mean what was the existing practice of the Court—*i.e.*, that a judge sent a note to the President, informing him that he wished to put a question; the President then called on him to

put it at what he considered the best moment, and that was all.

M. FROMAGEOT, on the contrary, thought that a judge should at all events inform the President of the subject of the question to be put.

Baron ROLIN-JAEQUEMYNS also thought that " notifying the President " could not simply mean asking his permission to speak. The import of the question to be put must also be explained to him. Otherwise, the President would merely be deciding on a point of order.

An exchange of views with the object of defining the meaning of the expression " *en référer au Président* " (apprise the President) followed.

The PRESIDENT drew attention in this connection to a slight difference between the French and English texts of the Resolution of February 20th, 1931. The French text read: " *Au cours des plaidoiries et avant ou après chaque traduction, des questions pourront être posées aux plaideurs par les juges individuellement, après en avoir averti le Président.*"

The English was as follows: " During counsel's speeches and before or after each interpretation, questions may be put to them by individual judges after notifying the President."

Did the word " *en* " in the French refer to the text of the question or the wish to put a question ?

M. FROMAGEOT recalled that the original draft had been as follows: [1]

> " Au cours des plaidoiries et après chaque traduction, des questions pourront être posées aux parties par les juges individuellement, après en avoir averti le Président par une courte note. Les questions devront exclusivement se référer à l'objet actuel de l'argumentation."
>
> (During counsel's speeches and after each interpretation, questions may be put to the parties by individual judges, after informing the President in a short note. Questions must relate exclusively to the subject to which the argument is devoted at the moment.)

According to this text, therefore, the President must be apprised of the question to be put.

Count ROSTWOROWSKI pointed out that the text read by M. Fromageot had not been adopted in 1931. The text adopted simply said: [2] " During counsel's speeches . . . questions may be put . . . after notifying the President."

The PRESIDENT thought it was always a delicate matter to modify a system which worked well. He recalled that for the last four years judges had had the right to put questions and that they made use of this right. Parties, therefore, were now acquainted with this practice.

Jonkheer VAN EYSINGA having asked the President what the purport of the second vote asked for by M. Negulesco would be, the PRESIDENT said that this vote would be taken upon the principle of inserting in the Rules the Resolution of February 1931, leaving aside the question of the import of that Resolution, a point which would be considered later on.

MM. ANZILOTTI and NEGULESCO expressed the opinion that, before deciding whether the Resolution should be transferred to the Rules, the Court should decide whether, if it were to be transferred, the Resolution should be left as it stood and, if so, what was its precise import.

[1] D 2, A. 2, p. 300, No. 42.
[2] *Ibid.*, No. 44.

The PRESIDENT, in regard to this point, observed that, according to the original practice, individual judges could not put questions. When the Rules had been revised in 1931, some judges had asked that this right should be given to judges, without in other respects touching the President's right to control the hearings.[1] Such had been the conditions in which the Resolution had been adopted.

Under the Statute—which gave the President general control of hearings and could not be modified by the Rules—as well as according to existing practice, the President had the right to allow an individual judge to speak in order to put a question, without knowing precisely the terms of that question. M. Fromageot's proposal seemed to deprive the President of this right.

M. GUERRERO, Vice-President, on the contrary believed that the President's right would be increased if a judge were bound, before putting a question, to apprise the President of its subject.

Baron ROLIN-JAEQUEMYNS thought it would perhaps be desirable, in M. Fromageot's text, to refer to the provisions in the Statute to the effect that the hearing was under the control of the President.

M. ANZILOTTI was afraid that it might be difficult to oblige a judge to state to the President the exact purport of the question which he wished to put; if the precise purport of the question were not made known to him, it would be impossible for the President to exercise his control; but, on the other hand, to oblige a judge to formulate the question he wished to put. might be asking him to do something that was impossible, because some questions did not lend themselves to precise explanation, there and then, in a few words. In the Rules, however, some rather elastic wording might be employed without attempting to lay down anything definite. In this way matters would be much facilitated, for, in the end, everything must depend on the circumstances of the individual case.

The PRESIDENT, having ascertained that the Court wished to vote again on the question already put by him [2], took a fresh vote upon it in the following form:

> " Does the Court wish to insert in the Rules a provision concerning the right of judges, including the President, to put to speakers questions exclusively relating to the subject to which the argument is devoted at the moment ? "

By six votes to four, the Court answered the question in the affirmative.

The PRESIDENT asked M. Fromageot to prepare a final draft of his proposal, which would be distributed and considered at the next sitting.

6.II.35.*

Discussed without an Article Number. — First Reading.

Questions to put to Parties: Text of M. Fromageot.

M. SCHÜCKING suggested that the Court should first examine M. Fromageot's proposal [3] on the right of putting questions.

The PRESIDENT read this proposal, which was worded as follows:

" During the hearing, which is under the control

* D 2, A. 3, pp. 185-186.
[1] D 2, A. 2, pp. 212 and 292.
[2] P. 200.
[3] P. 199.

of the President, the latter may put questions to parties in regard to the point which is being argued at the moment, or may ask them for explanations, either in the name of the Court, if it has requested him to do so, or on his own behalf.

" Every judge may likewise himself put questions to parties or ask for explanations; nevertheless, he shall first apprise the President.

" The parties shall be free to answer, either at once, or at a later date."

Baron ROLIN-JAEQUEMYNS thought that this text was perhaps more liberal in the right it gave to the judges than in that which it gave to the President. For, as regards the President, it laid down that he might put questions in regard to the point which was being argued, whereas in the case of judges it simply said that they might put questions.

Jonkheer VAN EYSINGA proposed that the second paragraph should read:

" Every judge may himself put such questions."

M. GUERRERO, Vice-President, suggested the following wording:

" Every judge may also do so, but must first apprise the President."

M. URRUTIA asked it if was intended that the questions must be confined to the subject to which the argument was devoted at the particular sitting. He observed that, in practice, judges asked questions, for instance, on the Memorials and the Counter-Memorials.

M. FROMAGEOT thought that, in the latter case, it would be a request for explanations, in accordance with the proposed text. He added that, in using the words " which is being argued at the moment ", he had been guided by the words of the Court's Resolution of February 20th, 1931, on its practice: " . . . the subject to which the argument is devoted at the moment ".[1]

The PRESIDENT thought that the words " the point which is being argued at the moment " might lead to misunderstandings. It would be better to keep to the actual words of the Resolution of February 20th, 1931.

M. GUERRERO, Vice-President, pointed out that a judge might ask questions relating not only to the arguments put forward by the speaker whom he was addressing, but also to those of his opponents.

M. FROMAGEOT did not think that the text would prevent a judge from doing so, especially if the words " at the moment " were omitted.

The text might also be worded: " . . . may put questions to the parties concerning their arguments ".

M. ANZILOTTI considered that the words in the Court's Resolution on its practice: " in regard to the subject to which the argument is devoted at the moment ", covered every contingency.

What the Court desired was—while allowing the greatest latitude to the judges—to avoid the putting of questions which were irrelevant to the issue.

The PRESIDENT put the following question to the Court:

" Does the Court decide to adopt the text circulated in Distr. 3280 ? "[2]

M ANZILOTTI asked if it was understood that the text, if adopted, would be subject to any modifications which the Drafting Committee might make in it.

The PRESIDENT was of opinion that this would be so. The Drafting Committee would also have to consider the place where the text was to be inserted.

The Court unanimously answered the question in the affirmative.

Adopted in first reading.[1]

12.II.35.

See under Article 53, paragraph 1, pp. 203-204, for discussion of Article 52 in connection with Article 51 (Article 53, paragraph 1, of Rules of 11.III.36).

5.IV.35.*

Article 52.

M. URRUTIA raised the question whether it was necessary, in this article, to retain the words: " . . . *si celle-ci lui en a exprimé le désir* " (if the latter has requested him to do so). This phrase seemed to him likely to give the impression that the President might put a question in the name of the Court without previously consulting it.

M. FROMAGEOT said that this was not purely a question of wording: the Court had wished to cover all contingencies (questions put in virtue of a decision of the Court; questions put by the President on his own initiative; questions put by judges). Personally, however, he saw no objection to the deletion of the words referred to by M. Urrutia.

M. GUERRERO, Vice-President, on the other hand, considered that the words criticised by M. Urrutia served a purpose and should be retained.

With regard to the third paragraph of Article 52, he proposed that the words " before the close of the oral proceedings " should be added.

Jonkheer VAN EYSINGA thought that a party could not be compelled to answer a question; if it failed to answer, it did so at its own risk.

M. GUERRERO, Vice-President, had complete respect for the freedom of the parties in this matter; but he was anxious to avoid the possibility of a reply being made so late that the other party would be unable to comment upon it.

M. FROMAGEOT pointed out that it was a delicate matter to fix a time-limit after which the party concerned would be held not to have answered.

The REGISTRAR explained that, according to the Court's practice, the oral proceedings were not finally declared closed until after the first reading of the judgment or opinion; that would make it difficult to adopt the text proposed by M. Guerrero.

M. NEGULESCO said that he could not support M. Urrutia's proposal. It was a principle of procedure that the President represented the Court at public sittings. With regard to the putting of questions to parties, it had been desired to establish a contrary principle. Any question put by the President was regarded as put by him personally, in the absence of a previous decision by the Court empowering him to put it in the name of the Court. The text had been adopted to express this idea; if they modified it now, they would be replacing a clear text by one the interpretation of which might be open to doubt.

[1] D 2, A. 2, p. 300.
[2] *I.e.*, the text proposed by M. Fromageot; see above.

* D 2, A. 3, pp. 437-438.
[1] For text, see meeting of 9.IV.35, p. 203.

The PRESIDENT put the following question:

" Does the Court decide to delete the words ' if the latter has requested him to do so ' in paragraph 1 of Article 52 ? "

Six judges voted for the motion and six against.

Count ROSTWOROWSKI gave his reasons for having voted for the deletion of the reference to the Court's wishes. He still regarded the idea underlying the words in question as very sound, but he had doubts as to the advisability of embodying them in the Rules, which should not contain any reference to the Court's private deliberations. The text was quite clear and adequate notwithstanding the deletion of the words in question.

The PRESIDENT said that he would give his casting vote at the beginning of the next meeting devoted to the revision of the Rules.

9.IV.35.

Article 52.

The PRESIDENT said that, after mature reflection, he had decided to give his casting vote in favour of the deletion of the words " if the latter has requested him to do so " in the first paragraph of Article 52, a deletion proposed by M. Urrutia (see meeting of 5.IV.35 above).

The text adopted in first reading after this deletion was:

" 1. During the hearing, which is under the control of the President, the latter, either in the name of the Court or on his own behalf, may put questions to the parties concerning their arguments or may ask them for explanations.

" 2. Each of the judges may likewise himself put questions to the parties or ask for explanations; nevertheless, he shall first apprise the President.

" 3. The parties shall be free to answer at once or at a later date."

Second Reading and Final Adoption.

Article 52 was read a second time on 22.II.36 and finally *adopted* on 11.III.36. On the latter occasion, the words " concerning their arguments " were deleted in paragraph 1, because a judge who had questions to put to the parties must not be bound to confine his questions to their arguments; he might also wish to put questions regarding lacunæ in their arguments.

ARTICLE 53 *(Articles 50 and 51, old Rules, with New Paragraph).*

WITNESSES AND EXPERTS: EXAMINATION OF — AND SOLEMN DECLARATION MADE BY —

12.II.35.*

Paragraph 2, discussed as Article 50.

The PRESIDENT said that the Co-ordination Commission proposed the following text: [1]

" Each witness shall make the following solemn declaration before giving his evidence:

" ' I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.' "

The Co-ordination Commission had proposed in its Article 49 to enable the evidence of witnesses to be taken by a delegation of the Court. If the Court had adopted that proposal, the wording of Article 50 would have had to be adapted to that situation by the omission of the words " in Court ", which appeared in the existing text. As the Co-ordination Commission's text of Article 49 had not been adopted for insertion in the revised Rules, the President doubted whether it was necessary to alter the existing text of Article 50.

M. GUERRERO, Vice-President, would prefer to maintain the text of Article 50 of the existing Rules, without any change.

Baron ROLIN-JAEQUEMYNS, though in favour of the changes proposed by the Second Committee and afterwards by the Co-ordination Commission, was nevertheless inclined to think that no change should be made in the existing text, which did not seem hitherto to have given rise to any difficulty.

M. FROMAGEOT thought it would be best not to retain the words " in Court ", but simply to say: " Each witness shall make the following solemn declaration before giving evidence . . .". Apart from *commissions rogatoires*—in which case the evidence would naturally have to be taken according to the local procedure—the Court had power to order enquiries to be carried out by persons designated by itself. During these enquiries, the investigator or the commission of enquiry would interrogate persons; he must not be left in doubt as to whether the person whom he was examining was under the same obligations as a witness or if such obligations applied only to persons giving evidence before the Court itself. However, as the words in question were in the existing text, the lesser evil would be to let them stand.

The PRESIDENT was also in favour of maintaining the existing text. He doubted whether, in reality, it would be applicable—even if the words " in Court " were omitted—to the solemn declaration made by a witness before a commission of enquiry; for Section B of the Rules, which the Court was now discussing, was confined to proceedings before the Court or before the Special Chambers. Accordingly, if an enquiry involved the taking of evidence, the whole procedure for the hearing of witnesses would have to be prescribed in the order concerning the enquiry.[1]

The President noted that no objection was made to the existing text, and that the Court unanimously desired to maintain it.

Article 50 of the existing text was adopted.

. . . . . .

Paragraph 1, discussed as Article 51.

The PRESIDENT said that, in the case of Article 51, the Co-ordination Commission proposed a text which differed somewhat from the present text of the Rules. The new text was worded as follows:

" Witnesses appearing before the Court shall be examined by the agents or counsel of the parties or of the Governments or organisations concerned, under the control of the President. Questions may be put

* D 2, A. 3, pp. 230-238.

[1] *Ibid.*, p. 873.

[1] *Cf.* A 17, p. 99.

to them by the President and afterwards by the judges."

" *Commentary:* [1] The Commission adopted the text proposed by the Second Committee, subject to the substitution of the words ' agents or counsel ' for ' representatives ', and of the expression ' judges ' for ' members of the Court '.

" The first of these changes is due to the fact that, in the Commission's view, the word ' representatives ' might give rise to doubt: for it has sometimes been argued that only the agents have a representative capacity. The Commission recognises that the word ' representatives ' was probably chosen in order to cover representatives of interested ' organisations ' as well; but, as is remarked above under Article 46, the Commission uses the word ' counsel ' in a sense sufficiently wide to cover all persons who plead, other than agents.

" As regards the second change, it is due to considerations of uniformity (see Article 4 above [2]).

" The Commission observes, however, that, in contradistinction to the case of Article 50, the present article can only apply to the hearing of witnesses before the Court in plenary meetings. It must, however, be understood that, when the Court takes the evidence of witnesses by a delegation of several judges, each of the latter is entitled to put questions to witnesses.

" As regards the application of the present article to advisory procedure, the Commission refers to what it said above under Article 47."

M. FROMAGEOT pointed out that it was necessary to establish a relationship between Article 51 and the Court's decision regarding questions put to the parties during the oral proceedings.[3] Without prejudice to the question whether the Court would wish to adopt the same rules concerning questions put to witnesses by judges as for questions put to parties, it was necessary to ensure that there was no contradiction or doubt in regard to the application of either article.

Article 51 said: " Questions may be put to them by the President and afterwards by the judges." Should this second clause of Article 51 be governed by the rule recently adopted for the putting of questions to parties ? In other words, must the judges apprise the President of these questions ?

The PRESIDENT, whose opinion was shared by M. Fromageot, did not believe it was necessary.

M. FROMAGEOT considered that, in that case, they should either adopt the same rule in Article 51 or make it clear that the article on putting questions to the parties was not applicable.

M. SCHÜCKING pointed out that Article 51 constituted a special rule, whereas the article which dealt with the putting of questions to parties laid down a general rule which had precedence over the special rule.

M. ANZILOTTI considered that, even in the case contemplated by Article 51, the judge must obtain the President's leave to put his question. The expression " apprise the President " (" *en référer au Président* ") merely meant that the judge said to the President: I wish to put such-and-such a question. The President had to consider whether or not it was a suitable moment for putting the proposed question. It was for that reason that he had not thought it necessary to propose any change in the present text.

M. GUERRERO, Vice-President, did not believe that the interpretation of Article 51 would give rise to the difficulty suggested by M. Fromageot. The only change needed in the present text would, in his view, be the omission of the word " afterwards ". Naturally, the President would speak first, and at any time afterwards, as he pleased. But the text must not give the impression that, if the President put no questions, the judges could not put any.

M. URRUTIA thought it was unnecessary to frame a special rule for the examination of witnesses. Of course, every judge must be entitled to ask the President's leave to put a question. More especially, it seemed unnecessary to lay down that questions had to be put by the President and *afterwards* by judges.

M. SCHÜCKING thought that a judge's right to put questions to witnesses went rather farther than his right to question the parties. The situation was indeed different.

The Court's interpretation of the latter right was that the President might ask a judge to wait for a suitable opportunity to put his question. That would always be possible, for, as a rule, the hearings continued for several days.

Witnesses, on the other hand, were as a rule only present at a single hearing. Judges could no longer put questions to them after they had gone; the judge's right must therefore be more absolute in the examination of witnesses. Every judge must be entitled to put his questions at once, even during the witnesses' statements, although he must obtain the approval of the President, who was responsible for the conduct of the meeting.

The PRESIDENT wished to raise another question. The text of Article 51 said: " witnesses shall be examined . . . under the control (*autorité*) of the President ". This word " *autorité* " seemed to imply something more than the general control exercised by the President for the good order of the discussions. Would not the word " *contrôle* " be preferable ?

Baron ROLIN-JAEQUEMYNS said that the word " *autorité* " was always used to indicate the authority of the President. If the word " *contrôle* " were used in the French text, it might give rise to doubts.

The PRESIDENT pointed out that the Vice-President had proposed to omit the word " afterwards ".

M. FROMAGEOT, referring to the Vice-President's suggestion to omit the word " afterwards ", read the following passage from the book: *Statut et Règlement de la Cour permanente de Justice internationale — Eléments d'interprétation* (Berlin, 1934) [1]:

" In the Drafting Committee's text, the article concluded with the following words: ' *et, avec son assentiment, par les juges* '. It was, however, pointed out (D 2, p. 524) that judges must be allowed themselves to put questions in regard to points which were not clear to them; the wording of the draft did not, however, prevent the President from refusing leave to put a question to a witness if he thought that the supplementary explanations which the judge wished to obtain were unimportant. The principle that a judge appraises the value of evidence according to his own opinion would thus be subjected to a restriction; for that

[1] D 2, A. 3, pp. 873-874.
[2] *Ibid.*, p. 862.
[3] Pp. 200-201.

[1] P. 381 of that publication.

principle required that a judge should not form an opinion on evidence until he thought the point sufficiently clear, no matter what the President might think on the subject.

" To satisfy these observations, the Court decided to replace the words ' with his consent ' by the word ' afterwards '. It appears from the discussion which took place on this point that the President had to decide the order in which questions might be asked, but that he had not the power to prevent a judge from asking a question (D 2, p. 211)."

Such was the origin of the word " afterwards ", and M. Fromageot considered that it might be omitted without any disadvantage.

The PRESIDENT asked the Court to vote on the following question:

" Does the Court decide to omit the word ' afterwards ' in line 3 of Article 51 of the Rules ? "

The Court voted for the omission by eight votes to two.

The PRESIDENT, passing next to the changes proposed by the Co-ordination Commission, said that the first point was the substitution of the words " agents or counsel " for the word " representatives ".

M. NEGULESCO would prefer to maintain the original text on this point.

Jonkheer VAN EYSINGA observed that the Co-ordination Commission's amendment had lost its *raison d'être*, since the article no longer applied to advisory opinions. As the word " representatives " could, however, be interpreted as relating only to agents, he wondered whether it would not be well to give advocates and counsel also the right of examining witnesses. The word " representatives " might be replaced by: " agents, counsel and advocates ", as had indeed been proposed by MM. Urrutia and Fromageot.

The PRESIDENT considered that the word " representatives " covered agents, counsel and advocates.

M. URRUTIA held that, according to the Statute, Article 42 of which was decisive, the only representatives of the parties before the Court were the agents.

Baron ROLIN-JAEQUEMYNS asked the Court to retain the word " representatives ". This word was suitable because it brought out the point that anyone—no matter who—who examined a witness must represent the party.

M. URRUTIA feared that the use of this word might confine to the agents alone the right of putting questions.

Baron ROLIN-JAEQUEMYNS did not agree; under Article 42 of the Statute, the parties might have the assistance of counsel or advocates before the Court; therefore, the counsel and advocates acted as assistant representatives. Besides, if an advocate wished to put a special question in a case, the President could at once ask the agent if it was understood that the advocate was speaking on behalf of the Government in question; and, if the answer was in the affirmative, it was clear that the advocate represented the party.

The PRESIDENT thought that the words " representatives ", " agents ", " counsel " and " advocates " in the Statute or Rules should not be understood in a restrictive or technical sense.

M. NEGULESCO thought it would be a mistake to put M. Urrutia's proposal to the vote, for it would appear to signify that the Court agreed that the word " representatives " did not also refer to counsel and advocates. It would be better to retain the present text of Article 51, it being understood that the word " representatives " covered agents, counsel and advocates.

M. GUERRERO, Vice-President, would prefer the word " representatives ", because it had the wider signification.

The PRESIDENT thought it would be desirable that the Court should vote on the following question:

" Does the Court desire to replace the word ' representatives ' by the words ' agents, counsel or advocates ' ? "

M. ANZILOTTI said he would vote for the maintenance of the existing text of the Rules, for the following reason: in his view, it was only the representatives of the parties who could examine witnesses. Naturally, the agents could allow the advocates and counsel assisting them to put other questions. But it was primarily the agent who had to examine the witnesses. In his opinion, Article 44 of the Statute meant that no step would be taken on behalf of a Government except by the agent of that Government.[1]

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[1] The question of the representative character of agents, counsel and advocates, respectively, before the Court, has been on various occasions the subject of discussion in Court. Some extracts from the relevant minutes are reproduced hereafter:

(*a*) Extract from the minutes of the 17th meeting of the 26th Session, held on November 10th, 1932:

" 34. — *Article 42 of the Statute. — Respective responsibilities of agents and counsel.*

" The PRESIDENT [M. Adatci] referred to an opinion expressed in regard to Article 42 of the Statute, to the effect that the responsibility of Governments was engaged by declarations made by agents, but that those made by counsel or advocates engaged only the responsibility of the latter.

" The President said that he had thought that the clear and unequivocal wording of Article 42 of the Statute in itself afforded sufficient ground; for it laid down that the parties shall be *represented* by agents, but that they may have the *assistance* of counsel or advocates. This interpretation, moreover, was confirmed by the preparatory work. At the 1920 Assembly, the Argentine Government had proposed an amendment to the article submitted by the Jurists' Committee (and which was practically identical with the article now in force); according to this amendment, parties might also have counsel or advocates to *represent* them. It was rejected for the reason, set forth in the report as adopted by the Assembly *, that 'only the agents can represent the parties '. The President had no doubt that it was in view of this that the Court had given Articles 34 and 35 of the Rules their present form: they referred exclusively to the agents and not to counsel or advocates; these articles should be compared and contrasted with for instance Article 46 of the Rules, which—in a different connection—referred not only to agents, but to counsel and advocates as well.

" That the Court had regularly acted, as regards questions of procedure, on the assumption that the agents alone represented the parties was proved by a large number of precedents which the President had examined; but he would not occupy the time of the Court by quoting them, at all events at the moment.

" The same held good also with regard to declarations intended to bind States in matters of policy. Many precedents to the point could be cited; the President, for the moment, confined himself to mentioning the two Mavrommatis cases. In the first (Judgment No. 2), the Court had relied on a declaration made during the hearings by Sir Cecil Hurst †; he had learnt shortly afterwards from M. Oda that this had been possible because of the fact that in that case Sir Cecil Hurst had appeared as agent, not as counsel. On the other

* *Note by the President* [M. Adatci]:

" The minutes of the Sub-Committee of the Third Committee contain, in this respect, the following:

" ' The Chairman [M. Hagerup] then drew attention to the amendment proposed by the Argentine delegation for Article 40 (Annex 3). He pointed out that, if the idea of the amendment was to establish that there was no incompatibility between the function of agent and that of advocate, it was unnecessary; if, on the other hand, it was intended to state that not only the agents but also the advocates were representatives of the parties, it was inexact.

" ' The amendment was rejected.' "

† A 2, p. 22.

M. NEGULESCO thought they should be clear, to begin with, who was the representative of a party in the various cases which might arise. Article 42 of the Statute laid down, it was true, that the parties were represented by the agents. But it added that they could be assisted before the Court by counsel or advocates. The agent could be "assisted" by an advocate, and the word "assistance" must be construed in a wide sense so as to cover the delegation or transmission of powers by the agent to the advocate, authorising the latter to represent the party. Otherwise, if the word "assistance" were taken in a narrow sense, the result would be that the advocate would no longer represent the party in the agent's absence.

M. FROMAGEOT considered that, in principle, in proceedings before the Court, during the examination of witnesses and on all other occasions, it was only an agent who could make a statement committing his Government; an advocate could not do so, unless he made his declaration in the presence of his agent and the latter tacitly associated himself with it.

Moreover, the Statute showed clearly in Article 42 that counsel or advocates, unlike agents, were not representatives of the party; but, if they spoke in the absence of the agent, they were merely assisting the agent.

M. GUERRERO, Vice-President, thought that, if it was not certain that an advocate could represent a party, it would be better to go back to the formula proposed by M. Urrutia: "agents, counsel or advocates". M. Guerrero's own view was, however, that, if the name of the advocate or counsel had been duly notified to the Court, he also represented the party. That was indeed necessary. For if, as M. Fromageot appeared to hold, a statement made by an advocate or counsel did not commit his Government unless the agent were present, the Court could not know whether a statement made by an advocate when the agent was not present was an expression of his Government's wishes.

The PRESIDENT pointed out that M. Fromageot's opinion would not be compatible with the method which the United Kingdom had, in practice, observed when having itself represented before the Court; he preferred to retain the existing text.

M. FROMAGEOT, on the contrary, thought that, since the word "representatives" might occasion difficulties, it would be better not to retain that term, but to enumerate the persons who could put questions. The problem concerning the representative characters of agents on the one hand, or of advocates and counsel on the other hand, might be settled later on.

The PRESIDENT accordingly put the following proposal to the vote:

> "The Court decides to replace the word 'representatives' in the first line of Article 51 by the words 'agents, counsel or advocates'."

The above proposal was adopted by six votes to four.

The PRESIDENT asked if there were any other amendments to the article.

M. FROMAGEOT thought it would be advisable to add the words "or experts" after "witnesses".

Jonkheer VAN EYSINGA pointed out that Article 51 of the Rules implemented Article 51 of the Statute, which referred both to witnesses and experts.

M. ANZILOTTI observed that, if an expert was called by a party, he was on the same footing as a witness. But if an expert was appointed by the Court, the latter was entitled to examine him; the parties had no right to interrogate him without the Court's consent.

Jonkheer VAN EYSINGA thought that Article 51 of the Statute evidently referred only to experts appointed by the parties.

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hand, in the second Mavrommatis case, the Court had relied on a declaration by Sir Douglas Hogg *, although the latter had appeared as counsel; but this was exclusively due to the fact that Sir Douglas Hogg had spoken not in his capacity as counsel but, as expressly stated, as Attorney-General—*i.e.*, as a member of the Government. This was clear from the actual text of the judgment.

"M. FROMAGEOT asked whether the statement made by the President at the hearing should be considered as definitely expressing the doctrine of the Court; if so, he wondered what was the value of statements by counsel; were they in the nature of private legal opinions?

"The PRESIDENT inclined towards this view.

"M. FROMAGEOT said the Court must certainly draw a distinction between agents and counsel. The agent represented the Government in all matters of procedure; for instance, he signed the documents of procedure on behalf of his Government, and took the place of the latter in the conduct of the case. This system had its origin in the early days of arbitration, as it was thought that the interposition of the agents between the Governments or Foreign Offices and the tribunal, for the purposes of the proceedings, tended to diminish tension between the parties. On the other hand, a counsel was an advocate, engaged by a party to plead its case and to present arguments on its behalf.

"M. GUERRERO, Vice-President, thought the question was too important to be disposed of in the time then available. He was not familiar with the precedents; but if a ruling had to be given as to the mission and the powers of those who represented parties before the Court, it would need to be based on the Court's Statute, and not upon the minutes of an Assembly Committee. It might be going too far to lay down that the agent alone represented the Government; it appeared to him that the counsel did this also, in some respects. It sometimes occurred that a party appointed its Minister at The Hague as its agent simply because he was on the spot and was in touch with the Court; but he made no speech at the public hearings, and left this task to the counsel. Sometimes, indeed, the submissions were formulated by counsel: could the Court hold in such a case that the Government in question had made no submissions because they were not presented by the agent?

"M. ANZILOTTI said it should not be difficult to reach a solution, when time allowed of ampler discussion. There was certainly a distinction between the representative character of an agent and that of counsel or solicitor, but this distinction, which was similar to that made in many of the laws regulating procedure between solicitors *(avoués)* and counsel *(avocats)*, was revealed mainly in the conduct of the case. For instance, if the counsel of a Government said he withdrew a part of the submissions, the Court would wish to satisfy itself that the agent had authorised such a step.

"The PRESIDENT said that there was no time for further discussion at the moment. The matter must stand over until it was possible to go thoroughly into the question."

(*b*) Extract from the minutes of the 59th meeting of the 26th Session, held on December 16th, 1932:

"87. — *Approval of minutes.*

"P.-V. 14 and 17 were approved, subject to certain modifications which were embodied in the texts.

"In this connection, the PRESIDENT [M. Adatci] stated that he had not been able to change his opinion, as recorded in No. 34 of P.-V. 17, on the due construction of Article 42 of the Statute. As, on that occasion, the Court was compelled by the circumstances to interrupt the discussion without bringing it to a conclusion, the President intended to place the matter on the Agenda for some future meeting. With this object in view, the President invited his colleagues to be good enough to examine the question for themselves. In order to facilitate their work, he caused to be distributed an extract concerning Article 42 of the Statute, from the Registry file, on the interpretation of the Statute †; he also drew his colleagues' attention to a proposal made by M. Huber on the occasion of the revision of the Statute in 1926 ‡."

* A 5, p. 37.

† See "*Statut et Règlement de la C. P. J. I. — Eléments d'interprétation*", pp. 317 *et sqq.*, particularly p. 320.

‡ D 2, A., pp. 124-132.

M. FROMAGEOT observed that Article 50 of the Rules was necessarily confined to witnesses. But, as regards Article 51 of the Rules, experts put forward by the parties must be able to be examined or cross-examined like witnesses. It would therefore seem natural that Article 51 should mention experts as well as witnesses.

M. SCHÜCKING realised that a difference must be made between the case of an expert called by a party and that of an expert whom the Court desired to call *proprio motu*. But, in the section of the Rules now under consideration, the Court was concerned only with evidence adduced by the parties themselves. For that reason, in Article 51, an expert should be placed on the same footing as a witness, as proposed by M. Fromageot.

The PRESIDENT thought that the Court had left the Drafting Committee to find some form of words which would not raise difficulties if experts were called as witnesses.[1]

Baron ROLIN-JAEQUEMYNS would prefer that Article 51 should refer only to witnesses, leaving open the possibility of a reference to that article in some other article which would deal with experts.

The PRESIDENT asked M. Fromageot if he wished his proposal to be voted upon.

M. FROMAGEOT explained that his desire had been to introduce an additional clause at this point to make it clear that the same system applied to experts and to witnesses, but he would not press his proposal.

Baron ROLIN-JAEQUEMYNS said that the Court had not yet decided on the Co-ordination Commission's proposal to add the words " appearing before the Court " after the word " witnesses ". Those words were designed to show that the witnesses in question were those who appeared before the Court, not those whose evidence was taken on commission by a delegation of the Court, or in any other way.

The PRESIDENT, whose view was shared by Jonkheer van Eysinga, said that, having regard to the text they had just adopted, the clause could refer only to the examination of witnesses before the plenary Court, whether that were stated or not.

He asked the Court to vote on the proposal to add the words " appearing before the Court " after the word " witnesses ".

The proposal was rejected by nine votes against one.

The PRESIDENT put the whole of Article 51 to the vote; with the amendments already adopted, it read as follows:

> " Witnesses shall be examined by the agents, counsel or advocates of the parties, under the control of the President. Questions may be put to them by the President and by the judges."

This text was unanimously adopted.

8.IV.35.

Article 53, which combined the old articles 50 and 51, was adopted without observation in first reading with the following text:

> " 1. Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges.
>
> " 2. Each witness shall make the following solemn declaration before giving his evidence in Court:
>
> " ' I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.'
>
> " 3. Each expert shall make the following solemn declaration before giving his evidence in Court:
>
> " ' I solemnly declare upon my honour and conscience that my evidence will be in accordance with my sincere belief.' "

Note. — References to Article 53 during the discussion on Article 54: see Article 54, p. 210.

24.II.36.*

Article 53. — Second Reading.

Baron ROLIN-JAEQUEMYNS observed that Article 53 reproduced the terms of Articles 50 and 51 of the Rules in force (*i.e.* 1931 Rules), but inverted the order of those provisions. Was not the old order more logical ?

M. FROMAGEOT preferred the order of the new text. Paragraph 1 dealt with the question who was to examine the witnesses or experts; that question having been dealt with, the next point was the examination of witnesses: that was the place for the solemn declaration.

The PRESIDENT also recalled that the third paragraph was new; it was an addition providing for a solemn declaration by experts. The article began with the most important point—namely, the rule indicating by whom witnesses were to be examined; then followed the two solemn declarations.

M. ANZILOTTI would have preferred the order followed in the Rules in force, if the subject-matter had still been divided into two separate articles. But if they had only one article, the order followed in the text under consideration seemed better. The article stated a principle of fundamental importance: that witnesses were examined by the parties under the control of the President; it was right that it should be enunciated at the beginning of the article.

There being no further observations, the PRESIDENT declared Article 53 adopted in second reading.

24.II.36.

See under Article 57, p. 220, for discussion of Article 53 in connection with Article 57.

26.II.36.

See under Article 58, p. 224, for reference to Article 53 in connection with Article 58.

11.III.36.**

Article 53. — Final Adoption.

The PRESIDENT said that, in paragraph 3, the Drafting Committee had considered the text in connection with a criticism of the employment of the word " *déposition* " (evidence); the Committee accordingly proposed to replace this word by " *exposé* " (statement).

Article 53, as a whole, was finally *adopted* with this amendment.

[1] *Cf.* pp. 177 (meeting of 7.II.35) and 180-181 (meeting of 8.II.35).

* D 2, A. 3, pp. 618-619.

** *Ibid.*, p. 731.

ARTICLE 54 *(Article 48, old Rules).*

PRODUCTION OF WITNESSES AND EXPERTS

12.II.35.*

Discussed as Article 48.

The PRESIDENT opened the discussion on Article 48 of the Rules. The text proposed by the Co-ordination Commission was as follows: [1]

> " The Court may invite the parties to call witnesses, or, subject to the provisions of Article 44 of the Statute, call for the production of any other evidence on points of fact in regard to which the parties are not agreed."
>
> *Commentary:* " The Commission has maintained the existing text, with a drafting change designed to show clearly that the reservation regarding Article 44 of the Statute, contained in the clause in question, relates, not to steps which have to be taken by the parties, but solely to measures that have to be taken by the Court itself."

M. FROMAGEOT saw no need to add the words " in regard to which the parties are not in agreement " after the words: " on points of fact " [2].

M. SCHÜCKING thought that the omission of these words would be a very important change, for it would enable the Court, if circumstances required, to take any steps necessary to ascertain the objective truth, which the Court could not do with the text as now proposed.

M. FROMAGEOT explained that his reason for proposing the omission of these words was merely that he thought them superfluous, and not because he had wished to change the substance of the clause.

M. ANZILOTTI said he could accept the omission in the sense indicated by M. Fromageot—that is, if the words were considered superfluous. But if their omission might be taken to mean that the Court could proceed to verify the facts even where the parties agreed in admitting them, he would feel great hesitation at omitting the phrase in question.

The PRESIDENT put the following question to the vote:

> " Does the Court decide to omit the words ' in regard to which the parties are not in agreement ' at the end of Article 48 ? "

The voting resulted in a tie.

The PRESIDENT, in compliance with the principle he had laid down at the previous meeting—namely, that he did not wish the existing Rules to be changed if there was no real majority—declared that the words in question would be retained in Article 48.

He asked if there were any other proposals for amendments to Article 48.

M. URRUTIA asked why the Co-ordination Commission had proposed to change the existing wording of Article 48 of the Rules.

The PRESIDENT explained that the Co-ordination Commission had wished to improve the text without changing the substance.

Baron ROLIN-JAEQUEMYNS considered that Article 44 of the Statute did not apply to the interrogation of witnesses, but only to other forms of evidence.

The PRESIDENT observed that the existing Article 48 dealt with two hypotheses: in the one case, the Court invited the party to produce a witness, in the second case it asked for the production of other kinds of evidence. Article 44 of the Statute could relate only to the second hypothesis, and it was not necessary to apply it to a communication addressed directly to an agent. That was why the Co-ordination Commission had drawn a distinction.

M. ANZILOTTI thought that Article 48 of the Rules contemplated another case in making a reservation concerning Article 44 of the Statute, namely the case in which the witnesses whom the Court wished to call were unwilling to appear before it. Article 44 of the Statute accordingly related both to witnesses and to other forms of evidence.

Jonkheer VAN EYSINGA thought that the Co-ordination Commission's proposal related only to the wording.

13.II.35.*

Discussed as Article 48.

The PRESIDENT recalled that, at the end of the previous sitting, the Court was considering Article 48 of the Rules. The point under discussion had been the position of the words " subject to the provisions of Article 44 of the Statute " in the article. The Co-ordination Commission had considered that the article would be clearer if these words were placed in the second part of the article.

M. URRUTIA was afraid that, if Article 48 of the Rules were drafted as proposed by the Co-ordination Commission, the terms of Article 44 of the Statute would be infringed, because the method of notification provided for in that article would not apply to the invitation to produce witnesses. For this reason, M. Urrutia would prefer to keep Article 48 of the Rules as it was.

M. GUERRERO, Vice-President, thought the words in question might be deleted. That would avert any difficulty and also the risk of inconsistency with the Statute.

The PRESIDENT considered that this might be done, since it might seem superfluous to embody in the Rules a reference to an article of the Statute—in this case Article 44.

M. ANZILOTTI pointed out that it appeared from the minutes of the 1922 discussions [1] that the Court at that time had had in mind principally the evidence of witnesses; that was easy to understand, for, if the Court wished to ask the agent of a party to produce witnesses or any other kind of evidence, it was unnecessary to apply Article 44 of the Statute, since direct communication between the Court and a party was always possible. On the other hand, if the Court asked for something which required action to be taken in another State, Article 44 of the Statute must be applied and direct application must be made to the Government. That was the idea underlying Article 48 of the Rules. It followed that, if the reference to Article 44 of the Statute were deleted, the Court would be saying something which was self-evident.

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* D 2, A. 3, pp. 238-239.
[1] *Ibid.*, p. 873.
[2] *Cf.* D 2, p. 210.

* D 2, A. 3, pp. 239-242.
[1] *Cf.* D 2, pp. 209, 522.

Jonkheer VAN EYSINGA, if this reference were deleted, would prefer to see the text amended so as to bring out clearly the two contingencies in view. If the proposed deletion were made, Article 48 would seem merely to mean that the Court might ask the parties to do something, whereas it was clear that the Court had two objects in view: to be able to ask the agents for further evidence, and to be able to apply direct to a State, under Article 44 of the Statute, when it was impossible to obtain the evidence through the agents.

M. GUERRERO, Vice-President, did not think this change necessary. The Court could always call on a party to produce witnesses or other evidence. If the party conformed to the Court's request and presented the witnesses before the Court itself, the Court could without difficulty examine them at once. If, on the other hand, the party stated that a witness was in a particular country, Article 44 of the Statute would have to be applied. In order to obtain the evidence of this witness, the Court would have to communicate direct with the Government of the territory. The deletion of the reference to Article 44 of the Statute seemed therefore to present no difficulty: it would leave the two contingencies mentioned unaffected.

The PRESIDENT thought that if, in the course of a suit, the Court wished witnesses to be called or documents produced, it would in practice always request the representatives of the parties to do so; it would communicate direct with a foreign Government only if the parties replied that they could not call a certain witness or produce a certain document because the witness or document was in a foreign country and they had no power to produce them. In a case of that kind, the Court would have recourse to the method of obtaining evidence on commission.

M. SCHÜCKING agreed with Jonkheer van Eysinga: Article 48 should either be deleted because its contents were already implicit in the Statute, or else it should be rendered complete.

Article 48 merely said that the Court could invite the parties to call witnesses; but there was also the possibility that the Court might wish on its own initiative to approach a Government in order to obtain on commission the evidence of witnesses or any other evidence without asking the parties for it. That was another possibility which should be mentioned in Article 48.

M. ANZILOTTI recalled that in 1922 a different standpoint had been taken; it had been held that, before such a Court, reliance must above all be placed in the willingness and ability of the parties to furnish the Court with the necessary evidence. That was why two parallel courses between which the Court might choose had not been contemplated in this article. The general rule was that the Court approached the parties; and only if a party were unable to produce a witness or obtain some other evidence was the procedure mentioned in Article 44 of the Statute to be resorted to; it followed that, even if the words in question were deleted, the position would not be altered.

M. GUERRERO, Vice-President, whilst agreeing with M. Anzilotti, would be prepared to accept the following wording: " If the witnesses or other evidence asked for are in the territory of another State, the Court will proceed in accordance with Article 44 of the Statute."

M. ANZILOTTI would prefer a more flexible wording. It was possible that a witness would be in the territory of another State but that he was willing to appear before the Court. The rule was that the party must undertake to produce its own witnesses as well as those whom the Court wished to hear.

Jonkheer VAN EYSINGA recalled that in 1922 the Court had decided to retain the principle expressed in Article 48—namely, that the Court could on its own initiative apply to a Government to secure the appearance of a particular witness.

The PRESIDENT gathered that Jonkheer van Eysinga construed the expression " subject to " in the existing Article 48 as meaning: " without prejudice to the provisions of Article 44 of the Statute "—*i.e.* reserving the absolute freedom of the Court to act on its own initiative. He also gathered that Jonkheer van Eysinga would wish to amend the article only if the words in question were deleted. For that reason, the Court should first of all vote on the proposal to delete the words: " subject to the provisions of Article 44 of the Statute ".

M. ANZILOTTI understood that the intention of the Court in deleting these words would not be to modify the substance of the text, but simply to remove a phrase which was regarded as superfluous.

M. SCHÜCKING would prefer to keep the article. In his opinion, it was essential that the Court should be able *proprio motu* to have evidence taken in order to ascertain the correctness of facts. This important principle should be embodied in the Rules of Court.

The PRESIDENT took a vote on the following question:

> " Does the Court decide to delete the words ' subject to the provisions of Article 44 of the Statute ' in the first line of Article 48 of the Rules ? "

By six votes to four, the Court answered the question in the negative.

The PRESIDENT recalled that M. Urrutia had proposed that Article 48 of the Rules should be retained in its existing form.

M. ANZILOTTI wished to define the meaning of the expression " *sous réserve* " (subject to). Did it signify that the Court, whilst able to apply to a foreign Government, could also apply to a party ? Or did it mean that the Court could apply to a party, but only within the limits fixed by Article 44 of the Statute, if it wished for the evidence of witnesses in a foreign country to be taken ?

In the second alternative, care must be exercised because it was possible that the party would be in a position to produce the witness itself.

M. SCHÜCKING also thought that the phrase was intended not so much as a reservation as a means of keeping open a possible course.

Baron ROLIN-JAEQUEMYNS said that the idea to be expressed was that Article 48 of the Rules did not infringe the provisions of Article 44 of the Statute.

The PRESIDENT stated that the question of the phrase " subject to . . . " would be reserved and referred to the Drafting Committee. He also stated that the Court was unanimously in favour of retaining the existing text of Article 48.

8.IV.35.*

Article 54. — First Reading.

M. NEGULESCO considered that the word " experts ", which had been added by the Drafting Committee to the

* D 2, A. 3, pp. 439-440.

text adopted by the Court [1], modified the substance of the article. This article was concerned with witnesses and expert-witnesses, but not with experts properly so called; in his view and that of other members of the Court, the only true experts were those appointed by the Court. M. Negulesco did not at the moment wish to enter upon a full discussion of the question, but reserved the right to bring the matter up again at the second reading.

The PRESIDENT explained that experts appointed by the Court were dealt with in Article 57 of the Co-ordination Commission's text. Article 54, as also Article 53, only concerned experts called by the parties at the request of the Court.

M. FROMAGEOT observed that the distinction drawn by Article 54 between witnesses and experts was brought out very clearly by Article 53, which differentiated between the declaration made by witnesses and that made by experts.

In M. NEGULESCO's view, the word " witnesses " represented a wide conception, which covered both witnesses proper and experts appointed by the parties.

M. ANZILOTTI thought that the question raised by M. Negulesco was probably mainly one of words: should the term " witnesses " be understood—in accordance with Anglo-Saxon practice—as covering both persons who gave information on matters of fact and persons who gave opinions upon questions in regard to which they possessed special qualifications, or should a distinction be drawn—in accordance with Continental practice—between witnesses and experts ?

The PRESIDENT, who took the same view, thought that in reality the Court was agreed that the article referred only to these two categories of persons and not to experts appointed by the Court. He added that, if the word " experts " were deleted in Article 54, the same should be done in Articles 49 and 53.

After a discussion, the PRESIDENT explained that the Drafting Committee had considered that, if the word " witnesses " had been used alone, the meaning might have been a little doubtful to Continental jurists; the Committee's sole object in adding the word " experts " had been to make the meaning clear.

Baron ROLIN-JAEQUEMYNS having suggested that the expression *"des témoins ou experts"* (witnesses or experts) should be replaced by the expression *"des témoins ou des experts"* (either witnesses or experts), M. FROMAGEOT considered that that would emphasise the distinction between witnesses and experts to which M. Negulesco objected and thus increase the difficulty.

There being no further observations, the PRESIDENT declared Article 54 adopted in first reading with the following text, the question raised by M. Negulesco being reserved for the second reading:

> " The Court may invite the parties to call witnesses or experts, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement. If need be, the Court shall apply the provisions of Article 44 of the Statute."

Second Reading and Final Adoption.

Article 54 was adopted in second reading on 22.II.36 unchanged save for the addition of the words " of the Court " after the word " Statute "; and was finally *adopted* unchanged on 11.III.36.

ARTICLE 55 *(Article 52, old Rules).*

WITNESSES OR EXPERTS: INDEMNITIES OF —

12.II.35.*

Discussed as Article 52.

The PRESIDENT invited the Court to examine Article 52 of the Rules, referring to the indemnities of witnesses. No proposal in regard to this article was made in the Co-ordination Commission's report.

M. SCHÜCKING doubted whether this article should be inserted at this point, seeing that it related only to witnesses called by the Court, and that the Court was now dealing only with evidence produced by the parties.

13.II.35.**

Discussed as Article 52.

The PRESIDENT opened the discussion on Article 52. The Co-ordination Commission had suggested no amendment to this article.

Baron ROLIN-JAEQUEMYNS wished to know whether it was clearly understood that this article referred only to witnesses called by the Court.

The PRESIDENT thought that, if the Court simply indicated to a party that it would be desirable to have further information in the shape of the oral evidence of witnesses, the expenses involved by calling witnesses would fall upon that party. [1]

Baron ROLIN-JAEQUEMYNS wondered whether the expression " called by the Court " would not be better than: " who appear at the instance of the Court ".

Jonkheer VAN EYSINGA would prefer to retain the word *" invitation "* (instance). Article 47 of the Rules concerned witnesses called by the parties; Article 52 did not refer to these, whose expenses were borne by the parties. Article 48 said that the Court " may invite the parties to call witnesses". It was to such witnesses that Article 52 referred.

Baron ROLIN-JAEQUEMYNS observed that, according to the existing text of Article 48, the Court invited " the parties ", but not the actual witnesses. It should be made clear that the Court bore only the expenses of witnesses actually called by itself.

Jonkheer VAN EYSINGA thought that, in the case of a witness who appeared under Article 48, the summons was issued through the parties or agents, but that the witness appeared at the instance of the Court.

Baron ROLIN-JAEQUEMYNS wished to be clear on certain points: if the Court, considering that it had insufficient data in regard to a case, requested a party to call witnesses to confirm its statements, the Court was not really calling any witnesses; it was merely inviting the party to do so. In

* D 2, A. 3, p. 238.
** *Ibid.*, pp. 242-243.
[1] See p. 209; *cf.* p. 181 (meeting of 8.II.35).

[1] *Cf.* A 7, pp. 96-97.

that case, it did not seem that the Court's budget should have to bear the expenses of such witnesses. Only if the Court on its own initiative directly invited a person to come to give evidence before it, could it be said that the Court was responsible and must pay his expenses.

Jonkheer VAN EYSINGA thought that there was no doubt on the point and that Article 52 referred only to witnesses called under Article 48.

M. ANZILOTTI recalled that, in the case concerning the large estates [1], the Court had required certain information of a technical character and had asked the parties to call persons able to furnish explanations and information in this connection. The parties had called experts chosen by themselves, who had given evidence in Court. If he remembered rightly, these witnesses had been regarded as called by the parties, who had borne their expenses.

If, however, it was the Court which wished to have the evidence of a certain person and requested the latter to appear before it, it must assume responsibility for the witness's expenses.

M. URRUTIA feared that the expression " at the instance of the Court " in the existing Article 52 was not clear, and that it might lead to the Court's having to pay expenses which it should not have to support.

The PRESIDENT recalled that the Court had acted with great circumspection in the cases which had occurred.

In practice, it had drawn a distinction between a case where additional evidence in regard to certain questions was required, when it left the initiative entirely to the parties, and a case where the Court informed the parties that it wished a particular person to be called as a witness. In the latter case the Court had to bear the witness's expenses.

M. ANZILOTTI emphasised that the existing text covered widely different contingencies. It seemed dangerous to try to make provision for everything in the Rules. It would therefore be better to stick to the existing text.

The PRESIDENT observed that the Court was agreed that Article 52 referred solely to witnesses and declared that the article was maintained in its existing form. He wished, however, to make a reservation regarding the English text.

First and Second Readings and Final Adoption.

The article was adopted unchanged [1], but with the number 55 in first reading on 8.IV.35.

At the second reading on 24.II.36, a question was raised as to the French text. The words " sur l'invitation de la Cour " had been criticised and it was held that the English text " at the instance of the Court " was more correct, because as a general rule the Court would not invite particular persons to appear, but would simply inform the party concerned that it wished to hear evidence on some particular point and the party would select the witness. It was decided to replace " invitation " in the French text by " initiative ". The English remained unchanged.

On 11.III.36, Article 55 was finally *adopted* unchanged.

ARTICLE 56 *(Article 49, old Rules).*

WITNESSES AND EXPERTS: EXAMINATION OF — OTHERWISE THAN BEFORE THE COURT ITSELF

9.II.35.*

Discussed as Article 49.

The PRESIDENT opened the discussion on Article 49, for which the Co-ordination Commission had submitted the following draft:

> " The Court may instruct one or more of its members to examine witnesses whom it has decided to hear, or to carry out an inspection locally." [2]

M. FROMAGEOT wondered whether, from the point of the order in which the Court should take the articles, Article 49 did not cover witnesses called by the Court as well as those called by parties.

Again, unlike the text proposed by the Co-ordination Commission, the existing Article 49 covered the taking of evidence on commission. That article ran:

> " The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses out of Court."

The PRESIDENT, in this connection, read the following passage from the Co-ordination Commission's report:

> " The Commission considered in fact that the object of the article was, on the analogy of Article 50 of the Statute, to make it possible for witnesses to be examined on behalf of the Court, but otherwise than by the full Court or on commission. It was also meant to cover enquiries which the Court might wish to entrust to one or more of its members; and it did not seem certain that this possibility was adequately provided for by Article 50 of the Statute." [2]

Jonkheer VAN EYSINGA pointed out that witnesses could either be heard by the Court itself or their evidence taken on commission. The Co-ordination Commission had wished to provide for a special case: the delegation of powers to a few members of the Court for the purpose of hearing witnesses. Perhaps, however, it was unintentional that the wording failed to cover the taking of evidence on commission.

M. FROMAGEOT considered the taking of evidence on commission as a special case. The new draft covered cases where the Court either examined witnesses itself or delegated its powers to some of its members. When evidence was taken on commission, the Court entrusted the examination of witnesses to some other person. If a party asked that a witness should be examined locally, the local authority—if it had to undertake this examination—must be qualified to receive a commission or request from the Court.

M. ANZILOTTI said that this case was provided for and dealt with in Article 44 of the Statute; that was why the Co-ordination Commission had said nothing about it in the Rules.

Jonkheer VAN EYSINGA recalled that the book on the

* D 2, A. 3, pp. 216-217.

[1] See footnote 1, p. 210, second column.

[2] D 2, A. 3, p. 873.

[1] *I.e.*, with the 1931 text.

[2] D 2, A 3, p. 873.

Statute and Rules of Court [1] referred to the taking of evidence on commission in the following terms:

> "When the text of Article 48 of the Rules was discussed at the preliminary session, it was observed that, if witnesses would not appear voluntarily, there was no means of getting their evidence except by taking it on commission. In this connection, it was proposed to insert in the Rules a provision which was 'adopted subject to drafting'. This provision became Article 49 of the Rules."

The only object of Article 49 was to make it possible to take evidence on commission.

The PRESIDENT was not certain that the taking of evidence on commission was covered by Article 49 of the existing Rules.

Baron ROLIN-JAEQUEMYNS did not think that the Court was confronted with two texts which were mutually inconsistent. The Co-ordination Commission had not meant to delete the existing Article 49 and to replace it by another. They could either retain the existing Article 49 and also adopt the Commission's text, or they could simply adopt the former. Personally, he would prefer to retain the existing Article 49.

M. URRUTIA would also prefer to leave the existing article of the Rules and to append to it the article proposed by the Co-ordination Commission.

M. NEGULESCO confirmed that in 1922 this Article 49 had been intended to cover the taking of evidence on commission.[2] He would like to see the meaning of the article made plainer.

M. ANZILOTTI questioned whether the Statute really empowered the Court to delegate its powers to one or more of its members. In his view, Article 50 of the Statute referred to persons selected outside the Court.

M. SCHÜCKING said that, if the Statute allowed evidence to be taken on commission, it must also allow witnesses to be examined by some members of the Court.

M. ANZILOTTI said that the two cases were very different. The delegation of powers, which perhaps took place when evidence was taken on commission, was expressly provided for in the Statute (Article 44); it was moreover a necessity, because the evidence of a witness in another country could be taken only by the local authority. But there was nothing to compel the Court to entrust the examination of a witness to a delegation of its members instead of undertaking it itself. He knew of no article in the Statute which could serve as a basis for such a delegation of powers, though he could cite some articles which, in his opinion, would preclude it: in that connection, he drew special attention to the first paragraph of Article 25.

11.II.35.*

Discussed as Article 49.

The PRESIDENT invited the Court to continue its examination of Article 49. He recalled that, at the previous sitting, the suggestion had been made that the Co-ordination Commission's text [1] should be combined with that of the existing Rules, which would be retained.

M. URRUTIA, on the other hand, submitted the following proposal:

> *"That Article 49 be replaced by the following:*
>
> "The Court, or the President if the Court is not sitting, may order evidence to be taken on commission."

This article should, in M. Urrutia's view, be confined to the taking of evidence on commission, and it appeared to have been inserted in order to cover the taking of evidence on commission, though that was not expressly mentioned.

In his view, it did not seem necessary to reproduce the words "at the request of one of the parties" contained in the existing text, since the Court had already in principle recognised the right of parties to ask for any evidence which they thought necessary to be produced with the co-operation of the Court. Nor was it necessary to say: "or on its own initiative", since that was a right recognised by the Statute itself. Furthermore, there was no need to indicate in what circumstances the Court could arrange for evidence to be taken on commission; that was already laid down in other articles of the Rules or in the Statute itself.

M. ANZILOTTI said the reason why the phrase "at the request of one of the parties or on its own initiative" had been inserted in the Rules was as follows: a party informed the Court of the witnesses whom it desired to be heard; these witnesses were not on the spot, and it might happen that they were unable to come to the seat of the Court; in that case the Court, in order to obtain their evidence, would have to take the steps provided for by Article 44 of the Statute. Article 49 of the Rules said: "at the request of one of the parties", because, in certain cases, it was for a party to indicate its witnesses and to request the Court to take the necessary steps to have them heard in a foreign country.[2]

M. URRUTIA thought that that was understood. Article 47 provided that "each party shall inform the Court . . . the names . . . of witnesses . . .". If the Court could not hear witnesses because they could not appear before it, it had the right to order that their evidence should be taken on commission.

The PRESIDENT was not sure that M. Urrutia's proposal covered quite the same ground as the existing Article 49. He pointed out that the expression "*commission rogatoire*" had a technical meaning which differed in the different systems of law.

Baron ROLIN-JAEQUEMYNS in principle had no objection to M. Urrutia's proposal. In his opinion, it would be a good thing to add to Article 49 something definite regarding evidence on commission; but he thought that the Co-ordination Commission's text was satisfactory.

In any case, whether the Court adopted the Co-ordination Commission's text or that of M. Urrutia, the existing Article 49 should be retained; it was merely a question of supplementing it.

M. URRUTIA did not object to the retention of the existing Article 49, but some reference should be made to the taking of evidence on commission. Moreover, the Statute (Arti-

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* D 2, A. 3, pp. 218-227.

[1] See *Statut et Règlement de la Cour permanente de Justice internationale. Eléments d'interprétation*, published (Berlin, 1934, Carl Heymann's Verlag) by the *Institut für ausländisches öffentliches Recht und Völkerrecht*, p. 370.

[2] D 2, pp. 145-146.

[1] See p. 211.

[2] *Cf.* D 2, pp. 145, 209, 522.

cle 44) laid down that the Court was to take action through the Government of the State concerned not only as regards the hearing of witnesses but also for the service of all notices.

Jonkheer VAN EYSINGA gave the following explanations concerning Article 49, as proposed by the Co-ordination Commission. If a State wanted the Court to take cognisance of statements made by some persons resident in the territory of one of the two parties and adduced these statements in evidence before the Court, such statements could be included in the documents of the written proceedings. It was, however, also possible that after the written proceedings the same State might realise that it would be useful to have the evidence of other persons; that would then be a matter governed by the rules concerning witnesses in the oral procedure. The State concerned would communicate its list of witnesses and ask the Court to arrange to have their evidence taken—it might be—on commission. It was certain that Article 49 had been included in the Rules in 1922 in order to cover the taking of evidence on commission.[1] If it were desired to retain a provision of the kind, it would be better to combine M. Urrutia's draft and the old Article 49, which related to the same matter, in a single text, rather than to retain them as separate paragraphs.

The Co-ordination Commission had proposed an innovation: besides obtaining evidence on commission, the Court was to have the right to delegate the hearing of witnesses to one or more of the judges. There they were confronted with the difficulty pointed out by M. Anzilotti at the end of the sitting on February 9th[2]: Article 25 of the Statute laid down that the Court was to exercise all its powers in plenary session.

M. GUERRERO, Vice-President, observed that the difference between M. Urrutia's proposal and the existing Article 49 was that the latter applied solely to the commissioning of some authority to take evidence which could not be taken by the Court, whereas M. Urrutia's text covered *commissions rogatoires* in general. As the Court at the moment was considering the articles relating exclusively to the hearing of witnesses, the proposed article should cover only "*commissions rogatoires*" given for that purpose (the taking of evidence on commission).

After M. Guerrero, Vice-President, had spoken on the meaning of the expression "*commission rogatoire*", the PRESIDENT pointed out that, so far as the Court was concerned, the only case where it would be necessary to have recourse to the system of *commissions rogatoires* was when witnesses had to be heard in a State which was not a party to the suit before the Court. That was a case which had so far never arisen.

M. SCHÜCKING proposed the retention of the existing text, having regard more especially to the different ways in which it seemed that the term "*commission rogatoire*" could be used.

M. ANZILOTTI thought that the term had a generally accepted meaning: it signified acts of mutual judicial assistance between the courts of different countries. That was the sense in which it was used in the Hague Convention concerning civil procedure, to which a large number of States had adhered. Perhaps, however, it would be better not to use the expression in the actual text of the Rules, since there seemed to be a possibility that it would be interpreted in different ways.

Since the existing Article 49 was now regarded by most members of the Court as clear without any reference therein to *commissions rogatoires*, would it not suffice to insert a reference to Article 44 of the Statute? The text would then run:

> "The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses out of Court, *in accordance with Article 44 of the Statute.*"

M. URRUTIA, in view of the uncertainty still prevailing as to the meaning of the expression "*commission rogatoire*", said that he was ready to withdraw his proposal and accept the text proposed by M. Anzilotti.

M. NEGULESCO observed that Article 49 contained the words: "the Court, or the President should the Court not be sitting". It was doubtful whether the President could take a step of this kind, seeing that it involved a delegation of the Court's powers.

He added that the text of Article 49 was much narrower than that of Article 44 of the Statute. A provision in more general terms covering all possibilities should be drafted; it might run as follows:

> "The Court may decide, after hearing the parties, that evidence may be taken out of Court."

The PRESIDENT proposed as a basis for discussion the following draft, which was intended to extend and make clearer the existing text of Article 49:

> "The Court, or the President if the Court is not sitting, shall, at the request of one of the parties or on its own initiative, take the necessary measures, in accordance with Article 44 of the Statute, either to procure evidence on the spot or for the examination of witnesses on the spot."

M. SCHÜCKING pointed out that the expression "evidence" covered that of witnesses.

The PRESIDENT admitted that it did. Moreover, would a provision of this kind be in its right place in the chapter concerning oral proceedings? If a party applied to the Court to have witnesses examined who were elsewhere than at The Hague, it was probable that the application would be made to the Court during the written proceedings, and that the interested party would not wait to make its request until the oral proceedings.

M. ANZILOTTI thought that they were not concerned with documentary evidence, but with the evidence of witnesses. In some countries, the law governing oral evidence was such that it could not be taken by the Government direct. If the Court wished to have witnesses examined in one of these countries, it would have to arrange for their evidence to be taken on commission, and this would be undertaken by the judicial authority if it were set in motion in the manner prescribed by law. That was a question of national law which might differ from country to country.

The PRESIDENT proposed a new draft:

> "The Court, or the President if it is not sitting, shall take the necessary steps, in accordance with Article 44 of the Statute, for the examination of witnesses or to take other evidence out of Court."

Jonkheer VAN EYSINGA thought that it should be left to the Drafting Committee to go into the question whether

[1] See "*Statut et Règlement de la Cour permanente de Justice internationale. Eléments d'interprétation*", p. 370.

[2] See p. 212.

Article 49 of the Rules should contain an express reference to Article 44 of the Statute. Except in the case of a reservation, as in Article 48 of the Rules, this course did not seem consistent with the general system adopted in the Rules. Moreover, it was certainly preferable not expressly to refer to *commissions rogatoires* and to use an expression with as much flexibility as possible.

Jonkheer van Eysinga observed, in the last place, that Article 49, as at present drafted, covered two different sets of circumstances. One of the parties might inform the Court that it desired some person to be called as a witness and that, as that person could not be examined at The Hague, it suggested that his evidence should be taken on commission. That was the first possibility. Article 50 of the Statute, however, said that the Court could *ex officio* announce that it intended to call a certain witness without that witness having been named by a party; this possibility was also contemplated in Article 48 of the Rules. The Court might therefore prefer to retain the words: " at the request of one of the parties or on its own initiative ", which the President had deleted in the last draft of his text. Article 49 would then cover both possible cases.

M. FROMAGEOT was afraid that the text as at present drafted: " The Court, or the President should the Court not be sitting, shall . . . take . . . on its own initiative . . .", seemed to give the President an important power which probably belonged to the Court alone—*i.e.*, power to order the examination of a witness.

M. ANZILOTTI thought it was simply a question of making arrangements in regard to witnesses whom the Court was obliged to hear, or whom it had already decided to hear.

M. FROMAGEOT agreed that a party might, in the course of the written proceedings, ask to have the evidence of its witnesses situated at a distance taken on commission, and that, if the Court was not sitting, the President might, in its absence, make the necessary arrangements for the examination of the witnesses and, when the Court assembled, their statements would be communicated to the judges. In such a case, the action of the President would be quite comprehensible. But if the request for the examination of witnesses was made during the oral proceedings, it would, of course, be the Court and not the President which would decide upon it.

The PRESIDENT pointed out that Article 49 referred only to cases where the parties asked for witnesses to be examined; cases where the initiative was taken by the Court were covered by Article 48.

M. GUERRERO, Vice-President, would prefer to retain the existing text of Article 49, adding an express provision to the effect that, if need be, the evidence of witnesses might be taken by a delegation of the Court, with the consent of the Government of the territory concerned. Perhaps, however, this possibility was already covered by Article 49. That was a question of interpretation.

M. FROMAGEOT doubted if it was possible, without amending the existing Article 49, to construe it as enabling the Court to empower some of its members to take evidence away from the seat of the Court.

M. GUERRERO, Vice-President, said that that was his personal interpretation and did not commit the Court. If the Court kept the existing text of Article 49, that did not necessarily mean that it accepted this interpretation.

The PRESIDENT, alluding to M. Fromageot's remarks concerning the President's powers, said that, to his mind, Article 49 referred simply to the administrative arrangements with regard to the examination of witnesses whom one of the parties wished to be heard. In order to save the Court's time, the President might, for instance, think it better that certain witnesses should be examined out of Court. That did not cover making orders. Article 44 of the Statute gave the President no powers in this respect. The President's power to act when the Court was not sitting was derived only from Article 49 of the Rules. Was it sound to give the President this power ?

M. URRUTIA drew attention to a case where one of the parties asked the Court to examine witnesses who were not on the spot, and where the request was made between the end of the written proceedings and the opening of the oral proceedings. In such a case, if the Court was not sitting, the President should be able to make arrangements so that the evidence should be available at the oral proceedings. There were therefore cases in which the President might, if the Court was not sitting, make arrangements of this kind.

The PRESIDENT agreed that there were, but only in order to comply with a request made by a party.

Moreover, it had been recalled that in 1922 the Court had drafted the existing Article 49 to cover the taking of evidence on commission *(commissions rogatoires)*; the article must therefore be regarded as so doing. That being so, what was the President's position ? If the Court was not sitting, could he on his own initiative take the necessary steps to get evidence taken on commission ?

Jonkheer VAN EYSINGA thought that Articles 48 and 49 were mutually complementary, and that one could not well be considered without the other.

M. FROMAGEOT asked whether Article 49 should not be construed as presuming that the request for the examination of the witnesses had already been presented; in that case, the President would not be taking the initiative of having the witnesses examined but simply arranging for their evidence to be taken on commission, after it had already been decided that they should be examined.

In 1922 the following had been proposed [1]:

> " Instead of calling witnesses to be examined before the Court itself, a party may request the Court to cause the evidence of witnesses to be taken on commission. Such a request may also be made during the written proceedings.
>
> " The Court, or, if the Court is not sitting, the President, shall decide whether the request shall be complied with.
>
> " Before any decision is taken, the other party shall have the right to submit observations."

The PRESIDENT thought that the discussion had reached a stage at which the question arose whether it would not be better to retain the existing text of Article 49, or at all events to take that text as a basis for discussion. He questioned, in the first place, whether it was desirable to delete the words: " at the request of one of the parties or on its own initiative ".

M. FROMAGEOT pointed out that, if one of the parties wished a witness situated at a distance to be examined but did not suggest any means of having him examined, it was impossible to act otherwise than to have his evidence taken on commission. What became of the President's initiative in that case ?

M. ANZILOTTI thought it possible that the President or the Court might consider it difficult to call a witness named

[1] D 2, p. 145.

by a party without a danger of losing much time or incurring heavy expense. The President or the Court might in that case take the initiative of commissioning some authority to take his evidence. Or the Court itself might take the initiative of asking a party to call a witness; if the party pointed out that the witness resided too far off, the Court might have his evidence taken on commission.

M. GUERRERO, Vice-President, thought that it might also be necessary for the President to take the initiative in some circumstances.

M. NEGULESCO thought that the words " the necessary steps " in Article 49 referred to administrative steps. Before the President took such steps, a decision must have been taken. That decision was for the Court to take, and afterwards the President took the necessary steps to carry it out.

Baron ROLIN-JAEQUEMYNS drew attention to the right of parties—provided for in Article 47 of the Rules—to announce the names of witnesses before the opening of the oral proceedings. Supposing that the oral proceedings had not yet begun and that in the course of the written proceedings a party had indicated witnesses whom it wished to call: if the Court was not yet assembled, the President could take the necessary steps; he had no need to obtain the approval of the Court for the purpose.

The PRESIDENT gathered that the majority of members of the Court were in favour of the retention of the existing text of Article 49. Accordingly, he would take that text as the basis for the successive votes to be recorded by the Court.

He asked whether any members of the Court desired to delete the words: " or the President should the Court not be sitting . . .".

(No objection was made to the retention of these words.)

He next took the opinion of the Court regarding the deletion of the words: " at the request of one of the parties or on its own initiative . . .".

By eight votes to one, with one abstention, the Court decided to retain these words.

The PRESIDENT continued to read Article 49:

> ". . . the necessary steps for the examination of witnesses out of Court."

M. SCHÜCKING wished to extend the scope of the article by saying: " or to obtain other evidence out of Court ".

The PRESIDENT, personally, was opposed to M. Schücking's proposal.

M. ANZILOTTI considered that the proposed phrase might be a natural corollary of the existing text, but the provision should not be placed among articles concerning witnesses. He therefore asked that the point should be reserved.

The PRESIDENT took the opinion of the Court on the addition of the words: " or to obtain other evidence ".

By eight votes to two, the Court decided in favour of this addition.

The PRESIDENT said that, as a result of the successive votes recorded, Article 49 was adopted in the following form:

> " The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses or to obtain other evidence out of Court."

M. NEGULESCO observed that this text referred only to requests emanating from one of the parties and made under Article 47—*i.e.*, requests made before the end of the written proceedings.

Baron ROLIN-JAEQUEMYNS pointed out that the request might be made before the beginning of the oral proceedings or even afterwards, if it was presented with the consent of both parties or if the Court accepted the evidence.

M. FROMAGEOT thought that, in the article under discussion, the word " request " implied that the evidence was of a kind which merely called for administrative arrangements that would have to be taken by the Court. The Court had now laid down a principle: before the opening of the oral proceedings, each party must indicate the names of witnesses whom it desired to be heard. It had been recognised that this evidence could be produced as of right.

In the course of the oral proceedings, a request for permission to produce evidence was not to be granted as of right if made without the consent of the other side. If that consent was not forthcoming, the point was decided by the Court after hearing the parties.

The necessary arrangements for the taking of the evidence might be made either at the request of the party concerned or on the initiative of the Court or of the President; that was the import of Article 49.

The PRESIDENT took a vote on Article 49 as a whole.

This article was unanimously adopted.

The PRESIDENT recalled that doubts had been expressed as to the power of the Court to delegate the examination of witnesses to one or more of its members.

Personally, he regarded the examination of witnesses as in the nature of an enquiry which could be entrusted to members of the Court under Article 50 of the Statute.

M. FROMAGEOT, even if such an assimilation were justified—on which point he was doubtful—thought that the examination of witnesses was perhaps a more delicate matter than an enquiry.

The PRESIDENT did not dispute that, but thought that the Court derived its right either from Article 50 or from Article 30 of the Statute.

M. GUERRERO, Vice-President, took the same view. If the Court could, under Article 50 of the Statute, appoint a commission composed of persons unconnected with it, why should it not appoint some of its own members ?

M. FROMAGEOT pointed out that Article 50 of the Statute referred only to enquiries or expert reports, and not to the hearing of witnesses.

If it was desired to interpret it more widely, he would not object, because it was logical that the Court should place reliance in its members before anyone else.

M. GUERRERO, Vice-President, foresaw a difficulty in the case of witnesses called to give evidence at The Hague before the Court when in session. That difficulty would not arise in the case of witnesses to be examined in some other country.

M. URRUTIA thought that provision should not be made for witnesses to be examined out of Court by members of the Court. Recourse would always have to be had to the State in whose territory the witnesses happened to be in order that they might be examined in accordance with the laws of that State. Accordingly, he saw no great advantage in providing that witnesses might be examined by judges empowered to do so. It would be better to stick to the terms of Article 51, which provided that witnesses would be examined by the agents or counsel of parties or interested Governments under the control of the President, the latter,

and after him the judges, being able to put questions to them.

The PRESIDENT asked the Court to vote on the Co-ordination Commission's proposal: [1]

> " The Court may instruct one or more of its members to examine witnesses whom it has decided to hear or to carry out an inspection on the spot."

M. FROMAGEOT asked that the text should be divided for purposes of voting; the first vote to be on the portion ending: " . . . witnesses whom it has decided to hear ".

M. GUERRERO, Vice-President, said that he would vote against the text if witnesses present before the Court were meant, but in favour of it if it was a question of taking their evidence elsewhere.

The PRESIDENT took a vote on the first part of the text:

> " The Court may instruct one or more of its members to examine witnesses whom it has decided to hear . . ."

By seven votes to three, the Court decided against the adoption of this text.

M. FROMAGEOT suggested that, in order to take account of the distinction made by the Vice-President, the Court might vote on the question whether the decision also applied as regards the examination of witnesses elsewhere than at the seat of the Court.

M. GUERRERO, Vice-President, thought that, in that case, the words " with the consent of the interested Governments " should be added.

Jonkheer VAN EYSINGA would prefer that the Court should content itself with Article 49, which, in its present form, left all the necessary latitude.

M. ANZILOTTI said that, whilst recognising the practical advantages of the proposed system, he would be obliged to vote against it. For no Government could give the Court power to exercise judicial powers in its territory; it would be contrary to law; only the judicial authorities of the country could do so.

M. GUERRERO, Vice-President, pointed out that a Government might wish that witnesses announced by it should be examined by judges independent of its administration of justice. The provision proposed by him would not be binding on Governments, which would remain free to give or withhold their sanction.

M. SCHÜCKING, though he approved the idea, nevertheless shared the hesitation felt on constitutional grounds by M. Anzilotti.

M. NEGULESCO thought that, in spite of certain objections the existence of which he recognised, the Court might adopt the Vice-President's proposal. The same rule would apply as regards inspections carried out on the spot.

The PRESIDENT took a vote on the following question:

> " Does the Court decide to adopt in its Rules the principle that the Court may, with the consent of the Government of the territorial State, instruct one or more of its members to examine witnesses elsewhere than at the seat of the Court ? "

The votes being equally divided for and against the motion, the PRESIDENT said that, as a principle, when the Court was considering amendments to be made in the Rules, no amendment should be made without a majority. Accordingly, notwithstanding his personal vote, he announced that he would give his casting vote against the motion.

It was therefore recorded that the Court has given a negative answer to the question put by the President.

The PRESIDENT recalled that M. Fromageot had asked for a special vote on the second part of the text of Article 49 as proposed by the Co-ordination Commission (*inspection on the spot*).

M. FROMAGEOT said that he had asked for separate votes to be taken because, unlike the examination of witnesses, an inspection on the spot was a thing which the Court did not appear to be authorised by the Statute to undertake itself. [1] In that case, therefore, the Court should be able to delegate one or more of its members for this duty.

M. SCHÜCKING also took the same view. The object of an inspection on the spot was to ascertain a local or geographical situation and involved no exercise of authority. He pointed out, however, that the provision in regard to this matter would be out of place amongst clauses relating to witnesses.

M. FROMAGEOT replied that the question of the position of Article 49 remained reserved.

M. NEGULESCO said that though, in very rare cases, one could imagine an inspection on the spot being carried out without hearing witnesses, in most cases an inspection on the spot was of no value unless steps were taken on the spot to hear witnesses who might, however, be rather informants, and would not need to be sworn.

Baron ROLIN-JAEQUEMYNS observed that a witness was someone who had to take an oath and whose duty was to answer questions put to him. An enquiry, however, was a different thing from an examination of witnesses, so that, in so far as an enquiry was concerned, it would be possible for the Court to delegate its powers to certain judges.

The PRESIDENT asked the Court whether it decided to adopt in the Rules—the question of the position of the provision being reserved—the principle that it might instruct one or more of its members to carry out an inspection on the spot.

After an exchange of views as to the difference between the conception of an enquiry and an inspection on the spot, M. FROMAGEOT said that, in the event of the result of the vote being against the adoption of the proposed provision, the fact that the provision was not included in the Rules must not be construed as precluding the Court from having an inspection on the spot carried out by one or more of its members. He therefore asked the President to put the question as follows: " Is it necessary to insert . . . ? "

M. GUERRERO, Vice-President, said that he would vote in favour of any addition to the Rules, because he thought it desirable to give the parties the maximum of useful information. He was anxious that, if the Court had occasion at a plenary sitting to deal with a question of an inspection on the spot, it should be able to point to a provision in the Rules known to the parties concerned.

The PRESIDENT took a vote on the question in the following form:

> " Does the Court think it desirable to embody in

[1] D 2, A. 3, p. 873.

[1] *Cf.* Statute, Article 28; *cf.* also C 17—I, Vol. II, p. 493; Vol. V, pp. 2212 *et sqq.*

the Rules the principle that the Court may instruct one or more of its members to carry out an inspection on the spot ? "

By six votes to four, the Court answered the question in the negative.

13.II.35.

See under Article 57, p. 219, for discussion of Article 49 (Article 56 of Rules of 11.III.36) in connection with Article 53 (Article 57 of Rules of 11.III.36).

First and Second Readings and Final Adoption.

The article was adopted in first reading on 8.IV.35 with the number 56 and with the following text:

" The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses or experts otherwise than before the Court itself."

It was read a second time on 24.II.36 and finally *adopted* (11.III.36) unchanged.

ARTICLE 57 *(Article 53, old Rules, with New Paragraph 1).*

Enquiry or Expert Reports

13.II.35.*

Discussed as Article 53.

The PRESIDENT referred to the relevant passage in the Co-ordination Commission's report: [1]

" The Second Committee has proposed the deletion of this article on the ground that it is superfluous. The Co-ordination Commission takes the same view.

" In this connection, the Co-ordination Commission considers that it would have been desirable that the Statute of the Court should have contained a clause similar to Article 76 of the first Hague Convention of 1907, whereby the signatories of that Convention gave a general undertaking to give every assistance to an arbitral tribunal in the case of steps being taken to procure evidence on the spot, etc. The Commission, however, realises that a statutory provision of that kind cannot be introduced as a Rule of Court."

M. ANZILOTTI was not sure if it would be wise to adopt the Co-ordination Commission's proposal to delete the article. The taking of the initiative by the Court itself in having an enquiry carried out or expert report made was something which was not recognised in the laws of procedure of all countries; accordingly, it was not perhaps a bad thing to inform parties that, in this case, the report of the investigators or experts would be communicated to them and that they might discuss it.

After an exchange of views as to whether Article 53 overlapped one of the clauses of Article 42 of the Rules, the PRESIDENT took a vote on the following question:

" Does the Court decide to retain Article 53 ? "

The Court unanimously answered the question in the affirmative.

The PRESIDENT declared that Article 53 was retained.

He also recalled that the report of the Co-ordination Commission on Article 53 referred to a suggestion made by a member of the Court, M. Fromageot, the terms of which were as follows:

" If the Court considers it necessary to apply Article 50 of the Statute and to have an enquiry carried out or an expert report made out of Court, a judgment shall be delivered to that effect setting out the purpose of the enquiry or expert report.

" Failing an agreement between the parties regarding the number and appointment of the persons holding the enquiry or of the experts, the Court shall *proprio motu* appoint three, who will give their opinion by a majority vote."

The Co-ordination Commission's report continued as follows:

" The Commission, however, does not feel able to recommend the adoption of these clauses. In the first place, it observes that the Court will provide for the carrying out of an enquiry or the preparation of an expert report desired by it, not by means of a judgment, but by means of an order. In the second place, the Commission considers that the first of the two paragraphs proposed to a large extent overlaps the provisions of Article 33 as drafted by the Commission. Thirdly, it holds that the organisation of commissions of enquiry suggested in the second paragraph of the proposal seems needlessly to tie the hands of the Court, which might wish either to appoint a single commissioner or—as was the case in the Chorzów suit—to attach to the commission of enquiry assessors appointed by the parties."

The PRESIDENT thought it would be desirable to consider this proposal and to decide on principle whether it would be a good thing to include in the Rules an article concerning the organisation of an enquiry.

M. FROMAGEOT considered that the principle underlying his proposal was laid down in Article 50 of the Statute, the method of application of which his proposal was intended to define. He would have thought that it would be a good thing to do this; but he could also understand the view that it would be better to rest content with the general provision in the Statute.

Jonkheer VAN EYSINGA, like the Co-ordination Commission, thought that the text proposed by M. Fromageot might overlap Article 33 of the Rules.[1] It was true that that article had been considerably amended [2] by the Court in May 1934.

M. FROMAGEOT recalled that Article 33 had been drafted with a view to an unofficial getting into touch with the parties in order to arrange the details of the procedure. Article 50 of the Statute, which stated explicitly: ". . . the Court may . . . entrust any individual . . . with the task of carrying out an enquiry or giving an expert report ", had nothing in common with Article 33.

The PRESIDENT said that, in the form proposed by the

* D 2, A. 3, pp. 243-248.

[1] *Ibid.*, p. 874.

[1] See text adopted 1.VI.34, pp. 117-118.

[2] For the text submitted by the Co-ordination Commission, see p. 111, meeting of 29.V.34.

Co-ordination Commission, Article 33 did perhaps give the President the right to make an order in regard to an enquiry, but, according to the text adopted by the Court, the article no longer did so. For that reason, it would be a good thing to consider M. Fromageot's proposal.

M. SCHÜCKING did not agree with Jonkheer van Eysinga. Article 33 did not provide that in matters of evidence the Court must always make orders; accordingly, it was important expressly to say that evidence in the shape of an expert report called for by the Court must always form the subject of an order.

M. FROMAGEOT, in reply to a question by Baron Rolin-Jaequemyns, said that his proposal would form the first paragraph of Article 53, the existing text forming the second paragraph.

The PRESIDENT was prepared to re-submit M. Fromageot's proposal in his own name. He was satisfied that it did not overlap Article 33. The latter, in the form adopted by the Court, doubtless envisaged the summons of the parties' agents by the President and a discussion in the course of which the latter would obtain all the information desired. This discussion would, however, take place at the outset of a case. It was very unlikely that the need for an enquiry would clearly appear at so early a stage.

Jonkheer VAN EYSINGA observed that Article 33 was included in the part of the Rules headed "General Provisions"; it applied to the oral proceedings and written proceedings alike. Accordingly, he maintained his standpoint.

The PRESIDENT said that M. Fromageot's original proposal had been modified by its author as follows:

> "If the Court considers it necessary to apply Article 50 of the Statute and to arrange for an enquiry or for an expert report out of Court, an order shall be made to this effect, in which shall be stated the purpose of the enquiry or expert report and which, in the absence of an agreement between the parties as to the number and appointment of the persons holding the enquiry or of the experts, will decide these points."

He said that this draft, which did not preclude the inclusion of other conditions in the order, was not inconsistent with the course adopted by the Court in the case concerning German interests in Polish Upper Silesia.

M. ANZILOTTI observed that, according to M. Fromageot's draft, if the parties were in agreement, the Court must conform to their proposals. This was probably what would be done in practice; nevertheless, the Court must retain a free hand even when there was an agreement. Accordingly, instead of the words: "failing an agreement between the parties", it would be better to say: "after hearing the parties".

M. NEGULESCO agreed in principle with M. Fromageot's proposal. Article 50 of the Statute, however, appeared specially to have in view steps taken by the Court on its own initiative, and M. Fromageot's text said: "If the Court considers it necessary to apply Article 50 of the Statute . . ."; it was therefore limited to steps taken by the Court *ex officio*. If the Court decided to sanction an expert report asked for by one of the parties, M. Fromageot's text would seem not to apply. Contrarily to what had been agreed a few days before, if a claimant asked for an expert report before the oral proceedings, in the event of disagreement between the parties, the Court must decide; the report could not be asked for as of right.

M. ANZILOTTI thought that there was no room for any doubt: any party had the right itself to have an expert report made; but in that case it appointed its experts itself, and it would not be a case of an expert report ordered by the Court.

M. GUERRERO, Vice-President, also thought that, if a party, before the oral proceedings, asked to be allowed to produce an expert report, that would be an *ex parte* report. If, however, it asked the Court itself to have an expert report made, in that case the report would be one made after hearing argument by the parties, although not on the initiative of the Court. It was this second possibility for which provision should be made, and it did not appear to be covered by M. Fromageot's text. Article 50 of the Statute, which was cited in that text, related only to decisions taken by the Court *proprio motu*.

M. ANZILOTTI observed that both cases were covered by Article 50; but that in the latter, the Court, instead of acting on its own initiative, was doing so at the request of a party. In either case, it was the Court which ordered and arranged for the expert report.

M. GUERRERO, Vice-President, considered that the procedure in the two cases should be different. In the first, the Court was free to choose its experts, since the enquiry was held upon its initiative. In the second, the Court's rights in this respect were not so definite. In any case, it would be better to delete the reference to Article 50 of the Statute in the proposed text.

M. FROMAGEOT considered that Article 50 of the Statute covered every case and saw no reason for the deletion of the reference to it in the text which he had proposed.

M. SCHÜCKING thought that Article 50 of the Statute applied only to cases where an enquiry or expert report was ordered by the Court, *proprio motu*, and for that reason he wished the reference to Article 50 in M. Fromageot's text to be retained.

The PRESIDENT recognised that, under Article 50 of the Statute, the Court was fully empowered to order an enquiry or expert report *proprio motu*. But if a party drew the Court's attention to the desirability of ordering an expert report and if the Court complied with the suggestion, the Court would no doubt likewise take action in virtue of the powers conferred upon it by Article 50.

M. NEGULESCO thought that an expert report ceased to be a report ordered *proprio motu* when one of the parties asked the Court to obtain it and when the other party took exception to this request. In that case, the latter became a contentious issue, and the Court would be obliged to give a decision.

M. ANZILOTTI recalled that Article 50 of the Statute gave the Court full powers at any time to entrust an enquiry or expert report to any person, etc., that it might select. A party therefore could ask the Court to make use of these powers. If the other party objected, the decision would rest with the Court. That was a matter entirely different from the question of evidence produced by the party itself.

M. GUERRERO, Vice-President, thought that, since the Statute gave the Court power *proprio motu* to order an expert report or enquiry, it was inconceivable that it should not also allow a party to ask the Court to order an enquiry or expert report. The fundamental principle was that a party was entitled to produce any evidence, the appraisement of the value of evidence produced resting with the Court. The effect of M. Fromageot's text might, however,

be to suppress the right to adduce evidence in the shape of an expert report. If the request were made before the elapse of the prescribed time-limit, the Court could not do otherwise than order the expert report desired.

M. Guerrero accepted M. Fromageot's text within the terms of Article 50, but he also wished to provide for a case where a party asked for an expert report within the time-limit fixed by the Rules. He observed that, if an expert report constituted the only evidence which a party could adduce, it would ask the Court to order this report to be made. The Court, whatever form of report it called for, could not refuse a party the right to adduce evidence of this kind.

M. ANZILOTTI pointed out that a party could itself produce its own expert report; this would constitute *ex parte* evidence and would come under Article 47 of the Rules. But if the party applied to the Court and asked for an expert enquiry on a given point, it would no longer be a question of *ex parte* evidence but of the exercise by the Court of powers appertaining to it.

It was of no great consequence whether these powers were derived from Article 50 or from a general principle of procedure not stated in the Statute. In any case, the Court had power to order an expert report. That was a power which it might or might not exercise at its discretion. That was the point which M. Fromageot's proposal was designed to make clear.

M. FROMAGEOT also agreed that it was impossible to refuse to allow a party to produce whatever evidence it might wish, and Article 49 of the Rules was definite on this point: " The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps . . ."

Baron ROLIN-JAEQUEMYNS recalled that M. Fromageot's proposal dealt with the question how the Court should proceed once it had been decided on principle to have an expert report. M. Fromageot had referred to Article 50 of the Statute because that article was the source of the Court's powers in this connection. In Baron Rolin-Jaequemyns' view, the question in what circumstances Article 50 was operative was beside the point.

M. GUERRERO, Vice-President, said that, if M. Fromageot's proposal were concerned solely with the Court's right to order enquiries, he could accept it. If, on the other hand, the proposal covered both the power *proprio motu* to order an enquiry and the power to decide as to a party's right to ask for one, he could not accept it.

M. NEGULESCO asked that the words " to apply Article 50 of the Statute " should be deleted from M. Fromageot's text.

The PRESIDENT took the opinion of the Court on this amendment.

By five votes to four with one abstention, the Court decided that the words " to apply Article 50 of the Statute " should be maintained.

The PRESIDENT asked the opinion of the Court on M. Fromageot's proposal that his text should be inserted as the first paragraph of Article 53.

Jonkheer VAN EYSINGA asked that M. Fromageot's proposal should be divided for the purpose of voting, as it comprised two quite distinct portions. He also desired the words " out of Court " to be deleted, as they did not appear in Article 50 of the Statute.

By eight votes, with two abstentions, the words " out of Court " were deleted.

The PRESIDENT took a vote on the first part of M. Fromageot's text:

> " If the Court considers it necessary to apply Article 50 of the Statute and to arrange for an enquiry or an expert report, an order shall be made to this effect, in which shall be stated the purpose of the enquiry or expert report. . . ."

This portion of the text was adopted by eight votes to one, with one abstention.

The PRESIDENT opened the discussion on the second part of M. Fromageot's proposal.

Baron ROLIN-JAEQUEMYNS was afraid that the text restricted the powers of the Court too much by saying that, failing an agreement between the parties regarding the number and appointment of the persons holding the enquiry or of the experts, the Court will settle these points. The Court must be left an entirely free hand.

M. ANZILOTTI proposed that the words " failing an agreement between the parties " should be replaced by: " after hearing the parties ".

The PRESIDENT took the opinion of the Court on the second part of M. Fromageot's text, with the amendment suggested by M. Anzilotti:

> " . . . and which, after the views of the parties have been heard regarding the number and appointment of the persons holding the enquiry or of the experts, shall decide these points."

This second portion of the text was unanimously adopted.

The PRESIDENT said that no doubt the Court would leave the Drafting Committee to consider whether the text of the paragraph just adopted was in harmony with the text of the second paragraph of Article 53 adopted at the beginning of the sitting.

M. FROMAGEOT, in this connection, suggested the following wording: " . . . and which, after the views of the parties have been heard, shall decide the number and method of appointment of the persons holding the enquiry or of the experts ".

14.II.35.

See under Article 49, pp. 186-187, for discussion of Article 53 (Article 57 of Rules of 11.III.36) in connection with Article 47 (Article 49 of Rules of 11.III.36).

16.II.35.

See under Article 49, p. 188, for discussion of Article 53 (Article 57 of Rules of 11.III.36) in connection with Article 47 (Article 49 of Rules of 11.III.36).

First Reading.

The article was adopted on 8.IV.35 as number 57 and with the following text:

> " 1. If the Court considers it necessary to apply Article 50 of the Statute of the Court and to arrange for an enquiry or an expert report, an order to this effect shall be made, after duly hearing the parties, stating the purpose of the enquiry or expert report and setting out the number and appointment of the persons holding the enquiry or of the experts.
>
> " 2. Any report or record of an enquiry and any expert report shall be immediately communicated to the parties."

24.II.36.*

Second Reading.

Paragraph 1.

M. NEGULESCO observed that the first paragraph of this article concerned the ordering of an expert enquiry or report by the Court. The preceding provisions, however—*e.g.*, Article 49—dealt with experts called by the parties who were in fact " expert witnesses ".[1]

Accordingly, in Article 53, where the solemn declaration to be made by experts was provided for, it seemed desirable to distinguish between experts proper and expert witnesses.

Since Article 57 concerned experts appointed by the Court *proprio motu*, would it not be well, following the example of various national legislations, to provide for the taking of a solemn declaration by these experts ?

The third paragraph of Article 53 might be drafted as follows:

> " Each expert shall make the following solemn declaration before giving his evidence in Court or handing in his report:
>
> " ' I solemnly declare upon my honour and conscience that the opinion expressed by me will be in accordance with my sincere belief.' "

This would cover all cases, whether of expert witnesses, or of experts appointed by the Court who might not perhaps give oral evidence but would simply hand in their report to the Court.

The PRESIDENT said that this proposal would involve an addition to Article 53, which had already been examined. Probably, however, the Court would not oppose this proposal, which would have the effect of making good a possible omission. Article 57, however, read as follows: ". . . an order to this effect shall be made, after duly hearing the parties, stating the purpose of the enquiry or expert report "; that meant that the Court would fix all details of the expert report for which it had decided to arrange under Article 50 of the Statute. The terms of the experts' solemn declaration would therefore be settled in this order.

M. ANZILOTTI referred to the precedent of the Chorzów case, in which the Court had ordered an expert report.

The REGISTRAR said that, in the Chorzów case,[2] the Court had decided, by a judgment given on September 13th, 1928, that the Polish Government should pay the German Government an indemnity the amount of which was to be fixed by it, on the basis of a report by experts. In an order made the same day, the Court organised a committee of experts; Article 4 of this order provided that the members of the Committee were to make a solemn declaration the terms of which were given.

At the first meeting of the Committee presided over by the President of the Court, the members of the Committee —experts and assessors appointed by the parties—made the solemn declaration thus provided for, whereupon the President declared them duly installed in their functions.

In this case, both the composition of the Committee and the terms of the declaration had been settled having regard to the special circumstances of the case. As a consequence of this, the Co-ordination Commission,[3] and subsequently the Court[4]—rejecting a proposal involving a more rigid system—had agreed that all details in connection with an expert report should be settled in the order arranging for it.

M. NEGULESCO, on the basis of this precedent, considered that, in order to codify the Court's practice in the Rules, a provision should be devoted to the solemn declaration of experts appointed by the Court.

The PRESIDENT pointed out that Article 53 of the Rules covered the case of witnesses or experts called by the parties, and the present wording seemed to meet that case quite satisfactorily.

Article 57, on the other hand, dealt with the case where the Court decided to apply Article 50 of the Statute. In that case, the Court itself took the initiative. Article 50 provided that the Court might at any time entrust the carrying out of an enquiry or the giving of an expert report to any individual, " body, bureau, commission or other organisation that it may select ". Accordingly, it would not always be a question of a person. The question was whether they could render the making of the declaration provided for in Article 53 obligatory in the case, not of an individual, but of a body of persons.

It did not appear that any gap existed in Article 57 of the Rules.

M. GUERRERO, Vice-President, agreed that Article 53 of the Rules was concerned only with what might be called expert witnesses—*i.e.*, persons called as experts by the parties concerned and whom the Court must regard as witnesses. Article 57 dealt with the entrusting of a task by the Court to persons chosen by it.

As the President had pointed out, an expert report might be entrusted not merely to an individual but to a body or association: accordingly, it was impossible to provide for the same declaration in the case of such experts as in the case of those called by the parties.

It would therefore be better for the Court to reserve the right to settle in its order all details in regard to the expert report, including the solemn declaration to be made by the experts. It did not appear necessary to add anything to Article 53 or Article 57.

M. FROMAGEOT agreed with the President and the Vice-President. The only question which arose was whether the terms of Article 57 now under consideration adequately represented the practice of the Court as recalled by the Registrar.

The article spoke of an order, stating the purpose of the enquiry or expert report, and settling the number and appointment of the persons holding the enquiry or of the experts. Would it not be desirable also to indicate in the Rules that the order should also state the formalities to be observed which might include a declaration, solemn or otherwise, an oath or an undertaking not to divulge economic secrets, etc. ?

If the Court agreed to this suggestion, it would suffice to add to the present text the words: " and the formalities to be observed ", which would establish the precedent created by the order of 1928.

The PRESIDENT proposed to say:

> ". . . and setting out the number and appointment of the persons holding the enquiry or of the experts and the formalities to be observed ".

He thought it better that the reference to " formalities " should be put at the end of the sentence, in order to avoid any danger of preventing the persons appointed from themselves settling any points of detail left unprovided for in the order.

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* D 2, A. 3, pp. 624-626.

[1] *Cf.* pp. 217-219 and pp. 186-187.

[2] A/B 32; C 35.

[3] See D 2, A. 3, p. 874.

[4] See p. 218.

Jonkheer VAN EYSINGA asked whether it was necessary to retain both the verbs "*préciser*" (state) and "*se prononcer*" (set out). Would not the first suffice ?

M. FROMAGEOT and the PRESIDENT considered it necessary in any case to retain the phrase: "stating the purpose of the enquiry". The end of the first paragraph of Article 57 would then read as follows:

> "An order to this effect shall be made . . . stating the purpose of the enquiry or expert report and setting out the number and appointment of the persons holding the enquiry or of the experts and the formalities to be observed."

There being no objections, the PRESIDENT declared this addition to paragraph 1 of Article 57 adopted.

He also declared paragraph 1 adopted as thus amended.

Paragraph 2.

There being no observations, the PRESIDENT declared paragraph 2 and the whole of Article 57 adopted in second reading.

11.III.36.*

Final Adoption.

The PRESIDENT said that, in Article 57, the Drafting Committee proposed to delete the words "*par application de l'Article 50 du Statut de la Cour*" (to apply Article 50 of the Statute of the Court). Further, in paragraph 2, the Committee proposed to delete the word "immediately", which seemed superfluous in view of the general rule in Article 44.

The whole of Article 57, as thus amended, was finally *adopted.*

ARTICLE 58 *(Article 44, old Rules, with New Paragraph 3).*

RULES FOR ORAL TRANSLATIONS

29.V.34. *

Discussed as Article 44.

The PRESIDENT observed that the Co-ordination Commission had not made any substantial change in the existing text. It proposed the following wording:

> "1. In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting when the decision has to be made, speeches before the Court in one of the official languages shall be translated into the other official language. The same course shall be taken in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.
>
> "2. Whenever a language other than French or English is employed, either under the terms of the third paragraph of Article 39 of the Statute, or in a particular instance, the necessary arrangements for translation into one of the two official languages shall be made by the party, Governments or organisations concerned. In the case of witnesses or experts who appear at the instance of the Court, these arrangements shall be made by the Registrar."

The reason for the change in paragraph 1 was to be found in the resolution adopted by the Court on March 29th, 1933, according to which: "The Court will decide, in sufficient time before the opening of the oral proceedings in each case, whether it is desirable for the purposes of the case in question to dispense with oral translations at the public hearings. Should the Court not be sitting, the decision will be taken by the President.[1]"

The President pointed out that the decisions in question had to be taken a fortnight before the opening of every session, as it was necessary to allow the Registrar sufficient time to make the requisite arrangements.

Furthermore, the Co-ordination Commission had used the word "speeches" instead of "statements". However, the really important point was the questions and answers, including questions to witnesses and their replies.

M. GUERRERO, Vice-President, thought that the wording of the first part of the paragraph could be simplified by saying, merely: "Subject to a contrary decision by the Court, or by the President if the Court is not sitting, speeches before the Court . . ."

The PRESIDENT admitted that the wording suggested would be simpler, but the reason why the Co-ordination Commission had adopted the form proposed was that the decision in regard to translations would require to be taken a fortnight in advance. It was therefore the President who would have to take the decision if the Court was not sitting at that time.

Baron ROLIN-JAEQUEMYNS did not see the advantage of saying (in the French text): "*sauf décision prescrivant le contraire*"; could they not simply say: "*sauf décision contraire*" ?

The PRESIDENT said that this alteration was accepted.

M. FROMAGEOT wished to change the wording (in the French text): "*les plaidoiries faites*".

M. GUERRERO, Vice-President, and Baron ROLIN-JAEQUEMYNS thought it would suffice simply to omit the word "*faites*".

The PRESIDENT said that this change was accepted. He also declared that paragraph 1 of Article 44 was adopted with these alterations.

As regards paragraph 2, the President proposed to retain the existing text of the Rules.[1]

There being no objection to the President's proposal, paragraph 2 of Article 44 was adopted in this form.

6.II.35.**

Discussed as Article 44.

The PRESIDENT recalled that Article 44 had already been discussed and approved at the session in May 1934. He also recalled that the first paragraph had been adopted in the form proposed by the Co-ordination Commission (with slight modifications affecting the French text only).[2]

With regard to paragraph 2, the Court had decided to retain the existing text of the Rules.

There being no observations, the President said that this

* D 2, A. 3, pp. 120-122.

[1] See E 9, p. 163.

* D 2, A. 3, p. 731.

** *Ibid.*, p. 180.

[1] This text was the same as that given above, omitting the words ". . . Governments or organisations . . .".

[2] See above (meeting of 29.V.34).

article might be regarded as adopted in the form approved at the session in May 1934.

First Reading.

The article was adopted with slight verbal modifications made by the Drafting Committee and with the number 58 on 8.IV.35.

Text adopted:

" 1. In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.

" 2. Whenever a language other than French or English is employed, either under the terms of the third paragraph of Article 39 of the Statute of the Court, or on a particular occasion, the necessary arrangements for a translation into one of the two official languages shall be made by the party concerned. In the case of witnesses or experts who appear at the instance of the Court, these arrangements shall be made by the Registrar."

10.IV.35.*

M. GUERRERO, Vice-President, felt some doubt in regard to the clause in the second paragraph of Article 58, which laid down that " the necessary arrangements for translation " (of the evidence of witnesses or experts) " into one of the two official languages shall be made by the party concerned ". He wondered whether it was wise to leave this duty to be performed by the party itself, seeing that it might be to the latter's interest that the translation should not be in absolute conformity with the evidence.

The PRESIDENT pointed out that, in accordance with practice, it was the interpreter's words that were regarded as the official evidence before the Court; the responsibility for an incorrect translation rested upon the party.

M. GUERRERO, Vice-President, said that that was exactly the danger that he had in mind. He thought that the Registry might be instructed to arrange for the translation in all cases, the expenses being of course borne by the party, except in the circumstances referred to in Article 55 of the draft.

M. ANZILOTTI thought that the same question arose in regard to written documents, and that there was in consequence a gap in the Rules. At present, the translations made by the parties were only checked, to a certain degree, by the Registry.

The REGISTRAR explained that this general question had never been lost sight of. The Court had just approved, among other matters, a Budget providing for two posts of editing secretaries, which would be filled if the Court had to deal with cases in which a knowledge of languages other than the official languages was found necessary. The practice in regard to translations from such other languages was that they were checked by an official of the Registry. If substantial discrepancies between the translation and the original were revealed, the Registrar got into touch with the agent of the party concerned, with a view to having a correction inserted.

M. ANZILOTTI observed that the translations were also supervised to a certain extent by the opposing party.

M. FROMAGEOT suggested that the question raised by M. Guerrero might be reserved for the second reading.

The PRESIDENT said he would hesitate to see the Court making itself responsible for the translation of the evidence of witnesses and experts called by the parties, for it was very difficult to find thoroughly efficient translators.

The REGISTRAR added in the same connection that the reason which had led the Court to adopt the system he had outlined was, at least in part, because, if the Court made itself responsible for the translation, the accuracy of the latter might be challenged by the party that had called the witness; whereas, if the party itself was responsible for the translation, its accuracy could be checked by the Court.

The PRESIDENT said that the question would be reserved until the second reading.

24.II.36.*

Paragraph 1.

M. URRUTIA suggested that this paragraph would be clearer if it read:

" . . . *sauf décision contraire prise par la Cour ou par le Président si elle ne siège pas au moment où la décision doit être prise* ". (Note: the English text was not affected.)

Jonkheer VAN EYSINGA proposed that the expression " during the judicial vacations " should be substituted for the words " if the Court is not sitting ".

The PRESIDENT presumed that the proposal was that the first paragraph of Article 58 should read:

" In the absence of any decision to the contrary by the Court or, during the judicial vacations, by the President, speeches or statements made before the Court ", etc.

He took the opinion of the Court on Jonkheer van Eysinga's proposal.

The Court, by eight votes to one, with one abstention, decided against this amendment.

The PRESIDENT declared paragraph 1 of Article 58 adopted with the change of wording proposed by M. Urrutia.

Paragraph 2.

Count ROSTWOROWSKI considered that, as in Article 49, the word " *invitation* " should be replaced by " *initiative* ".

This was agreed to.

The PRESIDENT recalled that, at the first reading, the Vice-President had asked that the provision contained in this paragraph should be reserved, because in his view it might perhaps be dangerous for the Court to tie its hands to some extent by leaving the party concerned to make all arrangements for translation into one of the Court's official languages.

M. GUERRERO, Vice-President, remarked that, if the parties were allowed to have the evidence of witnesses translated by their own interpreters, the Court would be obliged to accept this evidence as thus translated. It therefore seemed desirable to provide for some degree of control by the Court. Perhaps it would suffice to add the words " under the direction of the Court ".

* D 2, A. 3, pp. 455-456.

* D 2, A. 3, pp. 626-629.

The PRESIDENT read the following wording proposed by the Registrar:

> " . . . the necessary arrangements shall be made by the party concerned for a translation into one of the two official languages, subject to the supervision of the Court."

M. FROMAGEOT believed that he recollected that the reason why, at the first reading, the Court had not seen fit to add anything to the text for Article 58 at present under discussion was that it had been feared that to give the Court a right of control over translations made from a foreign language into one of the Court's official languages would thrust a certain responsibility upon it. The Court accepted the translation submitted to it as it stood. The party submitting it was responsible, and the other party was perfectly entitled to dispute or criticise the translation.

M. GUERRERO, Vice-President, pointed out that there might be differences between the translation made by one party and a translation which the other party might submit. The Court therefore should be able to exercise some control.

Jonkheer VAN EYSINGA did not think that the proposed addition would modify the Court's practice, because, according to the discussions in 1935, such control already existed. The proposed addition did not therefore seem necessary.

M. URRUTIA would be afraid that this addition might create an impression that the Court should itself intervene in the translation. The practice was that, in the case of translations from other languages, these translations were checked by an official of the Registry; if important differences between the translation and the original were found, the Registrar got into touch with the agent of the party concerned with a view to having corrections made.

This practice differed from what was proposed, because the translations were checked only after they had been made. The party itself had to arrange for the making of translations.

Count ROSTWOROWSKI admitted this, but said that a party would in this matter always remain subject to the supervision of the Court.

M. NAGAOKA did not think it would always be possible to exercise this control, for instance in the case of a language with which the Court was not acquainted. The Court should regard the translation made by the interested party on its own responsibility as the official text.

The PRESIDENT wondered whether M. Urrutia's point might not be met by simply saying:

> " The necessary arrangements for a translation into one of the two official languages shall be made by the party concerned subject to the general supervision exercised by the Court."

M. GUERRERO, Vice-President, said that his chief anxiety concerned the translation of the evidence of witnesses and experts. In that case, it might be difficult for the Court to appreciate whether the evidence of a witness or expert called by a party was correctly rendered by the translation provided by that party.

Baron ROLIN-JAEQUEMYNS considered that the case of speeches by counsel differed from that of the evidence of witnesses.

In the latter case, the question assumed great importance because a witness gave his evidence on oath. In regard to evidence, the Court should exercise very careful control.

The PRESIDENT asked the Vice-President whether the following wording would satisfy him:

> " . . . shall be made by the party concerned subject to the supervision of the Court."

M. GUERRERO, Vice-President, accepted this text.

Count ROSTWOROWSKI asked whether the parties could not be placed under an obligation to furnish a correct translation.

The PRESIDENT considered that the wording suggested by him provided for this.

M. ANZILOTTI acknowledged that this wording reduced to some extent the scope of the control to be exercised by the Court; but in his view the Court should not concern itself at all with the translation of speeches of the representatives of parties. It was for them to submit their statements in one of the official languages. M. Anzilotti would therefore vote against any provision engaging the responsibility of the Court.

M. GUERRERO, Vice-President, explained that his proposal was not meant to apply to speeches but only to evidence. For the translation of the latter, the interpreters should be chosen by the Court itself, though the cost would be borne by the party concerned.

The PRESIDENT observed that, if the Court wished to draw a distinction between speeches and statements by agents on the one hand, and the evidence of witnesses and experts on the other, the text would require more radical amendment.

He therefore proposed that the second paragraph of Article 58 should be reserved and that, as on several previous occasions, he should invite some members of the Court to assist him to draft a text for submission to the Court at a future meeting.

The REGISTRAR desired to caution the committee to be constituted with regard to the idea of providing that sworn translators must be employed, an idea which had been mentioned in the course of the discussion. For, quite apart from the question of good faith and linguistic attainments, it would be necessary to have translators with a knowledge of the subject under discussion. Whereas it was difficult to find interpreters fulfilling all these conditions, it was relatively easy to find persons quite capable of checking the accuracy of a translation made by someone else. For that reason, it would be better if the Court confined itself to supervising translations.

Baron ROLIN-JAEQUEMYNS was anxious that the committee which was to meet should also be allowed to consider the first paragraph of Article 58, because corrections made in the second paragraph might involve corresponding alterations in the first paragraph, especially as special measures might have to be provided for in regard to the translation of the evidence of witnesses.

26.II.36.*

Second Reading.

The PRESIDENT drew the Court's attention to the new text for Article 58, which, in accordance with the decision taken on February 24th, had been prepared by the President with the assistance of some other members of the Court.

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* D 2, A. 3, pp. 642-644.

This text was as follows:

" 1. In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.

" 2. Whenever a language other than French or English is employed, either under the terms of the third paragraph of Article 39 of the Statute of the Court or on a particular occasion, the necessary arrangements for a translation into one of the two official languages shall be made by the party concerned; the evidence of witnesses and experts shall, however, be translated under the supervision of the Court. In the case of witnesses or experts who appear at the instance of the Court, arrangements for translation shall be made by the Registry.

" 3. The persons making the translations referred to in the preceding paragraph shall make the following solemn declaration in Court:

" ' I solemnly declare upon my honour and conscience that my translation will be a faithful rendering of the evidence which I am called upon to translate.' "

The President remarked that the Drafting Committee had not thought it necessary to amend the first paragraph.

In the second paragraph, after the words " party concerned ", the following sentence had been added: " the evidence of witnesses and experts shall, however, be translated under the supervision of the Court ". If this article were adopted, the Court would henceforward assume no responsibility for the translation of speeches or explanations by agents or counsel when a language other than the official languages of the Court was employed. It would, however, retain the right to exercise a measure of supervision over the translation of evidence of witnesses or experts, though that translation would be supplied by the parties.

Finally, the third paragraph, which was new, prescribed the solemn declaration to be made in Court by interpreters. This declaration would augment the solemnity of the procedure, and would serve to remind such interpreters of the importance of their duties.

M. NAGAOKA asked the precise meaning of the expression " under the supervision of the Court ". If it implied the assumption by the Court of a measure of responsibility in connection with the translation of evidence, would the Court always be able to undertake that responsibility ? The number of States which might come before the Court was fairly large, and it was possible to imagine a case in which a particularly difficult language unknown to the Court might be employed.

The PRESIDENT explained that the word " *contrôle* " was used here in the sense of " supervision ": if the Court had any reason to suppose that the translations were not accurate, it could have them checked. When the question had been considered, the difficulties which might arise in particular cases had not been lost sight of. It had been held that it was better to leave the responsibility in the first instance on the parties, but that the Court must not be in a position to have to accept a translation when there was reason to suppose that the translation was inaccurate.

Baron ROLIN-JAEQUEMYNS asked how the word " *contrôle* " would be rendered in the English text. The President having said that the word used would be " supervision ", Baron Rolin-Jaequemyns considered that this translation would tend to remove any uneasiness resulting from the use of the word " *contrôle* " in the French text.

M. FROMAGEOT explained that the expression " under the supervision of the Court " meant that the Court reserved the right to check the translation, a right which it would exercise if the translation appeared to it to be inaccurate or if there were some doubt as to its correctness.

M. ANZILOTTI remarked that, according to the new text, the intention seemed to be that the declaration to be made by interpreters and provided for in paragraph 3 should apply to the translation of speeches and statements by agents, as well as to that of the evidence of witnesses and experts. Personally, he would have preferred to leave out of account the translation of speeches and statements by agents; but if it was desired that the declaration to be made by interpreters should also cover speeches, the wording of the declaration would have to be amended, as at present it covered only the *evidence* of witnesses or experts.

The PRESIDENT emphasised that this provision, by stressing the importance of the task of the interpreter in such cases, would constitute a safeguard for the other party.

M. GUERRERO, Vice-President, remarked that there was not really any question of supervision by the Court in the case of the translation of speeches. The solemn declaration made by interpreters did not commit the Court to anything.

M. ANZILOTTI considered that, nevertheless, the Court did, to a certain extent, intervene when the translation was made. The responsibility for the interpretation of speeches no longer rested solely upon the parties.

Jonkheer VAN EYSINGA drew attention to the words " my translation will be a faithful rendering of the evidence *(déposition)* which I am called upon to translate ", and observed that this evidence might be that either of a witness or of an expert; in the latter case it might consist in the reading of a report. Were both cases covered by the word " *déposition* " (evidence) ?

The PRESIDENT thought that the point mentioned by Jonkheer van Eysinga required making clear. It might be reserved and referred to the Drafting Committee, which would try to find a more correct term.

Jonkheer VAN EYSINGA agreed. He also asked that the Drafting Committee should likewise direct its attention to Article 53, paragraph 3.

(This was agreed to.)

There being no further observations, the PRESIDENT declared the new text of Article 58 adopted in second reading, subject to final drafting.

11.III.36.*

Final Adoption.

The Drafting Committee proposed in paragraph 1 of the English text to say: " . . . the same *rule* shall apply ".

The Drafting Committee also proposed a simplification of the beginning of paragraph 2; this modification, which was made possible by the new wording of Article 39, paragraph 3, of the Statute, enabled the phrase " *soit dans un cas particulier* " (or on a particular occasion), which was liable to misunderstanding, to be omitted.

M. NAGAOKA, recalling that it had just been decided in Article 53 to describe as an " *exposé* " (statement) the

* D 2, A. 3, pp. 731-732.

observations of experts, suggested that it would be desirable to make the same change in paragraph 2 of Article 58.

The PRESIDENT agreed and said that the French text should be amended to read: " *Toutefois, la traduction des dépositions des témoins et des exposés des experts* . . .", the same change being made in the English text.

This was agreed to.

M. FROMAGEOT observed that the wording of the declaration to be made by translators in paragraph 3 seemed somewhat vague. It would be better to say: " . . . *que ma traduction sera complète et fidèle* ".

This was agreed to.

The PRESIDENT said that the English text would accordingly be amended as follows: " . . . that my translation will be a complete and faithful rendering of what . . .".

The whole of Article 58, as thus amended, was finally *adopted*.

ARTICLE 59 *(Article 55, old Rules).*

MINUTES

14.II.35.*

Discussed as Article 55.

The PRESIDENT opened the discussion on Article 55, the existing text of which was as follows:

> " The minutes mentioned in Article 47 of the Statute shall in particular include:
> " (1) The names of the judges;
> " (2) The names of the agents, advocates and counsel;
> " (3) The names, christian names, description and residence of witnesses heard;
> " (4) A specification of other evidence produced;
> " (5) Any declarations made by the parties;
> " (6) All decisions taken by the Court during the hearing.
> " The minutes of public sittings shall be printed and published."

He observed that the Co-ordination Commission proposed [1] in the first line to replace " minutes mentioned " by " minutes of hearings mentioned ". In the same sentence, the Commission proposed to delete, in the French text, the word " *notamment* ", which was untranslatable into English, in order to facilitate concordance between the two official texts.

In order to bring the text into conformity with the practice of the Court, the Commission proposed, in No. 2, to add the words: " who have taken part in the proceedings ", and, in No. 6, to add: " or announced ".

In the last paragraph, the Commission proposed to say " *sont* " instead of " *seront* " in the French text.

M. FROMAGEOT thought it would be desirable to instruct the Drafting Committee to revise the form of the article.

For the rest, the only substantial point which arose was what was meant by the words: " who have taken part in the proceedings ". Was the idea that persons present at the hearing should be mentioned or only those who had spoken ? The view had been expressed in the Court that it would be a good thing to record the presence of an agent even if he had not spoken.

The DEPUTY-REGISTRAR said that the practice was to mention in the minutes only the names of agents, advocates or counsel who had spoken at the hearing. An agent might be present at the beginning of a hearing and subsequently leave.

Jonkheer VAN EYSINGA pointed out that, if there were a large number of advocates and counsel in a case (as in the Eastern Greenland suit), it was very difficult to say which representatives of a party had been present at any given moment. The Commission had thought that the practice adopted in the Court's minutes was sound and wished to codify it in the Rules.

The PRESIDENT, by way of example, took the minutes of a hearing held in connection with a case before the Court:

> " Ninth public sitting . . .
> " *Present:* the members of the Court mentioned in the minutes of the seventh sitting. . . . The President called on M. Gustav Rasmussen. M. Rasmussen continued and concluded his statement. . . . The President, after consulting the Agent for the Danish Government, called on M. Steglich-Petersen. . . .
> " The Court rose at 6.50 p.m."

He next asked the Court to give their opinion on the proposal of the Co-ordination Commission to replace " minutes mentioned " by: " minutes of hearings mentioned ", in the first line of Article 55.

Baron ROLIN-JAEQUEMYNS saw no reason for the change; the existing text was perfectly clear.

M. GUERRERO, Vice-President, would prefer to retain the existing first line of Article 55.

A change which might be justified, on the other hand, was that relating to the word " *notamment* " (in particular). As the article was intended to make it plain that the six points mentioned in Article 55 must always be included in the minutes, the expression " *doit toujours mentionner* . . ." (shall always include) might be substituted for " *notamment* " (in particular).

The proposal to replace " minutes mentioned " by " minutes of hearings mentioned " was put to the vote.

There being an equal division of votes, the President declared that the existing text was maintained.

He next took a vote on the proposal to delete the word " *notamment* " (in particular).

By seven votes to three, the Court rejected this proposal.

M. FROMAGEOT thought that the vote would not prevent the Drafting Committee from endeavouring—for instance, on the lines suggested by M. Guerrero—to express the same idea in another form which would not present the same difficulty from the point of view of the English version.

The PRESIDENT said that the Commission had made no proposal with regard to No. 1.[1]

In the case of No. 2, the Co-ordination Commission proposed the addition of the words: " who have taken part in the proceedings ".

In any case, the word " advocates " in the existing text would be retained.

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* D 2, A. 3, pp. 256-258.

[1] *Ibid.*, p. 874.

[1] The numbers refer to the 1931 text, then in force. The Co-ordination Commission had replaced them by letters.

M. FROMAGEOT thought that, if the Co-ordination Commission's proposal were adopted, the Drafting Committee should propose some formula such as: " the names of the agents and counsel who have spoken ". That would be more in accordance with the reasons given by the Co-ordination Commission in its report in support of its proposal.

The PRESIDENT wondered whether No. 2 might not be deleted altogether, if the Court wished to keep to the method at present followed in preparing the minutes.

M. FROMAGEOT said that that was the method advocated by the Co-ordination Commission, in accordance with existing practice.

M. SCHÜCKING thought that practical difficulties had probably led to the present restricted application of Article 55 as regards the enumeration of persons present; but he had always regarded Article 55 as bearing an interpretation different from that adopted in the Court's practice.

M. ANZILOTTI would prefer the presence of agents, advocates and counsel at the beginning of a hearing to be recorded in the minutes. The minutes at present assumed that they were present, and this practice was perhaps admissible, but to lay down as a principle in the Rules that it was unnecessary to record the presence of parties at a hearing seemed inadvisable.

M. GUERRERO, Vice-President, proposed the following wording: " the names of agents, advocates and counsel present at the hearing ".

Jonkheer VAN EYSINGA observed that the recording in the minutes of the names of persons who addressed the Court was really implied by No. 5 of the existing Article 55: " any declarations made by the parties ". Accordingly, No. 2 must mean a list, although, in practice, no such list appeared to be made. He repeated that there might be difficulty in including an enumeration of agents, advocates and counsel at the beginning of the minutes if the delegations were very numerous.

The DEPUTY-REGISTRAR said that, at the first hearing in a case, the President always stated the names of representatives of parties and recorded their presence.[1] When judgment was delivered, he recorded the presence of the agents or representatives of parties to whom due notice had been given under Article 58 of the Statute.[2]

M. URRUTIA thought it necessary that the presence of agents should be recorded in the minutes; the point was not perhaps so important in the case of counsel or advocates. He suggested the following: " the names of agents present at the hearing and of advocates and counsel who have addressed the Court ". The Drafting Committee might, if they saw fit, prepare a draft on these lines.

The PRESIDENT would prefer: " the names of the agents, and the names . . . ".

M. NEGULESCO thought it necessary not only to record the presence of agents but also of advocates and counsel in the minutes.

15.II.35.*

Discussed as Article 55.

The PRESIDENT observed that, at its previous meeting, the Court had examined Article 55 of the Rules. It had stopped at sub-paragraph (*b*) of the text of the Co-ordination Commission.[1] According to the latter's report,[2] the main idea underlying the amendments which it submitted was to bring the text into line with the Court's existing practice. In practice, the minutes of the hearings had never contained the names of agents, advocates and counsel. If the minutes had been drawn up in such a way as to satisfy the Court during the twelve years of the latter's existence, it would suffice, in order to bring the text of Article 55 into harmony with the Court's practice, to delete No. 2 of the existing text. On the other hand, if they retained No. 2, it would evidently be necessary to modify the Court's practice.

Jonkheer VAN EYSINGA said that the Co-ordination Commission had also recognised that, even if the Court's practice during the twelve years of its existence had perhaps not been literally in accordance with No. 2 of Article 55, it had never occasioned difficulties or criticism, and the Commission had considered that it might be advisable, so to speak, to legalise that practice. He agreed with the President that the best way of attaining that object would be to delete No. 2; for the declarations (and that term could be taken as applying to the pleadings) of the parties were included under No. 5, and these declarations would necessarily include the names of the persons who made them.

M. FROMAGEOT pointed out that the minutes—which were not intended to duplicate the verbatim records provided for in the preceding article—sometimes contained statements made by the agents, but never included the pleadings. In regard to the latter, all that was given was a reference to the verbatim record, which was subjoined.

Jonkheer VAN EYSINGA observed that the first paragraph of Article 55 contained the words: " shall, in particular, include . . .". Those words did not mean that the declarations or the pleadings were to be reproduced *in full*. The minutes need only mention that a given person had pleaded, or had made a declaration.

M. FROMAGEOT thought it was clear that, in certain respects, the Court's practice did not always seem to be in accordance with Article 55 of the Rules. It seemed, therefore, advisable either to alter Article 55 to bring it into line with the Court's practice, or, conversely, to alter the practice to bring it into line with the article.

M. URRUTIA would prefer the second of those two alternatives. The Rules must inform the parties as to their obligations to the Court. No. 2 of the existing Article 55 had the advantage of informing the agents that they had to be present in Court. If they deleted it, and accepted the wording proposed by the Co-ordination Commission, it would seem that they no longer attached importance to the presence of agents, counsel or advocates in Court.

The PRESIDENT observed that the Statute entitled any party to be represented by an agent. If the agent were absent at the time of some important incident—for instance when the Court was delivering a decision—the whole responsibility for his absence would rest with the party concerned. As regards the validity of the decision, the presence or absence of the agent made no difference whatever.

M. URRUTIA agreed that the Statute did not compel the agents to be present in Court, but he thought it important that the minutes should record the names of the agents who were actually present. Hence it was necessary to maintain the principle of the present Article 55 of the Rules, though the wording of the text might be reserved.

* D 2, A. 3, pp. 259-265.

[1] See, for instance, C 53, p. 188.

[2] *Ibid.*, p. 199.

[1] *I.e.*, at No. 2 of the 1931 text.

[2] D 2, A. 3, p. 874.

M. GUERRERO, Vice-President, would like, if possible, to have No. 2 of the existing Article 55 made stronger. According to Article 47 of the Statute, the minutes were documents containing an authentic record of what had taken place at the hearings. If they omitted to mention the absence of an agent or of his representative from a hearing, difficulties might result later, for instance, in the case of the examination of witnesses. Moreover, Article 53 of the Statute might have a certain bearing on the agent's obligation to be present at the hearings; and the only authentic means of recording his absence was in the minutes. In short, the Vice-President would prefer to retain the existing text and to apply it in practice.

Count ROSTWOROWSKI observed that, as a technical point, the delegations of the parties were placed at two separate tables in the Great Hall. It would suffice if the minutes mentioned the persons sitting at those tables.

M. ANZILOTTI said that the object of the clause which the Court was examining was to record the presence of the parties. For that purpose, it would suffice to mention the names of the agents. The advocates and counsel might play a very important part, but it was none the less true that it was the agent who represented his party before the Court.[1] The proposal made by M. Urrutia at the previous meeting [2] might provide a basis for a draft which could be referred to the Committee.

M. FROMAGEOT suggested the following text, which was supported by M. Anzilotti: " the names of the agents present and the names of advocates and counsel who addressed the Court ".

The PRESIDENT believed that No. 2 of the existing Article 55 contemplated only the insertion of a list of the agents, etc., without reference to what they did. If the Court desired that the minutes should contain such a list, the best plan would be to leave No. 2 as it was and to amplify No. 5, so as to make it provide for a record, not only of the declarations made on a given point of procedure, but also of the names of all the agents and advocates who took part in the debate and, in addition, of any questions put by the judges; these questions were, as a fact, inserted in the minutes, though the article did not mention them.

M. GUERRERO, Vice-President, considered that the minutes should mention the names of agents, advocates and counsel. That might be important, for instance, in the case of the examination of a witness, or in the case of declarations made by agents or counsel which the agents might be invited to confirm if they were not present when the words were uttered.

M. SCHÜCKING thought that, from a practical standpoint, the members of the delegations of the parties might sign a list, which would be a sufficient record of their presence. A person would be considered as present at a hearing if he had been present when it opened.

The PRESIDENT said that, in practice, the effect of this proposal would be that the minutes would always give the names of persons belonging to the delegations of the parties which were communicated to the Court before the beginning of the oral proceedings.

Baron ROLIN-JAEQUEMYNS thought that it was only a question of persons present at the hearing.

The point which the Court must be clear upon was: Did it desire that the composition of each party's delegation should be recorded in each set of minutes? Or did it desire that the minutes should record the members of the delegations present at each hearing? His own view was that it was important to know what persons were present, and not merely to mention the agents and counsel who addressed the Court. That object might be attained by retaining in No. 2 of Article 55 of the Rules: " the names of the agents, advocates and counsel ", and specifying later on, in No. 5: " the names of persons who made declarations and of those who pleaded before the Court ".

The PRESIDENT believed that the Court would find no difficulty in agreeing that No. 2 of the article enumerated the persons representing the parties, and that No. 5 referred to their activities.

Jonkheer VAN EYSINGA thought that, if that were so, the balance between No. 1 and No. 2 would not be preserved. No. 1 was intended to record an objective fact: the presence of the judges who constituted the necessary quorum. If No. 2 of the minutes merely gave a list of persons, some of whom were perhaps not present at the hearing, No. 2 would differ entirely in character from No. 1.

M. GUERRERO, Vice-President, also feared that a mere mention in the minutes of the names of all the agents, advocates and counsel, without its being stated whether they were present, might give an incorrect picture of the hearing.

Count ROSTWOROWSKI suggested that the minutes should mention, under No. 2, the persons who " appeared " in Court at the hearing.

The PRESIDENT wondered if would not suffice to retain paragraph 2 as it stood, but to interpret this paragraph, in practice, as meaning that the minutes would always mention all persons present at a hearing and belonging to the delegations of the parties.

Count ROSTWOROWSKI agreed that paragraph 2 should be retained in its present form without any addition. But if it was desired to bring No. 2 and No. 1 into harmony with each other, a distinction must be drawn between the presence of the judges (which was obligatory) and that of the parties' representatives (which was less necessary).

M. ALTAMIRA considered that the Court ought first to be clear as to whether the obligation to be present was, or was not, equally incumbent upon the judges and upon the representatives of the parties.

Several members of the Court being of opinion that this important question should be settled apart from that of the drawing up of the minutes, M. FROMAGEOT pointed out that the minutes ought to convey an exact picture of the circumstances in which a public hearing had taken place, including the fact of the presence of certain judges or of certain other persons representing the parties.

The PRESIDENT asked the Court to vote upon the following question:

> " Does the Court decide to maintain No. 2, the question of the contents of that sub-paragraph being reserved ? "

He explained that this reservation had specially in view the question whether it was desirable, as M. Anzilotti considered, to draw a distinction between agents, on the one hand, and advocates and counsel on the other hand

[1] As concerns this subject, see pp. 205-207 and footnote, pp. 205-206.
[2] P. 226.

By nine votes against two, the Court voted in favour of retaining No. 2.

The PRESIDENT asked the Court to vote upon a second question, namely:

> " Does the Court wish that No. 2 should enumerate the persons mentioned, or that it should give an indication of the part that they took in the proceedings ? "

He explained that the aim of this question was to obtain a decision on the principle of the Co-ordination Commission's proposal to add the words: " who addressed the Court ".

M. NEGULESCO, whose opinion was shared by Baron ROLIN-JAEQUEMYNS, having raised the question of the representative capacities of agents, advocates and counsel, respectively, the PRESIDENT and the VICE-PRESIDENT were of opinion that that question might be reserved for subsequent discussion.

The PRESIDENT, observing that, in any case, that issue would not be prejudged by the question which he had just read, asked the Court to vote on that question.

Nine votes were given in favour of an *enumeration* of the persons in question, one for an *indication of the part that they took in the proceedings*; one judge abstained.

The PRESIDENT asked the Court to say if it desired that No. 2 of Article 55 should expressly provide for a record of those persons only who were present. He observed that M. Anzilotti wished that a distinction should be made between the agents, on the one hand, and the advocates and counsel on the other hand, and that the agents actually present should in any case be mentioned.

M. ANZILOTTI said that he did, indeed, regard it as essential to record the presence of the agents, whereas this was not necessary in the case of advocates and counsel. An agent was under an obligation to be present, and his absence might prevent the Court from performing some act of procedure. He therefore preferred the text first proposed by M. Urrutia and afterwards by M. Fromageot.[1]

M. GUERRERO, Vice-President, was in favour of retaining the existing text, which he found adequate. If they adopted M. Anzilotti's idea, he feared that they might be imposing on the agents an obligation to which they were not liable under the Statute.

M. URRUTIA explained that, in his view, it was merely necessary to lay down that when an agent was present at a hearing his presence must be recorded in the minutes, in the same way as the fact that an advocate or counsel had addressed the Court.

Baron ROLIN-JAEQUEMYNS thought it would suffice to mention that the party had appointed a certain person as its agent; but it would be dangerous to emphasise the fact of his presence or of his absence.

M. ANZILOTTI proposed that No. 2 should be worded as follows:

> " (2) The names of the agents; the names of the advocates and counsel who have addressed the Court."

He explained that, as it was a question of the minutes of a meeting, the mention of the agents' names signified that they were present.

M. GUERRERO, Vice-President, would prefer to retain the existing clause. But if it were desired to make it more definite, they might say: " the names of the agents, advocates and counsel present at the hearing ".

M. FROMAGEOT would prefer, as he had already said, that the names of the persons present at the hearing—the judges, agents, advocates and counsel—should appear at the head of the minutes.

No. 2 of the article might then read: " the names of the representatives of the parties in the case present at the hearing ". That would not signify that the representatives in question could not be absent for a short time.

M. SCHÜCKING feared that, if the minutes gave only the names of counsel and advocates who addressed the Court, it might appear that those who had not spoken, because the hearing was devoted to the pleadings of the other side, had been absent.

M. NEGULESCO was also of opinion that, if the minutes were to constitute an accurate record, they should mention the presence of all persons who attended the hearing: agents, counsel and advocates.

M. GUERRERO, Vice-President, referring to M. Anzilotti's proposal, feared that it might be deduced from the omission of an agent's name in the minutes that his party was not represented at the hearing.

He therefore preferred the existing text of the Rules. However, to make it clearer, he would agree to saying: " the names of the agents, advocates and counsel present or represented at the hearing ".

M. URRUTIA did not think that any complications would arise in practice, since the Court had agreed that an agent might delegate his functions.

Jonkheer VAN EYSINGA thought that the text of 1922, which was very clear, contemplated the insertion of the names of all persons—agents, counsel or advocates—who were present at the hearing. He thought it would be a mistake to introduce the word " representatives "—having regard to the terminology used in other articles—or to introduce the word " present ", which might influence the interpretation of No. 1 of Article 55.

For the rest, Jonkheer van Eysinga would be glad if the Registrar—who was absent at the moment for reasons of health—would explain the reason for the difference which had grown up between the Court's practice in regard to minutes and the text of Article 55, paragraph 2, of the existing Rules.

The PRESIDENT understood that Jonkheer van Eysinga was proposing an adjournment of the debate. If so, that proposal must be put to the vote.

M. GUERRERO, Vice-President, did not think that the point under discussion was so important as to justify an adjournment.

The PRESIDENT asked the Court to vote upon the proposal of an adjournment.

By seven votes against two and two abstentions, the Court rejected the proposal.

The PRESIDENT said that there were three amendments before the Court. M. Anzilotti's amendment was as follows:

> " The names of the agents; the names of the advocates and counsel who have addressed the Court ";

M. Fromageot's amendment would make the text read:

> " The names of the representatives of the parties present at the hearing ";

finally, there was the Vice-President's amendment, which proposed to add at the end of No. 2 of the existing Article 55 the words: " present or represented at the hearing ".

[1] See p. 226.

The PRESIDENT asked the Court to vote first on M. Anzilotti's amendment.

Baron ROLIN-JAEQUEMYNS was inclined to vote in favour of the first part of the amendment, because it said nothing about the presence of the agents. At the same time, this might result in some doubt as to the meaning.

M. ANZILOTTI repeated that the minutes could mention only the names of persons who were present.

M. GUERRERO, Vice-President, thought that the voting would be simplified if the amendment he had moved were voted upon first.

The PRESIDENT put the following question to the vote:

" Does the Court decide to add the word ' present ' to paragraph 2 of the existing Article 55 ? "

By six votes against three and two abstentions, the Court adopted the amendment.

The PRESIDENT observed that No. 2 of Article 55 would accordingly be worded as follows:

" (2) The names of the agents, advocates and counsel present ".

In this way they would avoid the necessity for deciding on the amendments of MM. Anzilotti and Fromageot.

Jonkheer VAN EYSINGA, having regard to the result of the vote, proposed to add the word " present " in No. 1 of Article 55, which would read: " the names of the judges present ". This would avoid any discrepancy between the wording of Nos. 1 and 2.

M. FROMAGEOT and M. ALTAMIRA observed that this proposal was in conformity with the Court's practice.

After a debate on the possible consequences of inserting this word, and as to whether it might prevent a judge who had been absent on grounds of health for one or more hearings from continuing on the Bench in a case, without the pleadings having to be repeated, the PRESIDENT asked the Court to vote on M. van Eysinga's proposal to add the word " present " to No. 1 of Article 55.

The Court unanimously voted in favour of the insertion of this word.

The PRESIDENT opened the discussion on No. 3:

" (3) The names, christian names, description and residence of witnesses heard ".

There had been no amendment proposed to this clause.

The PRESIDENT declared that No. 3 was adopted.

He then read No. 4:

" (4) A specification of other evidence produced ".

M. FROMAGEOT thought that the meaning of this clause should be made clearer.

The PRESIDENT thought the Court would see no objection to the Drafting Committee being asked to prepare a text which, without altering the substance, would bring out the meaning more clearly.

This was agreed to.

The PRESIDENT opened the discussion on No. 5:

" (5) Any declarations made by the parties ".

He suggested that the Drafting Committee should be asked to elaborate this paragraph, so as to bring it into complete accordance with the Court's practice. As a fact, the minutes contained a number of points—in particular, questions put by the judges—which were not mentioned in the present No. 5.

M. ANZILOTTI had a remark to make on the wording of this paragraph. The article said: " The minutes . . . shall in particular include . . . *(mentionne notamment)*." But the declarations referred to in No. 5 were not merely included *(" mentionne ")*; they were given verbatim.

The PRESIDENT thought it was agreed that the Drafting Committee should establish the definitive text of No. 5.

The President went on to No. 6:

" (6) All decisions taken by the Court during the hearing ".

He pointed out that the Co-ordination Commission had proposed to add the words: " or announced "; and that M. Fromageot had proposed to put " delivered " instead of " announced ".

Count ROSTWOROWSKI wished to provide for cases in which the Court did not deliver a decision at once, but announced that it would deliver it in due course.

M. ANZILOTTI said it might also happen that the Court, having decided a point which would have to be dealt with in an order, might nevertheless think it necessary to inform the parties immediately as to the nature of its decision. In such a case, the Court would *announce* the decision at the hearing, and the order would be made subsequently [1].

The PRESIDENT said there was also the case of a decision adopted after a private deliberation of the Court, allowing an agent, at his request, a period of time for the preparation of his reply [2]. In any case, the Co-ordination Commission had considered the existing No. 6 too narrow, as it was confined to decisions taken at the hearing.

He suggested, however, that the text would be found sufficiently wide if it were made to read: " decisions taken or announced by the Court during the hearing ".

Baron ROLIN-JAEQUEMYNS thought that if only one word were employed it would be better to say " taken " *(" prises ")*; but, if greater exactitude were required, they should say " announced or delivered ". Personally, he would prefer to leave No. 6 as it stood.

M. FROMAGEOT thought it would be wiser to leave the Drafting Committee to settle the question.

The PRESIDENT said that the Court agreed to refer the text to the Drafting Committee.

He then went on to the last paragraph of Article 55:

" The minutes of public sittings shall be printed and published."

M. FROMAGEOT suggested that the French text should read *" sont "* instead of *" seront "*.

The PRESIDENT noted that there was no objection to this proposal.

The final paragraph of Article 55 in the French text would therefore read:

" Les procès-verbaux des séances publiques sont imprimés et publiés."

First and Second Readings and Final Adoption.

The article was adopted in first reading on 8.IV.35, with minor changes of wording and with the number 59. The text thus adopted was as follows:

" 1. The minutes referred to in Article 47 of the Statute of the Court shall include:

" The names of the judges present;

[1] C 53, pp. 189, 199.
[2] C 18—I, pp. 14, 23-24.

" The names of the agents, counsel or advocates present;
" The names, christian names, description and residence of witnesses and experts heard;
" A statement of the evidence produced at the hearing;
" Declarations made on behalf of the parties;
" A brief mention of questions put to the parties by the President or by the judges;
" And decisions delivered or announced by the Court during the hearing.

" 2. The minutes of public sittings shall be printed and published."

On 24.II.36 the article was adopted unchanged in second reading.

At the final *adoption* of the article on 11.III.36, on the proposal of the Drafting Committee, the word " *notamment* " in the French text of paragraph 1 was dropped and the word " *comprend* " (shall include) substituted for " *mentionne* ". This involved no change in the English and made the text uniform with that of several other articles.

ARTICLE 60 *(Article 54, old Rules).*

Shorthand Notes of the Oral Proceedings

14.II.35.*

Discussed as Article 54.

The President invited the Court to consider Article 54, the first paragraph of which was worded as follows in the existing Rules:

" A verbatim record shall be made of the oral proceedings, including the evidence taken, under the supervision of the Registrar."

To this paragraph, the Co-ordination Commission proposed to add the following new sentence: [1]

" Unless otherwise decided, this verbatim record shall not comprise the interpretations from one official language to the other made in Court by the interpreters."

At first, the verbatim record had included the speeches of advocates and also the translation made in Court by the interpreters. Subsequently, the Court had introduced the system of a complete translation of the shorthand report of the original speech into the other official language. This translation duplicated the interpretations, and accordingly the latter had been omitted from the verbatim record. It was in view of this practice that the Co-ordination Commission had proposed the new sentence.

Paragraph 2 of Article 54 ran as follows in the existing Rules:

" The report of the evidence of each witness shall be read to him in order that, subject to the direction of the Court, any mistakes may be corrected."

The Co-ordination Commission had proposed no change in the second paragraph.

The third paragraph of the existing article was as follows:

" The report of statements made by agents, advocates or counsel shall be communicated to them for their correction or revision, subject to the direction of the Court."

The Co-ordination Commission proposed to replace the words " agents, advocates or counsel " by the words " agents and counsel ", and the words " *exposés ou déclarations* " (statements) by the word " *plaidoiries* " (speeches). Lastly, it proposed the deletion of the words: " or revision ". These words had been inserted in Article 54 in 1926, [2] and in some cases this had given rise to difficulties. The Co-ordination Commission proposed to return to the original text of the Rules by omitting the word " revision ".

M. Urrutia would prefer the existing text of the article. All the proposed changes seemed to him either unnecessary or inacceptable.

In the third paragraph, the word " *exposés* " might perhaps be replaced by " *plaidoiries* ". But, in any case, the word " *déclarations* " should not be deleted, for it sometimes happened that an agent made a declaration before making his " *plaidoirie* ", and that was what the existing article was designed to cover. Lastly, the change to the effect that agents and advocates might correct their speeches but not revise them seemed to be going too far. An advocate must have the right to say that his meaning was not precisely expressed in a certain passage, but that amounted, not to correction, but to revision.

M. Schücking also considered that an advocate must be allowed to delete from the verbatim record of his speech expressions which overstepped his meaning.[1]

M. Fromageot agreed with MM. Urrutia and Schücking. He thought that the existing Article 54 should only be very slightly altered, for instance, the word " *exposés* " in the third paragraph might be replaced by " *plaidoiries* ".

The President observed that the expression " subject to the direction of the Court " had been interpreted in the past as meaning that the Court's consent was required for a substantial alteration. He thought that in actual fact the Court took the speeches as made in Court as the basis for its deliberation.

M. Fromageot wished the word " revision " to be retained; he considered that the idea underlying it was sound. He added that, personally, he worked on the printed edition containing the revised text of speeches rather than on the roneographed edition.

The President was doubtful whether the retention of the word " revision " might not, in certain circumstances, open the door to misuse of the privilege.

Jonkheer van Eysinga observed that, even with the existing text, the right was a limited and relative one, as it must always be exercised subject to the direction of the Court.

The President thought that the word " correction ", rightly interpreted, would suffice.

M. Fromageot thought that in any case this word should not be construed as it had been before 1926: *i.e.* as covering only purely verbal changes—mistakes of English or French. It should be given a wider meaning, permitting the deletion of passages or expressions going beyond the

* D 2, A. 3, pp. 253-256.
[1] *Ibid.*, p. 874.
[2] D 2, A., pp. 148-151.

[1] *Cf.* C 16, Vol. III, p. 844, document 138. (See also pp. 835 *et sqq.*, documents 124 *et sqq.*)

speaker's intentions. If the word " revision " were deleted, the interpretation of the word " correction ", which had obtained in 1925—as recalled by the Co-ordination Commission [1]—must also be abandoned.

M. ANZILOTTI pointed out that, in oral proceedings, an alteration might assume some importance, for the use of one word instead of another might modify or even entirely change the meaning of a sentence. Regard must be had to the interests of the other side, who might not be aware of the revision of the text when making their reply or rejoinder, even though they were subsequently informed of it, as was no doubt the case.

M. GUERRERO, Vice-President, suggested the following modification of the last paragraph of (existing) Article 54: " . . . of statements . . . for their verbal correction or revision, subject to the direction of the Court ". This would preclude revision of the substance, which was the only danger.

M. FROMAGEOT would prefer: " for their correction or revision but without substantial modifications ".

M. URRUTIA thought that the Court should allow the deletion of certain phrases or words which a party desired to withdraw. Of course, the other side must be informed of these modifications. The Court might, for instance, prescribe that, before making any change, the party concerned should notify it to the other side. If the other side agreed, what reason was there for leaving the oral statements of parties in their original form, if that form embodied observations which might have unfortunate international effects ?

The PRESIDENT thought that, in such a case, the proposed deletion would certainly be brought to the notice of the Court, and the latter could sanction it.

He asked the Court first of all to give its opinion upon the proposal to add the words " at each hearing held by the Court " at the beginning of the first paragraph.

Jonkheer VAN EYSINGA explained that the Co-ordination Commission had added these words in order to bring Article 54 of the Rules into line with Article 47 of the Statute.

By six votes to three, with one abstention, the proposal was adopted.

The PRESIDENT next observed that the Co-ordination Commission proposed the addition of the words " if any " after the words " evidence taken ".

M. FROMAGEOT thought these words unnecessary.

The PRESIDENT noted that the Court was not in favour of adding these words.

He then took a vote on the Co-ordination Commission's proposal for the addition of a new sentence to the first paragraph of Article 54 (see preceding page).

By six votes to four, the proposal was adopted.

The PRESIDENT observed that the sentence would be added, subject, of course, to purely verbal amendment.

The President said that there were no proposed changes in respect of the second paragraph of Article 54. There being no observations, he declared the paragraph adopted.

He also observed that the words " agents, advocates or counsel " were retained in paragraph 3.

In the second line of the French text of that paragraph, the Co-ordination Commission had proposed to substitute " *plaidoiries* " for " *exposés ou déclarations* "; it was decided, on the proposal of M. Urrutia, to use the words " *plaidoiries ou déclarations* " (speeches or declarations).

The President remarked that the Co-ordination Commission had suggested the deletion of the words: " or revision ".

M. NEGULESCO drew attention to M. Fromageot's proposal to say: " for their correction or revision but without substantial modifications ".

The PRESIDENT first took a vote on the proposal for the deletion of the words " or revision ".

By six votes to four, the Court rejected the proposal.

The PRESIDENT next took the opinion of the Court on M. Negulesco's proposal for the addition of the words: " but without substantial modifications ".

M. ANZILOTTI presumed that it remained understood that no change could be made without the consent of the Court and of the other side.

M. GUERRERO, Vice-President, thought that the words " subject to the direction of the Court " sufficed to ensure that substantial deletions or corrections would not be made.

M. NEGULESCO wished the words suggested to be inserted in order to make it clear that the speakers' right of revision was a limited one and that they could not be allowed to alter the substance of their speeches.

The PRESIDENT took a vote on M. Negulesco's proposal.

There being an equal division of votes, the PRESIDENT gave his casting vote in favour of the maintenance of the existing text.

He then took a vote on the whole of Article 54 of the Rules, with the amendments adopted by the Court.

The article was adopted unanimously.

First Reading.

The article was adopted without discussion in first reading on 8.IV.35 as number 60 and with the following text:

> " 1. In respect of each hearing held by the Court, a shorthand note shall be made under the supervision of the Registrar of the oral proceedings, including the evidence taken, and shall be appended to the minutes referred to in Article 59 of the present Rules. This record, unless otherwise decided by the Court, shall contain any interpretations from one official language to the other made in Court by the interpreters.
>
> " 2. The report of the evidence of each witness or expert shall be read to him in order that, subject to the direction of the Court, any mistakes may be corrected.
>
> " 3. Reports of speeches or declarations made by agents, counsel or advocates shall be communicated to them for correction or revision, subject to the direction of the Court."

Second Reading.

On 24.II.36, the article was read a second time. On this occasion, Jonkheer van Eysinga remarked, in connection with paragraph 1, second sentence, that there was another of the cases previously mentioned by him [1] of a text altered by the Drafting Committee in 1935 without any trace remaining of the reasons for the change of wording. He had, for the rest, no objection to make.

[1] D 2, A. 3, p. 874.

[1] See p. 145.

In connection with paragraph 2, it was observed that the practice of the Court was that the report of evidence was read to and approved by witnesses at a public sitting of the Court. It was not therefore necessary to add the words " in Court ".

The whole article was adopted in second reading.

Final Adoption.

On 11.III.36 the article was finally adopted with minor verbal changes in the English text, the words " This note " being substituted for " This record " in paragraph 1, and at the end of paragraph 3, the words " under the supervision of the Court " for " subject to the direction of the Court ".

ARTICLE 61 *(Article 57, old Rules).*

Interim Measures of Protection

(This Article is composed as follows: Paragraph 1 = new; Paragraph 2 = paragraph 1 of old Article 57; Paragraph 3 = part of paragraph 1 of old Article 57, remainder new; Paragraph 4 = new; Paragraph 5 = new; Paragraph 6 = paragraph 2 of old Article 57; Paragraph 7 = new; Paragraph 8 = paragraph 3 of old Article 57; Paragraph 9 = new.)

18.II.35.*

Discussed as Article 57.

Interim Measures.

The PRESIDENT invited the Court to consider Article 57 of the Rules, relating to interim measures of protection.

The existing text of this article had been adopted in 1931. Some amendments had been proposed by the Third Committee and by Count Rostworowski.[1] The Co-ordination Commission had tried in its draft to meet the various observations made.

The Co-ordination Commission proposed the following draft:[2]

" 1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the contentious case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures the indication of which is proposed.

" 2. The proceedings set on foot by the request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

" 3. If, when the request is made, the Court is not sitting and if, in view of the circumstances of the particular case, the President considers that it cannot meet in time to enable its decision to be effective, he shall act in its stead.

" 4. In all other cases, the President shall convene the Court without delay; he shall also, if he considers it compatible with the urgent nature of the interim measures of protection, convene the judges, if any, who have been appointed, under Article 31 of the Statute, to sit in the case to which the request relates.

" 5. The Court or the President, as the case may be, may indicate interim measures of protection other than those proposed in the request.

" 6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene it in order to submit to it the question whether it is expedient to exercise this right in a particular case.

" 7. In all cases, the Court or the President shall only indicate interim measures of protection after giving the agents appointed by the parties to represent them in the case specified in the request an opportunity of presenting their observations. If no agent has been appointed, the diplomatic representatives at The Hague of the State concerned shall be requested temporarily to act as agent.

" 8. If interim measures of protection have been indicated, any party concerned in the case specified in the request may at any time apply for their revocation. The decision shall rest with the Court; it shall be convened for this purpose without delay.

" 9. The dismissal of a request for the indication of interim measures of protection shall not prevent the Government which has made it from making a fresh request in the same case based on new facts."

The Co-ordination Commission's draft covered cases not contemplated by the existing text; it reverted to some extent to the system in force before 1931,[1] in that it authorised the President to indicate interim measures if the Court was not sitting.

M. SCHÜCKING, in order to simplify the discussion, proposed that the article should be taken paragraph by paragraph.

He thought that paragraph 1 of the Co-ordination Commission's draft contained an improvement, in that it expressly provided that there must always be an actual case to which interim measures applied for must relate.

The PRESIDENT, noting that M. Schücking's proposal met with approval, opened the discussion on paragraph 1.

Count ROSTWOROWSKI, referring to his memorandum in support of his proposal,[2] read the passage from the text submitted by him with the same object in view:

" A request for the indication of interim measures of protection made to the Court by the parties or by one of them shall follow or accompany the document submitting the principal suit to the Court."

This text designedly mentioned the moment at which an application might be made, stating that it might either accompany or follow the document instituting proceedings. Furthermore, the expression " principal suit " was used in order to give the proceedings in regard to the request for the indication of interim measures the character of supplementary proceedings.

The object of the second sentence of the first paragraph of the Co-ordination Commission's Article 57 was to define the form in which an application should be presented. Count Rostworowski's text indicated more fully the essential particulars which must accompany a request:

" It shall specify the names of the parties concerned, the subject of the principal suit, the rights to be

* D 2, A. 3, pp. 279-283.
[1] *Ibid.*, pp. 778 and 910.
[2] *Ibid.*, p. 875.

[1] D 2, A. 2, p. 315, under Article 57.
[2] D 2, A. 3, p. 910.

protected, the interim measures to be taken, the name of the agent and his address at the seat of the Court."

Baron ROLIN-JAEQUEMYNS said that the existing text of Article 57 of the Rules entirely satisfied him, and, before any amendments were made, he wanted to know what advantages were to be gained by changing it.

The PRESIDENT said that the existing text of the Rules required in every case the immediate convocation of the Court, since it deprived the President of power himself to indicate interim measures. That meant that, if the Court was not sitting when a request was made, there must, notwithstanding the urgency of the matter, be a delay corresponding to the time required for the assembly of the Court. Further, the 1931 text did not prevent a request for interim measures from being made without sufficient reason. The new text had been drafted to obviate these two objections.

M. GUERRERO, Vice-President, preferred paragraphs 1 to 3 of Count Rostworowski's text to paragraphs 1 and 2 of the Co-ordination Commission's, for the former gave some useful details.

Jonkheer VAN EYSINGA observed that the first two paragraphs of the Commission's text contained nothing new. Moreover, it said the same thing as Count Rostworowski's draft, but in a more concise and flexible form.

M. van Eysinga observed that Count Rostworowski, in the observations accompanying his proposal, drew a distinction between three kinds of cases which might come before the Court: contentious cases, advisory opinions and requests for interim measures. But a request for interim measures would seem rather to be a proceeding incidental to a contentious case, and not an independent proceeding. It would therefore be better to adopt the Co-ordination Commission's draft, which seemed to be based on the latter view.

Count ROSTWOROWSKI pointed out that Article 57 of the Rules (1931 text) began by laying down that an application for interim measures had priority. In other words, the article assumed the request to have already been submitted. It appeared desirable, however, to precede this first sentence of Article 57 by a provision concerning the time for the presentation of a request and specifying the form in which it should be made. The existing terms of paragraph 1 of Article 57 were not, therefore, altered; it was merely a question of adding something to them.

With regard to the question of principle raised by Jonkheer van Eysinga, it was beyond dispute that the Court was fulfilling one function when it delivered a judgment and another when it gave an advisory opinion. The indication of interim measures was a function which led up neither to a judgment nor to an advisory opinion; it was therefore an independent function. Certainly, it was grafted on to the contentious proceedings; and, since it could have no existence independently of a principal action, it was, not an independent, but a separate proceeding. This the Court had recognised by its practice.

M. GUERRERO, Vice-President, thought that the Court was in agreement as regards the substance of paragraphs 1 and 2 of the Co-ordination Commission's text and paragraphs 1, 2 and 3 of Count Rostworowski's text. Might not, therefore, the two drafts be referred to the Drafting Committee, which would submit a text ?

The PRESIDENT thought it better to examine the whole article before referring it to the Drafting Committee.

M. FROMAGEOT having raised the question of the interpretation of the word "*requête*" (application) in the existing Article 57, the PRESIDENT, considering that a request for the indication of interim measures should be regarded as a proceeding incidental to a case before the Court, and with reference to Article 40 of the Statute, said that he would prefer the term "*demande*" (request)—proposed by the Co-ordination Commission and also, for that matter by Count Rostworowski—to the term "*requête*" (application).

M. FROMAGEOT saw no objection, but thought it would be well for the Drafting Committee to know precisely what the Court's views were on the question whether what the request should contain was to be laid down in detail.

M. SCHÜCKING thought that the indication of details would be most valuable to parties.

The PRESIDENT observed that in point of fact the first sentence of the existing Article 57 had not been criticised. The Commission, in submitting a new text of the whole article, had simply sought to render it complete; that was why it had made additions to paragraphs 1 and 2.

He proposed to take the opinion of the Court on the adoption of paragraph 1 of Article 57, as proposed by the Co-ordination Commission; the vote would, of course, be a provisional one.

MM. URRUTIA and FROMAGEOT pointed out that all the provisions of the article formed an indivisible whole.

The PRESIDENT did not press the point, and observed that *paragraph 2* of the Co-ordination Commission's text had given rise to no remarks.

He said that *paragraph 3* of the Co-ordination Commission's text raised a question of principle, as it proposed a return to the system existing before 1931 in so far as concerned the indication of interim measures by the President.

Count ROSTWOROWSKI recalled that, in regard to this point, he had made express reservations. He considered that to give the President this power in the Rules would be contrary to the Statute.

The wish to avoid the more or less automatic convocation of the Court in the event of a request for the indication of interim measures, prescribed by the existing article, had, however, led him to propose that, before convening the Court, the President should make preliminary enquiries of the interested parties in regard both to points of law and of fact. If necessary, the President would convene the Court for an early date and fix the date for a public sitting at which the parties could present their observations; but the President, after enquiry, might find that it was unnecessary to convene the Court.

M. GUERRERO, Vice-President, referring to the discussions which had taken place in 1931, pointed out that the decisions which the Court might have to take in connection with interim measures were perhaps more delicate than any others, because they would often involve a political element affecting the sovereignty of States. To entrust the President with the duty of acting alone in the stead of the Court would therefore be imposing too heavy a responsibility upon him. Moreover, the word "*indication*" had been used in the article of the Statute dealing with measures of protection precisely in order not to offend the susceptibilities of States. It had been argued that the power given to the President was necessary because it was sometimes impossible to assemble the Court rapidly. That reason, in M. Guerrero's opinion, was not enough. Before indicating interim measures, the parties must be given a hearing; and if the Court could

summon the agents to appear before it, it would certainly also have time to assemble. Moreover, it was sometimes better to be able thoroughly to reflect upon a decision to be taken than to have to give an immediate answer. Lastly, if the case aroused keen interest, the countries concerned would accept more calmly a decision given by the full Court than by a single person.

For these various reasons, M. Guerrero thought it necessary to reserve the decision in this matter to the Court alone.

The PRESIDENT recalled a proposal of the Third Committee which ran as follows:

> " If the Court is not sitting, it shall be convened without delay by the President. Pending the meeting of the Court and its final decision upon the application, the President shall have power to indicate any temporary measures which may appear to him expedient."

Furthermore, Mr. Kellogg had made the following observations on the same subject:

> " I think this rule should provide that, if the Court is not sitting, the President may provide for interim measures provided such measures do not affect the final judgment; in other words, that the interim measures simply maintain the *status quo* and protect the parties. I do not see any necessity in such case to go to the expense of calling a session of the Court in order to institute an interim provision so that the final judgment may dispose of the whole case. This is the practice, so far as I know, of every Court in the world."

The President announced that, at the beginning of the next sitting, he would ask Jonkheer van Eysinga, Rapporteur of the Third Committee, to explain the proposal of that Committee which had just been read and which had not perhaps been thoroughly understood by everyone. M. van Eysinga would also explain how the Co-ordination Commission's draft had been worked out on the basis of that of the Third Committee.

19.II.35.*

Discussed as Article 57.

The PRESIDENT asked the Court to proceed with the discussion of Article 57. He requested the Rapporteur of the Third Committee to explain, as had been agreed, the text proposed by that Committee, and also the changes which that text had undergone at the hands of the Co-ordination Commission.

Jonkheer VAN EYSINGA gave the following information:

The difficulty which confronted the Court in regard to interim measures of protection was that it was not always assembled. If it were not for that difficulty, it would of course always be the full Court which would decide in regard to the indication of such measures. The idea which prevailed when the Rules were drawn up in 1922 [1] was that interim measures called for prompt action. It was for that reason that the Rules delegated the right of taking action to the President, should the occasion arise when the Court was not assembled. That was, moreover, in conformity with the practice that had been followed in applying Article 48 of the Statute, which said that the Court took the necessary steps for the conduct of the case: that clause had not been regarded as a bar to the making of orders by the President, when necessary. In 1931 [1] the Court considered that it was advisable to emphasise, not only the urgency, but also the importance of interim measures of protection; it was desired that the Court should act, so far as possible, with the full weight of its authority; and that authority would be enhanced if the decision was given by the full Court.

It was in view of these considerations that Article 57 of the Rules was modified in 1931.

When the Third Committee took up the question of interim measures, it naturally turned to the case of the Prince von Pless and the action which the President, the late M. Adatci, took on that occasion.[2] It was with this case in mind that the Committee, while maintaining the principle adopted in 1931—namely, that, as a general rule, it was the full Court which had to decide—proposed that, pending the meeting of the Court to take a final decision, it was the duty of the President to indicate any provisional measures which might appear to him expedient. That was what was said in paragraph 2 of the Third Committee's text.

When this proposal had come before the Co-ordination Commission, the latter was also in possession of Count Rostworowski's note [3], criticising the idea of allowing the President to indicate interim measures provisionally, pending the moment when they could be finally indicated by the Court. The Co-ordination Commission had then reviewed the whole question, and had reached the solution set forth in the proposal which the Court had begun to examine; it was to be found in paragraph 3 (see p. 232).

It was in order to meet the criticisms of Count Rostworowski, who had pointed out that the indication of provisional interim measures by the President was an idea foreign to the Statute, that this text had reverted, for cases of exceptional gravity, to the system of 1922. In practice, however, there was a fairly close resemblance between the Co-ordination Commission's text and the text proposed by the Third Committee. But, in form, the Third Committee's text left the right of indicating interim measures of protection to the full Court, and the President was only empowered to indicate provisional measures which the Court, when it had assembled, might or might not adopt.

On the other hand, the Co-ordination Commission's proposal empowered the President to indicate the measures definitively, subject to the Court's right to revoke the decision, if it thought fit, but only if the President believed that, unless he adopted these measures, the Court could no longer adjudicate usefully because, by the time that it was assembled, it would be confronted with accomplished facts which would deprive its action of any effect.

Count ROSTWOROWSKI pointed out that, according to the account given by Jonkheer van Eysinga, the cause of the difficulties lay in the possibility of the circumstances being of such an urgent nature that they involved the necessity for immediate measures. However, in fact, in Count Rostworowski's opinion, it must not be forgotten that in every case there was a whole procedure to be gone through which would require a certain time. The question of urgency was no doubt important, but it must not prevail over the observance of legal principles. It seemed that the Court could easily be convened within the time required to go through the necessary steps of the procedure: notifica-

* D 2, A. 3, pp. 283-291.

[1] D 2, pp. 77 *et sqq.*

[1] D 2, A. 2, p. 315, under Article 57.

[2] C 70, p. 429, document 113.

[3] D 2, A. 3, p. 910.

tion, appointment of an agent, etc. Meanwhile, as Count Rostworowski had pointed out in his note, there were certain measures which the President would have to take, other than interim measures of protection: in particular, a preliminary enquiry. If, at the end of this time, the enquiry showed that the question had settled itself, the President would no longer need to convene the Court. If, however, the question were not settled, the Court would be immediately summoned, and its meeting would have been duly prepared by the preliminary enquiry.

In reply to a question by M. Urrutia in regard to the situation mentioned by Jonkheer van Eysinga, in connection with the Prince von Pless case, the REGISTRAR recalled that the German Government had asked for the indication of interim measures to suspend certain measures of constraint which had been authorised against the Prince von Pless, and which were to become applicable at the end of a time-limit due to expire two days after the date on which the question was submitted to the Court. M. Adatci had thought that, in view of the impossibility of getting the Court together before the expiry of this period of two days, it was his duty to ask the Polish Government whether it would not think it desirable to prolong this time-limit, in order that the Court might adjudicate to some useful purpose instead of finding itself confronted with an accomplished fact when it came to take its decision.

M. URRUTIA observed that M. Adatci's action was not in the nature of an indication of interim measures of protection.

M. NEGULESCO said that the text proposed by the Co-ordination Commission alluded, in its third paragraph, to the President's right to indicate interim measures of protection when the Court was not sitting.

The contentious character of measures of that kind debarred the Court from delegating its powers to its President. These interim measures were, properly speaking, an incident in the main question submitted to the Court, as Count Rostworowski had pointed out in his report. The parties had to be heard, and the national judges had to take their places on the Bench, in accordance with Article 31 of the Statute. If these powers were delegated, the result would be, first, to give the President power to decide in a contentious case, which would be contrary to the Statute, and, secondly, to eliminate the national judges, whom the parties were entitled to appoint under the Statute.

Moreover, M. Negulesco doubted whether the Court would be acting within the terms of Article 41 of the Statute if it gave such powers to the President. Even if this delegation of powers were possible in law, the President would, in nearly every case, find it impossible to perform the task imposed on him. If the cause of the dispute consisted in certain acts which had been accomplished, and if the respective rights of the parties and the forcible acts were mutually contested, how was the President to take steps to safeguard the rights of the parties, seeing that the parties could not proceed to lay evidence before him, for the taking of evidence, according to the Statute, was reserved solely for the Court ?

Moreover, the gravity of the measure adopted might produce serious reactions in a case surrounded with political difficulties.

M. SCHÜCKING was in favour of the Co-ordination Commission's proposal because, in his view, it was in the very nature of interim measures that they required the bestowal of extraordinary powers upon the President. For if, before the interim measures could be indicated, it was necessary to await the meeting of the Court, the indication might lose much of its utility. No doubt, it was necessary to act only with the greatest caution, as it was a matter that affected the sovereignty of States. On the other hand, most important interests might be in issue in such a case and any loss of time might be a danger. It was therefore desirable that the Court should provide for the possibility, in exceptional cases, of interim measures being indicated by the President, subject to the possibility of these measures being revoked, if necessary, by the Court, when it met shortly afterwards.

M. GUERRERO, Vice-President, feared that, if the Court once more empowered its President to indicate interim measures of protection, serious difficulties might result. The indication of interim measures was a decision of grave moral importance, and they would need to be sure that a party might not argue, in order to avoid compliance with a decision taken by the President, that under the Statute these powers were conferred upon the full Court alone. Moreover, if the full Court, when it had assembled, were to revoke the measures indicated by the President, this would be detrimental to the authority both of the latter and of the Court, not to mention the effects which the President's indication of measures might have produced in the interval.

For these reasons it was, in M. Guerrero's opinion, wiser not to reverse the decision which the Court adopted in 1931. In taking that decision, the Court had been mindful of the fact that it had inserted a new Article 27 in its Rules, extending the powers of the President to convene the Court when he thought it necessary, and also to the fact that a system of quasi-permanent sessions was contemplated.

The PRESIDENT desired to explain his personal point of view. The Court was at present working on the basis of the existing Statute. That Statute provided for ordinary and extraordinary sessions, separated by periods during which judges were entitled to proceed to their homes. The judges were also, he said, equally entitled to be summoned to any session, no matter what was their country of origin, for, otherwise, the judges domiciled in Europe would be given a privileged position. In these circumstances, and with communications as they were at present, it would take about three weeks to assemble the Court. A case might be submitted in which the indication of interim measures of protection was a matter of urgency. Since the Statute contained a clause providing for such measures, it was necessary that the Rules should make adequate provision for applying that clause in a manner that would enable its object to be attained. That condition would not be fulfilled if a decision could not be given until a period of three weeks had elapsed. On the other hand, it would readily be admitted that, if the President were given powers to indicate interim measures of protection, he must convene the Court immediately, and that, so soon as the Court had met, its decision would supersede the action taken by the President.

For these reasons, the President considered that the text proposed by the Co-ordination Commission for Article 57 was better than that adopted in 1931.

M. FROMAGEOT said that, like M. Schücking, he was in favour of the Co-ordination Commission's proposal, but would like to suggest a slight variation of it. Granted that, in certain cases of exceptional urgency, it might be necessary for the President to take action himself, would it not be possible to lay down that, in such a case, his decision would be of an entirely provisional character and would not become definitively valid until it had been confirmed by the Court ? It would thus, in fact, be the Court that would decide, and that would be in accordance with the Statute; and the delicate situation which might arise for the President's

authority owing to the possibility of the Court's revoking his decision, as was contemplated by the Co-ordination Commission's text, would in that way be avoided. Or, if the Court did not wish to go so far, might not the President be empowered merely to take the necessary steps to enable the Court to adjudicate usefully, in accordance with the precedent created by M. Adatci in the Pless case ?

M. ANZILOTTI thought that the Third Committee's proposal was substantially the same as M. Fromageot's suggestion. It was, however, essentially different from that of the Co-ordination Commission, which laid down that it was the President who decided in the Court's stead; whereas, according to the Third Committee's proposal, the President only decided pending the decision of the Court, which might confirm, modify or revoke the measures provisionally indicated by the President. Personally, he preferred this method, which was, in his opinion, entirely in harmony with the existing Statute. Nevertheless, he could perhaps accept the Co-ordination Commission's proposal were it not that Article 27 of the Rules, which went further than the Statute at present in force, obliged the President to convene the Court in cases less grave than that of the indication of interim measures. Moreover, having regard to paragraph 5 of that article, M. Anzilotti did not agree with the President that overseas judges, not resident in Europe, were always entitled to receive a summons; hence, the time necessary for the Court to assemble would be much less than three weeks. To sum up, so long as Article 27 was maintained, M. Anzilotti did not feel it possible to go further than the proposal of the Third Committee.

The PRESIDENT pointed out that Article 27 of the Rules had been amended in 1931 to comply with the Assembly's resolution asking the Court to examine the possibility of attaining, to a considerable extent, the object aimed at by Article 23 of the revised Statute, which laid down that the Court should remain permanently in session except during the judicial vacations. Moreover, the Court had inserted the following observation in the commentary which prefaced the printed volume of the minutes of the discussions on the revision of the Rules in 1931:

> " The Court's examination of the points above mentioned has resulted, *inter alia*, in the drafting of a new text of Articles 27, 28 and 57 of the Rules of Court, which is based on the idea that judges are in principle always at the Court's disposal, the Court itself being always at the disposal of the parties.[1] "

M. URRUTIA thought that the Third Committee might be prepared to amend its proposal, and adopt the following text: " any measures which he considers necessary in order to enable the Court to adjudicate usefully ". That text would, moreover, be in harmony with the analysis which the Co-ordination Commission had made of the Third Committee's suggestion.[2]

M. Urrutia could not, however, vote for a text which laid down that, if the Court was not sitting when the application for interim measures was received, and if the President, having regard to the particular circumstances, considered that it was impossible for him to convene the Court in sufficient time for it to adjudicate usefully, he should make the decision in the Court's stead. That would be going beyond Article 41 of the Statute.

M. GUERRERO, Vice-President, referring to the discussions in 1931 when the present Article 57 of the Rules was adopted, considered that the same points which had been raised then arose again on this occasion, because the Court was in the same situation. He saw no legal reason for altering what had then been decided, or for discarding the text of Article 57 as adopted in 1931 and reinstating the system prescribed in 1922.

M. FROMAGEOT did not think the Court would be discarding the text adopted in 1931 if it merely added the words: " Pending the meeting of the Court, the President shall take the necessary steps to enable it to meet and adjudicate usefully ". The reason for adding those words was to prevent the Court from finding itself confronted with some event which would make its meeting entirely purposeless and its decision ineffective. That was the practice inaugurated by M. Adatci, whose action was in no sense an indication of interim measures of protection.

The PRESIDENT pointed out that the Court had two proposals before it: that of the Third Committee and that of the Co-ordination Commission. Another possible course would be to maintain Article 57 in its existing form, bearing in mind the fact that M. Adatci had found it possible under that text to take the action that had been referred to.

M. FROMAGEOT suggested a slight alteration in the second paragraph of the Third Committee's proposal, which at present read:

> " Pending the meeting of the Court and its final decision upon the application, the President shall have power to indicate any temporary measures which may appear to him expedient."

He would merely propose to add the words:

> " . . . to enable the Court to adjudicate usefully."

That would show what kind of measures would appear expedient, and would make it clear that the measures in question were not interim measures of protection.

M. ANZILOTTI pointed out that taking measures to enable the Court to sit and adjudicate usefully would mean convening the Court and the agents, fixing dates for the hearings, etc.

Jonkheer VAN EYSINGA recalled that the Co-ordination Commission, when drawing up its report, had considered that, among the measures which the President might take, was—a most essential step—to get into touch with the parties. That was the sense in which the words " take such measures as he considers necessary to enable the Court to sit and adjudicate usefully " were to be understood. The word " usefully " meant that the President must act in such a way that, when the Court met at The Hague, it should not be confronted with an act already accomplished by one of the parties.

The PRESIDENT pointed out that the question of getting into touch with the parties was dealt with in paragraph 7 of the Co-ordination Commission's proposal, and not in paragraph 3.

M. ANZILOTTI observed that, in the Prince von Pless case, the President had, in short, asked the Polish Government to await the meeting of the Court before applying certain measures of constraint to the Prince von Pless. Did that not constitute, in fact, a provisional indication of measures of protection ?

Baron ROLIN-JAEQUEMYNS considered that action of that kind was precisely " taking the necessary steps to enable the Court to meet and adjudicate usefully ". The indication of an interim measure of protection, on the other hand, meant

[1] D 2, A. 2, p. 4.
[2] D 2, A. 3, p. 875.

laying down, almost theoretically, what a party was expected to do in order to fulfil its duty as a party in a suit before the Court.

M. SCHÜCKING pointed out that M. Adatci had not employed the ritual expression: " I indicate ", nor had he made reference to any article of the Statute or of the Rules. Therefore, in his view, it was evident that M. Adatci had not wished actually to indicate measures of protection.

That was *one* possible method. Another method would be to lay down that any indication of measures made by the President alone would need to be confirmed by the Court. Perhaps, in this matter, it was not expedient to require the President to perform functions which were not manifestly judicial, or to take steps which did not amount to an indication of measures. The term " indication " by itself did not convey the idea of an order; but to attenuate that idea still further might perhaps be an excessive diminution of the President's powers.

Jonkheer VAN EYSINGA, after reviewing once more the different courses that were possible, observed that the main point to be settled was whether or not the Court desired that the President should address himself to the parties—no matter how his action was described—to inform them that the Court had been urgently summoned, and to suggest that, in the interval, they should take certain steps which appeared to him expedient.

Count ROSTWOROWSKI said that the present discussion had confirmed him in his opinion that it was not desirable, in this matter, to give powers either to the President or to the Court to engage in diplomatic conversations. The Court was a judicial organisation; furthermore, proceedings for the indication of interim measures were contentious proceedings. It was proper that the arguments of both parties should first be heard before any interim measures were indicated; but they could not be so heard by the President, if he were going to take action.

The PRESIDENT asked the Court to vote on the following question:

> " Does the Court desire that the Rules shall empower the President, pending the meeting of the Court, to indicate interim measures of protection in conformity with Article 41 of the Statute ? "

The voting resulting in a tie, the PRESIDENT observed that his rule was not to use his casting vote in favour of a change in the *status quo* when the voting had not produced a majority. In the present case, he would therefore give his casting vote in the negative. Consequently, the President would not be empowered to indicate interim measures of protection under Article 41 of the Statute.

Jonkheer VAN EYSINGA thought that, in those circumstances, the Court might usefully vote on the question raised in paragraph 2 of the Third Committee's proposal. That paragraph made no mention of interim measures of protection; it stated that:

> " If the Court is not sitting, it shall be convened without delay by the President. Pending the meeting of the Court and its final decision upon the application, the President shall have power. . . ."

In order to satisfy the scruples of some members of the Court, Jonkheer van Eysinga would be prepared to word the last part of the clause as follows:

> " . . . to take such measures as may appear necessary to him to enable the Court to adjudicate usefully."

Jonkheer van Eysinga believed that the idea expressed in those words had the support of several members of the Court. He proposed that it should be voted upon.

The PRESIDENT asked if the measures contemplated by this text were to be communicated to the Council.

Jonkheer VAN EYSINGA thought that this should be done, but added that it would be for the President to consider what steps were necessary, according to the circumstances of the case; his hands must not be tied in advance.

M. NEGULESCO said that it was, no doubt, part of the President's duties to take the necessary steps to ensure that a case which was to come before the Court could be adjudicated upon. If this text had those duties in view, it was superfluous. If, on the other hand, it envisaged something else in addition, this should be more precisely stated.

M. Negulesco emphasised that the Statute required the Court to proceed with the greatest caution. Was it really possible to give the President the right, first to send telegrams to the parties, then to convene the Court, and perhaps to confront the latter with accomplished facts ? In any case, the text proposed to entrust the President with powers the extent of which was not precisely explained.

Jonkheer VAN EYSINGA said that it was impossible to be more precise in regard to measures which were nevertheless indispensable in certain contingencies for the good administration of justice. In this question, the Court was bound to show confidence in its Presidents.

The PRESIDENT would also prefer more precision in the proposed formula. It had been suggested that a text should be adopted and subjoined to an article in the Rules, entitled: " Interim measures of protection ". Would not a party which studied this text be therefore led to believe that it gave the President power provisionally to indicate an interim measure ?

It seemed to him that what Jonkheer van Eysinga really desired was to recognise the precedent created by M. Adatci as a method by which the same object might be attained as by the indication of interim measures. If that was not the aim of the proposed text, he questioned whether it would be in its right place in Article 57.

The REGISTRAR explained the reasons which had led President Adatci to act as he had done in the Prince von Pless case. His starting-point had been the obligation imposed on the President by Article 57 of the Rules, in the form given to it in 1931, to convene the Court urgently in any case. M. Adatci had considered that the clause creating this obligation must be interpreted reasonably, and that it could not mean that the Court was to be convened with the certainty of having nothing to do after it had met. Founding himself on that interpretation, M. Adatci had concluded that Article 57 contained an implied obligation for the President to take any action indispensable to ensure that, when the Court had met, it would at any rate have the possibility of adjudicating to some useful purpose.

M. GUERRERO, Vice-President, would prefer to leave the text of the article as it stood. The President would then be able, in face of a difficult situation, to act on the same lines as M. Adatci, but he would do so on his own responsibility. If the Court explicitly gave these powers to the President in its Rules, but did so in an indefinite manner, it might expose itself to difficulties and might open the door to forms of action that would be dangerous, especially in a dispute having a grave political aspect. It would be difficult to draw up a rule that would meet every

contingency. But future Presidents might, without disadvantage, take the precedent that had been established as a guide.

The PRESIDENT asked the Court to vote on the text which Jonkheer van Eysinga proposed to insert in Article 57, in place of paragraph 3 of the Co-ordination Commission's proposal; this text was worded as follows:

> " If the Court is not sitting, it shall be convened without delay by the President. Pending the meeting of the Court and its final decision upon the application, the President shall have power to take the steps which appear to him necessary in order to enable the Court to adjudicate usefully."

The Court adopted this text by seven votes against four.

The PRESIDENT observed that, in order to harmonise this text with that of Article 57 as proposed by the Co-ordination Commission, it would be necessary, in paragraph 4, to say " in all cases " instead of " in all other cases ". The Drafting Committee would examine this text to see what other adjustments might be required.

20.II.35.*

Discussed as Article 57.

Paragraph 4.

The PRESIDENT invited the Court to continue its examination of paragraph 4 of Article 57 of the Rules.

M. FROMAGEOT gathered that the point under discussion was whether, in principle, judges *ad hoc* should be summoned, unless it was actually impossible for them to reach The Hague in sufficient time.

Count ROSTWOROWSKI observed that the text submitted by the Co-ordination Commission did not state definitely that the same judges were meant as those appointed for the principal suit, but he gathered that that was the meaning.

He had proposed another wording: [1]

> " (5) Interested parties shall enjoy the benefits of Article 31 of the Statute and of the rules regarding the participation for the purposes of a case of national judges appointed *ad hoc*, in so far as is consistent with the degree of urgency of the interim measures of protection asked for."

This draft was designed to avoid prejudging the question he had mentioned. For the purposes of the principal suit, the appointment of judges *ad hoc* might not be necessary for another two or three months, but, if interim measures of protection were asked for, the Court would have to meet at once, and the presence of judges *ad hoc* might be required. In that case, the interested parties might offer to appoint other persons as judges *ad hoc* for the purpose of the decision concerning interim measures, and it seemed that the Court should not refuse to allow this.

The PRESIDENT observed that the solution suggested by Count Rostworowski involved the danger that there might be two national judges at the same time in the same case, one for the question of interim measures and the other for the principal suit. He was doubtful if that was consistent with the nature of proceedings in regard to interim measures, which were merely incidental to the main action and did not constitute an independent action.

Count ROSTWOROWSKI said that, in one case, an ordinary judge who was unable to sit in the principal action had asked if he could take part in proceedings concerning interim measures in the same case; the Court had allowed him to do so, holding that the proceedings were separate.[1]

M. GUERRERO, Vice-President, did not think that a hard-and-fast rule should be made. Regard must be had to the position of a distant country which might have appointed a judge *ad hoc* for the principal action, but which, if a question of interim measures of protection arose, might be obliged to appoint in his stead some other person nearer to the seat of the Court.

Baron ROLIN-JAEQUEMYNS attached special importance to a case where one of the parties already had a judge of its nationality on the Bench. In such a case, the other party should have every facility to appoint a judge *ad hoc* for the proceedings in regard to the request for interim measures of protection.

The PRESIDENT still saw a difficulty arising out of the fact that there might be two national judges appointed for the same case at the same time.

Baron ROLIN-JAEQUEMYNS thought the solution would be for the judge first appointed to resign and be replaced by the other.

Count ROSTWOROWSKI observed that one of the judges would be appointed for a certain time and to perform a certain duty, while the other judge would be appointed for another duty which would not materialise at the same time.

M. ALTAMIRA was not sure that the Drafting Committee's draft for paragraph 4 would not cover all contingencies. Personally, he thought that the wording proposed was very wide, and he thought it better to leave it as it was, simply altering the tense of the verb so as to ensure flexibility in its application.

M. URRUTIA asked whether the appointment of a judge *ad hoc* necessarily coincided with the filing of a request for the indication of interim measures of protection.

The REGISTRAR explained that judges *ad hoc* for the principal action might not be appointed until just before the opening of the oral proceedings. Nevertheless, when Governments had manifested an intention to appoint a judge *ad hoc*, they were invited to do so as soon as possible, precisely in view of the possibility of incidental proceedings. The Registrar added that, when the Co-ordination Commission had drafted its text, its main preoccupation had been the urgency of proceedings in regard to the indication of interim measures, and it had followed the guidance afforded by the Court's decision in the South-Eastern Greenland case, in which the Court had said in effect that judges *ad hoc* might sit if appointed and available.[2]

Baron ROLIN-JAEQUEMYNS thought that the object aimed at would be attained simply by deleting the words: " to sit in the case specified in the request ".

Jonkheer VAN EYSINGA agreed with this suggestion, which would impart greater flexibility to the provision. It was true, as the President had said, that a party could not have two judges *ad hoc* at the same time; but, if necessary, the difficulty could be overcome by arranging for one to succeed the other, as Baron Rolin-Jaequemyns had suggested.

The PRESIDENT thought that the arguments used in

* D 2, A. 3, pp. 291-302.

[1] *Ibid.*, p. 911.

[1] South-Eastern Greenland case.

[2] A/B 48, p. 280.

favour of the appointment of special judges *ad hoc* for proceedings in regard to interim measures would be more applicable in the case of a political body than of a Court of Justice whose title contained the word " permanent ". The object of Article 31 of the Statute was to place States which had no judge of their nationality on the Bench on an equal footing with those which had. But once a judge was chosen, he became a component part of the Court and could not be changed. This followed, *inter alia*, from the fact that, if a State had a deputy-judge of its nationality, that judge and no other must be appointed as judge *ad hoc*.

Count ROSTWOROWSKI thought that the text proposed by him, which was not so precise as that of the fourth paragraph of the Co-ordination Commission's text, might meet the case.

M. SCHÜCKING agreed. Unlike Count Rostworowski's draft, that of the Co-ordination Commission definitely laid down that the judge appointed for the principal action must also be convened for proceedings in regard to interim measures.

Jonkheer VAN EYSINGA was not sure that the wording proposed by Count Rostworowski might not be construed as meaning that if, in a case where interim measures of protection were applied for, the judges *ad hoc* for the principal action had not been appointed, the Court, before giving its decision, must await the appointment of these judges or of special judges *ad hoc*. That would lead to inadmissible delay.

Baron ROLIN-JAEQUEMYNS, in reply, observed that Count Rostworowski's text contained the following important reservation: " . . . in so far as is consistent with the degree of urgency of the interim measures of protection asked for ". In a case where interim measures were urgent, Article 31 of the Statute would not be applied.

The PRESIDENT took the opinion of the Court on the following question:

> " Does the Court prefer the wording of the fifth paragraph of Count Rostworowski's proposal to that of the fourth paragraph of the Co-ordination Commission's text ? "

By six votes to five, the Court decided in favour of the Co-ordination Commission's text.

Baron ROLIN-JAEQUEMYNS proposed that that text should be amended as follows: first, that the words " judges if any who have been appointed " should be replaced by " judges appointed under Article 31 of the Statute "; secondly, that the words " . . . to sit in the case to which the request relates " should be deleted.

M. ANZILOTTI asked whether it was understood that the text thus amended referred to judges already appointed.

Baron ROLIN-JAEQUEMYNS replied in the affirmative, but added that a judge *ad hoc* might resign and the party concerned might at once appoint another.

The PRESIDENT took a vote on the amendments proposed by Baron Rolin-Jaequemyns to the text of the Co-ordination Commission.

By ten votes to one, these amendments to paragraph 4 of that text were adopted.

The REGISTRAR observed that the Court, when it undertook the second reading of Article 4 *bis* of the Rules,[1] should perhaps bear in mind this new draft, because the question whether or not parties would automatically be reminded of their right to appoint judges *ad hoc* assumed special importance in view of the adoption of this text.

The PRESIDENT made a note of this observation and took a vote upon the following text for paragraph 4 of Article 57:

> " The President shall also, in so far as he regards it as consistent with the degree of urgency of the interim measures of protection, convene judges appointed under Article 31 of the Statute."

The Court unanimously adopted this text.

Paragraph 5.

The PRESIDENT read the following text for this paragraph, as proposed by the Co-ordination Commission:

> " 5. The Court may indicate interim measures of protection other than those proposed in the request." [1]

Count ROSTWOROWSKI said that he would vote against this text, since it would enable the Court to go further than the parties asked it to do; and that, in his view, was inadmissible.

M. ANZILOTTI thought that, since it was laid down that the Court could indicate interim measures *proprio motu*, it must also be able to indicate measures other than those asked for by the parties.

M. SCHÜCKING thought that, even if it were not laid down that the Court could indicate interim measures *proprio motu*, that would not prevent it from indicating measures of protection other than those proposed in the request. When the Court had to deal with a request for interim measures of protection, it must, in the nature of things, be able to exercise a very wide discretion. Moreover, once the jurisdiction of the Court to indicate measures of protection was established, there appeared to be nothing in the Statute limiting the Court's power in that respect.

M. URRUTIA nevertheless proposed that the Court should first deal with paragraph 6, which concerned the Court's right to indicate measures of protection *proprio motu*. If the Court adopted that paragraph, there would then, in his view, be nothing to prevent the Court from indicating measures not proposed in the request.

The PRESIDENT was quite ready to take the opinion of the Court on M. Urrutia's proposal; but he thought that M. Schücking was right in saying that different considerations applied to these two paragraphs. For if the Court received a request from one party, it was possible that the other party would ask it to modify the proposals made in the first party's request, and the Court must be free to appraise the position.

M. SCHÜCKING did not oppose the immediate discussion of paragraph 6, provided it was understood that the question arising out of paragraph 5 was entirely reserved.

The PRESIDENT said that paragraph 5 would be taken after paragraph 6.

Paragraph 6.

The PRESIDENT opened the discussion on paragraph 6

[1] Pp. 9, 11.

[1] In fact, the text of the Commission contained the following words : " The Court *or the President, as the case may be, may* indicate . . .". These words were deleted on account of the decision taken as concerned paragraph 3.

of the Co-ordination Commission's text, which was as follows:

> " 6. The Court may indicate interim measures of protection *proprio motu*. If it is not sitting, the President may convoke it in order to submit to it the question whether it is expedient to exercise this right in a particular case."

M. ALTAMIRA wished to draw the Court's attention to the fact that Article 41 of the Statute seemed to empower the Court to indicate interim measures of protection *proprio motu*.

MM. SCHÜCKING and GUERRERO, Vice-President, agreed. M. Guerrero added that the existing Article 57 of the Rules was also quite clear on the point.

M. FROMAGEOT referred in this connection to some passages in the Orders made by the Court in the South-Eastern Greenland case and in the case concerning the agrarian reform in Poland.[1]

The PRESIDENT asked the Court whether they adopted paragraph 6 of the Co-ordination Commission's text.

By seven votes to three, with one abstention, the Court adopted this paragraph, subject to drafting.

M. GUERRERO, Vice-President, observed, with regard to the wording of this paragraph, that the expression " exercise this right " was not appropriate. The Court had power (" *pouvoir* ") or jurisdiction (" *compétence* "), but there was no question of a right (" *droit* "). That was why he preferred the existing text.

M. SCHÜCKING observed that the world " *requête* " (application) in the text should be replaced by " *demande* " (request).

Jonkheer VAN EYSINGA considered that the only point in regard to which there could be any hesitation was the first sentence of the Commission's text. That sentence, though strictly correct, could be deleted without affecting the substance of the text. But, in the general plan of the Co-ordination Commission's draft, it was quite appropriate. For the rest, he attached no importance to the question raised by some of his colleagues whether the word " *faculté* " (power) would be better than " *droit* " (right) in this sentence.

M. URRUTIA observed that, if it were held that the Court could indicate interim measures *proprio motu*, to do so was a duty rather than a right. They might say: " the question of the expediency of indicating interim measures of protection in a particular case "; this would avert the necessity for using either " right " or " duty ".

The PRESIDENT said that Baron Rolin-Jaequemyns had handed him a proposal that paragraph 6 of the text proposed by the Co-ordination Commission should be replaced by the following:

> " The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convoke it in order to submit to it the question whether such measures are expedient."

M. ALTAMIRA wondered whether it would not be better to say: " The President shall . . .". For, if he did not convene the Court, he might thereby prevent interim measures from being indicated.

The PRESIDENT was afraid that if the word " may " were replaced by " shall ", the President would find himself obliged always to convene the Court as soon as a case was submitted to it; that would be going further than was intended. With regard to Baron Rolin-Jaequemyns' proposal, the President thought it would be better to divide it for purposes of voting; the first vote might be upon the sentence: " The Court may indicate interim measures of protection *proprio motu*." He opened the discussion on this sentence.

M. GUERRERO, Vice-President, raised the question whether paragraph 6 of the Co-ordination Commission's text was quite in conformity with Article 41 of the Statute. The former empowered the President to judge as to the expediency of interim measures, but Article 41 empowered the Court, and not the President, to consider whether circumstances required the indication of such measures.

Baron ROLIN-JAEQUEMYNS pointed out that the case under discussion was one where no request was presented to the Court by the parties. If, in such a case, the President did not convene the Court, it could not function. Moreover, the convocation of the Court was already implicitly provided for by Article 41 of the Statute when it said: " the Court shall have power to indicate, if it considers that circumstances so require, any provisional measures . . .". Of course, if the members of the Court considered for their part that the Court should be convened, there was nothing to prevent them from informing the President.

In reply to a question put by M. Guerrero, the REGISTRAR recalled that, when the Rules had been discussed in 1931, M. Guerrero had expressed himself as follows with regard to the corresponding provision in the existing Article 57: [1]

> " M. Guerrero considered that the clause would be at variance with Article 41 of the Statute, which empowered the Court, not the President, to judge if measures of protection were called for."

With regard to this, several judges had expressed the opinion that the President's judgment of the situation was purely a preliminary one. He simply had to decide whether there was occasion for the Court itself to consider whether circumstances required the indication of measures of protection.

The PRESIDENT took a vote on the first part of Baron Rolin-Jaequemyns' proposal: " The Court may indicate interim measures of protection *proprio motu*."

By eight votes to two, with one abstention, the Court adopted this text.

The PRESIDENT took a vote on the second part of the text proposed by Baron Rolin-Jaequemyns:

> " If the Court is not sitting, the President may convene it in order to submit to it the question whether such measures are expedient."

By nine votes to two, the Court adopted this text.

The PRESIDENT declared paragraph 6 of Article 57 adopted in this form.

Paragraph 5.

The PRESIDENT opened the discussion on paragraph 5 of the text proposed by the Co-ordination Commission:

> " 5. The Court may indicate interim measures of protection other than those proposed in the request." [2]

M. ANZILOTTI said that he would vote in favour of this text because the principle of the indication of interim measures by the Court, *proprio motu*, had been adopted.

[1] A/B 48 (1932), p. 284, and A/B 56 (1933), p. 178 *in fine*.

[1] D 2, A. 2, p. 189.

[2] See note p. 239, second column.

If the Court could only indicate such measures at the request of a party, it would have to confine itself to sanctioning or rejecting a party's request. But if it could, on its own initiative, indicate certain measures, it must also be able to modify those requested by a party.

The PRESIDENT took a vote on the text which he had just read.

By ten votes to one, the Court adopted this text.

It was understood that paragraph 6 would be placed after paragraph 5 in the text of Article 57.

Paragraph 7.

The PRESIDENT said that, as a result of the deletions involved by the votes already recorded, the text of this paragraph of the Co-ordination Commission's proposal would read as follows:

> " 7. In all cases, the Court . . . shall only indicate interim measures of protection after giving the agents . . . an opportunity of presenting their observations. If no agent has been appointed, the diplomatic representative at The Hague of the State concerned shall be requested temporarily to act as agent."

M. URRUTIA felt doubtful with regard to the latter part of this text. He would understand if diplomatic agents at The Hague permanently exercised the functions of agents before the Court, but, in the absence of special instructions, diplomatic agents had no official relations with the Court.

Baron ROLIN-JAEQUEMYNS proposed that paragraph 3 of the existing Article 57 should be retained as it stood. In that paragraph the word " parties " was used, whereas the text of the Co-ordination Commission spoke of " agents ". The difficulty observed by M. Urrutia would be avoided by reverting to the existing text.

M. URRUTIA and Jonkheer VAN EYSINGA approved Baron Rolin-Jaequemyns' proposal. Apart from the considerations mentioned by the latter, Jonkheer van Eysinga observed that some countries had no diplomatic representatives at The Hague.

The PRESIDENT recalled that almost all countries had representatives accredited to the Government of H.M. the Queen of the Netherlands, even though they might be resident in another country.

The REGISTRAR, referring to what M. Urrutia had said, added that from twenty to twenty-five Governments had officially instructed their legations at The Hague to keep in contact with the Court for various purposes—*e.g.*, for all communications between the Court and those Governments.[1] Furthermore, according to practice, until an agent was appointed, the diplomatic representative of a Government concerned in a case was often requested temporarily to act as agent.[2]

The PRESIDENT observed that the urgent character of interim measures had been the dominating consideration in all the decisions so far taken by the Court. Now to revert to the text of the existing Rules would be inconsistent with this, because no action would be able to be taken until an agent had been appointed.

M. ANZILOTTI, though he shared the apprehensions of the President, thought that a remedy should rather have been sought on the lines of the solution proposed by the Third Committee for the problem with which paragraph 3 of the new Article 57 dealt—that was to say, by authorising the President *provisionally* to indicate measures of protection. The solution adopted by the Court, however, was a different one.

The PRESIDENT asked the Court whether, as proposed by Baron Rolin-Jaequemyns, it desired to retain the third paragraph of the existing Article 57 of the Rules.

By eight votes to three, the Court answered the question in the affirmative.

Paragraph 8.

The PRESIDENT, observing that this paragraph would replace paragraph 7 of the Co-ordination Commission's text, opened the discussion on paragraph 8 of that text:

> " If interim measures of protection have been indicated, any party may at any time apply for their revocation. The decision shall rest with the Court; it shall be convened for this purpose without delay. "[1]

The President added that the existing Rules said nothing as to how the Court was to revoke interim measures which had been indicated.

M. ANZILOTTI asked whether, since it had been decided that the Court could indicate interim measures of protection *proprio motu*, it did not also follow that it could *proprio motu* revoke measures which had been indicated.

Baron ROLIN-JAEQUEMYNS would prefer this paragraph to be deleted. In any case, only the original indication, and not the measures indicated, could be revoked.

Jonkheer VAN EYSINGA thought that the paragraph was useful, because circumstances might change, and naturally in that case the Court would wish to revoke its indication.

Count ROSTWOROWSKI observed that, the provision giving the President power to indicate interim measures having been deleted, paragraph 8 seemed to serve no purpose.

M. ANZILOTTI thought that, nevertheless, there was something to be said for retaining this paragraph. A measure which had been expedient at a given time might not be so two months later. Why should not a party, which had complied with the Court's indications, have the possibility of securing the modification of measures taken, or even their revocation, if there was no longer any reason for them ?

Would it not be going too far to say that, once measures had been indicated by the Court and taken by a party in accordance with the Court's indications, they could not be revoked ? It must be remembered that the proceedings in the principal action might be protracted.

M. SCHÜCKING, though he agreed with Count Rostworowski as far as concerned the origin of the clause, also agreed with the point of view expressed by M. Anzilotti. But if a provision of this kind was adopted, some clause must be inserted calculated to prevent the Court from being confronted with endless proceedings.

M. ANZILOTTI proposed the following:

> " A party which has complied with the indications of the Court may, on the basis of new facts, present at any time a request for the revocation or modification of the measures indicated."

[1] *Cf.* E 10, pp. 57-60.

[2] C 74, p. 404 (document 1) and p. 9.

[1] *Cf.* note p. 239, second column.

M. NEGULESCO agreed with M. Anzilotti and M. Schücking. Measures of protection indicated by the Court must be temporary in character. Their continuance should depend upon the continuance of the circumstances in view of which they were indicated. If new facts subsequently came to light, a party should be entitled to ask the Court to revoke a measure.

Accordingly, to the words " if interim measures of protection have been indicated ", the words " and if new facts have come to light " might be added.

The REGISTRAR recalled that, in the only case where this question had arisen in practice—the case of the Sino-Belgian Treaty of 1865—the order indicating interim measures of protection had been revoked at the request of the party which had asked for such measures to be indicated, and not at that of the party to which the indication was addressed.[1]

Furthermore, since the measures were indicated " if circumstances so require ", would not the ground for such a request be a change in the circumstances which had led to the indication of measures in the first place rather than a new fact ?

M. ANZILOTTI submitted the following new text, taking into account the remarks of the Registrar:

> " In the event of a change in the circumstances which had led to the indication of interim measures of protection, the Court may, at any time, revoke that indication."

This would empower the Court to revoke its indication at the request of either party or on its own initiative.

The PRESIDENT found even this text somewhat too narrow. For a change, not in the actual circumstances which had led to the indication of measures of protection, but in some external circumstances, might produce effects which would lead the Court to revoke the measures indicated.

The REGISTRAR observed that the order revoking the indication of measures of protection in the Sino-Belgian case had emphasised that neither the indication nor the subsequent revocation of measures of protection must lend itself to favourising the policy of either party.[2] That was why, according to this order, a change in the circumstances which had led to the indication of measures must have occurred in order to justify the revocation of the indication.

M. ANZILOTTI suggested the following wording:

> " The Court may, at any time, as a result of altered circumstances, revoke or modify measures which have been indicated."

Baron ROLIN-JAEQUEMYNS observed that the Court could not revoke measures which it had not itself taken and which it had merely indicated. It could say that a fresh indication was required, but it could not revoke the actual measure.

The REGISTRAR said that, in the order to which he had already referred, the wording adopted for the revocation of the indication previously given was as follows:

> " The President . . .
>
> " *Declares* that the order indicating measures of protection made by him on . . . shall cease to be operative."

In reply to a question asked by M. Anzilotti, the Registrar explained that hitherto the Court had always given its decisions in regard to interim measures of protection in the form of orders.

M. ANZILOTTI suggested another wording for his proposal:

> " The Court may, at any time, as a result of altered circumstances, revoke or modify a decision indicating measures of protection."

M. ANZILOTTI pointed out that the same rule could not be applied both to the party which had asked for interim measures to be indicated and to the other side. The former could always ask for the revocation of such measures, and its request should be complied with. If, however, the other party asked for the measures to be revoked, there must have been a change of circumstances, a phrase which would also cover the possibility of new facts having come to light.

For the rest, a provision of this kind would be out of place except in a system as detailed as that proposed by the Co-ordination Commission: if the Court were to decide to retain Article 57 of the Rules unaltered, the same result would be reached by way of interpretation. There would be no objection to that.

The PRESIDENT took a vote on the following text to be substituted for the paragraph 8 proposed by the Co-ordination Commission:

> " The Court may at any time, as a result of altered circumstances, revoke or modify its decision indicating interim measures of protection."

This text was unanimously adopted.

Paragraph 9.

The PRESIDENT next invited the Court to consider paragraph 9 of the Co-ordination Commission's text, which was as follows:

> " The dismissal of a request for the indication of interim measures of protection shall not prevent the Government which has made it from making a fresh request in the same case based on new facts."

M. ALTAMIRA proposed that the word " party " should be substituted for " Government ".

After a brief exchange of views, the PRESIDENT proposed that this paragraph should be worded as follows:

> " The dismissal of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request based on new facts."

M. URRUTIA was prepared to vote for this text, but he thought that what was provided therein followed as a matter of course in view of the adoption of paragraph 8. He foresaw disadvantages in going into too much detail.

The PRESIDENT thought that paragraph 9 was useful in that it constituted a warning to parties that, if a request had been refused, it must not be presented a second time on the basis of the same facts.

M. ANZILOTTI thought that paragraph 9 was quite in keeping with the general plan of the Co-ordination Commission's proposal, though the position would be entirely different if it were decided to retain the existing Article 57 substantially unchanged.

The PRESIDENT said that the paragraph probably owed its origin to the dissenting opinion attached by M. Anzilotti

[1] A 8 (1927), p. 9.
[2] *Ibid.*, p. 11.

to the Court's order upon the request for the indication of measures of protection made in the case concerning the agrarian reform in Poland.[1] In any case, he gathered that those members of the Court who were in favour of deleting this paragraph did not regard it as objectionable but simply as superfluous.

The President took a vote on paragraph 9, worded as above.

This text was adopted by six votes to four, with one abstention.

The PRESIDENT observed that the Court had now examined all paragraphs of Article 57.

Nevertheless, before voting on the article as a whole, they must revert to paragraphs 1 and 2, in regard to which the decision had been reserved.

The REGISTRAR recalled that, with regard to paragraph 1, the Court had been in agreement as regards its substance, but had to decide between the Co-ordination Commission's text, that of Count Rostworowski and the existing text of Article 57, or a combination of the three. Paragraph 2 had been adopted, but its fate must depend on the solution adopted in regard to paragraph 1.

The PRESIDENT thought that, in order to assist the Drafting Committee, the Court should decide which of the various proposals it preferred. Of course, that would not preclude the Drafting Committee from trying to combine them.

M. GUERRERO, Vice-President, would prefer the Drafting Committee to submit a text on which the Court might vote.

M. FROMAGEOT said that several times when votes had been taken he had felt obliged to vote against the proposal or to abstain from voting, although sometimes in substantial agreement, because what the Court had to do was to choose between two systems of regulation: that of the existing Article 57 with all its flexibility—substituting perhaps the word *request* for *application*—and the detailed system proposed by the Co-ordination Commission with the amendments now adopted. The first thing to do, in his opinion, before voting upon the text, was to choose between the existing Article 57 and the Co-ordination Commission's proposal.

Baron ROLIN-JAEQUEMYNS agreed. In his opinion, the existing Article 57—with one or two slight changes—was preferable to the Co-ordination Commission's text.

Jonkheer VAN EYSINGA thought that, in order to be able to make a considered choice between these two texts, a definitive draft of the Co-ordination Commission's proposal should be prepared. It would be easy to prepare a text of Article 57 on the basis of the Court's successive votes in respect of paragraph 3 onwards. That left the first two paragraphs, for which there were Count Rostworowski's text and that of the Co-ordination Commission.

The PRESIDENT thought that, in this connection, the Court should first of all choose between the first paragraph of the existing Article 57 and paragraphs 1 and 2 of the Co-ordination Commission's proposal as an introduction to paragraphs 3 to 9 of that proposal.

M. ANZILOTTI said that in that case he would vote in favour of the first two paragraphs of the Co-ordination Commission's text, because he considered that all that had been decided with regard to the remainder of the article was based on the terms of these two paragraphs. He reserved, however, his final vote on the whole article.

The PRESIDENT took the opinion of the Court on the question whether they preferred to retain the first paragraph of the existing Article 57—which would imply the rejection of paragraphs 1 and 2 of the Co-ordination Commission's proposal.

By nine votes with two abstentions, the Court decided not to retain the first paragraph of the existing Article 57.

The PRESIDENT said that it was understood that this vote had simply been taken with a view to the preparation of a complete text of Article 57 of the Rules on the basis of the various votes recorded by the Court in regard to Article 57, and that it did not prejudge the question of the final choice between the existing text and the text which had just been voted paragraph by paragraph. The latter text would be distributed as soon as possible.

21.II.35.*

Discussed as Article 57.

The PRESIDENT observed that, at the last meeting, the Court had reserved its vote on Article 57 as a whole, in order to be able to have before it a complete text of the Co-ordination Commission's proposal, as amended by the Court:

"1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures the indication of which is proposed.

"2. The proceedings set on foot by a request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

"3. If the Court is not sitting, it shall be convened without delay by the President. Pending the meeting of the Court and its final decision upon the request, the President shall have power to take any measures which may appear to him necessary in order to enable the Court to give an effective decision.

"4. The President shall also, if he considers it compatible with the urgent nature of the interim measures of protection, convene the judges appointed under Article 31 of the Statute.

"5. The Court may indicate interim measures of protection other than those proposed in the request.

"6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene it in order to submit to it the question whether it is expedient to indicate such measures.

"7. In all cases, the Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations.

"8. The Court may at any time, by reason of a change in the situation, revoke or modify its decision indicating interim measures of protection.

"9. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts."

[1] A/B 58, p. 182.

* D 2, A. 3, pp. 302-303.

On the other hand, M. Fromageot had drawn up a text which he proposed should be substituted for the above:

> " A request for the indication of interim measures of protection addressed to the Court by the parties or by one of them at the beginning or during the course of proceedings shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency. If the Court is not sitting, it shall be convened for that purpose without delay by the President. Pending the meeting of the Court and its final decision on the request, the President shall take such steps as he considers necessary to enable the Court to give judgment to some useful purpose.
>
> " In the absence of a request, if the Court is not sitting, the President may convene it to submit to it the question whether it is expedient to indicate such measures.
>
> " In all cases the Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject."

The President explained that this was, in reality, the existing text of the Rules, with a clause added to the first paragraph.

M. GUERRERO, Vice-President, considered that the Co-ordination Commission's proposal, as amended by the Court, constituted an improvement on the existing Rules, because it described more clearly the procedure to be followed before the Court. He would therefore vote for this proposal.

Baron ROLIN-JAEQUEMYNS preferred M. Fromageot's text, because it was shorter and merely made a few drafting changes in the existing Article 57. Speaking generally, he was in favour of preserving a certain continuity in the Rules.

M. NEGULESCO pointed out that the Court had taken the Co-ordination Commission's text as a basis, and had arrived by successive steps at the text which was now before it. From the point of view of the interpretation of the text in the future, it seemed to him more logical to retain this text than to discard it in favour of that of M. Fromageot.

Count ROSTWOROWSKI said he would vote for Article 57 as a whole, as adopted in detail by the Court, subject, however, to the reservation that the indication of interim measures by the Court *proprio motu* was, in his view, hardly consistent with the spirit of the Statute, which did not provide for action by the Court *proprio motu*, whether in regard to judgments or to advisory opinions.

The PRESIDENT asked the Court to vote on M. Fromageot's text, which, if adopted, would replace the text containing the paragraphs which the Court had accepted by a vote.

M. Fromageot's text was rejected by seven votes against four.

The PRESIDENT then put to the vote the text of Article 57 as given above, subject to its final review by the Drafting Committee.

This text was unanimously adopted.

First Reading.

The text provisionally adopted by the Court on 21.II.35 (see above) was amended by the Drafting Committee and considered in first reading on 8.IV.35. The article was adopted with the text submitted by the Committee and with the number 61. The text adopted was as follows:

> " 1. [Text identical with that on p. 243 (meeting of 21.II.35).]
>
> " 2. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.
>
> " 3. If the Court is not sitting, it shall be convened without delay by the President. Pending the meeting and decision of the Court, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision.
>
> " 4. [Text identical with that of paragraph 5 on p. 243.]
>
> " 5. [Text identical with that of paragraph 9 on p. 243.]
>
> " 6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene it in order to submit to it the question whether it is expedient to indicate such measures.
>
> " 7. [Text identical with that of paragraph 8 on p. 243.]
>
> " 8. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies the decision indicating such measures.
>
> " 9. When the President has occasion to convene the Court, he shall, if he considers it compatible with the urgency of the matter, convene judges who have been appointed under Article 31 of the Statute of the Court."

Note. — For references to Article 61 during the discussion on the draft Articles 26 and 27 (Article 25 of the Rules in force), see Article 25, pp. 57, 58 and 61-63 (meetings of 11.II, 12.II and 13.II.36).

25.II.36.*

Article 61. — Second Reading.

Paragraphs 1 and 2.

As no observations were submitted, the PRESIDENT declared that paragraphs 1 and 2 of Article 61 were adopted.

Paragraph 3.

The PRESIDENT read the text, as adopted in 1935.[1]

He reminded the Court that, at the beginning of the session, he had proposed the following text:

> " 3. Should the request be made during the judicial vacations, the Court shall be convened without delay by the President; as soon as the presence of nine members is assured, the President shall inform the other members that their attendance is not necessary. Pending the meeting and decision of the Court, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision." [2]

That clause had been based upon the report of the Committee of Jurists of 1929, which had held that the Court might begin to examine a case as soon as a quorum

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* D 2, A. 3, pp. 635-641.

1 See above.

2 See D 2, A. 3, p. 978.

was available, and that the President could then inform the other members that their presence was not necessary.

As that text had encountered some objections, the President thought it would be better to take the text adopted in 1935 as a basis of discussion, without regard to the two amendments to that text that had been proposed.

M. GUERRERO, Vice-President, recommended the adoption of paragraph 3 in the form given to it at the first reading, with the addition, however, of a few words to enable the Court to be convened without delay by the President, even during the judicial vacations.

M. URRUTIA was in favour of adopting the third paragraph without making any change in the text adopted in 1935.

M. GUERRERO, Vice-President, observed that there was a difference between paragraph 3 of Article 25, which gave the President the right to convene the Court, and the proposal which had just been made to insert in paragraph 3 of Article 61 the words " during the judicial vacations ". That proposal implied not a right, but an obligation.

M. NEGULESCO thought that an examination of the text of Article 61, in conjunction with that of Article 25, paragraph 3, showed that there was no need to add anything to Article 61, paragraph 3. Paragraph 2 of Article 61 laid down that a request for the indication of interim measures of protection should be treated as a matter of urgency, so that Article 25 would apply. Paragraph 3 of Article 61 added that the Court would be convened " without delay " by the President, thereby showing that the President was obliged to convene the Court without delay.

The PRESIDENT drew attention to another point which had been suggested to him by the Registrar. Could the word " *convoquer* " be retained in the text, now that the revised Statute had come into force ? In the practice of the Court, the term " *convocation* " had acquired a certain technical meaning, which was associated with the notion of extraordinary sessions.

M. ANZILOTTI confirmed what the President had said. Article 23 of the 1920 Statute read: " *Le Président convoque la Cour en session extraordinaire quand les circonstances l'exigent.*" (" The President may summon an extraordinary session of the Court whenever necessary.") The former Rules had simply reproduced this expression of the Statute.

The REGISTRAR pointed out that, up to the present, the term " *convocation* " followed by the words " *de la Cour* " had always signified the summoning of the Court for an extraordinary session. But, according to Article 23 of the revised Statute (English text), the Court was " permanently in session ". In order to avoid criticism, it would therefore be better to say: " les membres *de la Cour* sont *convoqués* " (" the members of the Court shall be convened ").

Baron ROLIN-JAEQUEMYNS also considered that there was a difference between convening the Court and convening the members of the Court. Having regard to its antecedent use, the expression " *convocation de la Cour* " might give rise to certain difficulties.

He proposed that this third paragraph of Article 61 should read: " If the Court is not sitting, its members shall be convened without delay by the President."

M. ANZILOTTI asked if the President intended to withdraw the text which he had proposed for paragraph 3 of Article 61, containing the words: " If the request is made during the judicial vacations . . ." in place of " if the Court is not sitting ". If the former of these two wordings were maintained, the word " *convocation* " would be perfectly suitable.

M. FROMAGEOT, referring to M. Negulesco's remarks on the words " without delay ", explained why, in his view, this expression was appropriate. It showed what the President's duty was, both during vacations and at other times. In the former case, the words " without delay " implied that there was urgency, and that it was necessary, on that account, to convene the Court. In the latter case, the import of the words was that, although urgency was not a necessary condition for the summoning of the Court, yet when interim measures were requested, the President was bound to convene the Court without delay.

M. ANZILOTTI said that the main point of paragraph 3 of Article 61 was that it referred to the vacations; from that point of view the wording proposed by the President offered an advantage.

Jonkheer VAN EYSINGA observed that, under the system of the 1920 Statute, the Court was not always in session; it was therefore necessary to provide means for summoning it for an extraordinary session. The term " *convocation* " was used in connection with extraordinary sessions. On the other hand, the ordinary session opened at a fixed date, and for that session no " *convocation* " was issued.

Article 23 of the revised Statute contained a somewhat similar provision. Throughout the whole year, except during the judicial vacations, the Court was customarily *en fonctions* (" shall remain permanently in session"). That did not make it impossible for judges to go home when the Court had nothing to do. But during the judicial vacations the Court was not *en fonctions*, except in cases of urgency; if the President sent for the judges they were bound to be at his disposal; accordingly, during the vacations—but only during the vacations—it was correct to speak of " *convocation* " in the technical sense which that term possessed under the system of the former Statute.

M. NAGAOKA pointed out that the first sentence of paragraph 3 of Article 61 of the Rules was not concerned with the action of the Court, but sought to prescribe the duties of the President. The words " if the Court is not sitting " had reference to a fact; if the members of the Court were not present at The Hague, the President was always obliged to convene (*convoquer*) them without delay.

He himself would prefer to maintain the text adopted at the first reading, but to word the first sentence as follows: " If the Court is not sitting, the President shall convene its members without delay." That would show that what the article sought to prescribe was the duty of the President.

M. GUERRERO, Vice-President, proposed the following wording: " If the Court is not sitting, it shall be summoned to meet (*réunie*) by the President without delay ". The words " summoned to meet " (" *réunie* ") would be perfectly in accord with the second sentence of the same paragraph, which began with the words: " Pending the meeting . . . of the Court . . ." (" *En attendant que la Cour se réunisse* ").

M. URRUTIA wished the Court to retain the text of Article 61, paragraph 3, adopted in first reading, subject, however, to the following alteration: " If the Court is not sitting, its members shall be convened (*convoqués*) without delay by the President."

Baron ROLIN-JAEQUEMYNS thought that, in this paragraph, the Court should deal only with vacations, since the other points were already covered by paragraphs 1 and 2 of Article 61. If this view were adopted, it would

avoid the difficulty of deciding whether to use the expression " convening the Court " or the expression " convening the members of the Court ".

Baron Rolin-Jaequemyns was strongly in favour of the addition previously suggested by the President: " Should the request be made during the judicial vacations, the Court shall be convened without delay."

The PRESIDENT asked the Court to vote on the following question:

> " Does the Court adopt the following words, in the opening sentence of paragraph 3: ' The members of the Court shall be convened . . .', in place of ' The Court shall be convened ' ? "

By seven votes against one, with two abstentions, the Court answered this question in the affirmative.

The PRESIDENT stated that, as a result of the above vote, the first sentence of paragraph 3 of Article 61 would be worded as follows: " If the Court is not sitting, the members of the Court shall be convened without delay by the President." M. Nagaoka had suggested inverting the order of the sentence and saying: " If the Court is not sitting, the President shall convene the members without delay." Were there any objections to that alteration ?

Jonkheer VAN EYSINGA said he would not ask for a vote on M. Nagaoka's proposal, but he must make a reservation, as there were other proposals still pending, and their fate might be affected by this wording.

The PRESIDENT declared that, subject to Jonkheer van Eysinga's reservation, the Court adopted M. Nagaoka's text.

Baron ROLIN-JAEQUEMYNS said that he had abstained when the last vote was taken because he did not feel that the Court could usefully decide as to the words " convene the Court " before it was certain whether this paragraph did or did not relate to judicial vacations. He would therefore be glad if a vote might be taken to decide whether paragraph 3 of Article 61 did or did not cover this case.

The PRESIDENT observed that Baron Rolin-Jaequemyns was proposing to replace the words " if the Court is not sitting " in paragraph 3 of Article 61 by the words " if the request is made during the judicial vacations ".

This proposal, being put to the vote, was rejected by seven votes against three.

The PRESIDENT observed that the text now adopted for paragraph 3 of Article 61 was as follows:

> " If the Court is not sitting, the members shall be convened by the President forthwith. Pending the meeting and decision of the Court, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision."

M. ANZILOTTI pointed out that the President's former proposal [1] laid down the very useful principle that, in a case of urgency, if nine members were present at The Hague, the Court was able to proceed.

M. GUERRERO, Vice-President, observed that, if a date was fixed by the President and if nine members of the Court had arrived by that date, there was nothing in the Statute which would justify the President in postponing the opening of the Court's sittings for several days, on the ground that he had not yet received the reply of any particular judge.

[1] P. 244.

M. ANZILOTTI agreed that that was so. But it was still not clear whether, in fixing the date, the President ought to take into consideration the distance which some of the judges would have to come, so as to enable them all to be present at the appointed time. It had been said that judges were free to travel to distant countries during the vacations: was the President bound to take that circumstance into account when summoning the Court ?

M. FROMAGEOT pointed out that the judges were bound to obey the President's summons; if they had good reasons for not doing so, the Court would appraise them. To lay down that the President might summon the Court and that it might meet as soon as there was a quorum might give rise to unjustified suspicions in the minds of the parties as to the composition of the Court. It would be wiser not to give any ground for such suspicions.

M. ANZILOTTI pointed out that, according to Sir Cecil Hurst's proposal, the President would be bound to summon all the members of the Court, but the Court would be able to begin to examine the case as soon as nine members were present.

M. NAGAOKA asked how the Court interpreted the words: " Pending the meeting of the Court ".

The PRESIDENT pointed out to M. Nagaoka that these words were a necessary introduction to the clause providing that " The President shall, if need be, take such measures as may appear to him necessary to enable the Court to give an effective decision."

M. NAGAOKA observed that, as soon as a quorum was present, the Court would begin upon the case; but the other judges, who would subsequently arrive, would also join in its proceedings; this paragraph did not empower the President to prevent members who desired to sit in the case from taking part in the Court's proceedings. Accordingly, the construction placed upon the expression: " Pending the meeting and decision of the Court " covered the first part of the additional phrase which had previously been proposed by the President. Even without that addition the Court would be able to function effectively.

Baron ROLIN-JAEQUEMYNS considered that the fact of the Court's being assembled would not prevent the President—so long as the Court had not yet given its decision—from taking such steps as he deemed necessary to enable the Court to give an effective decision—*i.e.*, in fact, to reserve the liberty of the Court. It was not, he observed, a question of giving the President power to act in place of the Court.[1]

Count ROSTWOROWSKI pointed out that Article 61 sought to show regard for two considerations: first, the urgency of the case and the desire to do nothing to prejudice its urgency; secondly, the position of members of the Court who were far away. The Court had held that it could give precedence to the former consideration, and could adjudicate as soon as there was a quorum. That was the view which had governed the text adopted at the first reading. It had been decided that the President ought to do all in his power to enable the Court to function, without, however, waiting until eleven members were present.

M. FROMAGEOT asked the President to take a vote on the expediency of adding to the text the words which would authorise the President to refrain from summoning other members of the Court, once a quorum was available.

[1] See, for the interpretation of the clause in question, pp. 233-238.

Personally, he would vote for the text adopted at the first reading.

The PRESIDENT asked M. Anzilotti if he did not wish to submit a text.

M. ANZILOTTI said that he would have made a proposal if the question at issue had been that of the judicial vacations, but that proposal had not been accepted; the wording now adopted was " the Court is not sitting ". In that case, as the members should always be at the Court's disposal, he did not feel able to make any suggestion.

As no amendment was proposed, the PRESIDENT declared that paragraph 3 of Article 61 was adopted in the terms that he had just read.

Personally, he was not in favour of this paragraph for the reasons that he had given at the first reading.

Paragraphs 4 and 5.

Paragraphs 4 and 5 of Article 61 were adopted without observations.

Paragraph 6.[1]

The PRESIDENT said that, in view of the previous discussions, it would be best that the Court should take as a basis for the discussion of this paragraph the text adopted at the first reading.[2]

M. URRUTIA moved to substitute the words " may convene the members of the Court " for the words " may convene it ".

Count ROSTWOROWSKI observed that the paragraph under discussion introduced a notion which was not entirely in accord with the Statute—namely, the idea of interim measures being indicated by the Court, *proprio motu*. Personally, Count Rostworowski did not think that the Court could go so far, nor did he believe that the States which had signed the Statute had accepted such a possibility. That the parties should be able to ask the Court to indicate interim measures seemed not unnatural. But to lay down that the Court might indicate them, *proprio motu*, would be to anticipate the concessions which States might be disposed to make in regard to their rights of sovereignty. There seemed to be nothing in the Statute conferring such powers on the Court.

Count Rostworowski must therefore make every reservation concerning the principle involved in paragraph 6. He would vote against the paragraph, because he did not regard it as in harmony with the spirit of the Statute.

Baron ROLIN-JAEQUEMYNS did not believe that Count Rostworowski's arguments against paragraph 6 of Article 61 found any support in the Statute. On the contrary, according to Article 41 of the Statute: " The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party." It might happen that the Court would consider it necessary for certain interim measures of protection to be taken to safeguard the delivery of its judgment and to ensure respect for justice. Moreover, there was nothing in the Statute to prevent it from acting in that way.

Jonkheer VAN EYSINGA favoured the retention of this paragraph, which had been introduced in 1931, for the reasons just mentioned by Baron Rolin-Jaequemyns. Article 41 of the Statute was couched in very general terms; it did not say that the Court might only indicate interim measures of protection if it were requested to do so by a party. It was upon the remarkably wide basis of the text of Article 41 that the Court had taken its stand in 1931, when it introduced paragraph 2 of Article 57, and subsequently when it maintained that provision (*cf.* pp. 239-240). Personally, Jonkheer van Eysinga believed that this clause was consistent with the Statute, and carried out its intentions.

The PRESIDENT also pointed out that the Court, in the order which it had made concerning the request for the indication of interim measures submitted in connection with the South-Eastern Greenland case [1], had spoken in the following terms:

> " Whereas, moreover, the Court is satisfied that it may proceed to indicate interim measures of protection both at the request of the parties (or of one of them) and *proprio motu*; but as the Norwegian request for interim measures of protection must first be examined, leaving the question whether measures should if necessary be indicated *proprio motu* to be determined subsequently. . . . "

Count ROSTWOROWSKI was still unable to alter his opinion as to the expediency of inserting this paragraph 6 in Article 61 of the Rules; if this paragraph were omitted, the question would be reserved; and it might, if required, be discussed on some future occasion.

M. NAGAOKA agreed with Count Rostworowski's view. The passage quoted by the President showed that the Court had felt able to contemplate the indication of interim measures, *proprio motu*, although there was no express provisions to that effect in its Rules; it appeared therefore that paragraph 6 of Article 61 was superfluous.

Jonkheer VAN EYSINGA made a reservation in regard to the words " if the Court is not sitting ", in place of which he would prefer to insert: " during the judicial vacations ".

The PRESIDENT put the following question to the Court:

> " Subject to what may hereafter be decided concerning the proposal to amend the phrase ' if the Court is not sitting ', does the Court adopt paragraph 6 of Article 61 in the form that was given to it at the first reading " ?

By six votes against four, the Court answered the question in the affirmative.

The PRESIDENT next put the following question to the Court:

> " Does the Court decide to substitute the words ' during the judicial vacations ' for the words ' if the Court is not sitting ', in the second line of paragraph 6 ? "

By seven votes against one, with two abstentions, the Court answered the question in the negative.

The PRESIDENT noted that the Court agreed, in pursuance of a suggestion by M. Urrutia, to bring the wording of this text into accord with the decision it had taken to use the expression " convene the members of the Court "; the

[1] Text submitted by the President " adopted in first reading with modifications ": " During the judicial vacations, the Court may indicate interim measures of protection *proprio motu*. The President may convene it, as provided in paragraph 3 above, in order to submit to it the question whether it is expedient to indicate such measures." (See D 2, A. 3, p. 978.)

[2] See p. 244.

[1] A/B 48, p. 284; see also A/B 58, p. 178.

text adopted for this paragraph would accordingly be as follows:

> " The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene the members in order to submit to the Court the question whether it is expedient to indicate such measures."

Paragraphs 7 and 8.

Paragraphs 7 and 8 of Article 61 were adopted without observations.

Paragraph 9.

The PRESIDENT proposed, in order to make the phraseology of the article more uniform, to substitute the words " convene the members of the Court " for " convene the Court ".

Paragraph 9 of Article 61 would accordingly be adopted in the following terms:

> " When the President has occasion to convene the members of the Court, he shall, if he considers it compatible with the urgency of the matter, convene judges who have been appointed under Article 31 of the Statute of the Court."

(Adopted in second reading.)

11.III.36.*

Article 61. — Final Adoption.

The PRESIDENT said that no changes were proposed in the French text of paragraphs 1 to 8. In paragraph 3, the Committee proposed to render the phrase " *en attendant que la Cour se réunisse et se prononce* " by " pending the meeting of the Court and a decision by it ".

In paragraph 9, the President said that the Drafting Committee proposed an amendment which was more than a mere verbal correction. It proposed that the paragraph should read as follows:

> " 9. When the President has occasion to convene the members of the Court, judges who have been appointed under Article 31 of the Statute of the Court shall be convened if their presence can be assured at the date fixed by the President for hearing the parties."

The reason was that the original wording might create an impression that the possibility of sitting without the judges *ad hoc* might be used to dispense with their presence. That of course was not the intention, but with the new wording, which really changed nothing, the Committee hoped that any possibility of misunderstanding in this respect would be avoided.

There being no observations, the PRESIDENT declared Article 61 finally *adopted* with the amendments indicated above.

ARTICLE 62 *(Article 38, old Rules, with New Paragraph 5).*

PRELIMINARY OBJECTIONS

24.V.34.

See under Article 32, p. 91, for discussion of question of preliminary objections in connection with Article 35 (Article 32 of Rules of 11.III.36) and the " *forum prorogatum* ".

25.V.34.*

Discussed as Article 38.

The PRESIDENT went on to Article 38, which dealt with preliminary objections, and had been worded as follows in the Co-ordination Commission's draft:

> " 1. Any preliminary objection raised by a State shall be submitted after the filing of the other party's Case and within such time as may be fixed for the filing of the Counter-Case, unless the objection is based on grounds independent of the merits of the action; in that case, the objection may be submitted without awaiting the filing of the Case.
>
> " 2. A preliminary objection shall contain a statement of facts and of law on which the plea is based, and a list of the documents in support; it shall end with a statement of the conclusions. The documents in support shall be printed as an annex to the objection.
>
> " 3. The party against whom the objection is raised may, within the time fixed by the Court, or, if the Court is not sitting, by the President, submit a written statement containing observations on the objection and a list of documents in support; this statement shall end with the conclusions. The documents in support shall be printed as an annex.
>
> " 4. Unless otherwise decided, the further proceedings shall be oral.
>
> " 5. When the parties have been heard, the Court may decide on the objection, or may join the objection to the merits, or may take such other decision in regard to it as it considers just."

M. ANZILOTTI, referring to the first paragraph, asked whether the words " when proceedings are begun by means of an application ", which were to be found in the existing Rules, were intentionally deleted, and whether it had intentionally been given a general form which made it applicable both to proceedings instituted by special agreement and by application.

In his view, the point was not unimportant. For was it possible to admit that a party which had signed a special agreement could come before the Court, after the special agreement had been filed, and contend that the Court was not competent to adjudicate ?

The PRESIDENT explained that, when the Co-ordination Commission had decided to omit the words which limited the article to cases submitted by application, it had before it certain proposals making the article applicable both to advisory and to contentious proceedings. It considered that the wording chosen would enable a State, in certain circumstances, to appear before the Court and dispute its right to adjudicate on some question submitted to it for advisory opinion. The possession of this right might be of considerable advantage.

M. SCHÜCKING acknowledged that, if a party had signed a special agreement, it could not dispute the Court's jurisdiction, if such jurisdiction had been established in the special agreement itself. But it was conceivable that one of the parties might make requests to the Court not falling within the limits of the special agreement. Then the

* D 2, A. 3, pp. 84-87.

* D 2, A. 3, pp. 732-733.

other party would be able to contend that, on those points, the Court was not competent.

M. ANZILOTTI thought that in that case it would no longer be a question of a preliminary objection in the meaning of that article.

M. GUERRERO, *Vice-President, pointed out that, if both* parties agreed to submit a dispute to the Court, including the question whether the Court had jurisdiction, and if one of the parties then raised the question of jurisdiction, that would certainly be a preliminary objection. However that might be, he considered that Article 38 was not only concerned with objections to jurisdiction, but with all preliminary objections. Accordingly, seeing that other objections, besides those to the jurisdiction, might be lodged, it appeared desirable to adopt the text as worded by the Co-ordination Commission.

M. URRUTIA thought that a case might arise, in a suit instituted by special agreement, in which one of the parties might justly contend that the Court had no jurisdiction. Why should they therefore restrict the possibility of lodging preliminary objections to cases submitted by application ?

M. ANZILOTTI observed that the term preliminary objection indicated an objection designed to stop the proceedings (*prozesshindernde Einrede*). It was possible that it might be found, as a suit proceeded, that some special point was not within the Court's jurisdiction; but in such a case the proceedings would still continue.

He had in mind preliminary objections only in the sense that he had just indicated. From that point of view, it appeared to him inconceivable that a State that had signed a special agreement could come and inform the Court that it had no jurisdiction.

M. FROMAGEOT pointed out that a special agreement conferred jurisdiction on the Court on a given question, and he could not imagine that, after signing an agreement of that kind, a party could come before the Court and argue that the latter was incompetent to deal with that question.

The President had pointed out, M. Fromageot continued, that paragraph 1 had been altered so as to enable the article to be applied to advisory procedure. But the Court would remember that it had been decided not to touch advisory procedure, so that the Co-ordination Commission's reasons for the course it had taken seemed to have lost much of their force; and if the reason for a change had disappeared, the text might be left in its original form.

The PRESIDENT contended that it was quite possible that, in the first stages of an advisory opinion, a question of a purely contentious character might arise.

M. FROMAGEOT feared that, in the absence of any definition of a " preliminary objection ", that term might lead to misunderstandings. As a fact, the word " preliminary " did not apply to the nature of the objection, but to the moment at which it was submitted. If the text were to speak of " objections to the jurisdiction " and " objections to the admissibility ", it would be clear what was meant.

Jonkheer VAN EYSINGA said that if they re-inserted the words " when proceedings are begun by means of an application ", in the text of Article 38, they would understand more clearly what had been in the mind of the Co-ordination Commission, for these words were only removed to enable the article to apply to advisory proceedings.

M. SCHÜCKING said that, if a special agreement had been concluded to safeguard the interests of certain nationals of a party, and if the same case were submitted to another international tribunal, it was conceivable that the other party might raise the question of *litispendance* as a preliminary objection, although the Court had had the case submitted to it by special agreement.

M. ANZILOTTI said he did not see how a State which had signed a special agreement for the submission of a case to the Court could bring the question referred to in the special agreement before some other tribunal.

M. NEGULESCO thought that there were very good reasons for maintaining the Co-ordination Commission's text.

In the first place, if the Court subsequently decided to apply in advisory procedure the provision with reference to preliminary objections in contentious proceedings, this text would be sufficiently elastic to allow this to be done. In the next place, the text was applicable if a preliminary objection was raised in a case brought by special agreement. That was necessary because cases of this kind could readily be imagined. M. Negulesco took as an example the case of two parties agreeing, after the signature of the special agreement, not to bring the issue before the Court till after a certain lapse of time. Should one of the parties submit it to the Court, contrary to that agreement, the other party might lodge an objection to the jurisdiction.

M. GUERRERO, Vice-President, also mentioned a very usual case in which the same thing might occur.

The PRESIDENT observed that M. Negulesco and the Vice-President had both demonstrated the possibility of a preliminary objection being raised in a case submitted by special agreement. He, for his part, wished to point out the possibility of an objection being lodged in connection with a request for an advisory opinion. In his view, such an objection would involve contentious proceedings.

M. FROMAGEOT considered that the various contingencies envisaged by the Vice-President and M. Negulesco really represented cases in which the carrying out of a special agreement had been made dependent upon the fulfilment of a condition. The non-fulfilment of this condition might then give rise, *in limine litis*, to the filing of an objection with the Court. But a clause in the Rules, which might be quite appropriate where proceedings had been instituted by means of an application, would be out of place here. When proceedings were instituted by special agreement, the documents might have to be filed simultaneously, and then the formula of Article 38 proposed by the Co-ordination Commission would cease to be appropriate. For, in such a case, the first document filed by the party lodging the objections would be a Memorial, not a Counter-Memorial.

M. ADATCI thought that the Co-ordination Commission should be asked to undertake a thorough examination of the two cases—namely, that in which proceedings were instituted by application, and that in which they were instituted by special agreement. Further, the Commission should endeavour to find a precise definition of a preliminary objection. In this connection, he proposed that Article 38 should be referred back to the Co-ordination Commission.

Jonkheer VAN EYSINGA observed that hitherto it had been the practice only to mention preliminary objections in connection with proceedings begun by application, and not in connection with cases submitted to the Court jointly by the two parties. He drew attention to the danger of,

so to speak, suggesting to parties the raising of preliminary objections in cases brought by special agreement.

The PRESIDENT thought that, if the Court decided to refer Article 38 back to the Co-ordination Commission, it would be most useful if it also gave it some guidance. It might, for instance, suggest the re-insertion at the beginning of Article 38 of the words: " when proceedings are begun by means of an application "; then the addition of a new clause covering in guarded terms the possibility of a preliminary objection in a case brought otherwise than by application, the Court being left a free hand to regulate the procedure by means of orders on the basis of the preceding provisions. As regards the possibility of a preliminary objection in connection with advisory opinions, nothing would be said here.

(The Court agreed.)

26.v.34.*

Discussed as Article 38.

The PRESIDENT observed that, at the end of the previous day's discussion, Article 38 had been referred back to the Co-ordination Commission, which was to prepare a new draft text.

The Commission had worked on the lines indicated to them, at the end of the meeting, by the Court in pursuance of a suggestion by the President. It had also had before it a text drawn up by M. Fromageot.[1]

The result of the Co-ordination Commission's labours had taken the form of the three draft articles (Articles 38, 38 *bis* and 38 *ter*) given on page 5 of Distr. 3168, in the following terms:

> " *Article 38.*—When a case is brought before the Court by application, any objection to the admissibility of the application, and any objection to the Court's jurisdiction, where the respondent demands a decision on the objection before any further proceedings on the merits, must be submitted by the respondent at latest by the expiry of the time-limit fixed for the filing of the respondent's Counter-Case; nevertheless, if the objection is based on grounds independent of the merits of the question, it may be submitted without awaiting the filing of the Case."
>
> " *Article 38* bis.—1. A preliminary objection shall contain a statement of facts and of law on which the plea is based, and a list of the documents in support; it shall end with a statement of the conclusions. The documents in support shall be printed as an annex to the objection.
>
> " 2. The party against whom the objection is taken may, within the time fixed by the Court, or, if the Court is not sitting, by the President, submit a written statement containing observations on the objection, and a list of documents in support; at the end of this statement shall be formulated the conclusions. The documents in support shall be printed as an annex to it.
>
> " 3. Unless otherwise decided, the further proceedings shall be oral.
>
> " 4. After hearing the parties, the Court may give its decision on the objection, or join the objection to the merits, or take such other decision as it thinks right."
>
> " *Article 38* ter.—If an objection is lodged in a case brought before the Court otherwise than by an application, the Court, or, if it is not sitting, the President, shall make an order for the conduct of the proceedings, having regard as far as possible to the provisions of Article 38 *bis*."

As the adjective " preliminary " had been criticised, the Commission had replaced it in Article 38 by a definition of that term, as given by the Court in Judgment No. 12: " when the respondent asks for a decision upon the objection before any subsequent proceedings on the merits . . . ". On the other hand, according to the Commission's proposal, this clause would only apply to a plea raised to the Court's jurisdiction, or to the admissibility of the action.

Finally, the last words of the draft Article 38 gave effect to a proposal that had been made by the Second Committee in its report in 1933, and adopted in the Co-ordination Commission's report of May 14th.

Article 38 *bis* was a combination of some of the paragraphs of Article 38 of the existing Rules and the amendments proposed by the Second Committee in 1933; it was in harmony with paragraphs 2 to 5 of Article 38, as proposed by the Co-ordination Commission in its report of May 14th.

Article 38 *ter* was based on the ideas which he (the President) had expressed on the previous day.

The President added that M. Fromageot had proposed that, if the right of lodging objections were to be extended to actions brought by special agreement, this extension should be limited to cases of non-observance of a condition postulated in the special agreement; but the Co-ordination Commission had not felt convinced that that was the only case that could possibly arise, and a majority of the Commission held that the clause ought to be so wide as to cover every case. Furthermore, the Commission's text had carefully avoided saying that the suits contemplated were those instituted by special agreement.

M. GUERRERO, Vice-President, asked that M. Fromageot's text, to which the President had referred, should be circulated to the Court.

His request was complied with.

The PRESIDENT read the text in question, which was as follows:

> " *Article 38.*—1. When a case is brought before the Court by application, any objection to the admissibility of the application, and any objection to the Court's jurisdiction to entertain the claim forming the subject of the said application must be filed by the party concerned at latest by the expiry of the time-limit fixed for the filing of its Counter-Case.
>
> " 2. When a case is brought before the Court by a special agreement, filed by one only of the parties, and where the execution of the said special agreement is subjected to some condition, an objection based on the alleged non-observance of that condition must be filed by the other party as soon as the latter receives notification of the filing of the special agreement, and at latest within the period granted to the said party for the filing of the first document of its written procedure."

This was followed by an Article 39, in which M. Fromageot desired to reproduce paragraphs 2 *et sqq.* of the existing Article 38, subject to the various amendments that had been proposed.

M. FROMAGEOT explained that, as the expression " preliminary objections " was obscure, he had thought it better

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* D 2, A. 3, pp. 87-97.

[1] See below.

to define the kinds of objection that must be presented *in limine litis*. Furthermore, the provision, in his text, that the objection must be filed at latest by the expiry of the time-limit fixed for the filing of the Counter-Case, showed that the party concerned was free to raise the objection immediately, if it thought fit; this made it possible to dispense with the phrase: " . . . if the objection is based on grounds independent of the merits of the case . . . Case ", which appeared obscure.

Continuing his explanations, M. Fromageot said that his second paragraph referred to cases instituted by special agreement, since it was necessary, for the sake of completeness, to consider these cases also. M. Fromageot did not share the fears that had been expressed that a clause providing for this eventuality might be regarded as an invitation to lodge objections against a special agreement. In his text he had used the words: " subjected to some condition ", which, in his view, covered every possible contingency. For the rest, in indicating the moment at which objections in such cases " must be filed ", he had used expressions designed to take account of the fact that, when a case was brought before the Court by special agreement, the documents constituting the written procedure might have to be filed simultaneously.

M. ANZILOTTI said it would be very difficult for him to agree with the Commission's proposals, and more especially with its Article 38 *ter*.

Article 38 dealt with two specific forms of objection; Article 38 *bis* no doubt also referred to the same forms of objection. On the other hand, Article 38 *ter* spoke, in quite general terms, of objections filed in cases brought before the Court otherwise than by application; but it gave no indication as to what kind of objections these might be. They could not, by definition, be objections to the admissibility of the application, or to the Court's jurisdiction. Furthermore, according to the proposed draft, it would appear that, whenever an objection was filed in proceedings instituted by special agreement, a special order would have to be made to regulate the conduct of the proceedings in regard to the objection; that would, he feared, be incomprehensible, at least to people who had not been present at the debates in the Court; the Co-ordination Commission's draft would be open to unfortunate interpretations.

In his view, the so-called objections which might be raised when the execution of a special agreement was subjected to some condition were of a totally different nature from the objections provided for in Article 38. For that reason he would find it possible to accept a text, such as M. Fromageot's, which contained separate clauses, within the same article, for each of these contingencies, thus showing that they were entirely distinct.

Coming to the last words of Article 38, as proposed by the Commission, M. Anzilotti said that, while he was in agreement on the principle, he thought it would be necessary to modify this clause from another point of view; or perhaps, even, the phrase might be omitted altogether. The difficulty in adopting it lay in the words: " on grounds independent of the merits of the question ". The distinction between the merits and form of the case was one of the most difficult problems in matters of procedure, and these words would open the door to interminable discussions.

The PRESIDENT pointed out that the first Rules of Court did not contain any provisions in regard to objections. It was in the light of the experience gained in the Mavrommatis case that the Court had introduced Article 38 of the existing Rules; that article precluded the filing of an objection before the submission of the Case. As that rule had, in its turn, led to practical difficulties in a recent suit, the Second Committee had proposed to open the door to the submission of an objection which had nothing to do with the merits of the case, even before the filing of the Case. The wording of the Co-ordination Commission's draft was the same as had been proposed by the Second Committee.

M. FROMAGEOT, referring to paragraph 4 of Article 38 *bis*, considered that the expression " take such other decision as it thinks right ", which appeared to contemplate an adjournment of the matter, was extremely vague.

The PRESIDENT explained that these words had been added to provide for situations such as might arise as a result of the reservations made by certain States when signing the Optional Clause.

M. FROMAGEOT, turning to Article 38 *ter*, said that Article 38 *bis*, to which that article referred, did not appear to give any instructions for the conduct of the proceedings, but merely stated what an objection should consist of.

M. GUERRERO, Vice-President, thought it would be dangerous to seek to classify objections in the Rules, that being a matter in which the Court was almost without experience, except in regard to objections to jurisdiction. As a fact, it was by no means certain that every objection could, necessarily and in all cases, be classified as an objection to the admissibility or an objection to the jurisdiction.

In his view, the same remark applied to paragraph 4 of the proposed Article 38 *bis*. There was no reason why the Rules should prejudge the future decision of the Court.

Speaking generally, he would prefer that the rules in regard to objections should be couched in rather general terms. For instance, an article on the subject might be worded somewhat as follows:

> " Objections must be raised, at latest, at the time of the filing of the last document of the written proceedings."

The rule would not, thus, make a distinction according as the objection was raised in an action brought by special agreement or by application. Furthermore, the party concerned would be left free to file its objection at any time whatever, up to the filing of the last document of the written proceedings. For one must bear in mind the possibility that the party concerned might think it unnecessary, on reading the application, to raise any objection, but might be led to an opposite conclusion after studying the other party's Case.

M. SCHÜCKING said he shared the Vice-President's opinion. In this connection, he observed that the Court had declared, in one of its judgments, that it preferred to avoid classifying objections, according as they were raised against the admissibility of the suit or the jurisdiction. There were also other reasons against such a classification.

As regards the possibility of filing preliminary objections in actions brought by special agreement, he thought that M. Fromageot went too far in seeking to restrict this possibility to cases where the execution of the special agreement was " subjected to some condition ". It was impossible to foresee every contingency, and it would therefore be better, in his view, to use some very general terms, such as those suggested by the Vice-President.

Count ROSTWOROWSKI could not regard the omission

of the word " preliminary " in Article 38 as altogether innocuous. The article provided that objections might not be filed after the submission of the Counter-Case. The Court had admitted, by its jurisprudence, that questions of jurisdiction might be raised at any stage in the proceedings. As a result of the omission of the word " preliminary ", the Commission's text appeared, therefore, unduly rigorous. To avoid this difficulty, the idea might be re-introduced in the following form: " objections filed *as preliminary objections* ". As M. Fromageot's text for Article 38 explained clearly what the term " preliminary objection " meant, this wording would be neither dangerous nor vague—as in the text at present in force.

Jonkheer VAN EYSINGA wondered whether the second phrase of Article 38, as proposed by the Co-ordination Commission, could not be omitted; for it did not add much to what was already said in the first phrase, in the form now proposed for it.

As regards what Count Rostworowski had said, he did not think that the word " preliminary ", in the existing Article 38, related solely to the time at which the objection was raised; in his opinion, it had also some relation to the subject-matter of the objection. If this idea of the matter of the objection, which was undoubtedly embodied in the word " preliminary ", was defined—as in the text of M. Fromageot and of the Co-ordination Commission—there seemed no longer any reason for adding the notion " preliminary ", merely for the sake of form.

M. ADATCI pointed out that three other members of the Co-ordination Commission had agreed with M. van Eysinga that the second phrase of Article 38, as proposed by the Commission, might be omitted.

M. ANZILOTTI pointed out that, since the Co-ordination Commission's article provided expressly for cases in which the respondent " demands a decision on the objection before any further proceedings on the merits ", the preliminary character of the objection was explicitly recognised; Count Rostworowski's hesitations on this point were therefore largely satisfied.

M. Schücking had criticised the Commission's text because it was confined to two kinds of objections, whereas M. Schücking considered there might be many other kinds. That was quite true; but the only objections which had hitherto been encountered in the Court's practice had been those to the admissibility of a suit, or to the jurisdiction. In his (M. Anzilotti's) view, the Co-ordination Commission's text possessed the advantage of clarity, for everyone was more or less familar with the terms " admissibility of the application " and " jurisdiction of the Court ". Moreover, if an objection were submitted which could not be described precisely either as an objection to admissibility of the suit or to the jurisdiction, it would always be possible to apply, by analogy, the provisions laid down for those two kinds of objections.

Count ROSTWOROWSKI said that the phrase referred to by M. Anzilotti, which the Commission had us in place of " preliminary ", did not suffice to remove his scruples. It was necessary to say that the exception had been raised " as a preliminary objection ".

M. ANZILOTTI said that, if Count Rostworowski was prepared to allow the respondent State first to set up a defence on the merits and then to contest the Court's jurisdiction, he must make an express reservation. Moreover, the Court had pronounced an opposite opinion in its Judgment No. 12.

The PRESIDENT asked the Court to vote on Jonkheer van Eysinga's proposal to omit the last phrase of Article 38 of the Commission's text, namely:

> " Nevertheless, if the objection is based on grounds independent of the merits of the question, it may be submitted without awaiting the filing of the Case."

This proposal was adopted by ten votes, with two abstentions.

The PRESIDENT declared that the phrase in question was omitted.

He then put to the vote Count Rostworowski's motion to replace the words, in the Commission's text:

> " objections to the admissibility of the application, and any objection to the Court's jurisdiction, where the respondent demands a decision on the objection before any further proceedings on the merits must. . . ."

by the words:

> " objections filed, as preliminary objections, to the admissibility of the application or to the Court's jurisdiction, must. . . ."

The results of the voting showed five votes against five, with two abstentions. The President gave his casting vote in the same sense as his first vote, and the proposal was accordingly rejected.

M. GUERRERO, Vice-President, recalled that he had submitted the following text, which he asked the President to put to the vote:

> " Objections must be filed, at latest, at the time of the submission of the last document of the written proceedings."

He added that the above text was intended to replace Article 38, as proposed by the Co-ordination Commission.

M. NEGULESCO asked the Vice-President whether, in his opinion, if his proposal were accepted, the respondent would be estopped from raising an objection to the jurisdiction when he came to plead on the merits.

M. GUERRERO, Vice-President, considered it impossible that a party, having begun to plead on the merits, should raise an objection to the jurisdiction.

M. NEGULESCO thought that, in that case, there was a difference of opinion as to whether or not there was estoppel in such a case. The Court's Judgment No. 12 said (p. 22) that Article 38 of the Rules did not imply an estoppel.

M. ANZILOTTI pointed out that, according to the same judgment, if a party pleaded on the merits, it could no longer raise a plea to the jurisdiction.

The PRESIDENT asked the Court to consider M. Guerrero's text.

M. ANZILOTTI explained why it was impossible for him to accept this text, though he recognised its advantages.

M. URRUTIA pointed out that, according to M. Guerrero's text, an objection could be filed at any time up to the submission of the last document of the written procedure. But, in the case of a preliminary objection, the end of the time-limit should, it would rather appear, be the filing of the first document of the written procedure by the respondent.

M. NEGULESCO was afraid that, if it adopted the Vice-President's motion, the Court would by implication decide the question whether a respondent who did not lodge a plea to the jurisdiction before arguing the merits was liable to be precluded from lodging that plea.

He pointed out that the Court's jurisdiction could not be assimilated to that of municipal courts. The latter possessed a general jurisdiction, whereas the Court's jurisdiction resulted only from the wishes of the parties, as expressed either by a special agreement or by a treaty that had been concluded (Article 36 of the Statute). It was therefore a question of substance which could be raised during the oral proceedings. The respondent, who possessed this right, could, however, institute fresh proceedings under Article 38 before judgment was given on the merits.

The PRESIDENT thought that the Court might now vote on the Vice-President's motion.

M. SCHÜCKING proposed that the motion should run: " any *preliminary* objection . . .", etc.

M. GUERRERO, Vice-President, accepted this amendment.

M. ANZILOTTI asked M. Guerrero whether he also had in mind cases submitted by special agreement.

M. GUERRERO, *Vice-President, replied in the affirmative.*

Baron ROLIN-JAEQUEMYNS asked whether the motion meant that an objection should be raised before the presentation of the Counter-Case.

M. GUERRERO, Vice-President, thought that a party should be free to lodge an objection—this would be the latest possible moment—up to the time when that party had to reply to the other party's claim.

The PRESIDENT read the text of M. Guerrero's motion as finally drafted by the latter: To replace the clause in Article 38 of the Co-ordination Commission's draft by the following:

> " Any preliminary objection shall be submitted at latest before the expiration of the time fixed for the filing by the party raising the objection of its first document of the written proceedings."

Baron ROLIN-JAEQUEMYNS, observing that M. Guerrero's text was intended to apply both to cases submitted by special agreement and to those brought by application, asked that the opinion of the Court should be taken separately in regard to the two categories of cases.

M. GUERRERO, Vice-President, as author of the proposal, agreed to Baron Rolin-Jaequemyns' request. If *the Court's vote were affirmative in both cases*, there would be nothing to add to the text. If, on the other hand, the Court adopted the proposal only with regard to cases brought by application, the word " application " would have to be embodied in the text.

The PRESIDENT took the opinion of the Court on M. Guerrero's text, regarded as applicable to cases brought by application.

By nine votes to three, the Court adopted the text.

The PRESIDENT then asked the Court to vote on M. Guerrero's text regarded as applicable to cases submitted by special agreement.

Upon a vote being taken, six members of the Court voted for the motion and six against.

The PRESIDENT, being anxious that the Court should be in a position to pass upon the whole question of objections, including also objections in cases submitted by special agreement, gave his casting vote for the motion.

Accordingly, he announced that, provisionally, the text for Article 38 proposed by the Co-ordination Commission was replaced by that proposed by M. Guerrero, namely:

> " Any preliminary objection shall be submitted at latest before the expiration of the time-limit fixed for the filing by the party raising the objection of its first document of the written proceedings."

M. ANZILOTTI observed that, for the moment, this new Article 38 was therefore to be regarded as covering both cases brought by application and those submitted by special agreement.

The PRESIDENT turned next to Article 38 *bis*.

He asked members of the Court not to dwell too much on points of form; the texts were to be regarded as submitted subject to amendments of wording.

Baron ROLIN-JAEQUEMYNS thought that paragraph 2 of Article 38 of the existing Rules expressed the same thing in a better way.

The PRESIDENT said that the Co-ordination Commission might be instructed as far as possible to follow the wording of paragraph 2 of Article 38 of the existing Rules. But he himself was not quite happy about the last part of this paragraph: " . . . it shall mention the evidence which the party may desire to produce ". Did not the words " documents in support ", used just before, cover all written evidence ?

M. ANZILOTTI thought that there might be other evidence. As, in the case of objections, there was only one answer, the party concerned should be called upon to give particulars of its defence at the earliest possible moment. He therefore proposed that the text of the existing Rules should be retained.

The PRESIDENT accordingly took a vote on the second paragraph of Article 38 of the existing Rules.

This text was maintained by a unanimous vote.

The PRESIDENT next turned to paragraph 3 of Article 38 *bis*.

M. GUERRERO, Vice-President, with regard to this paragraph, would be inclined to adopt the text of paragraph 4 of Article 38 of the existing Rules.

The PRESIDENT drew attention to the second sentence of this paragraph:

> " The provisions of paragraphs 4 and 5 of Article 69 of the Rules shall apply."

The two paragraphs referred to related to summary procedure. The President therefore thought the sentence superfluous.

M. ANZILOTTI recalled that the sentence was designed to enable all evidence to be produced at the oral proceedings, including other than written evidence. The characteristic feature of summary procedure was that everything took place at the hearing. If a party had reserved the right to call certain witnesses, and if the Court decided to hear them, it would summon them immediately. The idea was to make the procedure as speedy as possible. The sentence in question usefully supplemented the preceding one.

The PRESIDENT asked whether the Court wished to replace paragraph 3 of the Co-ordination Commission's Article 38 *bis* by the last paragraph of Article 38 of the existing Rules.

He noted that the members of the Court were unanimously agreed on this point.

Accordingly, he stated that paragraphs 1, 2 and 3 of the Co-ordination Commission's text were replaced by the second, third and fourth paragraphs of the existing Rules.

He asked what should be done with regard to the fourth paragraph of the Co-ordination Commission's Article 38 *bis*.

M. ANZILOTTI said that he was disposed to accept this clause.

Baron ROLIN-JAEQUEMYNS asked that this clause should be divided up.

The PRESIDENT called upon the Court to express its opinion upon this clause, phrase by phrase.

> " After hearing the parties, the Court may either give its decision upon the objection. . . ."

(No objection.)

> " . . . or join the objection to the merits . . . "

(No objection.)

> " . . . or take such other decision as it thinks right."

M. SCHÜCKING considered that the only way in which the Court could deal with a preliminary objection was either by giving its decision upon it at once or by joining it to the merits.

The PRESIDENT could also conceive other possibilities, for instance, if the case was one brought under the Optional Clause and if the party against which the application was directed had only accepted the Clause with reservations. But he agreed that, if the Court thought that these other possibilities were covered by the phrase: " . . . the Court may either give its decision upon the objection . . . ", the end of the sentence was perhaps unnecessary.

M. ANZILOTTI was afraid that the concluding phrase of the sentence might be read as meaning more than was intended; it might be understood that the Court need not consider the objection.

The PRESIDENT asked whether there was a proposal to delete the words following: " or join the objection to the merits ".

He was afraid that, if nothing was said except that " the Court may either give its decision upon the objection or join the objection to the merits ", any other course would thereby be excluded.

M. ANZILOTTI thought that in point of fact the Court would always pass upon an objection. The question was simply whether it must do so at once or when it considered the merits. On the other hand, it could not act as though the objection had not been lodged. But a phrase as general as " or take such other decision as it thinks right " would cover the adoption of that course.

The PRESIDENT thought the best thing would be to delete these words.

(It was decided accordingly.)

The PRESIDENT next invited the Court to consider Article 38 *ter* (see p. 250).

The President recalled that the Court had been equally divided in regard to the question of objections raised in cases submitted by special agreement and that, in order to leave the question open, the President had given his casting vote in favour of making the new first paragraph of Article 38 also applicable to such objections. His object had been to give the Court an opportunity of coming to a definite decision in connection with Article 38 *ter* on the following question:

> " Is it the Court's wish that the question of objections in cases brought by special agreement should be dealt with in a special provision ? Or, on the contrary, does it wish there to be only a single clause implicitly covering both contingencies ? "

In this connection, the President observed that the Court had already adopted a clause which would cover both contingencies.

M. ANZILOTTI thought there was a third possibility—namely, that the Court might prefer to cover only cases brought by application without covering, either implicitly or expressly, cases brought by special agreement.

The PRESIDENT agreed. He thought that there would have to be a series of votes before the position became quite clear. In the first place, he wanted to know the answer to the following question:

> " Does the Court wish the Rules expressly to cover objections raised in cases brought by special agreement ? "

He took a vote on this question.

Baron ROLIN-JAEQUEMYNS explained his vote. His idea was that the first part of Article 38, as just adopted, applied not only to cases brought by application, but also to cases brought by special agreement.

The Court, by eight votes to four, answered the question in the negative.

The PRESIDENT said that in that case he would regard both Article 38 *ter*. proposed by the Co-ordination Commission and No. 2 of Article 38 proposed by M. Fromageot as rejected.[1]

The Court accordingly was left with the Vice-President's draft—which had already been accepted for cases brought by application—as the new first paragraph of Article 38. The question now arose whether the Court wished to add something to this text in order to limit its application to cases brought by application, or whether, on the contrary, it preferred to leave the text unchanged.

Jonkheer VAN EYSINGA would prefer it to be limited to cases brought by application.

M. GUERRERO, Vice-President, observed that the successive votes taken showed that there was a majority which wished objections to be treated in the same way, whether the case was brought by application or by special agreement.

In those circumstances, he thought that a fresh vote to determine whether anything should be added to the text adopted in order to confine its effects to actions brought by application would be quite superfluous and might place the Court in a contradictory position. If the President did not share his opinion, he would prefer that the whole question should be referred back to the Co-ordination Commission, as the Court's sole idea was to accomplish a work of real utility.

The PRESIDENT took the opinion of the Court as to whether Article 38 should be referred back to the Co-ordination Commission.

By eight votes to two, with two abstentions, the proposal was rejected.

M. GUERRERO, Vice-President, observed that the rejected motion was for the reference of the article to the Commission for reconsideration of its substance. But it would be a good thing if the Commission would examine it from the point of view of wording, as some modification in that respect might be desirable.

The PRESIDENT recalled that the Co-ordination Commission was entrusted with the revision of the wording and the harmonising of texts adopted by the Court.

[1] See p. 250.

He asked the Court to say whether it desired that some words should be added to the text adopted on the proposal of the Vice-President in order to confine its effects to cases submitted by application.

The Court expressed its opinion against such an addition.

M. FROMAGEOT drew the Court's attention to the fact that, when Article 33 [1] had been considered, its fourth paragraph had been reserved for consideration in conjunction with the question of objections.

The REGISTRAR said that paragraph 4 of Article 33 related to the orders to be made if an objection was filed. In consequence of the decision referred to by M. Fromageot, the Co-ordination Commission had considered the question, and it had found that all that was necessary had already been said in the text of Article 38 proposed by it. That was the reason why the paragraph had not been brought up again before the Court.

I.VI.34.*

Discussed as Article 38.

The PRESIDENT next turned to Article 38, which was as follows:

> " 1. Any preliminary objection shall be submitted at latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party.
>
> " 2. The document submitting the preliminary objection shall contain a statement of facts and of law on which the objection is based, the submissions and a list of the documents in support; these documents shall be attached; it shall mention evidence which the party may desire to produce.
>
> " 3. Upon receipt by the Registrar of the document submitting the objection, the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the objection is submitted may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.
>
> " 4. Unless otherwise decided by the Court, the further proceedings shall be oral. The provisions of paragraphs 4 and 5 of Article 69 of the Rules shall apply.
>
> " 5. After hearing the parties, the Court may give its decision on the objection, or join it to the merits."

The President recalled that the text of paragraph 1 was that adopted by the Court (p. 253). The Co-ordination Commission had proposed no change in this text. The same applied to paragraph 5. With regard to paragraphs 2 to 4, the Court had decided to retain the existing text of the Rules.

Jonkheer VAN EYSINGA raised the question whether it would not be well for the Court to vote definitively on the question whether the first paragraph concerned only cases brought by application or whether it also covered cases brought by special agreement.

The PRESIDENT thought that the point would be settled by adopting the paragraph as it stood, since there was nothing in it confining it to applications.

Jonkheer VAN EYSINGA observed that, in that case, the adoption of the paragraph would mean that the article covered both categories of preliminary objections; he for his part would, in those circumstances, vote against the proposed text.

M. ANZILOTTI recalled that the text had been drafted with the idea of covering both applications and special agreements.

The PRESIDENT moved the following question:

> " Does the Court adopt paragraph 1 of Article 38 in the form proposed by the Co-ordination Commission, it being understood that the wording adopted covers cases brought by special agreement ? "

M. ANZILOTTI understood that the Court was voting on the question of principle and not upon the draft. He could accept the draft, assuming that it were already decided that the paragraph should cover applications and special agreements; but he was opposed to the admission of preliminary objections in cases brought by special agreement.

The PRESIDENT gathered that the Court agreed that, if the proposed draft were not adopted, it would be necessary to insert some words to define the scope of this paragraph.

Upon a vote being taken, the President's motion was adopted by nine votes to three.

M. FROMAGEOT observed that the Court had thus adopted the fundamental principle: the new Article 38 covered both cases brought by application and those brought by special agreement; but, this principle having been established, the drafting of Article 38 seemed at fault.

The PRESIDENT recalled that the Co-ordination Commission had had before it a draft adopted by the Court, and that it had proposed no change therein.

M. ANZILOTTI, though maintaining his opinion on the question of principle, considered that the proposed draft had the advantage of being sufficiently elastic to allow the Court to have regard to the circumstances of each case.

M. URRUTIA proposed that the words " *est proposée* " (shall be submitted), in paragraph 1, should be replaced by " *doit être présentée . . .* " (any preliminary objection must be filed).

This proposal was unanimously adopted.

On the proposal of the PRESIDENT, it was decided, in paragraph 3, to replace the word " *proposée* " (submitted) by " *introduite* " (directed).

There being no observations with regard to paragraphs 3 and 4 of Article 38, the PRESIDENT turned to paragraph 5. He observed that this paragraph did not appear in the existing Rules. The proposal laid before the Court by the Co-ordination Commission had contained the words: " or take such other decision in regard to it as it may deem just ". These words had been deleted by the Court.

M. FROMAGEOT proposed that they should say: " *les parties entendues, la Cour . . .* " (after hearing the parties, the Court . . .). He also criticised the use of the expression " *peut statuer* " (may decide).

Jonkheer VAN EYSINGA pointed out that to join the objection to the merits was in fact one way of deciding on the objection.

M. ANZILOTTI thought that the import of the expression " *peut statuer sur l'exception* " (may decide on the objection) was that the Court was free to give an immediate decision on the objection or to join it to the merits.

* D 2, A. 3, pp. 148-150.

[1] Article 37 of the Rules of 11.III.36.

M. FROMAGEOT proposed: " The Court may give a separate decision."

M. ANZILOTTI and Baron ROLIN-JAEQUEMYNS supported this proposal.

After an exchange of views as to the exact meaning of the phrase: " *les parties une fois entendues* " (after hearing the parties), M. FROMAGEOT proposed the following:

> " La Cour, après avoir entendu les parties, statue sur l'exception ou la joint au fond." (" After hearing the parties, the Court shall give its decision on the objection or shall join the objection to the merits.")

The PRESIDENT was afraid that this wording would place the Court in a difficulty should its jurisdiction be suspended owing to a case having been referred to the Council, and should it for this reason be obliged to wait perhaps a year before giving its decision upon an objection. This might happen because some States, in signing the Optional Clause, had inserted a condition to the effect that, if a case were referred to the Council, the parties could only have recourse to the Court if the case remained more than a year before the Council.

M. ANZILOTTI thought that would be a question of interpreting the provision appended to the Optional Clause, and the Court would have to examine that question in every individual case.

The PRESIDENT thought it would be better to say something in paragraph 5 which would not entirely preclude the Court from suspending its decision. In his opinion, the text proposed by M. Fromageot precluded this.

M. ANZILOTTI did not think so.

The PRESIDENT took a vote on the text proposed by M. Fromageot:

> " 5. After hearing the parties, the Court shall give its decision on the objection or shall join the objection to the merits."

By eleven votes to one, the Court adopted this text.

23.II.35.*

Discussed as Article 38 and in connection with Article 66 (4) (old Rules) (suppressed).[1]

The PRESIDENT read the existing text of Article 66 (4):

> " Objections to the Court's jurisdiction to revise or to construe a judgment, or other similar preliminary objections, shall be dealt with according to the procedure laid down in Article 38 of the present Rules."

He said that the draft proposed by the Co-ordination Commission was as follows:

> " The procedure laid down in Article 38 of the Rules shall apply in the event of an objection to the Court's jurisdiction or an objection on any other ground, in connection with the revision or interpretation of a judgment."

The President said that there was no substantial difference between the two texts.

M. ANZILOTTI was afraid that the expression " or an objection on any other ground " in the new text might cover too much. The article really applied only to objections described in the existing Rules as " preliminary " —*i.e.*, " the objections referred to in Article 38 ". The Drafting Committee might find a suitable wording.

The REGISTRAR observed that the object of Article 66 (4) was to apply to proceedings in revision or interpretation " the procedure laid down in Article 38 of the Rules . . . ". But that involved certain practical difficulties, as Article 38 of the Rules was designed to apply to normal procedure.

The PRESIDENT noted that the Court adopted the draft proposed by the Co-ordination Commission for Article 66 (4), it being understood that the Drafting Committee would consider the points raised by M. Anzilotti and by the Registrar.

8.IV.35.

Article 62. — First Reading.

The article was adopted in first reading with minor alterations in the text approved on 1.VI.34 (pp. 255-256).

26.II.36*.

Article 62. — Second Reading.

Paragraph 1.

Baron ROLIN-JAEQUEMYNS observed that, generally speaking, this article reproduced the terms of Article 38 of the old Rules; but, while the latter applied only to cases brought by application, the new article covered both cases brought by application and those submitted by special agreement. Was this difference intentional?

The PRESIDENT referred to the discussion upon this article which had taken place in 1934 (pp. 248-255).

Jonkheer VAN EYSINGA attached great importance to the question brought up by Baron Rolin-Jaequemyns.

Under the Rules in force, a preliminary objection could be lodged only in a case brought by application. The Co-ordination Commission had proposed to extend the scope of this provision,[1] so as to make it applicable in advisory proceedings.

A discussion had then ensued [2] in the course of which various examples had been cited to show that, even when a case was brought before the Court by special agreement, it was desirable to allow preliminary objections to be lodged. In that connection, a very important and delicate contingency had been barely touched upon—namely, the case where two States came before the Court in virtue of a special agreement, which in itself was valid and in proper form, but one of them lodged an objection to the Court's jurisdiction, contending that the convention on the basis of which the dispute had been brought before the Court (namely, the special agreement) was vitiated, for instance, by constraint or fraud. That would raise serious questions which it would perhaps be better that the Court should not be called upon to examine. But, according to the text proposed for Article 62, many problems which have in fact embittered relations between States could be brought before the Court, and this would not tend to promote respect for agreements. It was in this connection that Jonkheer van Eysinga had said in 1934 (pp. 249-250) that the provision would constitute a sort of invitation to parties

* D 2, A. 3, p. 335.

[1] This Article 66 (4) was provisionally adopted as stated at this meeting. On 29.II.36, however, it was pointed out that it had disappeared and no trace was to be found of the reasons (see meeting of 29.II.36, p. 330). Presumably, it was considered that Article 38 (now 62) rendered this provision superfluous.

* D 2, A. 3, pp. 644-649.

[1] *Ibid.*, p. 870.

[2] Pp. 248-250.

to lodge preliminary objections when a case was brought by special agreement; for it opened up the possibility of alleging that an agreement, although concluded in due form, was nevertheless void. It was doubtful whether it would be desirable to encourage a frame of mind which was not calculated to increase respect for international agreements.

M. FROMAGEOT considered that, in so far as special agreements were concerned, Article 62 might cover the case of an objection lodged on the ground that the special agreement had been presented too late: the parties might have agreed to submit a case to the Court but subject to the condition that the special agreement should be filed before a certain date; if the special agreement were filed after that date, an objection might be lodged.

M. GUERRERO, Vice-President, remarked that in every case the parties were entitled to lodge objections: these might be of various kinds and did not relate solely to the question of jurisdiction. Paragraph 1 of Article 62 simply fixed a time-limit for the lodging of objections.

Jonkheer VAN EYSINGA again referred to the example he had given and emphasised that the proposed Article 62 introduced a new factor; Article 38 of the old Rules had covered only cases brought by application; henceforward it would be possible to lodge objections in cases where hitherto no provision had been made for them. An objection might be lodged on the ground of bad faith; or the binding force of a convention imposed by force of arms might be disputed. This constituted a danger to be feared.

The PRESIDENT observed that, even when a case was submitted by application, there was nothing to prevent the respondent from adducing in his defence the arguments mentioned by Jonkheer van Eysinga. So far as the Court was concerned, the question whether such an argument were employed to support an objection or as a part of the case for the defence was purely a matter of procedure.

M. ANZILOTTI said that personally he had always been opposed to the change extending the scope of the article under discussion to cover cases submitted by special agreement. Preliminary objections implied a claimant and a defendant—*i.e.*, a case brought by application.

With regard to the question raised by Jonkheer van Eysinga, it was open to doubt whether the Court could derive jurisdiction to deal with it from the special agreement. The jurisdiction of the Court was dependent upon the validity of the special agreement; if the actual validity of the special agreement were impugned on any ground, the Court might well feel doubtful whether it had jurisdiction to adjudicate upon this question.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to limit the application of Article 62 to cases brought by application ? "

By six votes to four, the Court answered the question in the negative.

The PRESIDENT stated that, accordingly, the text of Article 62, paragraph 1, would be maintained as it stood.

Baron ROLIN-JAEQUEMYNS considered that it would be desirable to indicate in the heading that the article concerned preliminary objections. This had been indicated in the text of the old article, and it was in paragraph 1 of the new Article 62, but not in the heading, which was simply " Objections ".

The PRESIDENT drew Baron Rolin-Jaequemyns' attention to the discussion on the question of preliminary objections which had taken place in 1934 (pp. 250-252).

Baron ROLIN-JAEQUEMYNS said that his reason for wishing to add the word " preliminary " to the heading of the section was to prevent any possible misunderstanding.

M. ANZILOTTI also thought this addition necessary. Objections might also constitute elements of the defence on the merits; but this article was concerned with objections designed to stop the proceedings.

M. GUERRERO, Vice-President, was unable to concur in Baron Rolin-Jaequemyns' suggestion; if the Rules contained a heading concerning preliminary objections, there would have to be another concerning objections of another kind.

Baron ROLIN-JAEQUEMYNS pointed out that all objections other than preliminary objections fell to be considered in conjunction with the case on the merits. If, for instance, a special agreement were filed too late, a party might lodge an objection, but that objection could not properly be described as a preliminary objection.

M. FROMAGEOT said that he would be obliged to vote against the proposed addition. Though it was true that in paragraph 1 of Article 62 these objections were called preliminary objections, it had been explained in the course of the discussions [1] that the objections constituting objections of a preliminary character were those relating to admissibility or jurisdiction. It had been added that, if an objection were lodged which could not be described as precisely relating either to the question of admissibility or to that of jurisdiction, the provisions inserted for these two categories of objections might always be applied by analogy. Accordingly, the heading " Objections ", without qualifications, clearly indicated what was meant.

M. ANZILOTTI pointed out that expressions commonly used in some legal terminologies might have no equivalent in other legal terminologies. In international proceedings, it would perhaps be difficult and dangerous to limit the objections designed to stop the proceedings to those relating to the questions of admissibility and jurisdiction which, in some systems of municipal law, had a very definite technical meaning. That was why these expressions had deliberately not been used and the article simply referred to preliminary objections. In any case, it was clear that Article 62 referred only to objections the object of which was to stop the proceedings; it could not be otherwise than useful to let this appear from the heading itself.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to add the word ' preliminary ' to the heading preceding Article 62 ? "

He said that he would himself vote against this addition, which he thought superfluous.

By seven votes to three, the Court answered the question in the affirmative.

There being no further observations in regard to paragraph 1 of Article 62, the PRESIDENT declared that paragraph adopted.

Paragraph 2.

Paragraph 2 of Article 62 was adopted without observation. With regard to the English text, the PRESIDENT suggested the addition of the word " any " in the sentence " it shall mention *any* evidence ".

This suggestion was agreed to.

[1] Pp. 251-252.

Paragraph 3.

Jonkheer VAN EYSINGA proposed to substitute the words " during the judicial vacations " for the words " if the Court is not sitting ".

The PRESIDENT took a vote on Jonkheer van Eysinga's proposal.

By eight votes to one, with one abstention, the Court rejected this proposal.

There being no further observations, the PRESIDENT declared paragraph 3 adopted.

Paragraphs 4 and 5.

M. ANZILOTTI, referring to a reservation made by him at the first reading in regard to summary procedure, [1] observed that the paragraph under discussion contained a reference to Article 72 [2] of the draft Rules which dealt with that procedure.

M. Anzilotti therefore asked permission, if necessary—depending on the decision reached by the Court in regard to Article 72—to revert to paragraph 4 of Article 62.

Baron ROLIN-JAEQUEMYNS considered that the proposed text of paragraph 4 might lead to confusion. Would it not be better to delete it and simply to say: " After hearing the parties, the Court shall give its decision on the objection or shall join the objection to the merits " ? This sentence in paragraph 5 rendered the preceding paragraph superfluous.

M. ANZILOTTI pointed out that the first three paragraphs of the article dealt with the objection, the document submitting it and the written observations presented by the other party. The purpose of paragraph 4 was to enable the parties to argue the question orally.

M. URRUTIA thought that Baron Rolin-Jaequemyns would be satisfied if paragraph 4 ran: " . . . the further proceedings *in regard to the objection* shall be oral . . . ".

Baron ROLIN-JAEQUEMYNS would not object to this solution, but in his view the whole paragraph might be deleted.

M. ANZILOTTI recalled that the words " unless otherwise decided " had been inserted in order to allow a further exchange of written statements, should complex questions be raised by the objection.

M. FROMAGEOT considered that paragraph 4 served a purpose, and he would therefore be opposed to its deletion.

The PRESIDENT wondered whether M. Anzilotti's point would not be met by simply ending the sentence at the word " oral ", and deleting the reference to paragraphs 3, 4 and 5 of Article 72.

The REGISTRAR observed that this reference, which had not existed in the text proposed by the Co-ordination Commission, had been inserted by the Court in 1934 in order to make possible the production of any evidence.[3]

M. ANZILOTTI would not be opposed to this suggestion, but nevertheless asked to be allowed, if need be, to bring the question up again after Article 72 had been discussed.

He also wanted an explanation of the meaning of the words " after hearing the parties " in paragraph 5. Were these words merely a repetition of what had been said in the preceding paragraph—namely, that there would be oral proceedings—or did they mean that the Court's decision, either to adjudicate upon the objection or to join it to the merits, must not be taken without having given the parties an opportunity to present their views on the point ? That would seem to be the intention, for otherwise the words " after hearing the parties " would have no point. Moreover, an unwillingness to decide to join the objection to the merits without having heard the parties would be entirely comprehensible. The joinder of an objection to the merits, which compelled a State to appear before the Court, in spite of the fact that it claimed not to have accepted any obligation to do so, was in international proceedings an entirely different matter from the same step in proceedings at municipal law, in which the obligation to appear before a Court was not dependent on the will of the party concerned.

The PRESIDENT pointed out that, under paragraph 3, the party against whom an objection was directed was not obliged to answer by presenting observations. If it did not, the Court must hear the parties before adjudicating upon the objection or joining it to the merits.

In any case, the Court should first come to a decision in regard to the proposal to add the words " in regard to the objection " *(sur l'exception)* [1] after the words " the further proceedings " in paragraph 4.

He took the opinion of the Court on this amendment, which was accepted unanimously.

The PRESIDENT opened the discussion on the suggestion to delete the words following the word " oral " in paragraph 4.

He took the opinion of the Court on the proposal.

There being an equal division of votes, five in favour of the proposal and five against it, the PRESIDENT stated that the words in question would remain in paragraph 4.

Count ROSTWOROWSKI understood that any decision by the Court in regard to paragraph 4 would be taken subject to what was decided in regard to Article 72.

The PRESIDENT said that that was so. With this proviso, he declared paragraph 4 adopted and invited the Court to proceed to consider paragraph 5 of Article 62.

Jonkheer VAN EYSINGA, reverting to the question raised by M. Anzilotti as to the meaning of the words " *après avoir entendu les parties* " (after hearing the parties) recalled that those words had been inserted at a later stage in the discussion. Paragraph 5 had previously read: " *Les parties une fois entendues, la Cour peut statuer* " (After hearing the parties, the Court may give its decision) (pp. 255-256).

M. FROMAGEOT saw hardly any difference between the expressions " *Les parties une fois entendues* " and " *après avoir entendu les parties* ". It had also been observed that this addition had been made to indicate that the Court would consult the parties before deciding how it would deal with the objection. This interpretation of the phrase did not clearly emerge from the previous discussions.

M. GUERRERO, Vice-President, did not think it necessary to retain the words " after hearing the parties ". They might say: " The Court shall give its decision upon the objection or shall join it to the merits." It was for the Court to decide whether it would adjudicate upon the objection before taking the case on the merits.

The PRESIDENT did not feel able to concur in this sugges-

[1] P. 302.
[2] See p. 305 for text of Article 72 adopted in first reading.
[3] P. 253.

[1] This amendment, presumably by oversight, was not made in the English text.

tion ; for if the party against which the objection was directed did not reply by means of written observations, the only oral proceedings might be those referred to in paragraph 5. The Court could not adjudicate upon the objection without hearing both parties.

M. URRUTIA remarked that the parties would know from the Rules that the Court could either adjudicate on the objection or join it to the merits; there was therefore nothing to prevent them from indicating their views on the subject in their oral argument.

M. GUERRERO, Vice-President, supposed that the question of the joinder of the objection to the merits was not mentioned by the parties in the oral proceedings. In that case, if the Court decided to adopt this course, should it first hear the parties ?

M. URRUTIA did not think that any precise limits should be placed upon the scope of the oral proceedings; in his view they should cover both actual argument upon the objection and the views of the parties with regard to the way in which the objection should be dealt with by the Court.

The PRESIDENT proposed a return to the earlier draft:

> " *Les parties une fois entendues, la Cour peut statuer sur l'exception ou la joindre au fond.*"
>
> (" After hearing the parties, the Court may give its decision upon the objection or join the objection to the merits.")

Baron ROLIN-JAEQUEMYNS would be afraid that this text might be construed as meaning that, if the parties took no steps to be heard, the Court would be unable to give a decision.

M. FROMAGEOT thought that the Court could not be under an obligation to hear the views of the parties on the question whether it should give an immediate decision or join its decision on the objection to its decision on the merits.

The PRESIDENT drew the Court's attention to the draft prepared in 1933 by the Second Committee.[1] This showed that the distinction between the oral proceedings provided for by paragraph 4 and those contemplated in paragraph 5 had not existed when that draft had been made.

M. ANZILOTTI would, for his part, be inclined to accept the provision as it stood.

M. FROMAGEOT asked the President, with a view to clarifying the discussion, to put to the Court the question whether it held that it should always consult the parties as to when it should adjudicate upon an objection.

The PRESIDENT took a vote on this question, which the Court answered in the negative by seven votes to one, with two abstentions.

There being no objections, the PRESIDENT declared paragraph 5 adopted and, subject to M. Anzilotti's reservation in regard to paragraph 4, the whole of Article 62 (adopted in second reading).

29.II.36.*

Article 62. — Deletion of the Last Two Lines of Paragraph 4 (formerly Paragraph 4 of Article 38).

M. ANZILOTTI recalled that a question in connection with paragraph 4 of Article 62 had been reserved pending the adoption of Article 72. Article 62 dealt with preliminary objections; paragraph 4 of that article contained a reference to certain paragraphs of Article 72; but there was no longer any reason for this reference, as the procedure now laid down in Article 72 was the normal procedure. M. Anzilotti suggested that the proposal made during the discussion of Article 62 for the deletion of the last two lines of its fourth paragraph, which would then end with the word " oral ", should be adopted.

There being no objections, the PRESIDENT declared this proposal in regard to paragraph 4 of Article 62 adopted.[1]

5.III.36.*

Article 62, Paragraphs 3 and 5.

M. URRUTIA wished to make a further observation concerning Article 62, which had already been adopted. Paragraph 5 of that article was worded as follows:

> " After hearing the parties, the Court shall give its decision on the objection, or shall join the objection to the merits."

Three possible cases might occur.

Either the Court would allow the objection: objection to the jurisdiction, or objection to its taking cognisance of the suit; in that case, the proceedings would come to an end. Or the Court might overrule the objection. Or, again, the Court might decide, without giving its opinion on the objection, to join it to the merits.

In the second and in the last case, a question would arise in regard to the time-limits already fixed for the main proceedings; for, once the special proceedings in regard to the objection had begun, the time-limits previously fixed by the Court were suspended. Would it not be well to lay down, by a clause in the Rules, that, if the Court overruled the objection, or joined it to the merits, it would fix new time-limits for the proceedings relating to the merits ?

On the other hand, it was possible that, when the Court gave its decision on the objection, some of the time-limits might not yet have expired. In that case, if the objection were overruled or joined to the merits, the Court would have to say how these time-limits were to continue to run.

M. GUERRERO, Vice-President, supported M. Urrutia's suggestion. There was, indeed, a gap in Article 62 of the Rules which ought to be filled.

M. ANZILOTTI reminded the Court that the question of the suspension of the time-limits in the main proceedings and of the fixing of new time-limits where the objection was joined to the merits was one that had already arisen. Had it, he asked, been the practice to prescribe new time-limits in an order joining the exception to the merits ?

The REGISTRAR said that, in practice, the suspension of the time-limits for the main proceedings, as a consequence of the introduction of the objection, had been tacitly admitted. As long ago as 1933, the Registrar had pointed out that, in this respect, there was a gap in the Rules; but the Court had preferred not to alter its practice.[2] For instance, in one or two cases, it had rejected proposals for the insertion, in an order fixing time-limits for a preliminary objection, of a clause announcing the suspension of the time-limits fixed for the proceedings on the merits. It appeared, however, desirable

* D 2, A. 3, p. 676.
[1] *Ibid.*, p. 767 (*i.e.*, Article 38 of the old Rules).

* D 2, A. 3, pp. 705-708.
[1] See p. 258.
[2] *Cf.* " Report by the Registrar ", June 1933, under Article 39 (D 2, A. 3, p. 820). See also C 68, pp. 290-291.

that express provision should be made for suspensions of this kind.

Baron ROLIN-JAEQUEMYNS considered that, when the Court had expressed its opinion on the objection, it would have to re-examine the question of the time-limits.

Perhaps it would be necessary to insert some words in paragraph 3 of Article 62, in regard to this point, to the effect that the time-limits in the proceedings on the merits would be suspended.

In any case, it would be necessary to add something to paragraph 5. It must be said that the Court, after hearing the parties, would decide upon the objection, and would fix new time-limits, if need be, for the remainder of the written and oral proceedings; for the oral proceedings referred to in paragraph 4 of the same article were proceedings specially devoted to the objection.[1]

M. FROMAGEOT suggested adding the following words to paragraph 3: " During this time-limit [*i.e.* the time-limit fixed by the Court, or by the President if the Court is not sitting], the time-limits originally fixed for the proceedings on the merits shall be suspended."

M. ANZILOTTI pointed out that this formula would not suffice, because the time-limits relating to the merits would be suspended until the Court had decided upon the objection.

Baron ROLIN-JAEQUEMYNS observed that the proceedings on the merits were suspended as from the submission of the objection.

M. FROMAGEOT agreed that that was so.

In these circumstances, it would be necessary to supplement paragraph 3 by the words: " From that moment, the time-limits originally fixed for the proceedings on the merits shall be suspended."

As regards paragraph 5 of Article 62, it might be worded as follows:

> " After hearing the parties, the Court shall give its decision on the objection, or shall join the objection to the merits and shall, if necessary, once more fix time-limits for the proceedings on the merits."

M. NEGULESCO said he shared M. Urrutia's feelings on this point. It seemed, indeed, that Article 62 would have to be supplemented, and that the Court could not be content, in the case pointed out by M. Urrutia, with the first part of paragraph 4 of Article 38, in virtue of which the Court might extend time-limits which it had fixed.

The PRESIDENT wondered whether it was necessary to insert anything in Article 62. The Court could always settle the whole question on the basis of Article 38.

M. URRUTIA pointed out that it might happen that, when the Court gave its decision on the objection, some of the time-limits originally fixed for the proceedings on the merits had already expired. If so, it would no longer be merely a question of extending the time-limits, but of fixing new ones.

M. GUERRERO, Vice-President, agreed with M. Urrutia, and considered that a special provision in the Rules would be required.

It would suffice to add, in paragraph 5: " After hearing the parties, the Court shall give its decision on the objection, or shall join the objection to the merits. If the Court overrules the objection, or joins it to the merits, the Court, or the President if the Court is not sitting, shall once more fix time-limits for the further proceedings."

Indeed, if the Court allowed the objection, the proceedings would come to an end. It was only if the Court overruled the objection, or joined it to the merits, that the need would arise of fixing new time-limits for the further proceedings.

Moreover, the suspension of the time-limits would be provided for in paragraph 3.

The REGISTRAR pointed out that there was not, strictly speaking, a suspension of the time-limits. What was suspended was the obligation of the parties to file a particular written Memorial by a given date.

M. FROMAGEOT proposed that the text should simply read: " The proceedings on the merits shall be suspended."

The PRESIDENT said that, in that case, paragraph 3 of Article 62 might be worded as follows:

> " Upon receipt by the Registrar of the objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the objection is directed may present a written statement of its observations and submissions; documents in support shall be attached, and evidence which it is proposed to produce shall be mentioned."

As regards the fifth paragraph, it might be worded as follows:

> " After hearing the parties, the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings."

It did not seem necessary in this case to say: " The Court, or the President if the Court is not sitting."

M. FROMAGEOT thought it would be better that the (French) text should read: " *fixe de nouveau les délais pour la suite de l'instance* ".

The PRESIDENT noted that paragraphs 3 and 5 of Article 62, in their new form, were adopted by the Court.

11.III.36.*

Article 62. — Final Adoption.

The Drafting Committee proposed a slight improvement in the wording of paragraph 1 of the French text: " . . . *au plus tard avant l'expiration du délai fixé pour la première pièce de la procédure écrite à déposer par la partie soulevant l'exception* ". The corresponding English text would be: " . . . at the latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party".

The PRESIDENT said that the Drafting Committee proposed no change in paragraphs 2 to 5 of Article 62 except, in paragraph 3, to replace the words: " *la Cour ne siège pas* ", by " elle *ne siège pas* ".

Article 62 was finally *adopted*, as thus amended.

[1] *Cf.* p. 258.

* D 2, A. 3, p. 733.

ARTICLE 63 *(New Article, cf. Article 40, paragraph 2, No. 4, old Rules).*

COUNTER-CLAIMS

28.V.34.*

Discussed as Article 40, Paragraph 2.

M. SCHÜCKING recalled that, in paragraph 2 of Article 40, a slight change had been made in the clause relating to counter-claims which, according to the new text, could be presented only when proceedings were begun by application.[1] M. Schücking personally agreed with this, but said that the amendment had not been discussed.

In this connection, he raised the question of the meaning to be attached to "counter-claim". Did it cover only claims arising out of the defence? Or could the respondent always bring a counter-claim in the Counter-Memorial, even if the counter-claim had no connection with the principal claim? The records of the preparatory work shed little light on this problem, except for only one sentence which appeared in the minutes of the meeting of March 9th, 1922:[2]

> "After a discussion, during which stress was laid on the difference between counter-claims essential for the purpose of the defence and counter-claims independent of the case, M. Beichmann's proposal" —this proposal concerned another matter—"was adopted."

Perhaps M. Anzilotti could throw some light on the import of this passage.

M. ANZILOTTI thought he remembered that the question had been dealt with by the Court in one of its judgments.[3] It was a question of determining the relation between the counter-claim and the principal claim, the counter-claim being considered as admissible, provided that it was connected with the principal claim.

In the course of the discussion in 1922 to which M. Schücking had referred, the attention of the Court was directed to the fact that, sometimes, a counter-claim constituted a means of defence, and that the Court could not in justice pass upon the principal claim without at the same time passing upon this plea of the defence.

M. NEGULESCO raised the question whether the Court should maintain the existing regulation resulting from Article 40 of the Rules as to the form which counter-claims must take.

According to the proposed system, when proceedings were begun by application, the respondent might submit a counter-claim in the Counter-Case, provided that it fell within the Court's jurisdiction. But in M. Negulesco's view the counter-claim should be presented, like the principal claim, in the form of an application, pursuant to Article 40 of the Statute. That article made no provision for the possibility of an action being brought before the Court by the respondent against the applicant in the Counter-Case. Moreover, that article prescribed that the application was to be notified to all States, but they would not receive notice of a counter-claim lodged in the Counter-Case. Accordingly, a third State which was a party to a convention the construction of which was involved by the counter-claim would not be informed.

M. Negulesco also observed that, if a counter-claim was to be regarded merely as a plea of the defence, the Court could not pass upon it in the operative part of its judgment, but only in the grounds. But there were cases in which the counter-claim might outweigh and nullify the principal claim, so that the Court should be able to give judgment upon it against the applicant.

For these reasons, M. Negulesco thought that a counter-claim should be lodged in the form of an application. If necessary, and if this claim was connected with the principal claim, the Court would order the joinder of the two actions.

The PRESIDENT wondered whether, in order to give practical effect to the ideas formulated by M. Negulesco, all reference to counter-claims should be omitted from Article 40 of the Rules.

M. NEGULESCO thought so. There would also have to be a special rule to the effect that any counter-claim must be submitted to the Court in the form of an application, the Court being free to order its joinder to the principal action.

The PRESIDENT asked whether, in 1922, the Court had considered the question of the compatibility between Article 40 of the Statute and Article 40 of the Rules.

M. ANZILOTTI was not able to give the precise origin of this rule. He thought, however, that he remembered that a similar rule was embodied in the procedure of the Supreme Court of the United States of America.

At the preliminary session, M. Anzilotti had noticed that the text proposed simply said that the conclusions of the Counter-Case might include counter-claims. He had then raised the question of the Court's jurisdiction, and the Court had added the words: "in so far as the latter come within the jurisdiction of the Court".

With regard to M. Negulesco's proposal, M. Anzilotti admitted that, theoretically, his ideas were sound. But the method adopted in the Rules possessed a practical advantage in that it enabled the respondent to demand, in the course of the same proceedings, what was due to him from the applicant for a reason related to the dispute already pending. That was the real purpose and the proper function of counter-claims.

M. GUERRERO, Vice-President, in view of the considerations put forward by M. Negulesco, thought that counter-claims should follow the same procedure as ordinary applications. Accordingly, he supported the proposal that there should be a special article relating to counter-claims and that it should be provided therein that such claims should be presented in the form of applications.

Jonkheer VAN EYSINGA appreciated what M. Negulesco said, but thought that, in practice, the existing situation would not be very much changed if they deleted the passage in Article 40 concerning counter-claims and drafted a new article regarding them and providing that they

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* D 2, A. 3, pp. 104-110.

[1] Text of Article 40, paragraph 2, No. 4, old Rules:

"(4) Conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court."

Text proposed by the Co-ordination Commission:

". . . when the case is brought by application, these conclusions may include counter-claims in so far as the latter come within the jurisdiction of the Court." (See D 2, A. 3, p. 870.)

[2] See D 2, p. 140.

[3] See A 17, pp. 37-39.

must be presented by application. In any case, if that course were adopted, they would have to lay down up to what point in the main proceedings an application submitting a counter-claim could still be lodged without having to be treated as a separate action. With regard to the interest of third States in receiving notification of a counter-claim, M. van Eysinga observed that in Article 42 of the Rules, paragraph 2, there was a provision enabling the Court or the President to instruct the Registrar to hold the Cases and Counter-Cases of each suit at the disposal of any State entitled to appear before the Court. He thought that the lodging of a counter-claim was precisely a case in point where recourse would be had to this rule, which could be applied without a request on the part of the Government affected.

Summarising, he was of opinion that, as M. Negulesco's proposal would, in practice, lead merely to a formal change, it would be better not to adopt it.

M. GUERRERO, Vice-President, thought that, nevertheless, a Government would be able to appreciate the situation much more easily if the counter-claim were presented in the form of an application.

M. ANZILOTTI was unable to attach much importance to the question of notification to third States. Since there was in the Rules a provision enabling counter-claims to be presented, that sufficed to place States in a position to keep themselves informed. On the other hand, M. Anzilotti drew attention to the practical utility of the existing rule. It was in fact possible that a counter-claim would be so closely bound up with the defence that, if the respondent were bound to submit a special application, there would be a danger of placing the latter in a difficult position. This was borne out, in M. Anzilotti's view, by the experience gained by the Court in the Chorzów case (merits).

Accordingly, in his view, before abandoning the existing system and envisaging a system requiring an application for the presentation of counter-claims, they should take time for reflection and consider the way in which such claims were presented under the various systems of municipal law.

M. Anzilotti also asked whether information could be obtained as to the origin of the existing rule.

The REGISTRAR said that the rule in question was already embodied in the preliminary draft submitted to the Court at its preliminary session by the Geneva Secretariat.[1] This draft, which was prepared by the Registrar, was to a great extent based on the procedure of the Supreme Court of the United States of America. Accordingly, it was very likely that, as M. Anzilotti had supposed, the rule was taken from that procedure.

This provision in the preliminary draft had remained practically unchanged throughout all the discussions of the preliminary session, until the debate upon the final draft submitted to the Court by its Drafting Committee.[2] Then it was that M. Anzilotti had proposed the deletion of all that now constituted Article 40, and, alternatively, the amendment of the clause concerning counter-claims, so as to limit it to claims " coming within the jurisdiction of the Court ".

M. WANG agreed with M. Negulesco, having regard in particular to the difficulty of saying, in a particular case, whether a counter-claim was a true counter-claim or was really a part of the defence on the merits.

M. SCHÜCKING recalled that M. Anzilotti had pointed out the great practical value of the existing rule and wondered whether the new article whereby M. Negulesco proposed to replace the existing rule would have the same practical advantages. On the contrary, if the counter-claim had to be presented in the form of a real application, would not the advantage peculiar to this proceeding disappear ? He also observed that, already under the existing system, the Court could doubtless join a counter-claim to the principal claim if it held that they were interconnected.

M. Schücking would therefore prefer the existing rule to be maintained.

M. NEGULESCO said that, in a normal case before the Court, each party could file two written documents and could address the Court twice orally. On the contrary, in the case of counter-claims, the existing system, according to which the respondent raised a counter-claim in the Counter-Case only, allowed the applicant to file a single written document—the Reply—in regard to the claim, whereas the respondent could refer to the matter a second time, in his Rejoinder. M. Negulesco raised the question whether this inequality between the parties in the written proceedings in regard to a counter-claim was not inconsistent with the spirit of the Statute.

The REGISTRAR recalled that M. Schücking had quoted a summary of the discussion from the minutes of the 1922 preliminary session. In order to elucidate the point, the Registrar had sent for the verbatim record, which threw a great deal of light on the opinions which had inspired the drafting of Article 40 of the Rules:

> " M. WEISS (*translation*).—Are there not cases where a counter-claim may be regarded as a defence to the principal claim ?
>
> " M. ANZILOTTI (*translation*).—That is what we call a plea of counter-claim, but that would be a question to be decided by the Court in the particular case.
>
> " Lord FINLAY.—I should be disposed to have some such words as M. Beichmann suggests. There might be *une demande reconventionnelle* which, though in form a demand, was really in the nature of a defence to the proceedings. It might be so closely connected with it that it would be very wrong for the Court to take cognisance of the claim without taking cognisance of the counter-claim. On the other hand, there may be cases where a totally new subject would be introduced which the parties had never consented to refer to the Court, and that danger would be guarded against by the words proposed by M. Beichmann. I am disposed to think that that is a material improvement."

M. URRUTIA did not quite agree with M. Negulesco. In his view, though there were cases where a counter-claim was really in the nature of an application, there were others where it was bound up with the defence.

In any case, M. Urrutia considered that the Court was not yet sufficiently informed on the question of counter-claims to be in a position to decide it merely by a vote. It would therefore be better to delete the phrase in Article 40 referring to the matter and to devote a separate article to it.

M. ANZILOTTI pointed out that to proceed thus would, on the contrary, prejudge the question. The existing Rule in no way prevented the presentation of a counter-claim by means of an application; all that it did was to

[1] See D 2, p. 253.
[2] *Ibid.*, pp. 139 and 548.

enable a counter-claim to be presented as a conclusion of the Counter-Case.

M. URRUTIA replied that the proposed separate article could make provision for the same possibility.

He observed that there had so far been no discussion on the question whether, in a case submitted by special agreement, counter-claims could be presented, for instance, in a case where, in effect, both parties were at the same time applicant and respondent. If the Rules said—as was now proposed—that counter-claims could be presented only in cases brought by application, that possibility would be ruled out.

M. ANZILOTTI considered that, in the circumstances mentioned, it would not be a question of a counter-claim but of reciprocal claims.

Baron ROLIN-JAEQUEMYNS was opposed to the extension of the idea of counter-claim to cases submitted by special agreement. Moreover, he was inclined to agree with M. Negulesco that it would be a good thing to have a rule expressly stating that a counter-claim could be brought only by means of an application. But he did not think that that was a reason for deleting the phrase in Article 40 regarding counter-claims. In his opinion, what Article 40 meant was that, in a case submitted to the Court by application, a counter-claim might be brought provided that it had been previously lodged by way of application. It would be easy to add something to this effect to Article 40:

> "When proceedings are instituted by means of an application, the conclusions may include counter-claims, provided that the latter have been lodged by means of an application."

M. FROMAGEOT thought that Baron Rolin-Jaequemyns' proposal, according to which a counter-claim which had been submitted by means of a separate application would nevertheless be joined, by the party making it, to the principal claim, was most complicated.

In his view, a distinction should be drawn between the case in which the counter-claim constituted a defensive plea rebutting the conclusions of the Case and that in which it amounted to the presentation of a fresh claim. In the first case, the text of the Co-ordination Commission would apply. If, on the other hand, the respondent also presented an application, the Court might or might not join the two suits. But, since a counter-claim might assume the form of a defence, M. Fromageot would prefer to maintain the Co-ordination Commission's text, with the addition of the words: "in so far as the latter comes within the jurisdiction of the Court and constitutes a defensive plea rebutting the conclusions of the Case".

The PRESIDENT recalled that M. Anzilotti had asked that the Court should be allowed time to reflect upon the whole question before coming to a decision.

M. FROMAGEOT considered that there was one first fundamental question: had the Court made up its mind to regulate the matter of counter-claims? If so, should that matter be regulated in the terms of paragraph 2 of Article 40? If the answer was in the affirmative, the question was settled. If not, it should be reserved for further examination.

M. GUERRERO, Vice-President, proposed that the Court should first vote on the question whether it desired to deal with counter-claims in a separate article. If the answers were in the affirmative, it might then appoint a small special committee to work out the terms of this article.

M. ANZILOTTI supported the request for the postponement of the question, urging that the question should be reserved in all its aspects. He considered that even the proposal to appoint a small committee was premature.

The PRESIDENT considered that the Court could not refuse this request.

29.V.34.*

Discussed as Article 40, Paragraph 2.

The PRESIDENT drew attention to the document circulated by MM. Negulesco, Wang, Schücking and Fromageot, proposing to replace the last phrase of paragraph 2 of Article 40 of the Co-ordination Commission's draft by a special article in the following terms:

> "No claim may be included in the Counter-Case as a counter-claim unless it is directly connected with the subject of the application filed by the other party, and unless it comes within the jurisdiction of the Court."

M. ADATCI desired to have certain explanations on this text:

Did the authors consider that a counter-claim constituted a new case, within the meaning of the Court's Statute, or did they regard it merely as an incident of the proceedings?

Did the "direct connection" referred to in the text mean merely a connection in fact, or was it a connection in law? In other words, must it be both a direct and a juridical connection?

What was the opinion of the authors of the text in regard to a counter-claim as an element of the defence?

What procedure—for instance in regard to the submission of evidence—did the authors of this text contemplate in dealing with the counter-claim? In particular, should the proceedings in regard to the main action follow their course?

Lastly, what would be the position of the counter-claim, in the view of the authors of this text, in the event of the main action being withdrawn?

M. Adatci observed that the municipal codes of the different countries legislated for all these points in connection with counter-claims.

M. NEGULESCO said the idea in the minds of the four members who had signed this text had been to discover a formula which would reconcile the various opinions expressed, and that it was not based on any particular national code. With that object in mind, they had sought to define the kind of counter-claim that might be put forward in a Counter-Case, and thus to remove the vagueness of the Rule as at present worded.

In regard to that point, the authors of the proposal had considered that, if the respondent put forward a counter-claim, directly connected with the action, he should be able to include it in the Counter-Case. But if the counter-claim did not fulfil that condition, it must be put forward in the form of an application, in which the applicant might request the Court to join it to the main action.

In order to provide for the latter point, M. Negulesco desired to add a paragraph, as follows, to the text that the President had just read:

> "Any other claim, not fulfilling the first condition stated in the first paragraph, must be submitted in the form of an application. The Court may decide to join such claim to the application to which it relates."

* D 2, A. 3, pp. 110-117.

He believed that this text would furnish answers, by implication, to M. Adatci's questions.

Continuing, M. Negulesco explained that, in using the expression " direct connection ", the authors of the new text had in mind what was termed, in English, the " counter-claim ", but they had wished to exclude the " cross-action ". He would take the following example: Suppose that, as a result of a collision between two vessels, belonging to different States, one of these States sued the other for damages on the ground that the latter was to blame; and that the respondent State brought a counter-claim for damages. In such a case the grounds for the respondent's action really constituted the defence to the main proceedings. That was the idea expressed by Lord Finlay in 1922, when he said: " There might be *une demande reconventionnelle* which, though in form a demand, was really in the nature of a defence to the proceedings. It might be so closely connected with it that it would be very wrong for the Court to take cognisance of the claim without taking cognisance of the counter-claim." [1] It was a counter-claim in this narrower sense that the four judges had considered that a respondent should be allowed to submit in his Counter-Memorial.

M. FROMAGEOT desired to answer the questions put by M. Adatci.

In his view, a counter-claim did not institute a new case. The case was the suit instituted by the application, and it pursued its course, together with the counter-claim which had been grafted upon it.

In regard to the kind of connection intended, it could only, in his opinion, be a connection of fact—the same element of fact would underlie both the actions, the main action and the counter-claim. A connection in law was certainly conceivable, for instance, when two opposing claims were based upon the same treaty provision; but that would not, it appeared to him, enable a demand to be put forward as a counter-claim.

Next, in regard to M. Adatci's question concerning the procedure, M. Fromageot held that the proceedings that had been begun should follow their normal course; the applicant in the main action would make his defence against the counter-claim, and the latter should be accompanied by all the evidence in support of it.

Lastly, in regard to the withdrawal of the main action, M. Fromageot pointed out that a withdrawal was valid only if the other party consented. But a party that had submitted a counter-claim would evidently not consent, so that the Court would have to decide upon both claims.

Speaking generally, he considered that, when the term " counter-claim " was used in that Court, one must disregard the meaning attributed to it in the different national legislations, and simply decide what it should mean in proceedings before that Court. From that point of view, he thought the best definition would be: " a claim directly dependent on the facts of the main action ". That definition would exclude any claim, put forward in a Counter-Case, having no direct connection with the facts forming the basis of the main action. The question whether, in such cases, there was a sufficient degree of connection, was in itself a question of fact, and one which the Court must decide.

M. SCHÜCKING observed that, in providing that the claims must have a " direct connection " with the subject of the main application, the authors of the text had sought to find a flexible formula, which would have to be interpreted by the Court's jurisprudence; as a general rule, it would be a connection of law and of fact.

The authors of the proposal had desired to preserve the essentially practical system of including counter-claims in a Counter-Case, while at the same time making it clear that this system had its limits.

M. ANZILOTTI had no fundamental objection to the text thus proposed. It was true that an actual *acte de citation* appeared to be dispensed with in all national legal systems when a counter-claim was submitted, for the reason that it was not a new action, but something added to a case already pending. Similarly, Article 40 of the Statute only provided for cases being brought before the Court by application, or by special agreement, because the article only had new cases in view; on the other hand, when a counter-claim was brought, a case was already pending before the Court. However that might be, he agreed that it was desirable, in order to fill a gap in the existing Rules, to lay down the criterion of interconnection, which the Court had established by its jurisprudence. That result could, however, be obtained by a simple addition to paragraph 2 of the Co-ordination Commission's text. They might, for instance, have a clause to the following effect:

> " When proceedings are instituted by application, these conclusions may include counter-claims in so far as the latter come within the jurisdiction of the Court, provided always that such counter-claims are directly connected with the application submitted by the other party."

For the rest, the question of the interconnection of actions was one of the most complex problems of procedure; it would be better, therefore, not to try to define it, and leave the Court to decide, in each case, whether such a connection did or did not exist. Only later on, when the Court's jurisprudence had developed, would it be possible to attempt a definition of this notion in international proceedings. M. Anzilotti thought that the same difficulties would arise in distinguishing between connections of fact and of law.

M. FROMAGEOT explained that the word " direct " had been inserted in the proposed text in order to show that a remote connection would not suffice; perhaps the word " direct " was not sufficiently explicit, but it appeared to be of a certain value.

Jonkheer VAN EYSINGA admitted that it might be of advantage for a tribunal of such recent creation as the Court to have a mention of the idea of interconnection in its Rules. Nevertheless, when the Court had had to deal with a counter-claim—reference had been made to Judgment No. 13 [1]—it declared that a juridical connection must exist, although there was no special clause to that effect in its Rules; it acted thus on the principle that, where a particular point was not provided for, *ipsis verbis*, in the Rules, the Court was free to take such action as would lead to the fairest possible results. For his part, he thought this method had many advantages, particularly in so delicate a question.

Personally, Jonkheer van Eysinga would prefer to leave things as they were; for the question of interdependency was not the only one that arose. Even the numerous questions put by M. Adatci did not exhaust the problem of counter-claims. It seemed hardly necessary to make such efforts to fill a single gap when so many others remained;

[1] See p. 262.

[1] See A 17.

they must trust the ability of the Court to find a just solution in each individual case.

Furthermore, though agreeing on the substance, he found it difficult to accept the words " direct connection ", seeing that Judgment No. 13 of the Court had used the term " juridical connection ", and that the authors of the text did not seem to agree on the meaning of " direct connection ". The fact was that, when the Court had to deal with an actual case, it would rely on its sense of justice and deal with the question in the best way, no matter what Article 40 might say.

He recalled that that was also the conclusion reached by M. Anzilotti in his well-known article on this subject.[1]

Baron ROLIN-JAEQUEMYNS observed that, according to Article 40 of the Statute, cases could be brought before the Court only by application or by special agreement; but the proposed text would enable a counter-claim also to be brought before the Court in a Counter-Case, provided that there was a direct connection. It appeared therefore that this text, which had been framed in a spirit of conciliation, was not strictly in harmony with Article 40 of the Statute.

Moreover, Article 40 of the Statute also laid down that all States Members of the League must be informed whenever a new case was submitted, by the communication to them of any application received; but this rule would become inoperative once it were admitted that a new case could be submitted merely through a notification in the Counter-Memorial, because it possessed the character of a counter-claim.

Finally, no matter what text the Court might adopt, it must be made clear that it applied to proceedings instituted by application and not by special agreement.

The PRESIDENT said that, after careful consideration, he had come to the conclusion that the procedure in national courts was of no great assistance to the Court in this matter. The Court must construct its own system. For that reason, he was prepared to accept the proposed text.

M. WANG pointed out that, in the rules of procedure of the different Mixed Arbitral Tribunals, two different systems were adopted in regard to counter-claims. The first was that appearing in the Rules of Court. An example would be found in the Rules of Procedure of the Greco-German Tribunal,[2] which laid down that: " the reply shall contain . . . the conclusions which may be either rebutting . . . or in the nature of counter-claims ". An example of the second system was to be found in the Rules of Procedure of the German-Polish Tribunal,[3] where it was laid down, under the heading " Counter-claims ", that such claims were not admissible and that " any claim by the respondent seeking the condemnation of the applicant must be submitted in an application instituting proceedings; the Tribunal may order the cases to be joined, or to be pleaded at the same hearing ".

The wording of the proposed text sought to combine the advantages of both systems and to find a sort of *via media* between them by adopting the interconnection of the counter-claim and the main action as a criterion, such interdependency being deemed to exist when the counter-claim was based on the same facts as the main action; where this condition was fulfilled, the text allowed the counter-claim to be formulated in the Counter-Case.

The PRESIDENT said he thought the Court should first decide on the principle, and proposed that a vote should be taken on the following text:

> " Does the Court desire, in principle, the insertion in the Rules of the amendment proposed by MM. Negulesco, Wang, Schücking and Fromageot ? "

M. ANZILOTTI asked whether the same rule was not, as a fact, included in the existing Rules of Court and in the text proposed by the Co-ordination Commission.

The PRESIDENT recalled that the " text proposed " by certain judges did indeed embody this rule, but attached to it the condition that the counter-claim must be directly connected with the subject of the principal application.

M. URRUTIA asked whether, so as to enable those members of the Court who held that the Rules should remain unchanged on this point to give expression to their view, a vote might not first be taken on the following question:

> " Does the Court consider that no change should be made in the terms of Article 40 of the existing Rules ? "

M. ANZILOTTI proposed the following:

> " Does the Court wish to maintain the principle that counter-claims may be presented in the conclusions of the Counter-Case ? "

M. NEGULESCO observed that, in the minds of the authors of the " proposed text ", the expression " counter-claim " did not bear the same meaning as it did in the existing Rules.

M. ANZILOTTI said that his question simply formulated the principle that counter-claims might be presented in the Counter-Case.

M. SCHÜCKING understood that M. Anzilotti meant his question to be voted upon without reference to the existing rule.

M. ANZILOTTI agreed: if the result of the vote was in the affirmative, it would then be open to the Court to choose either the text of the Co-ordination Commission or the " proposed text ".

M. GUERRERO, Vice-President, feared that the vote desired by M. Anzilotti would lead to no result because there was no difference of opinion on the question whether counter-claims might be presented in the Counter-Case.

M. FROMAGEOT observed that MM. Anzilotti and Negulesco appeared to attach different meanings to the expression " counter-claim ". In his view, the word referred to the form in which a claim was presented and not to the nature of the claim itself. And what they had been seeking to define by speaking of a direct connection with the principal claim was the nature of the claim.

In these circumstances, M. ANZILOTTI re-submitted his motion in the following form:

> " Does the Court wish to maintain the principle that counter-claims directly connected with the principal claim may be presented in the Counter-Case ? "

The PRESIDENT took a vote on this motion, which was adopted by eleven votes to one.

M. FROMAGEOT recalled that the text which four judges had proposed to substitute for the last sentence of paragraph 2 of Article 40 of the Co-ordination Commission's draft contained only one paragraph. One of these judges, M. Negulesco, had taken the trouble to draft a second

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[1] " Scritti . . . in onore di Antonio Salandra ", 1928, p. 341; *Rivista di Diritto intern.*, 1929, p. 309; *Journal Clunet*, 1930, p. 857.

[2] See *Recueil des Décisions des T.A.M.*, Vol. 1 (1922), pp. 63-64.

[3] *Ibid.*, p. 691.

paragraph, running as follows:

> " Any other claim which does not fulfil the first condition laid down in paragraph 1 shall be presented in the form of an application. The Court may decide to join this claim to the application to which it refers."

M. Fromageot, however, did not approve this paragraph, as he thought it superfluous.

M. NEGULESCO had considered that parties should know that, if the counter-claim did not fulfil the condition laid down in paragraph 1, they must present an application.

After an exchange of views concerning what was meant by " a direct connection " and " a legal connection ", the PRESIDENT took a vote on the following question:

> " Does the Court wish to deal with counter-claims presented in the Counter-Case in a separate article of the Rules ? "

The motion was adopted by eleven votes to one.

The PRESIDENT, observing that this vote involved the deletion of the second phrase in paragraph 2 of the Article 40 proposed by the Co-ordination Commission, asked the Court to come to a decision regarding M. Negulesco's proposal for the addition of a paragraph to the text submitted by the four judges (see above).

M. NEGULESCO thought that this paragraph would be of use, particularly its second sentence: " The Court may decide to join this claim to the application to which it refers."

Count ROSTWOROWSKI thought that the authors of the proposed Article 40 would certainly have no objection to the addition at the beginning of their text of the words: " when proceedings are instituted by means of an application ", taken from Article 39, paragraph 2, of the existing Rules.

The PRESIDENT observed that there was no objection to the addition of these words.

M. ANZILOTTI thought that, if the text began with the words: " when proceedings are instituted by means of an application ", it should continue as follows: " claims directly connected with . . . may be presented in the Counter-Case as counter-claims, provided . . . ", instead of " no claim may be included . . . unless . . . ".

MM. SCHÜCKING and FROMAGEOT recognised that, if the words proposed by Count Rostworowski were added and the present wording maintained, it would appear to follow—reasoning *a contrario*—that when proceedings were not begun by application, any claims might be presented in the Counter-Case.

M. ADATCI said that he accepted the text proposed by M. Negulesco, having regard to the importance from the point of view of parties of the last sentence: " The Court may decide to join this claim to the application to which it refers."

Jonkheer VAN EYSINGA, though he appreciated the importance of this sentence, drew attention to the consequences which would ensue from it. It contemplated a case where the direct connection with the subject of the application was not sufficient to warrant the presentation of the counter-claim in the Counter-Case, and accordingly the counter-claim was submitted by means of an application. The claim having been filed in this way, the Court could, however, decide to join it to the principal suit because there was nevertheless a certain connection with the latter suit. This second sentence therefore established two degrees of connection. That introduced a very subtle complication.

The REGISTRAR observed that if a provision were included in an isolated article permitting the Court to join two suits, it would seem to follow that in other cases it could not do so. He was doubtful whether that was what was intended.

M. ANZILOTTI, who shared this doubt, considered that, if the Court had power to order the joinder of suits, that power should be provided for in a general rule; otherwise joinder would be inadmissible in all cases not covered by the present article. For the rest, he entirely agreed with those who regarded the addition proposed by M. Negulesco as superfluous: for, if the provision concerning counter-claims was not applicable, it followed, as a matter of course, that the general rules concerning the bringing of actions and the Court's power to order the joinder of actions would be applicable. The Rules ought not to contain superfluous provisions.

M. SCHÜCKING thought that, in order to avoid any possibility of argument *a contrario*, they might say:

> " The Court may exercise its power to order the joinder of the two suits. "

The PRESIDENT, recalling that M. Negulesco had proposed the addition of the following paragraph to the text submitted by the four judges:

> " Any other claim which does not fulfil the first condition laid down in paragraph 1 shall be presented in the form of an application. The Court may exercise its power to join this claim to the application to which it refers ",

took the opinion of the Court on this paragraph.

By seven votes to five, the paragraph was adopted.

The PRESIDENT observed that, as a result of the additions, deletions and amendments of wording which had been suggested, the text proposed by the four judges was now as follows:

> " When proceedings have been instituted by means of an application, counter-claims may be presented in the Counter-Case, provided that they are directly connected with the subject of the application filed by the other party and that they come within the jurisdiction of the Court."

He took the opinion of the Court on this text, which was unanimously adopted.

The PRESIDENT gathered that, with regard to the additional paragraph adopted on the proposal of M. Negulesco, the examination of the text from the point of view of drafting would be left to the Co-ordination Commission.

This was agreed to.

I.VI.34.*

Discussed as Article 41 (draft).

> " When proceedings have been instituted by means of an application, counter-claims may be presented in the submissions of the Counter-Memorial, provided that such counter-claims are directly connected with the subject of the application and that they come within the jurisdiction of the Court. Any

* D 2, A. 3, pp. 152-153.

other claim which does not fulfil the first condition mentioned shall be presented in the form of an application. The Court may exercise its power to join the two suits thus lodged."

The PRESIDENT recalled that Article 41 of the existing Rules concerned the right of the Court, or of the President if the Court was not sitting, to fix the date for the commencement of the oral proceedings. It had, however, been decided to transfer the rule to the section dealing with oral proceedings. The number 41 being thus vacant, the Co-ordination Commission proposed to insert under this number the clause adopted by the Court in regard to counter-claims.

M. FROMAGEOT was afraid that the phrase " any other claim which does not fulfil the first condition mentioned . . ." was not sufficiently clear.

Count ROSTWOROWSKI thought it would be better to add the word " separate " (" in the form of a *separate* application "); this would render the following phrase clearer.

M. FROMAGEOT also proposed the deletion of the word " other ".

M. GUERRERO, Vice-President, suggested the following wording:

" Any claim which does not fulfil the former condition shall be presented in the form of an application and be the subject of a separate suit or be joined to the main suit."

M. ANZILOTTI pointed out that the Court alone could decide to join the two suits.

M. FROMAGEOT proposed to amend M. Guerrero's text as follows:

". . . and be the subject of a separate suit or be joined by the Court to the original suit."

The PRESIDENT recorded that the text proposed by the Vice-President and amended by M. Fromageot was adopted.

This text would replace the second part of the text of Article 41 proposed by the Co-ordination Commission.

8.IV.35.*

Article 63. — First Reading.

M. ANZILOTTI wished the wording of this article to be reserved until the second reading. The text adopted by the Court [1] and maintained by the Drafting Committee made it appear that the presentation of a counter-claim in the submissions of the Counter-Memorial was no longer regarded as purely optional (*cf.* the existing Rules), but as obligatory, so that a claim could not be presented earlier: that, however, was contrary to the interests of the parties and of the Court itself.

M. NEGULESCO observed that the word " *peuvent* " (may) sufficed to show that there was no obligation.

M. ANZILOTTI also thought that the wording of the second sentence of the article was not clear when it said that " any claim which does not fulfil the first condition must be presented in the form of an application . . ."; this text might cause it to be thought that, even if a claim did not fall within the jurisdiction of the Court, it might be presented in the form of an application.

M. FROMAGEOT replied that, when a claim formed the subject of a separate application, it would be for the Court to decide as to its own jurisdiction.

M. SCHÜCKING thought that the wording of the proposed Article 63 did not make it clear whether a counter-claim, which fulfilled the conditions laid down therein, could be presented at a stage of the proceedings subsequent to the presentation of the Counter-Memorial.

The PRESIDENT said that such a claim might be filed in the form of an additional application, which the Court might or might not join to the main application.

Jonkheer VAN EYSINGA, who thought, like M. Anzilotti, that the submission of counter-claims should not be linked to the Counter-Memorial, suggested the following: " Counter-claims may not be presented after the end of the written proceedings."

M. SCHÜCKING thought that the legal position would be quite clear if, in the second line of the article, the word " *seulement* " (only) was inserted between " *peuvent* " (may) and " *être présentées* " (be presented).

Baron ROLIN-JAEQUEMYNS, without touching the substance of the article and solely with the object of making the wording clearer, suggested the following to replace the second sentence:

" Any claim which is not directly connected with the subject of the original application may be presented in the form of an application and may form the subject of separate proceedings or be joined by the Court to the original proceedings."

The PRESIDENT proposed that, in accordance with Baron Rolin-Jaequemyns' suggestion, the second sentence of Article 63 should be replaced by the following (the text suggested by Baron Rolin-Jaequemyns with some slight changes made at the meeting):

" Any claim which is not directly connected with the subject of the original application must be presented in the form of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings."

It was decided accordingly.

There being no further observations, Article 63 was adopted in first reading with this modification.

26.II.36.*

Article 63. — Second Reading.

The PRESIDENT recalled that the article had been provisionally adopted in 1935, subject to reconsideration of the wording in second reading. He was not, however, sure that the reservation which had been made at the beginning of the examination of the article had been maintained, following the discussions which had ensued later.

M. ANZILOTTI said that his reservation had related to the obligation to submit a counter-claim in the Counter-Memorial, and to the apparent superfluity of the second sentence of the text adopted.

Jonkheer VAN EYSINGA remarked that the new feature introduced into this article by the Court was the direct connection between the counter-claim and the subject of the original application now insisted upon.

As no amendment was suggested, the PRESIDENT declared Article 63 adopted in second reading.

* D 2, A. 3, pp. 440-441.

[1] See above: meeting of 1.VI.34.

* D 2, A. 3, p. 649.

11.III.36.*

Article 63. — Final Adoption.

The Drafting Committee had noticed that, in the draft of Article 63 adopted by the Court, the first sentence was in the plural and the second in the singular; it proposed a draft putting both sentences in the singular.

It was proposed to alter the English text accordingly and also in the second sentence of the article to substitute " must be put forward by means of " for " must be presented in the form of ".

Article 63 was finally *adopted*, as thus amended.

ARTICLE 64 *(Article 58, Paragraph 1, and Article 59, Paragraphs 1, 2 and 3, old Rules).*

INTERVENTION UNDER THE TERMS OF ARTICLE 62 OF THE STATUTE (APPLICATION)

21.II.35.**

Discussed under Articles 58 and 59.

The PRESIDENT opened the discussion on Articles 58 and 59 (intervention under Article 62 of the Statute).

The Co-ordination Commission had, he said, in compliance with the suggestion of the Third Committee, re-grouped the provisions of these articles [1] on a more logical plan, but had not changed them in substance:

" *Article 58.*

" 1. An application for permission to intervene under the terms of Article 62 of the Statute must be communicated to the Registrar, at latest, before the commencement of the oral proceedings.

" 2. The application referred to in the preceding paragraph shall contain:

" (*a*) A specification of the case in which the applicant desires to intervene;

" (*b*) A statement of law and of fact justifying intervention;

" (*c*) A list of the documents in support of the application; these documents shall be attached.

" 3. Such application shall be immediately communicated to the parties, who shall send to the Registrar any written observations which they may desire to make within a period to be fixed by the Court, or by the President, should the Court not be sitting.

" 4. The matter shall be placed on the agenda for a hearing, the date and hour of which shall be notified to all concerned. Nevertheless, if the parties have not contested the application for intervention in their written observations, the Court may decide that no oral arguments on the application will be heard.

" 5. The Court will give its decision on the application in the form of a judgment."

" *Article 59.*

" 1. If the Court admits the intervention, it shall, at the request of the intervening State, fix the time-limits within which such State is authorised to file a Case on the merits, and within which the other parties may file their Counter-Cases; the same course shall be followed in regard to the Reply and the Rejoinder. If the Court is not sitting, the time-limits shall be fixed by the President.

" 2. If the Court has not yet given its decision upon the intervention, but the application for intervention has not been contested by the written observations of the parties, the President, if the Court is not sitting, may, subject to any subsequent decision the Court may take as regards the admissibility of the application, fix, at the request of the State by which the application is made, the time-limits referred to in the preceding paragraph.

" 3. In the cases referred to in the two preceding paragraphs, the time-limits shall, so far as possible, coincide with those already fixed in the case to which the application for intervention relates and they may not extend beyond the beginning of the oral proceedings in that case."

Baron ROLIN-JAEQUEMYNS thought that Articles 58, 59 and 60 might be referred to the Drafting Committee for examination, if there was no objection to their substance. The changes which the Co-ordination Commission had proposed in them were chiefly concerning matters of form.

M. ANZILOTTI asked if the second paragraph of the existing Article 58 of the Rules had been intentionally omitted.

Jonkheer VAN EYSINGA pointed out that what Article 58 had in view was an intervention, in the true sense of the term, by a third party which had a legal interest in the case, whether intervening on its own account or in support of another party. That intervention might or might not be allowed by the Court according as it recognised, or declined to admit, the existence of a legal interest. The intention of the Third Committee, and afterwards of the Co-ordination Commission, had been that the preliminary proceedings, which must result in the acceptance or dismissal of the request to intervene, should be dealt with entirely in Article 58; Article 59 was concerned only with the event of the Court's having allowed the intervention, and the intervening party's having to take part in the main proceedings which had already begun.

It was said, both in the existing text and in that proposed by the Co-ordination Commission, that the party desiring to intervene must apply, at latest, before the commencement of the oral proceedings. It was therefore possible to intervene even when the two parties already before the Court had exchanged the documents of the written proceedings. But, once the oral proceedings had begun, it should no longer be possible to intervene. A breach was, however, made in this principle by the second paragraph of the existing Article 58, which laid down that:

> " Nevertheless, the Court may, in exceptional circumstances, consider an application submitted at a later stage."

This might, of course, give rise to difficulties, and as early as 1926 it had been proposed, though unsuccessfully, to delete this clause [1]—which was, moreover, inconsistent with the rule laid down in the final paragraph of Article 59, to the following effect:

> " These time-limits, however, may not extend beyond the beginning of the session in the course of which the case shall be heard."

* D 2, A. 3, p. 733.
** *Ibid.*, pp. 304-307.
[1] *Ibid.*, p. 876.

[1] D 2, A., pp. 151-152.

Jonkheer van Eysinga added that it was in these circumstances that the Third Committee, and subsequently the Co-ordination Commission, had proposed to omit the second paragraph of Article 58. It had appeared, indeed, that the period allowed for intervention would be sufficiently long if it was laid down—as was done by the general rule in paragraph 1 of Article 58—that a State could intervene at any time up to be beginning of the oral proceedings. Moreover, the Third Committee's Report had stated as follows:

> " Should the application for permission to intervene be communicated to the Registrar shortly before the beginning of the oral proceedings, the Court or the President would have to postpone the date for the commencement of the oral proceedings, under the terms of Article 33, paragraphs 2 and 3, of the Rules."

In that way, the rights of intervening parties and of other parties were adequately safeguarded.

M. NEGULESCO thought that a difference should be made according as the intervening party appeared to defend his own rights, or to support the cause of one of the original parties. In the former contingency, the right of intervention must be limited in time, as the intervening State would become a party to the suit and would be entitled to appoint a judge *ad hoc*: intervention should be permissible only so long as an exchange of written Memorials between the parties continued to be possible. But where the intervening party supported the cause of one of the parties, the Court might be more liberal and allow the intervention at any stage of the proceedings.

The PRESIDENT observed that Article 62 of the Statute did not recognise any such distinction. It was for that reason that it had been thought possible to deal with all the cases in the same manner in Articles 58 and 59 of the Rules of Court.

M. ANZILOTTI said that M. Negulesco had raised the question whether a State which intervened was, or was not, entitled to appoint a judge *ad hoc*; this, he considered, was one of those questions which the Court must, if necessary, decide in each individual case in accordance with general principles. The provisions of the Rules now under discussion were only concerned with intervention from the standpoint of procedure.

M. FROMAGEOT, who agreed with M. Anzilotti's views on this point, asked whether what might be termed independent proceedings were always necessary when a State applied to intervene, in order to decide whether the application should be allowed or rejected. Should not the rule provide for the possibility of simply joining the request to intervene and the main application, and of deciding in one and the same judgment both on that request and on the merits? This method would avoid delay in settlement of the case.

The PRESIDENT pointed out that, according to Article 62 of the Statute, the English text of which was particularly clear, it was only if the Court allowed the request of the State desiring to intervene that the State became a party. But it was necessary at the very beginning of a case to settle which were the parties.

M. ANZILOTTI said there was one very serious question which rendered preliminary proceedings necessary: that was the question of the Court's jurisdiction. If two States had signed a special agreement, were they always bound to accept the intervention of a third State? The same question arose also in regard to a case submitted to the Court by an application.

Jonkheer VAN EYSINGA agreed that a request to intervene might undesirably prolong the proceedings. It was precisely for that reason that it had been proposed to insert the following clause in the fourth paragraph of Article 58:

> " Nevertheless, if the parties in their written observations have not contested the request for permission to intervene, the Court may decide that there shall be no oral argument upon the request."

It was with the same idea in view that it had been suggested to omit the second paragraph of Article 58.

In short, the Co-ordination Commission had done everything in its power to satisfy in advance M. Fromageot's scruples—which that Commission shared. It would not be possible to do more without offending against Article 62 of the Statute.

The preliminary procedure was therefore necessary.

Once leave to intervene had been given, the intervening party must be able to co-operate on a footing of equality with the other parties. If the written proceedings were already completed when the intervention was allowed, the intervening State must be granted sufficient time to submit written statements, to which the other parties must be given an opportunity of replying.

M. FROMAGEOT realised that in certain cases it might be necessary for the Court to pass upon the request for leave to intervene in a separate judgment. But he thought that there would be other cases in which the Court could decide on the merits and on the request for leave to intervene in a single judgment.

The PRESIDENT said that it was only when the Court had announced its decision on the request for leave to intervene that the Registrar knew exactly which were the parties to which he must forward the documents, as provided in Article 42 of the Rules. That was, moreover, in harmony with the system laid down in Article 62 of the Statute, according to which intervention was not a right, but required the consent of the Court.

M. NEGULESCO proposed that the words in paragraph 5 of Article 58: " the Court shall give its decision on the application in the form of a judgment ", should be amplified by the insertion, after " decision ", of the words: " on the admissibility in principle of . . . ". For it might happen that the Court, even after allowing the intervention, might arrive at the conclusion, in its final judgment, that the intervening party had no claim, with the result that the intervention must be disallowed.

M. ANZILOTTI said that in such a case the Court would merely reject the conclusions of the intervening party.

The PRESIDENT asked the Court to decide whether it would adopt Articles 58 and 59 in the form proposed by the Co-ordination Commission, and refer them to the Drafting Committee.

The Court unanimously answered in the affirmative.

8.IV.35.*

*Article 64 (*i.e., *the old Articles 58 and 59 continued). — First Reading.*

Jonkheer VAN EYSINGA proposed that the letters *a*, *b* and *c* should be deleted in the second paragraph.

It was decided accordingly.

* D 2, A. 3, pp. 441-442.

M. ANZILOTTI expressed doubts as to the utility of the expression " at latest " in paragraph 1.

The REGISTRAR having explained that, originally, these words had been inserted in order to call the attention of the parties to the desirability of presenting such applications as soon as possible, M. ANZILOTTI did not press the point.

M. FROMAGEOT observed that the contents of paragraph 2 of Article 64 were arranged in tabular form, whereas that form had been abandoned in the case of some other articles.

The REGISTRAR replied that the Court had not really adopted a fixed rule in regard to this point.

Article 64 was adopted in first reading as presented by the Drafting Committee, with the alteration proposed by Jonkheer van Eysinga. Text adopted:

" 1. An application for permission to intervene under the terms of Article 62 of the Statute of the Court shall be filed with the Registry at latest before the commencement of the oral proceedings.

" 2. The application shall contain:

"A specification of the case;

"A statement of law and of fact justifying intervention;

"A list of the documents in support of the application; these documents shall be attached.

" 3. The application shall be immediately communicated to the parties, who shall send to the Registry their observations in writing within a period to be fixed by the Court, or by the President, if the Court is not sitting.

" 4. The application to intervene shall be placed on the agenda for a hearing, the date and hour of which shall be notified to all concerned. Nevertheless, if the parties have not contested the application to intervene in their written observations, the Court may decide that there will be no oral argument.

" 5. The Court will give its decision on the application in the form of a judgment."

26.II.36.*

Article 64. — Second Reading.

Paragraphs 1 and 2.

The first two paragraphs were adopted without observation.

Paragraph 3.

Jonkheer VAN EYSINGA proposed that the words " during the judicial vacations " should be substituted for the words " if the Court is not sitting " in paragraph 3.

The PRESIDENT took a vote on this proposal, which was rejected by eight votes to one with one abstention.

Baron ROLIN-JAEQUEMYNS observed that the second paragraph of Article 58 of the Rules in force contained the following:

" Nevertheless the Court may, in exceptional circumstances, consider an application submitted at a later stage."

This provision had disappeared from the Article 64 now submitted for the approval of the Court.

Jonkheer VAN EYSINGA recalled that this paragraph had been intentionally deleted. The idea was to make it possible for the proceedings to be carried on from a given moment with the intervener on a footing of equality with the original parties. Furthermore, in 1926, the following final sentence had been added to the old Article 59: " These time-limits, however, may not extend beyond the beginning of the session in the course of which the case shall be heard." This provision had not been in harmony with the second paragraph of Article 58, which said that the Court might nevertheless, in exceptional circumstances, consider an application submitted at a later stage. Under the first paragraph of Article 58, an application must be made before the oral proceedings; according to this paragraph, on the contrary, the Court might still allow intervention in the course of the oral proceedings. The deletion of the latter paragraph had thus removed the inconsistency between Articles 58 and 59 (p. 268).

The PRESIDENT, referring to the same minutes, recalled that in 1935 the Court had unanimously accepted the proposals of the Co-ordination Commission.

There being no observations, he declared paragraph 3 adopted.

Paragraphs 4 and 5.

Paragraphs 4 and 5 were adopted without observation.

The PRESIDENT declared Article 64, as a whole, adopted in second reading.

11.III.36.*

Final Adoption.

No change was proposed in this article, except for the deletion of the word "*immédiatement*" in paragraph 3, as the general principle that documents would be communicated as and when received was duly laid down in Article 44.

In the English text of paragraph 4, the Drafting Committee proposed to say: " nevertheless, if the parties have not, in their written observations, opposed . . . ".

Article 64 was finally *adopted*, as thus amended.

ARTICLE 65 *(Article 59, Paragraph 4, old Rules, with New Paragraphs 1 and 3).*

INTERVENTION UNDER THE TERMS OF ARTICLE 62 OF THE STATUTE (TIME-LIMITS)

21.II.35.

See under Article 64, p. 268, for discussion of Articles 58 and 59 (Articles 64 and 65 of the Rules of 11.III.36).

8.IV.35.

First Reading.

Article 65 (*i.e.*, Article 59 of the Co-ordination Commission's draft) was adopted in first reading with the following text:

" 1. If the Court admits the intervention and if the intervening State expresses a desire to file a Memorial on the merits, the Court shall fix the time-limits within which the Memorial shall be filed and within which the other parties may reply by Counter-Memorials; the

* D 2, A. 3, pp. 649-650.

* D 2, A. 3, p. 733.

same course shall be followed in regard to the Reply and Rejoinder. If the Court is not sitting, the time-limits shall be fixed by the President.

" 2. If the Court has not yet given its decision upon the intervention and the application to intervene is not contested, the President, if the Court is not sitting, may, without prejudice to the decision of the Court on the question whether the application should be granted, fix the time-limits within which the intervening State may file a Memorial on the merits and the other parties may reply by Counter-Memorials.

" 3. In the cases referred to in the two preceding paragraphs, the time-limits shall, so far as possible, coincide with those already fixed in the case to which the application for intervention relates."

26.II.36.

Second Reading.

Article 65 was adopted in second reading after a vote for the substitution in paragraphs 1 and 2 of " during the judicial vacations " for " if the Court is not sitting " had been rejected.

11.III.36.

Final Adoption.

Article 65 was finally *adopted* with the following amendments: The expression " *la partie intervenante* " (party intervening) was substituted for " *l'intervenant* " (intervening State) in paragraph 1 and for " *l'Etat intervenant* " in paragraph 2; and the words " to which the application for intervention relates " at the end of paragraph 3 were deleted as superfluous.

ARTICLE 66 *(Article 60, old Rules, with New Paragraphs 2 and 3).*

INTERVENTION UNDER THE TERMS OF ARTICLE 63 OF THE STATUTE

21.II.35.*

Discussed as Article 60.

The PRESIDENT opened the discussion on Article 60 of the Rules, pointing out that this article had in view the case of intervention provided for in Article 63 of the Statute—*i.e.*, the case in which a State was entitled to intervene because a treaty, to which it was a party, was in issue.

Jonkheer VAN EYSINGA observed that the Co-ordination Commission had proposed [1] to insert in the French text of the first paragraph of Article 60 the formula: " *convention invoquée . . . comme régissant le cas d'espèce* " (. . . convention relied upon . . . as governing the case in question) in place of the words: " *convention sur laquelle . . . se fonde pour demander la décision de la Cour* " (convention on which (the special agreement or application) relies in seeking the decision of the Court). The latter expression might, indeed, lead to misunderstandings; and it was not consistent with the English text.[2]

The PRESIDENT pointed out that another change was proposed, and asked the Registrar to give some explanations.

The REGISTRAR said that the further change merely consisted in providing for a " declaration of intervention "—*i.e.*, a formal act by which a State desiring to avail itself of Article 63 would inform the Court of its intention. That act would have the advantage of fixing a point of time as from which the State would become an intervening party, as would be done by a decision of the Court admitting a State's intervention under Article 62 of the Statute.

M. ANZILOTTI observed that the words " at a public sitting, the date and hour of which shall be notified to the intervening State " had been added to the third paragraph. That might give the impression that a public sitting would be held in every case in order to allow the parties and the intervening State to discuss the latter's written observations. He asked if that was really necessary.

Jonkheer VAN EYSINGA did not think that the intention had been to modify the existing text, but merely to ensure the possibility of hearing arguments on the written observations in question.

M. ANZILOTTI preferred not to make it compulsory to hold a special oral debate on the observations. These observations were submitted in regard to the convention " governing the particular case "; in other words, they related to the subject of the principal discussion before the Court, a discussion in which the intervening State would no doubt take part.

M. GUERRERO, Vice-President, thought that the wording of paragraph 3 was sufficiently elastic to allow the Court to decide whether, in any given case, a special public sitting should be held to hear arguments on these observations.

On the other hand, he felt some misgiving in regard to paragraph 2, which laid down that the Registrar would take the necessary steps to enable the intervening State to inspect " the documents in the case, in so far as they relate to the interpretation of the convention in question ". It might often happen that the intervening State would need, in order to present its statements, to inspect all the documents and not only a portion of them. It was true that the form which the Co-ordination Commission had given to that article was also very flexible.

Baron ROLIN-JAEQUEMYNS, on the other hand, found himself in agreement with M. Anzilotti, since this was a case in which a State had a right to intervene.

M. ALTAMIRA asked if M. Anzilotti's doubts—which appeared justified—would be allayed by substituting, in place of the passage which the Co-ordination Commission had proposed to add, the words: " . . . discussed by the latter in the presence of the intervening State ".

Jonkheer VAN EYSINGA, replying to M. Guerrero's observations, said that, though the question of interpretation

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* D 2, A. 3, pp. 307-312.

[1] Text of Co-ordination Commission:

" 1. The notification provided for in Article 63 of the Statute shall be sent to every State or Member of the League of Nations which is a party to the convention relied upon in the special agreement or in the application as governing the case in question. A State or Member desiring to avail itself of the right conferred upon it by the above-mentioned article shall send a declaration to this effect to the Registry.

" 2. The Registrar shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations in writing thereon within a time to be fixed by the Court, or by the President if the Court is not sitting.

" 3. These observations shall be communicated to the parties, which may comment thereon at a hearing the date and hour of which shall be notified to the intervening State. The Court may authorise the latter to reply." *(Translation.)* (See D 2, A. 3, p. 876.)

[2] Article 60, 1931 Rules.

raised by the suit could not always be separated from the other issues, yet, in some cases, this would be possible. During the oral debate between the two parties, the latter discussed the case as a whole; the intervening State, on the other hand, could discuss only the interpretation of the convention in question. The clause referred to by M. Guerrero was intended to legislate for that situation.

M. ANZILOTTI observed that he was one of those who had desired the insertion of the clause in question.[1] But, if the State which had declared its desire to intervene was not allowed to inspect all the documents, it must none the less be represented in Court throughout the oral proceedings. It would thus be enabled to address the Court and to submit observations on the interpretation of the convention, and its observations would be commented upon by the other parties. There was therefore no need to provide for special proceedings, distinct from the general oral proceedings in the case.

M. FROMAGEOT thought it improbable that a State would confine itself to discussing the interpretation of the convention from a solely abstract and theoretical standpoint; it would probably be aiming at some practical result.

M. ANZILOTTI said that, in that case, the State should intervene under Article 62 of the Statute. But, if it intervened under Article 63, it must confine itself to expressing its views on the interpretation of the convention, seeing that the only object of that article was to ensure uniformity in the interpretation of collective conventions.

M. NEGULESCO pointed out that Article 60 of the Rules was designed to implement Article 63 of the Statute. When a State intervened under the latter article with regard to the interpretation of a convention, it must be able to show that it was a party to the convention in question, and the Court must satisfy itself, after hearing the parties, that the State was entitled to intervene. The parties might see fit to offer objections, upon which the Court would then have to decide.

The PRESIDENT said that an application for leave to intervene was submitted only where a State did not possess a right to intervene. But in cases in which, under Article 63 of the Statute, there was a right of intervention, it would suffice for the State desiring to intervene to make a declaration to that effect.

M. URRUTIA, returning to the question raised by M. Anzilotti, said that paragraph 3 of Article 60, as worded by the Co-ordination Commission, did not prevent the agent of the intervening State from being present at all the public hearings; but the Court might decide that the issue in regard to which the State had intervened would be discussed at a particular public sitting, and that, on that occasion, it would hear the arguments of the intervening State.

M. GUERRERO, Vice-President, thought that the Co-ordination Commission had been right in providing for the possibility of a special public sitting in cases of intervention under Article 63 of the Statute. Under that article, any State being a party to the convention concerned possessed a right of intervention. Very probably a special public sitting would be necessary to ascertain whether this right existed. For instance, if the other signatories of the convention in question said that the State concerned had not ratified the convention, the Court would have to decide.

M. ANZILOTTI agreed that this was so, but observed that the " observations " mentioned in paragraph 3 of Article 60 related not only to the admissibility of the intervention, but to the interpretation of the convention concerned; that interpretation would, however, be debated throughout the whole of the oral proceedings, and it was scarcely conceivable that the intervening State should be debarred from taking part in the debate.

The REGISTRAR pointed out that the explanation of the words added by the Co-ordination Commission and criticised by M. Anzilotti was to be found in the second part of the passage: ". . . the date and hour of which shall be notified to the intervening State ". The text at present in force might give the misleading impression that the original parties could comment on the observations of the intervening State in the latter's absence; it was to obviate this impression that the passage in question was added, and in reading it the emphasis should be laid, not on the special public sitting, but on its notification to the intervening State.

M. ANZILOTTI suggested that the passage in question might be replaced by the words: " during the oral proceedings ".

M. FROMAGEOT proposed to add, after those words: " in which the intervening State shall take part ".

Jonkheer VAN EYSINGA proposed that the matter be referred to the Drafting Committee.

M. FROMAGEOT asked at what stage it would be possible to discuss, if necessary, whether the State in reality possessed a right to intervene as a party to the convention on which the application or the special agreement was based. Suppose, for instance, that a State was a signatory of a convention, but had not ratified it—at what moment, and by whom, would the question of its right to intervene be appraised ?

The REGISTRAR said there was indeed a gap in Article 60. According to Article 63 of the Statute, it was the Registrar's duty to notify all States having participated in a convention that they were entitled to intervene. The Registrar was therefore called upon to decide, in the first instance, whether a given State had participated in the convention concerned. In practice, he obtained the decision of the Court if it was in session, or that of the President if the Court was not in session. That decision was, as a rule, based on information obtained from the Government or from the institution with which the original copy of the convention in question was deposited. However, doubtful cases might arise. In such cases, no notification was sent. It was clear, however, that, if a State which had not been notified in accordance with Article 63 of the Statute nevertheless held that it was entitled to intervene and informed the Court to that effect, the Court must have power to decide.[1] But the Rules contained no definite provision on this subject. Article 73, on the other hand, dealing with advisory procedure, legislated as follows for a similar case which might arise in that procedure:

> " Should any State or Member referred to in the first paragraph have failed to receive the communication specified above, such State or Member may express a desire to submit a written statement or to be heard, and the Court will decide."

A clause of the same kind would be very useful in Article 60 of the Rules.

M. FROMAGEOT thought that Article 63 of the Statute imposed a very heavy responsibility on the Court and on

[1] D 2, pp. 84-97, 154-155, 205-206.

[1] *Cf.* C. 17—I, Vol. IV, pp. 2423 (document 50) and 2429 (document 54).

the Registry. It was, in fact, the Court, by virtue of the notification which it sent to a State, that decided that the State had participated in a convention.

No doubt, in most cases no difficulty would arise. But there might, in some cases, be disagreement in regard to ratification, and other similar cases might present themselves.

M. ANZILOTTI having pointed out that there might be disagreement in regard to the admissibility of an intervention under Article 63 of the Statute, M. GUERRERO, Vice-President, thought it would be wise to fill the gap which existed in the present Rules, owing to this case not being provided for.

M. FROMAGEOT said that a distinction must be made between two different cases: either the Court had notified a given State concerning the suit, under Article 63 of the Statute, or the State took the initiative and declared that it was a signatory of a certain convention and had a right to intervene under Article 63 of the Statute. In the former case, the Court could not well dispute the State's right to intervene, since the intervention was due to the Court's own action; in the second case, on the other hand, it seemed natural that the Court should judge whether the intervention was justified or not.

Jonkheer VAN EYSINGA thought that the Court was free to reject a claim to intervene made under Article 63 of the Statute, not only in view of an objection lodged by the parties, but also *proprio motu*, even if the intervening State had received the notification provided for in the article.

However, in his view, it would be wiser not to provide for these contingencies in the Rules, but to leave them to be regulated by the Court's practice.

M. SCHÜCKING thought a distinction should be made between cases in which the Court had notified a State, through the Registrar, and cases where no notification had been sent. In the former case, a right of intervention would be presumed to exist, so that the Court could allow the intervention without recording any actual decision—assuming that no objection had been lodged. If an objection were lodged, the Court would have to decide whether the intervention was admissible. If the State had not received a notification, the Court must in all cases give a decision. That, in his view, was the import of the Rules now in force, and they did not need to be supplemented on that point.

M. ANZILOTTI suggested that it might be advisable to provide specially for the possibility of an objection by the parties, and, in such a contingency, for a decision by the Court. It might be advisable, at the end of the first paragraph, after the words " a declaration to that effect ", to add ". . . at latest before the oral procedure ", as also a new paragraph worded as follows: " This declaration shall be communicated forthwith to the parties. Should the latter object to the intervention, the Court will decide ".

M. GUERRERO, Vice-President, agreed with this suggestion, in order to avoid the possibility of a State, which was not really entitled to intervene, coming in to support one of the parties in a suit, thus giving one or other of them an unfair preponderance.

Jonkheer VAN EYSINGA asked if M. Anzilotti's proposal would make it impossible for the Court, *proprio motu*, to question the right of a State to intervene under Article 63.

M. ANZILOTTI said that he was only considering the case in which an objection was raised against the intervention of a State that had received a notification from the Court.

Jonkheer VAN EYSINGA thought it would be well to provide, in addition, for the possibility of the question's being raised by the Court *proprio motu*.

M. ANZILOTTI said that, having regard to the first paragraph of Article 63 of the Statute, he doubted the possibility of the contingency referred to by Jonkheer van Eysinga.

M. URRUTIA, after alluding to the debates on the same point in 1926, and to the negative solution which had then been reached,[1] said he agreed with the text proposed by the Co-ordination Commission, which moreover did not deprive the Court of all right of action; for the intervening party could not take part in the discussion if the Court did not call upon it to speak. Unlike M. Anzilotti, he did not find that the existing text excluded the possibility of an objection.

M. FROMAGEOT thought that the additional words proposed by M. Anzilotti could easily be inserted at the end of paragraph 1. As to the doubts he had expressed, he gathered that, if the position was clear, the Registrar would, according to custom,[2] send the notification referred to in Article 63 of the Statute. But, if there was some uncertainty, the Registrar would refrain from sending the notification in order not to prejudge the Court's opinion; he would, however, communicate with the State in question, simply by way of information, so that if it believed itself entitled to intervene it could make a declaration of intervention; the State would, however, be informed that the Court's opinion was entirely reserved. Although that practical solution appeared satisfactory, he would welcome the insertion of the words which M. Anzilotti had proposed.

Jonkheer VAN EYSINGA said that, if it was decided to add those words, it was most necessary to provide also for cases in which the Court itself might become convinced that a certain State was not entitled to intervene. In such cases the Court must be entitled to give a ruling to that effect *proprio motu*; for, otherwise, the rule of *a contrario* might be invoked against action by the Court *proprio motu*.

The PRESIDENT put the following question to the vote, it being understood that the final wording was reserved:

> " Does the Court decide to add the following words at the end of the first paragraph of Article 60 of the Rules, as drafted by the Co-ordination Commission: ' This declaration shall be communicated to the parties. Should an objection be lodged, the Court will decide ' ? "

The Court unanimously answered the question put by the President in the affirmative.

Jonkheer VAN EYSINGA asked that it should be added that the Court could also give a decision *proprio motu*.

The PRESIDENT submitted the following text to the Court:

> " Does the Court decide that provision shall be made in the Rules for an objection by the Court *proprio motu* to an intervention under Article 63 of the Statute ? "

By five votes against four, with two abstentions, the Court answered the question in the affirmative.

M. FROMAGEOT said he had answered in the negative because, according to Article 63 of the Statute—the English text of which was specially clear—a State which had been notified appeared to have an absolute right of intervention, of which it could not be deprived.

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[1] D 2, A, pp. 158, 167.

[2] *Statut et Règlement de la Cour permanente de Justice internationale — Eléments d'interprétation*, pp. 446-447.

Baron ROLIN-JAEQUEMYNS said that he would have liked to vote in the affirmative; but as he felt, for the same reason as M. Fromageot, that he had no right to do so, he preferred to abstain.

Jonkheer VAN EYSINGA asked whether, if M. Fromageot's observation applied to this case, it would not also apply to the case contemplated by M. Anzilotti's proposal.

M. ANZILOTTI pointed out that the situations were different. The notification of a State by the Registrar created a right of intervention; but the question whether the required conditions were fulfilled was one which the parties could always raise; he saw no reason why the parties should be unable to dispute, before the Court, the legality of some action taken by the Registry. On the other hand, he thought it rather doubtful whether the Court itself could raise the question, seeing that an organ of the Court, acting with the authority of the Court or of its President, would, by notifying the State, have admitted the existence of the conditions prescribed for intervention.

M. NEGULESCO held that a notification by the Registry could not endow a State with a right of intervention if it had not participated in the plurilateral convention in question; for a right could not be created by an erroneous notification.

The PRESIDENT said that the two votes had been duly adopted, and that it would be for the Drafting Committee to propose a text which, while regardful of these decisions, would facilitate the efficient working of the Court. The latter would be able to resume the discussion when the text was submitted to it.

The REGISTRAR said that the difficulty which now confronted the Court was one which had often arisen in practice. The question had had to be settled in a number of cases. The method adopted had been that which M. Fromageot had just indicated—namely, only to send out notifications in cases in which the Registry was absolutely sure of the facts, and, in other cases, to inform the States of their right, independently of any notification, to suggest that they were entitled to intervene, subject always to the possibility that the Court might decide against their claim.[1] If it was desired to embody that method in the Rules, it could be done by inserting in Article 60 a new paragraph corresponding to paragraph 3 of Article 73 (Article 66 of the Statute in force since 1.II.36) of the Rules of Court.

8.IV.35.*

Article 66. — First Reading.

M. WANG observed that paragraph 3 of Article 66 spoke of the "*admissibilité de l'intervention*" (admissibility of intervention) whereas in paragraph 2 of Article 65 the expression "*admission . . .*" (. . . should be granted) was used. Was there any difference between these terms?

M. FROMAGEOT explained the difference in meaning between "*admissibilité*" and "*admission*". This difference, in his opinion, justified the divergence between the two articles.

M. ANZILOTTI, on the other hand, thought that, as the standpoint was the same in Article 65 as in Article 66, the same word should be used in both.

Baron ROLIN-JAEQUEMYNS proposed that the second sentence of paragraph 3 of Article 66 should be deleted. According to Article 63 of the Statute, a State which had been notified under that article could always intervene, and the Court could not therefore refuse to allow it to do so.

M. FROMAGEOT thought that the question raised by Baron Rolin-Jaequemyns was a question of principle, which it would be better to take up again at the second reading.

Count ROSTWOROWSKI understood the article as follows: even if, pursuant to paragraph 3 of Article 66, intervention under Article 63 of the Statute had been declared inadmissible, that did not preclude intervention under Article 62 of the Statute. It might be well to add to paragraph 3 of the Drafting Committee's text the words: "In the event of objection . . . intervention *under Article 63 of the Statute*" in order to make the position quite clear.

The PRESIDENT considered that the terminology of Articles 65 and 66 was correct. In the circumstances contemplated by Article 65, the Court gave its decision on the question whether intervention should be allowed. On the other hand, under Article 66, it simply decided whether the conditions requisite to render intervention a matter of right were fulfilled, the question whether intervention would be allowed being reserved.

M. FROMAGEOT, in this connection, suggested that the word "*recevabilité*" should be used in paragraph 3 of Article 66, instead of "*admissibilité*".

The PRESIDENT having observed that the word "*recevabilité*" would also be translated in English by "admissibility", M. Fromageot did not press the point.

After a short discussion, the PRESIDENT took a vote on Baron Rolin-Jaequemyns' proposal:

> "Does the Court decide to delete the second sentence of paragraph 3 of Article 66 proposed by the Drafting Committee?"

By ten votes to one, the Court answered the question in the negative.

The PRESIDENT asked if M. Wang would be satisfied with the insertion in paragraph 3 of the words "under Article 63 of the Statute".

M. WANG said that he would.

There being no other observations, the article was adopted in first reading with this addition to paragraph 3. Text adopted:

> "1. The notification provided for in Article 63 of the Statute shall be sent to every State or Member of the League of Nations which is a party to a convention invoked in the special agreement or in the application as governing the case referred to the Court. A State or Member desiring to avail itself of the right conferred by the above-mentioned article shall file a declaration to that effect with the Registry.
>
> "2. Any State or Member of the League of Nations which is a party to the convention in question and which has not received the communication referred to in the preceding paragraph may in the same way file with the Registry a declaration of intention to intervene under Article 63 of the Statute.
>
> "3. Such declarations shall be communicated to the parties. In the event of objection or doubt as to the admissibility of intervention under Article 63 of the Statute, the decision shall rest with the Court.
>
> "4. The Registrar shall take the necessary steps to enable the intervening State to inspect the documents in the case in so far as they relate to the interpretation of the convention in question, and to submit its written observations thereon to the Court within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

* D 2, A. 3, pp. 442-443.

[1] *Cf.* C 17—I, Vol. IV, p. 2400 (document 12).

" 5. These observations shall be communicated to the other parties and may be discussed by them in the course of the oral proceedings; in these proceedings the intervening State shall take part."

26.II.36.*

Article 66. — Second Reading.

Paragraph 1.

M. NAGAOKA raised the question whether there was any point in retaining the expression " State or Member ".

M. NEGULESCO observed that these words appeared in the reverse order in Article 66 of the revised Statute.

The PRESIDENT thought that the Drafting Committee might consider this point.

Subject to this, he declared paragraph 1 adopted.

Paragraphs 2 and 3.

Paragraphs 2 and 3 were adopted without observation.

Paragraph 4.

M. FROMAGEOT proposed that in this paragraph the words " intervening State " should be replaced by the word " intervener ". The beginning of paragraph 4 would then read:

" The Registrar shall take the necessary steps to enable the intervener . . .", etc.

M. NAGAOKA observed that, if this proposal were adopted, the same change would have to be made in the first paragraph of Article 65.

The PRESIDENT thought that this point also should be considered by the Drafting Committee.

This was agreed to.

Jonkheer VAN EYSINGA proposed that in paragraph 4 the words " if the Court is not sitting " should be replaced by " during the judicial vacations ".

The Court, by eight votes to one, with one abstention, rejected this proposal.

There being no further observations, the PRESIDENT declared paragraph 4 adopted.

Paragraph 5.

Paragraph 5 was adopted without observation.

The PRESIDENT remarked that the texts just examined by the Court were adopted in second reading subject to consideration by the Drafting Committee of the point concerning the word " State " which appeared in several paragraphs.

11.III.36.*

Article 66. — Final Adoption.

The PRESIDENT said that, in paragraph 1, the Drafting Committee proposed to add the words " of the Court " after the word " Statute "; also, as had been done in the revised Statute and in earlier articles of the Rules, to reverse the order of " *Membre de la Société des Nations* " and " *Etat* ".

Jonkheer VAN EYSINGA had felt some uncertainty on reading the new text. The reference in the article was, on the one hand, to Members of the League of Nations and, on the other, to certain other States which were parties to a multilateral convention; the new text, however, might be read as though the words " partie à une convention . . ." referred only to " *Etat* ", and as though the notification must be sent to all Members of the League of Nations without distinction. To correct this false impression, it would suffice to leave the sentence as it was before its modification by the Drafting Committee. In that form, it would not be liable to misunderstanding, and, moreover, there was no need to reverse the order of the words " *Membre* " and " *Etat* " in this article.

The PRESIDENT noted that there were no objections to Jonkheer van Eysinga's suggestion and that, accordingly, the original text: ". . . *à tout Etat ou Membre de la Société des Nations partie à une convention* " would be restored in paragraph 1 of Article 66.[1]

M. NAGAOKA observed that the same would have to be done in paragraph 2.

This was agreed to.

The PRESIDENT said that the Committee proposed another change in paragraph 2: the replacement of the phrase " *et qui n'aurait pas été l'objet de la communication ci-dessus visée* " (and which has not received the communication referred to in the preceding paragraph) by " *et auquel cette notification n'aurait pas été adressée* " (and to which the notification referred to has not been sent). The Committee also proposed in paragraphs 4 and 5, to substitute " the intervening party " for " intervener ". Lastly, in paragraph 3 of the English text, the Committee proposed to say: " if any objection or doubt should arise as to whether . . .".

There being no observations, Article 66 was finally *adopted*, amended as indicated above.

ARTICLE 67 *(New Article).*

APPEALS TO THE COURT

25.II.35.**

Discussed as Article 66 (6). — Appeals (" instances en recours ").

The PRESIDENT invited the Court to consider the question of appeals. The existing Rules contained nothing on the subject. The Co-ordination Commission [1] had not adopted the suggestion of the Third Committee—which had considered that the experience so far gained by the Court did not afford an adequate basis for concrete proposals [2]—and proposed an article the first paragraph of which was as follows:

" 1. If the Court receives a special agreement or application requesting it to consider whether an award made by another international tribunal is well

* D 2, A. 3, pp. 650-651.
** *Ibid.*, pp. 336-344.
[1] *Ibid.*, pp. 878-879.

* D 2, A. 3, pp. 733-734.
[1] This correction was not made in the English text.
[2] This report was submitted on March 15th, 1934. * The minutes of July 27th, 1932, contain, on the other hand, the following passage:

" 95. — *Procedure in cases of appeal.*

" M. FROMAGEOT urged the need for establishing a special procedure for dealing with appeals of this sort, and for deciding whether they were to be treated as appeals or as new cases, particularly in view

* D 2, A. 3, pp. 777-781.

founded, such special agreement or application shall be governed in all respects by the provisions of the Statute and Rules of Court concerning special agreements or applications instituting original proceedings before the Court."

There being no general observations, the PRESIDENT opened the discussion upon this paragraph.

Count ROSTWOROWSKI recalled that, in the Peter Pázmány University case,[1] the question had been raised whether appeals lodged with the Court should be treated as appeals in the technical sense or as new cases. In accordance with the conclusion reached by the Court on that occasion, the text proposed by the Co-ordination Commission adopted the latter course and laid down that an appeal would be treated as an " original suit ". On the other hand, by saying that the Court was asked to consider whether an award was " well founded ", the proposed text seemed to imply that the Court's task was to examine the award which was referred to it for that purpose. Would it not be better, in order to make it clear that the suit was an original one, simply to say: if the Court is called upon ". . . to consider a controversy which has already formed the subject of an international award " ? Moreover, it did not seem possible to regard the Court as a higher Court in relation to other international tribunals.

The PRESIDENT pointed out that the wording criticised by Count Rostworowski referred to a task entrusted to the Court by agreement between the parties. There could therefore be no objection if the carrying-out of that task involved criticism of a previous award.

M. GUERRERO, Vice-President, also observed that, with the consent of the parties concerned, the Court could certainly act as a Court of appeal from the arbitral tribunal responsible for the award impeached.

Count ROSTWOROWSKI observed that, if the Court, in its Rules, spoke of examining the question whether an award made by another international tribunal was well founded, the Governments would form a definite conception based on this expression of the Court's powers in this connection. It would be better to employ a more non-committal expression.

The PRESIDENT pointed to the tendency which had developed of recent years, especially at Geneva, to give the Court, in certain circumstances, a sort of appellate jurisdiction. The Powers would derive their ideas with regard to the Court's powers mainly from this development.

M. ANZILOTTI thought that, as a whole, the article proposed by the Co-ordination Commission, and in particular paragraph 1, seemed to indicate that the Court could entertain suits which constituted a sort of appeal from an award already made by some other international tribunal, but that it did not in the least prejudge either the nature of the appeal or the ambit of the Court's investigations. The proposed text seemed mainly to envisage a case where the Court would be acting more or less as a Court of cassation. It did not, however, preclude the Court from acting as a true Court of appeal. With regard to the necessity for providing for various contingencies, the expression " *bien-fondé* " (well founded)— a fairly non-committal one—seemed well chosen. On the other hand, M. Anzilotti felt some doubt as to the suitability of the expression " *nouvelle instance* " (original proceedings). The word " *nouvelle* " seemed unnecessary. It was possible to imagine cases which would not be brought before the Court in the form of an original suit but in which the Court would be frankly asked to re-examine the precise action already decided by another international tribunal.

M. FROMAGEOT observed in the first place that the Co-ordination Commission proposed to say: " If the Court receives a special agreement or application . . .", but though a special agreement might imply an agreement between the parties, it was difficult to imagine an application doing so, unless it was provided that it must be presented under some previous treaty or agreement. For that reason, the draft proposed by M. Fromageot[1] ran: " When an appeal . . . is lodged with the Court under a treaty, agreement or special agreement . . .".

M. Fromageot also pointed out, in connection with the expression " consider whether an award . . . is well founded ", that the Court had not merely to consider but also to decide. Moreover, the words " well founded ", criticised by Count Rostworowski, were unnecessary. M. Fromageot had proposed the following: " When an appeal from a decision given . . . is lodged with the Court . . .". If it were desired to avoid using the word

of the fact that the parties before the Court would not necessarily be the same as in the procedure before the Mixed Arbitral Tribunal.

" The REGISTRAR observed that this subject was on the agenda of one of the sub-committees studying the revision of the Rules.

" M. GUERRERO, Vice-President, suggested that the sub-committee should meet and appoint a Rapporteur. The latter could prepare a report, which the sub-committee would examine and submit to the Court after the vacation.

" The PRESIDENT, after consulting his colleagues, said that the Court agreed to accept the Vice-President's proposal."

In view of this decision, M. van Eysinga prepared a special report, which was distributed to the Court on *October 7th, 1932, and* the text of which has been published together with the report of the Third Committee in D 2, A. 3.

[1] A/B 61; see also C 72, C 73 and C 68.

[1] Text of this draft:

" 1. When, under the terms of a treaty, agreement or special agreement, an appeal is lodged with the Court from a decision given by some other tribunal, the provisions of the Statute and Rules shall be exclusively applied before the Court.

" 2. No application submitting to the Court an appeal from a decision given by some other tribunal shall be entertained unless it is presented in the name and on behalf of a party entitled to appear before the Court and directed against a party similarly qualified. Only such parties shall be held to be concerned in proceedings before the Court, save in so far as Articles 62 and 63 of the Statute and Articles 58 to 60 of the Rules may be applicable.

" 3. An application lodging an appeal shall bear the date of registration by the Registry of the Court.

" If the right of appeal is subject to time-limits, these shall be strictly observed, otherwise the right of appeal will be forfeited.

" An appellant, the seat of whose Government is outside Europe, may confine itself to notifying the Registry of the Court, within such time-limits, that it is appealing against the decision impeached and that it is despatching the application on the same date, duly certified by the Minister for Foreign Affairs.

" 4. An application lodging an appeal shall contain a precise statement of the grounds of complaint adduced against the decision impeached. It shall be accompanied by an authentic copy of this decision.

" The application shall, in accordance with Article 35 of the Rules, mention the name of the agent or agents appointed to conduct the case before the Court and the address selected by them at the seat of the Court.

" 5. It shall be the duty of the parties to produce to the Court all useful and relevant material from the record upon which the decision impeached was rendered.

" 6. No new claim may be made in appeal proceedings, except it be in regard to compensation or unless the new claim serves to sustain the principal claim.

" *Parties may also claim interest or other accessory sums which* have fallen due since the delivery of the decision appealed against, and damages in respect of prejudice suffered since that decision " (See D 2, A. 3, pp. 914-915.)

" appeal " or some similar term, they might speak of an action brought before the Court relating to a dispute in regard to which a decision had already been given. Personally, however, M. Fromageot would prefer to use the word " appeal " in an international sense, without regard to its possible meaning in any particular system of municipal law.

Lastly, M. Fromageot criticised the expression: " governed in all respects by the provisions of the Statute and Rules of Court concerning special agreements or applications instituting original proceedings before the Court ". He observed that what was meant was simply that the special agreement or application would not be governed by provisions other than those of the Statute and Rules, and that, for instance, the internal legislation of the parties concerned could not be adduced before the Court.

M. SCHÜCKING, for paragraph 1, preferred the text proposed by M. Fromageot to that of the Co-ordination Commission, because it did not exclude any of the various possibilities.

M. NEGULESCO, on reading the opening words of the first paragraph proposed by the Co-ordination Commission, received the impression that the Court could only examine the question whether the award was well founded in fact and in law. The terms of the proposed text, therefore, which contained the words " consider whether an award . . . is well founded ", were not sufficiently wide to cover all forms of remedial action—ordinary and extraordinary. But that was essential.

M. Negulesco thought that it was the duty of the Court to decide a dispute that had arisen in connection with an " award made ". But he considered that the text covered only awards made by other *international* tribunals. He thought, however, that it would be better to adopt some more flexible wording which would also cover appeal from a decision of a municipal Court, for instance:

> " If the Court receives a special agreement or application requesting it to adjudicate upon a dispute which has arisen in connection with an award made . . ."

Jonkheer VAN EYSINGA observed that most judges were agreed that as wide as possible a formula should be adopted so as to cover all kinds of " appeals ". That was why the Co-ordination Commission had proposed the heading: " Appeals " (" *Des instances en recours* "), which did not seem to exclude either revision or " cassation ". For parties were, under Article 36 of the Statute, free to submit to the Court any form of action. With the same object in view, M. Fromageot had advocated the use of the word " appeal " in a special sense. That word, however, had acquired a narrow and technical meaning, not only in municipal law but also in international practice, for instance in Article 39 of the Convention of 1920 between Danzig and Poland. On the other hand, Jonkheer van Eysinga approved the wording proposed by M. Fromageot in that it was not limited to remedial action against the decisions of international tribunals.

Baron ROLIN-JAEQUEMYNS thought that the word " appeal " proposed by M. Fromageot was not sufficiently precise to avert any possible misunderstanding. On the other hand, there were certain minor objections to the Co-ordination Commission's text. Could not the texts of M. Fromageot and the Co-ordination Commission be combined on the following lines:

> " Whenever the Court, under a treaty, agreement or special agreement, is requested by the parties concerned or by one of them to decide whether an award made by some other tribunal is well founded, the provisions of the Statute and Rules of Court shall be exclusively applied before the Court " ?

M. GUERRERO, Vice-President, agreed with those of his colleagues who were anxious to adopt a wording which would cover all possible contingencies, besides appeals proper, for instance, actions for the setting aside or revision of a judgment. Again, provision must be made not only for appeals against decisions given by international tribunals, but also against the decisions of other tribunals.

In order to cover all these contingencies, M. Guerrero suggested the following wording:

> " Any dispute arising between the parties in regard to an award made by another tribunal and referred to the Court under a treaty, agreement or special agreement, shall be governed by the provisions of the Statute and Rules of Court."

M. FROMAGEOT was afraid that neither the Co-ordination Commission's text nor the other wordings suggested contained anything expressing the essential idea, namely, that an appeal to the Court could be entertained only if brought by a party entitled to appear before the Court. Furthermore, the wording proposed by the Vice-President, like that of M. Negulesco, covered appeal only in the case of disputes arising " in connection with " a decision given; but it must be possible for the decision itself to form the subject of an appeal. M. Fromageot also explained the reasons militating in favour of the use of the latter term in preference to any other.

M. SCHÜCKING hesitated to accept the wording proposed by Baron Rolin-Jaequemyns, because it laid down that the Court must be asked to decide whether a previous decision was well founded; it was too narrow, he thought, and covered only one of the two possibilities, the other being the case where the parties wanted a new judgment on a suit which had already been adjudicated upon in first instance. M. Schücking would also like, if possible, to avoid using the word " appeal ". For these reasons amongst others, he preferred the wording of the Vice-President, which had the advantage of covering all possibilities.

M. ANZILOTTI, with regard to the wordings suggested by M. Guerrero and M. Negulesco, observed that, in regard to the subject under discussion, a distinction must be drawn between an appellate action and a dispute arising in connection with a decision. An appeal related to the actual decision itself, which stood to be confirmed, set aside, or amended, and such an action was possible in regard to decisions given by international tribunals but not in regard to those of municipal Courts. On the other hand, the decision of a municipal Court might form the subject of a dispute between States, which dispute could certainly be referred to the Court under an agreement between the States concerned; that contingency, however, had nothing in common with remedial actions which formed the subject of the present discussion, since the proceedings before the Court would have nothing to do with the judgment of the municipal Court. This distinction was very important, *inter alia*, because it safeguarded the independence of municipal Courts.

M. Anzilotti recalled in this connection the difficulties which, at the Hague Conference on Private International Law in 1928, had been encountered in connection with the adoption of a clause (" Protocol J ") to the effect that questions concerning the interpretation of agreements of private international law might be submitted to the Court by the Governments concerned.

M. URRUTIA had come to the conclusion that the reason why the Statute did not deal with the question of appeals was because it had been thought that Article 36 sufficed. That article, however, concerned disputes, and there were now international agreements providing that an international decision might be referred to the Court, if one of the parties desired to take this course, without any dispute having arisen. This new state of affairs made it necessary for the Court to include a new article in the Rules on the subject.

With regard to the wording, M. Urrutia accepted that proposed by M. Fromageot, subject to the substitution of the word " *saisie* " for the word " *invitée* ".

M. FROMAGEOT said that, when drafting his text so as to cover the possibility of an appeal from the judgments of municipal Courts, he had had in mind the Draft Convention of 1907 concerning the Prize Court.

M. NEGULESCO observed that, according to paragraph 1, the action would not constitute the transfer of a suit from one Court to another, but a fresh action brought before the Court. Accordingly, it was clear that the case adjudicated upon in first instance was regarded as closed, whence it followed that what was referred to the Court was a dispute arising *in connection* with the judgment already given—in accordance with the wording proposed by M. Negulesco. The words " original proceedings " would have to be deleted in order to make it possible for the Court to entertain an appeal from an international award, directed against the award itself.

M. GUERRERO, Vice-President, said that, according to his proposal, the Court's jurisdiction would always rest on the consent of the parties concerned. Accordingly, a decision given by a municipal Court could undoubtedly come before the Court. Moreover, there had already been cases of this in international arbitration practice.

Jonkheer VAN EYSINGA recalled that M. Anzilotti had envisaged the case of a decision given by a municipal Court which, under an agreement between two Governments and quite apart from any question of appeal, might form the subject of a dispute between those two Governments. Such a case might in fact occur; definite provision for it was made in the Additional Protocol to the 1907 Convention for the Establishment of an International Prize Court—the Protocol of 1910. But the Prize Court Convention itself, as already observed by M. Fromageot, constituted proof that an appeal could lie equally well from a municipal Court to the Court of Justice. States were free to adopt either the method of appeal provided for in the 1907 Convention or that provided for in the Additional Protocol of 1910; Article 36 of the Statute covered both possibilities, and all that Jonkheer van Eysinga meant to say was that the Court had no right in its Rules to exclude either of these two methods.

The PRESIDENT observed that the Court had discussed the same problem at great length in connection with the Peter Pázmány University case, and that the Co-ordination Commission's text took into account the opinions expressed by judges on that occasion; it had even adopted their phraseology.[1] Thus, for instance, the expression " whether an award made by another international tribunal is well founded " had been used in the Co-ordination Commission's text. That wording was, moreover, obviously sound; for, if the parties wished the actual dispute which had formed the subject of the judgment in first instance to be submitted to the Court, they would conclude to that end either a special agreement, or an agreement under which one of them might have recourse to the Court. In either case Article 40 of the Statute would apply. Again, though it was true that the terms of Article 36 of the Statute were sufficiently wide to enable the Court, in exceptional cases, to entertain disputes concerning the soundness of decisions given by municipal Courts, it was also true that, under Article 38 of the Statute, the Court applied only international law; it would therefore lack jurisdiction whenever it was a case of applying the domestic legislation of a State. In most cases, that would prevent the question of the soundness of the decision of a municipal Court from being referred to the Court. It would only be possible if the decision enunciated a principle of international law or concerned the interpretation of a treaty.

Jonkheer VAN EYSINGA pointed out that, in the President's view, it was possible under Article 36 of the Statute to refer the judgment of a municipal Court to the Court on appeal, but that the possibility was somewhat theoretical, owing to the terms of Article 38 of the Statute, according to which the Court must apply international law. In regard to this, Jonkheer van Eysinga observed in the first place that municipal Courts also often had to apply that law; so that appeal to the Court in cases where it was held that such Courts had wrongly applied international law would at any rate be possible. He also remarked, however, that it could not be said that the Court never applied municipal law. For instance, international law often laid down that the municipal law of a State was applicable in a particular case, and the Court could not do otherwise than apply it. There were, moreover, several precedents for this,[1] *inter alia*, the case referred to by the President, in which the Court had had to apply Hungarian municipal law. That was why, in Jonkheer van Eysinga's opinion, the argument adduced by the President on the basis of Article 38 of the Statute to refute Jonkheer van Eysinga's argument founded on Article 36 was not decisive; the Co-ordination Commission's draft should therefore be amended so as to make its terms wide enough to cover all possibilities, for instance by using the term " tribunal " (*juridiction*) in a quite general sense, as proposed by M. Fromageot.

For the rest, Jonkheer van Eysinga said that, from the point of view of the respect due to the sovereignty of States, he saw no difference between the impeachment of the judgment of a municipal Court before an international Court and the bringing of an action before the latter by the party which had lost the case before the municipal Court, with a view to obtaining an indemnity.

M. ANZILOTTI, on the contrary, thought there was a very great difference between the two proceedings, since the second, from the point of view of law, left the municipal Court's judgment intact.

He also felt that the Co-ordination Commission's draft was too exclusively based on the conclusions arrived at by the Court in the only " appeal " case which had been before it. From this point of view, he thought that M. Fromageot's wording, which was wider and more flexible, was to be preferred. But, if they adopted M. Fromageot's text, the term " *appel* " (appeal) must either be defined or replaced by some other term, for instance " *recours* " (remedial action). Further, it would be well to delete the word " exclusively ", because the agreement giving the Court jurisdiction might provide for special rules of procedure applicable to the particular case. In any case, the essential

[1] 25th Session, P.-V. Nos. 54, 60; 26th Session, P.-V. Nos. 7 and 8; 30th Session, P.-V. Nos. 5 and 6. — The President more particularly referred to P.-V. No. 6 of the 30th Session.

[1] *Cf.*, for instance, B 6; A 20.

thing was that the rule should cover all possible kinds of action (*recours*).

M. SCHÜCKING agreed with M. Anzilotti that all possibilities and all kinds of action should be covered, including revision, cassation and appeal in the sense of municipal law.

The PRESIDENT suggested that the Court should first decide the question of principle. Accordingly, he proposed the following formula for the purposes of voting:

> " Is the Court in favour of including in the Rules provisions covering remedial action (*instances de recours*)—appeals in a wide sense ? "

By nine votes to two, the Court answered the question in the affirmative.

The PRESIDENT having once more read the drafts proposed respectively by M. Fromageot and Baron Rolin-Jaequemyns, Jonkheer VAN EYSINGA observed that each of the proposed drafts contained valuable features, but that they were also each open to objections, of which he gave examples. In these circumstances, perhaps the best thing to do would be to make a list of the points in regard to which the various drafts differed and to vote on each point in turn. Another plan would be to refer the paragraph, together with all the new proposals, to the Drafting Committee.

The PRESIDENT thought it would be better for the Court first of all to vote on the Vice-President's proposal, which differed most widely from that of the Co-ordination Commission.

Personally, he was afraid that M. Guerrero's text would result in the Court's receiving numerous cases of alleged denial of justice before municipal Courts.

M. GUERRERO, Vice-President, saw no difficulty, since they would have to be disputes brought before the Court with the consent of the parties.

M. URRUTIA said that he could accept M. Guerrero's proposal, but what was really required was to say something more explicit regarding *instances de recours* (remedial action), as was done in M. Fromageot's text.

Baron ROLIN-JAEQUEMYNS was afraid that the expression in the Vice-President's draft: " any dispute arising between the parties in regard to an award ", was somewhat inaccurate. The dispute would relate rather to the *subject-matter* of an award than to the award itself.

M. GUERRERO, Vice-President, agreed to amend his text in accordance with Baron Rolin-Jaequemyns' proposal. He would, moreover, willingly withdraw it in favour of M. Fromageot's.

M. NEGULESCO thought it would be better for the Court first of all to agree on certain principles rather than to vote on particular wordings. As questions of principle, he mentioned the following: Should the word " appeal " be used in the text or not ? Should the expression " consider whether an award . . . is well founded " be left ? Should the expression " international tribunal " be left or should the word " tribunal " alone be used ? Should the expression " original proceedings " be kept ?

The PRESIDENT thought that the Court ought to vote on actual texts, so that the Drafting Committee would have something definite to work upon. In this connection, he asked the Court to vote on the question whether paragraph 1 of the text proposed by the Co-ordination Commission should be replaced by the following:

> " Any dispute arising between the parties concerning the subject-matter of an award made by another tribunal, and referred to the Court under a treaty, agreement or special agreement, shall be governed by the provisions of the Statute and Rules of Court."

By six votes to five, the Court answered the question in the negative.

The PRESIDENT observed that that left the amendments of M. Fromageot and Baron Rolin-Jaequemyns.

M. SCHÜCKING having asked whether, if a judge voted for M. Fromageot's text, he could still propose amendments, the PRESIDENT said that it would still be possible for him to do so.

Count ROSTWOROWSKI could accept M. Fromageot's text provided that the word " *recours* " (action) was substituted for " *appel* " (appeal), and that the expression " from a decision given " should be replaced by an expression designed to indicate that there was no question of a direct impeachment of the decision already given.

M. FROMAGEOT remarked that it sufficed to read the word " appeal " in its context and in conjunction with the provisions following it in his text, to realise that it was used in a sense entirely different from that in which it was generally used in municipal law. He added that the word " *recours* " was open to the same criticisms as " *appel* ".

The PRESIDENT asked the Court to vote on the following question:

> " Does the Court decide to avoid using the word ' *appel* ' (appeal) in the provisions to be included in Article 66 (6) of the Rules ? "

By six votes to one, with four abstentions, the Court decided to avoid using the word " *appel* ".

The PRESIDENT said that this vote might be useful as guidance for the Drafting Committee.

M. NEGULESCO suggested that the Drafting Committee should use the expression " *voie de recours* " (remedial action), which was sufficiently wide to cover all ordinary and extraordinary *voies de recours*.

The PRESIDENT said that he would ask the Court to choose between paragraph 1 of the Co-ordination Commission's text and that of M. Fromageot. It would, however, be better in the latter text to delete the word " exclusively ", which seemed to conflict with the provisions in the Rules to the effect that, in some cases, the Court must have regard as far as possible to any agreement between the parties.

The PRESIDENT put to the Court the question whether paragraph 1 of the Co-ordination Commission's text should be replaced by the following:

> " Whenever, under a treaty, agreement or special agreement, an (. . .) is lodged with the Court from a decision given by some other tribunal, the provisions of the Statute and Rules of Court shall be applied before the Court."

By ten votes, with one abstention, the Court answered the question in the affirmative.

It was agreed that the Drafting Committee should search for a term to insert in the space left blank in the wording adopted.

Jonkheer VAN EYSINGA raised the question whether the use of the terms " treaty ", " agreement " and " special agreement " side by side would be quite clear to those who had not been present at the discussion. The meaning,

of course, was that only in virtue of a treaty or agreement could a case be brought before the Court by application; but there was room for improvement in the wording, because a case could be brought before the Court by notification of a special agreement, but not by notification of any other kind of treaty. Jonkheer van Eysinga was anxious that the Drafting Committee should look into this point.

The PRESIDENT thought that the three words in question might be deleted and that they might simply say: " Whenever recourse is had to the Court in respect of a decision given by some other tribunal, the provisions of the Statute and Rules of Court shall be applied before the Court."

M. FROMAGEOT explained that his idea had been to lay down the principle that an appeal could not be lodged with the Court except in virtue of a special arrangement, which might result from a treaty, a convention, an agreement or a special agreement. There was no need to define a special agreement; as regards an application, the provisions which followed defined the conditions governing its presentation.

26.II.35.*

Discussed as Article 66 (6).

The PRESIDENT invited the Court to continue its examination of Article 66 (6). Recalling that the substance of paragraph 1 had been adopted on the previous day, he opened the discussion on paragraph 2 of the Co-ordination Commission's text,[1] worded as follows:

> " 2. If a request, to the effect that the Court should consider whether an international award is well founded, is submitted by application, it shall be held to have been made on the date on which the application is registered in the Registry."

The object of this provision was to avoid difficulties arising when the instrument giving the right to appeal fixed a time-limit and indicated the day on which the time began to run, but not that on which the proceeding would be regarded as taken.

Count ROSTWOROWSKI would have preferred a shorter and more elastic wording. For instance, they might say that an application " in this connection " would be held to have been filed on the date on which it was registered.

M. ANZILOTTI thought that the proposed rule should rather be made a general one applying to all instruments filed with the Registry. If it were introduced only in this connection, there would be a danger of an interpretation *a contrario* in other cases.

M. FROMAGEOT agreed: the general rule should be that all documents addressed to the Court—whether a simple letter, an application, a special agreement or a memorial—should be dated the day of their registration in the Registry.

M. ANZILOTTI having recalled that the Court had inserted a provision to this effect in Article 34 of the Rules adopted in May 1934, the REGISTRAR remarked that that provision related only to documents of the written proceedings, within the meaning of Article 43 of the Statute, and did not apply to instruments instituting proceedings.

The PRESIDENT, with special reference to the Agreements of Paris of 1930,[2] which conferred on the Court jurisdiction as a Court of appeal in certain cases, thought that the inclusion in the Rules of a provision of the kind suggested by M. Fromageot was necessary.

M. GUERRERO, Vice-President, agreed: even if the Rules contained a general provision to the same effect, it would nevertheless be well to have a special provision in regard to this subject which was entirely new.

Again, the beginning of the second paragraph of the Co-ordination Commission's text should be amended. The following wording might do: " This request shall be made in writing. It shall be regarded as filed on the date on which it is registered in the Registry."

M. FROMAGEOT recalled the wording which he had suggested: " An application ' on appeal ' shall be dated the day on which it is registered in the Registry of the Court ".

He also drew attention to the question of the method of calculating times, which was connected with that of the date on which proceedings were to be regarded as completed. If the parties failed to specify in their agreement or special agreement how times were to be calculated, how should that be done ? What method should be adopted ? Would it not be well to say this in the Rules ?

The REGISTRAR recalled that the same question had been raised in May 1934.[1] At that time, the Co-ordination Commission, on being invited to prepare a text, had preferred to recommend the Court [2] not to include in the Rules a provision of the kind contemplated, and had referred to the negative decision reached on the point in 1922.[3] The Court had followed the suggestion.

M. ANZILOTTI thought that all that could be said in the Rules was that the instrument bringing an action before the Court should be regarded as dated the day on which it was registered in the Registry. But this rule should apply generally. Furthermore, whenever times were fixed by a treaty, their calculation would become a question of interpretation.

M. URRUTIA recalled that the Court, when fixing time-limits for proceedings, must, under Article 33 of the Rules, have regard as far as possible to any agreement between the parties. There were also certain special cases—for instance, a dispute between a European State and a distant country—in which the Court must obviously be careful to avoid any inequality in fact between the parties.

M. FROMAGEOT recalled that this point was covered in the text which he had submitted.

M. SCHÜCKING proposed that the Court should proceed to vote on the principle embodied in paragraph 2 of the Co-ordination Commission's text. In his view, it was impossible to lay down rules regarding the interpretation of times fixed by agreement between the parties. The Court should confine itself to a provision making the material date the date on which the instrument bringing the action before the Court was registered in the Registry.

M. Schücking did not agree with M. Anzilotti that a general rule to the same effect should be inserted in another part of the Rules. For, in the case of an ordinary application, the rule was that parties were entirely free as regards the moment selected by them to file their application, whereas in the case of a remedial action—the case under consideration—they would always be bound to observe a time-limit fixed beforehand; that was why it would be useful to introduce a special rule here covering this case.

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* D 2, A. 3, pp. 344-356.
[1] *Ibid.*, p. 878.
[2] D 6, p. 620.

[1] Pp. 112 *et seq.*
[2] P. 130.
[3] D 2, pp. 131, 198.

The PRESIDENT suggested that the Court might vote on the following question:

> " Does the Court adopt the principle that a time-limit fixed for the bringing of a remedial action expires, unless otherwise specified in the agreement giving the Court jurisdiction, on the date on which the application is registered in the Registry of the Court ? "

After an exchange of views as to the import of the word " expires " in this question, M. NEGULESCO said that he thought that the date of registration fixed the moment at which the remedial action was brought before the Court; but, in order to be able to say whether the action had been brought too late, the moment at which the time-limit in question began to run and the time fixed for its expiration in the agreement between the parties must be specified. When there was a clause in that agreement fixing the manner in which the time-limit was to be calculated, the Court must carry out the intentions of the parties, but when the agreement said nothing, how was, for instance, a time-limit of twenty days to be calculated ? Were the *dies a quo* and the *dies ad quem* to be reckoned in the calculation, or should they be omitted ? And in the case, for instance, of a time-limit of three months as from the date of the notification to the agent, as was provided in the case of appeals from the awards of certain Mixed Arbitral Tribunals, would the time-limit expire on the day of the month corresponding to the day on which it began to run ? And if there were no corresponding day, would it expire on the last day of the month ? The making of rules in regard to time-limits would make it possible to say whether or not an instrument had been registered in the Registry before the expiration of a time-limit. The question of time-limits and that of the registration of an application should have been settled by the Court in the general provisions, but this had not been done. These rules must now be laid down in connection with remedial actions.

M. SCHÜCKING did not think that the Court could lay down when a time-limit began to run. That was a question of construing the intention of the parties.

Jonkheer VAN EYSINGA agreed with M. Schücking. The questions which had been discussed should not, apart from that of the date on which a remedial action was to be regarded as filed, be dealt with in this article.

The PRESIDENT, with a view to defining the question which had to be settled, read an extract from the preliminary objection lodged by the Royal Hungarian Government on October 20th, 1932, in the Peter Pázmány University case: [1]

> " Whereas it is quite definitely stated in this provision that if either of the two Governments concerned desires to make use of the right of appeal, it must exercise it within three months from the notification to its agent of the judgment impeached;
>
> " Whereas this notification took place, according to the admission of the appellant himself and according to the records of the Secretariat of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, on April 7th, 1932, whilst the application submitting the appeal was only registered with the Registry of the Court on July 11th, 1932—that is to say, after the expiration of the three months laid down in the Special Agreement."

The President added that in this case " the application submitting the appeal " had been *despatched* on July 7th, that was to say, within the time-limit fixed.

[1] C 68, p. 188.

The President had prepared his question with a view to meeting situations of this kind.

M. URRUTIA asked whether, seeing that the same difficulties might arise in any case in which a time-limit had been fixed beforehand, it would not be better to have a general provision.

M. FROMAGEOT referred to the negative decision taken by the Court on this subject in May 1934.

M. GUERRERO, Vice-President, thought that if, when an application bringing a remedial action was filed, there was any doubt as to whether it had been done within the time-limit fixed by the parties, the Court must interpret the parties' intention as it appeared from their agreement. On the other hand, he did not think that rules should be laid down in advance which would have to be observed by the parties when drawing up their agreement.

The only thing which should be done in the Rules was to inform the parties on what date the Court would regard an application as having been filed, that date being the date of registration. If they were told this, the parties would know what to expect. In order to have a flexible wording, they might, for instance, say that the application would be regarded as having been filed on the date of its registration in the Registry.

M. SCHÜCKING also accepted the Vice-President's wording. On the other hand, he was afraid that the motion proposed by the President was liable to give rise to misunderstanding. For, if a party filed its application before the expiration of a time-limit, the time-limit would not automatically expire as a result; the party might withdraw its application and replace it by another, provided that it observed the time-limit originally fixed.

The PRESIDENT read an amended version of his motion:

> " Does the Court adopt the principle that an application shall bear the date of the day on which it is registered in the Registry of the Court ? "

He added that the vote would be only on the question of principle, the wording remaining reserved.

Count ROSTWOROWSKI was afraid that the wording was too rigid. It must be made clear that the Court would only decide in case of doubt—*i.e.*, if the agreement between the parties was not clear.

M. URRUTIA said that he would vote in favour of the President's motion, but that at the second reading he would propose that the principle should be embodied in a rule of general application.

M. ANZILOTTI also accepted the motion, though he observed that Article 34, paragraph 3, as adopted in May 1934, would cover the matter if the Court had not held that that article did not apply to instruments instituting proceedings.

The President's motion was put to the vote and carried unanimously.

The PRESIDENT invited the Court to reconsider the wording.

M. ANZILOTTI said that he would like a general provision to be adopted laying down that the date of registration in the Registry would be the date on which any application would be held to have been filed, as was already provided in the case of Memorials, Counter-Memorials, Replies and Rejoinders in the new Article 34. He did not understand the distinction which had been drawn in this connection between documents instituting proceedings and

documents of the written proceedings, a distinction which seemed to signify that the former were not regarded as acts of procedure.

The REGISTRAR said that it did not appear that the Court had ever expressed the view to which M. Anzilotti had just referred. It had simply decided, on the basis of Articles 40 and 43 of the Statute, that a distinction should be drawn between two phases of the procedure: the institution of proceedings, which was dealt with in Article 40, and the actual proceedings, which, under Article 43, were divided into written and oral proceedings. What the Court had said was that the provisions relating to documents of " the written proceedings ", within the meaning of Article 43, did not apply to documents " instituting proceedings ", which were dealt with in Article 40, though both were " acts of procedure ".[1]

The PRESIDENT said that the Registrar had grounds, based on experience, for preferring the wording adopted in May 1934 in Article 34 of the Rules, to express the idea that when a document had to be filed by a given date, the date on which it was received in the Registry would be regarded by the Court as the material date. The same idea had to be expressed here.

The Court, on the proposal of the PRESIDENT, decided to refer the text to the Drafting Committee.

The PRESIDENT next turned to No. 3, second paragraph, of M. Fromageot's draft.[2]

The President added that he was afraid that, if a clause of this kind were inserted here only, it would be possible to argue *a contrario* in other cases.

M. SCHÜCKING thought that M. Fromageot's proposal went too far, because the question would always depend on the interpretation of the agreement on which the appeal was based. Furthermore, the thing itself was not so simple as appeared from the text; for instance, the possibility of a case of *force majeure*, necessitating *restitutio in integrum*, must be reckoned with.

M. ANZILOTTI, in this connection, referred to Article 33 of the Rules, which provided that the Court could, in certain circumstances, decide that a proceeding taken after the expiration of a time-limit should be considered as valid.

Might not the Court, under this provision, entertain a remedial action lodged too late ?

M. URRUTIA said that Article 33 of the Rules concerned only times fixed by the Court, and the question of the acceptance of a belated application was one which concerned the rights of the parties and could not be decided by the Rules; its solution was dependent on the contents of the arbitration agreement between the parties.

M. GUERRERO, Vice-President, who took the same view, thought it would be better not to insert M. Fromageot's text in the Rules.

Jonkheer VAN EYSINGA also thought that it should not be embodied in the Rules, the limits of which it appeared to overstep. No doubt, in the great majority of cases, the Court would come to the conclusion that the time-limits fixed must be strictly applied and that their non-observance involved forfeiture of the right of action; it was, however, also possible that there would be cases in which the parties laid down that their agreement—including the provisions relating to time-limits—should be construed *ex aequo et bono*.

The PRESIDENT asked the Court whether they wished to include in the Rules a provision to the effect that a time-limit for the bringing of a remedial action must be strictly observed and that non-observance involved forfeiture of the right of action.

By ten votes to one, the Court answered the question in the negative.

The PRESIDENT next passed to No. 3, third paragraph, of M. Fromageot's text.[1]

M. GUERRERO, Vice-President, thought that this paragraph also fell outside the scope of the Rules. It was not for the Court to lay down special rules in the case of a State situated at a great distance from the Court; it was for the State itself to exercise care only to accept time-limits which it would be able to observe.

Count ROSTWOROWSKI asked whether an application could not be lodged by telegram.

The REGISTRAR said that there was no actual precedent for this. In one isolated case, a Government had announced by letter the filing of an application at an early date, asking the Court to regard the date of receipt of the letter announcing the application as the date of presentation of the latter. The application, however, had not actually been filed.

Count ROSTWOROWSKI said that he had raised this question because it helped to clarify M. Fromageot's proposal. The latter simply provided that the fact that the appellant was lodging an appeal should be notified to the Registry of the Court. Did this communication constitute an application or merely the announcement of an application ? If the Court could accept an application presented by telegram, that would certainly simplify the situation for distant countries.

M. GUERRERO, Vice-President, thought that, if it were made possible for overseas countries to lodge an application by telegram, such countries would be placed in a privileged position in a case between them and a European country.

M. FROMAGEOT said that, if the Court thought his proposal served no purpose, he would not press it.

M. URRUTIA saw less objection to the adoption of M. Fromageot's proposal than to leaving things as they were, but he would like the proposal to be made applicable to all instruments instituting proceedings.

Jonkheer VAN EYSINGA observed that M. Fromageot's draft did not envisage the despatch by telegram of an application instituting remedial proceedings, but simply the announcement by telegram—having the effect of actual filing—of the despatch by post of an application of the kind. In his opinion, it would be right to include in the Rules a

[1] *Cf.* the following extract from P.-V. No. 3 of the 28th Session, held on May 12th, 1933:

" M. URRUTIA desired to make a general observation which he wished the Court to bear in mind when revising the Rules.

" In his opinion, it was important to determine at what moment proceedings before the Court began. According to Article 43 of the Statute, they began with the communication of Cases to the judges and parties.

" According to Article 39 of the Rules, on the other hand, the application itself was already a step in the proceedings.

" M. Urrutia personally thought that the filing of an application did not constitute a procedural step until notice of the application had been served upon the other party. In any case he wanted the Court, when it revised the Rules, to consider Article 39 in order if necessary to bring it into conformity with Article 43 of the Statute."

[2] See p. 276, footnote 1 in second column.

[1] See p. 276, footnote 1 in second column.

provision covering this possibility, but applicable, of course, only to parties whose seat of government was outside Europe.

M. FROMAGEOT pointed out that in reality the proposed paragraph constituted an exception to the general rule laid down in paragraph 1. In principle, the date of registration was the material date. Nevertheless, if the " appellant " 's seat of government was outside Europe, it would not forfeit its right of appeal because its " appeal " was actually lodged after the expiration of the time-limit, provided that it was despatched before the expiration of the time-limit and that the Court had been informed within it.

M. ANZILOTTI had no objection to the adoption by the Court of a provision of this kind; but if it did so, he would like the provision to be made a general one applicable to all applications.

The PRESIDENT put the following question to the Court:

> " Does the Court decide to include in the Rules a provision making it possible for States outside Europe to lodge an appeal, within the time-limit fixed, by telegram ? "

M. ANZILOTTI was not sure that this wording would cover M. Fromageot's point, which was that the announcement by telegram of the despatch of an application should suffice. The position was different if the actual application was sent by telegram.

M. FROMAGEOT said that, in framing his proposal, he had had in mind a system adopted in various treaties [1] with regard to ratifications to be deposited within a certain time by States outside Europe: the latter were allowed to announce by telegram that their instrument of ratification had been despatched within the time laid down, and this telegraphic announcement had the same effect as deposit of the instrument.

The PRESIDENT modified his question as follows:

> " Does the Court decide to include in the Rules a provision making it possible for States outside Europe to announce by telegram, within the time-limit fixed, their intention to lodge an appeal ? "

Jonkheer VAN EYSINGA would prefer to vote on M. Fromageot's proposal, reserving points of drafting.

Baron ROLIN-JAEQUEMYNS asked that the words " such time-limits " in this text should be replaced by: " within the time-limits fixed ".

M. GUERRERO, Vice-President, said that he would vote against the proposal because he thought that this provision, if inserted in the Rules, would create a privileged position which might be contrary to the intention of the parties.

M. ANZILOTTI, though not opposed to the actual principle, would vote against the introduction of the principle solely in connection with remedial actions. He did not see why the same rule should not be applied to other proceedings taken by States outside Europe.

Jonkheer VAN EYSINGA said that he would vote in favour of the proposal which did not prejudice the important point raised by M. Anzilotti, which should be reverted to later.

[1] *Cf.* Treaty of Versailles, final clauses (following Article 440).

The PRESIDENT took a vote on the following question:

> " Does the Court decide to include in the Rules a provision to the following effect:
>
> " ' An appellant whose seat of government is outside Europe may confine itself to notifying the Registry of the Court, within the time-limits fixed, that it is appealing against the decision impeached and that it is despatching the application on the same date, duly certified by the Minister for Foreign Affairs.' ? "

By six votes to five, the Court answered the question in the negative.

The PRESIDENT invited the Court to consider paragraph 2 of the text proposed by M. Fromageot [1]; he added that the Co-ordination Commission's text contained no corresponding provision.

The President referred in this connection to Article 34 of the Statute, according to which " only States or Members of the League of Nations can be parties in cases before the Court ".

M. FROMAGEOT said that one of the main questions which arose in connection with remedial actions before the Court was whether the " appeal " constituted a continuation of the action before the first tribunal or whether it was a new case. Another question to be decided was whether, in the " appeal " proceedings, States should act as the parties concerned or as representatives of the parties to the case before the first tribunal. In order to dispose of these questions, M. Fromageot had considered it necessary expressly to say that it was clearly to be understood that, as States only were entitled to appear before the Court, States alone could be allowed to lodge an " appeal " and that, in appellate proceedings, notwithstanding the idea of transference attaching to such proceedings in municipal law, the Court can have no dealings except with States entitled to appear before it. This would eliminate any doubts which might arise in the minds of Governments which, in an " appeal " case, might be inclined to attribute to it the consequences—the idea of transference, etc.—which the term " appeal " carries with it in their domestic legislation.

The PRESIDENT, in this connection, drew attention to the following paragraph from the judgment of the Court in the Peter Pázmány University case: [2]

> " The fact that a judgment was given in a litigation to which one of the Parties is a private individual does not prevent this judgment from forming the subject of a dispute between two States capable of being submitted to the Court, in virtue of a special or general agreement between them. In the dispute between Czechoslovakia and Hungary, which forms the subject of the present suit, the Czechoslovak Government maintains that the Mixed Arbitral Tribunal wrongly declared itself to have jurisdiction to adjudicate upon the claim for the restitution of certain landed property situated in Slovakia brought before the Tribunal by the Peter Pázmány University under Article 250 of the Treaty of Trianon; it also contends that this claim is not well founded and that it is not bound to make this restitution. This contention is disputed by the Hungarian Government.
>
> " Thus there is a distinct point at issue between two States."

With regard to the wording, the President observed that, before international tribunals, a Government fre-

[1] See p. 276, footnote 1 in second column.

[2] A/B 61, p. 221.

quently took up a private claim. But would not that be ruled out if the application had to be presented " in the name and on behalf of " a State ?

M. FROMAGEOT said that, if a Government took up a case on behalf of one of its nationals, it was the State itself and not the national who pleaded. In appellate proceedings before the Court, judgment would be given, not in favour of the private individual, but of his Government, and the payment to the individual of any indemnity awarded was a matter between the latter and his Government. It was possible that the wording of the proposed paragraph required attention.

The PRESIDENT considered that, having regard to Article 34 of the Statute, the fundamental question was whether it was necessary to embody this provision in the Rules.

Jonkheer VAN EYSINGA observed that, if the Court were to make a report on the work of revision of the Rules, it would be quite natural to mention therein the idea embodied in M. Fromageot's proposal. But the general principle underlying the Rules was that nothing already in the Statute should be repeated in them. In any case, if the provision—which at present only related to the filing of " appeals " by way of application—were to be inserted in the Rules, it should be made general.

M. SCHÜCKING agreed with M. van Eysinga. M. Fromageot's proposal related merely to a legal consequence of paragraph 1 of the same article of the Rules, which said *expressis verbis* that in the case of remedial actions the provisions of the Statute were applicable—including therefore Article 34.

M. FROMAGEOT was quite aware that Article 34 of the Statute already said what was contained in the provision proposed by him, but he thought that it would be well here to recall that the general principles of the Statute applied. However, if the Court thought it unnecessary, he was ready to withdraw his proposal.

The PRESIDENT asked the Court whether they wished to vote on the proposal.

There being no observations, he concluded that the Court did not wish a vote to be taken upon it.

He invited the Court to return to paragraph 3 of the text proposed by the Co-ordination Commission for Article 66 (6): [1]

> " 3. An application of the kind referred to in the preceding paragraph shall contain a precise statement of the grounds of complaint adduced against the decision impeached and constituting the subject of the dispute."

M. ANZILOTTI asked whether the Commission attached importance to retaining the words: " and constituting the subject of the dispute ", in regard to which he asked for an explanation.

The REGISTRAR said that these words, like the word " original " in paragraph 1 of the article proposed by the Co-ordination Commission, owed their presence in the text to the circumstances recalled in connection with M. Fromageot's proposal which had just been discussed: the idea had been to make it clear that an application instituting remedial proceedings was to be regarded in every respect as submitting an original suit. The words " constituting the subject of the dispute " were intended to recall the terms of Article 40 of the Statute, to the provisions of which the proposed rule, for the reason already indicated, was meant to add nothing.

M. ANZILOTTI, though he now understood the reasons for the introduction of these words, questioned whether they did not over-emphasise the idea that, as in the case of the only precedent which existed, it would be a question of a new suit. Cases might occur in the future in which it would simply be a question of a new phase in an existing suit. For instance, it was conceivable that two States might agree to regard an arbitral tribunal as a Court of first instance and the Court as a Court of appeal. Flexible wordings should be chosen capable of covering all possibilities.

The PRESIDENT regarded the words criticised by M. Anzilotti from a different standpoint. If an award had been rendered by a Mixed Arbitral Tribunal, and if it was possible to " appeal ", but the appellant was only dissatisfied with a part of the award, it would only lodge with the Court an " appeal " in respect of that part of the award.

M. ANZILOTTI thought that the deletion of the words in question would not affect the position in this respect.

M. GUERRERO, Vice-President, was in favour of the paragraph proposed by M. Fromageot corresponding to paragraph 3 of the Co-ordination Commission's text, because it covered all possible contingencies.

The PRESIDENT read the text proposed by M. Fromageot [1] (No. 4, paragraph 1) (the question of the use of the word " appeal " being reserved).

Jonkheer VAN EYSINGA said that there was a reason for the words " constituting the subject of the dispute " in the Co-ordination Commission's text. Paragraph 1 said that appeals were governed by the provisions of the Statute and Rules concerning special agreements and applications. Accordingly, the application must be as described in Article 40 of the Statute, and that was what was explained in this text. But if the contents of an " appeal " application were indicated, should not the same be done with regard to a special agreement ?

The REGISTRAR said that the Commission, following the guidance afforded by Article 35 [2] as adopted in May 1934 (paragraphs 1 and 2), [3] had preferred not to define in detail the contents of a special agreement, but to leave the utmost freedom to the parties in this respect.

M. FROMAGEOT thought it would be easy to meet Jonkheer van Eysinga's wishes by substituting the expression " the instrument lodging an appeal shall contain . . ." for the expression " the application lodging an appeal . . .".

The PRESIDENT put the following question to the Court:

> " Does the Court adopt the following wording to replace paragraph 3 of Article 66 (6) as formulated by the Co-ordination Commission:
>
> " ' The instrument shall contain a precise statement of the grounds of complaint adduced against the decision impeached ' ? "

Jonkheer VAN EYSINGA said that he would vote against the proposal, because the substitution of the word " instrument " for " application " and the parallelism with Article 35 gave rise, in his view, to a question which he would like to consider afresh.

[1] D 2, A. 3, p. 878.

[1] See p. 276, footnote 1 in second column.
[2] Article 32 of the Rules of 11.III.36.
[3] Pp. 94-95 and 97.

The PRESIDENT, in reply to a question put by M. Anzilotti, said that points of drafting were reserved.

M. NEGULESCO thought that the proposal to delete the words " constituting the subject of the dispute " seemed to raise a question of principle to which he attached some importance. He had always maintained that any remedial action should be regarded as a request submitting to the Court a dispute between two States in connection with an award made. This general formula would cover all ordinary and extraordinary remedial actions, and he thought that the expression " constituting the subject of the dispute " should be retained, because it corresponded to the statement made by the Court in the Peter Pázmány University case to the effect that there was " a distinct point at issue between two States ".

M. Negulesco would therefore vote against the proposal.

By six votes to five, the Court answered the question put by the President in the negative.

The PRESIDENT said that the Court had still to take a decision in regard to paragraph 3 of the text proposed by the Co-ordination Commission (see preceding page).

Upon a vote being taken, this text was adopted, subject to drafting, by seven votes to four.

The PRESIDENT next turned to paragraph 4 of the Co-ordination Commission's draft, which was as follows:

> " 4. An authentic copy of this decision shall be attached to the application. The same shall apply when a case is brought before the Court by special agreement."

M. FROMAGEOT observed that, arguing *a contrario*, paragraph 4 rendered paragraph 3 inapplicable in a case brought before the Court by special agreement.

Jonkheer VAN EYSINGA pointed out that paragraph 3 had been reserved for consideration by the Drafting Committee, which would, no doubt, also wish to go into the wording of paragraph 4.

Paragraph 4 was put to the vote and adopted by ten votes to one.

The PRESIDENT proceeded to read paragraph 5 of the text proposed by the Co-ordination Commission, which ran as follows:

> " 5. If it is not provided in the agreement under which the case is referred to the Court that the tribunal which has rendered the decision impeached shall transmit to the Court the record upon which the decision has been rendered and if that tribunal has not done so within the time-limit fixed by the Court for the filing of the first document of the written proceedings, it shall be the duty of the parties, in accordance with Article (40) of the Rules, to produce all material data from this record."

He recalled that M. Fromageot had proposed a text [1] on the same subject.

M. FROMAGEOT said that, in the " appeal " case which had been before the Court, the latter had held that, in accordance with the Statute and Rules, all data in the case should be supplied to it by the parties. The text which he had proposed was based on this precedent.

After an exchange of views as to the meaning to be attributed to the term " record " (*dossier*), which the Co-ordination Commission had taken from M. Fromageot's text, Jonkheer VAN EYSINGA said that he preferred the Co-ordination Commission's draft to that of M. Fromageot. For, if it was provided in the agreement sanctioning recourse to the Court that, if such recourse were had, the tribunal of first instance must send the record of the case to The Hague, why should not that provision be allowed to operate as proposed by the Co-ordination Commission ? By preventing this, the Court would be running the risk of making rules in regard to a matter which, in principle, was within the jurisdiction of the States concerned.

M. FROMAGEOT observed that, in practice, the Co-ordination Commission's text might give rise to technical difficulties; for the Court could not issue instructions to any tribunal either directly or through the parties.

Jonkheer VAN EYSINGA replied that the agreement between the parties might provide for the record to be transmitted by the tribunal; and as that was a matter in which their sovereign rights remained intact, the Court must make provision for this possibility.

M. GUERRERO, Vice-President, thought that the drafts proposed by the Co-ordination Commission and by M. Fromageot, were substantially similar, but that M. Fromageot's had the advantage of clarity and simplicity. It also seemed preferable to that of the Co-ordination Commission for the further reason that in reality the Court would not need to have before it the whole record of the proceedings in first instance.

The PRESIDENT took a vote on the following question:

> " Does the Court decide that, in principle, paragraph 5 of M. Fromageot's text shall replace paragraph 5 of the Co-ordination Commission's text ? "

Baron ROLIN-JAEQUEMYNS observed that the question really was whether the Court meant to omit the exception provided for in the first part of the Co-ordination Commission's text.

By six votes to five, the Court answered the question put by the President in the affirmative.

The PRESIDENT said that that being so, the Court must now consider in detail M. Fromageot's text. He suggested that it might be amended as follows:

> " It shall be the duty of the parties to produce to the Court all useful and relevant material upon which the decision impeached was rendered."

The REGISTRAR observed that, if this wording were adopted, the Court might receive the same documents from three sources: from both the parties, and also from the tribunal which had rendered the decision impeached.

The PRESIDENT, after replying that this would be less serious than to receive no documents, said that he had voted for M. Fromageot's text because there was at the moment a tendency to provide a right of appeal to the Court in respect of the decisions of municipal Courts upon the construction of conventions concerning private rights; and it was doubtful whether such Courts could be called upon to send their records to the Court.

The President took a vote on the text proposed by M. Fromageot amended as stated above.

This text was adopted by ten votes to one.

The PRESIDENT said that M. Fromageot had proposed a sixth paragraph for Article 66 (6), to which there was nothing corresponding in the Co-ordination Commission's text.

[1] See p. 276, footnote 1 in second column.

27.II.35.*

Discussed as Article 66 (6).

The PRESIDENT invited the Court to examine No. 6 of M. Fromageot's draft.[1]

M. ANZILOTTI observed that the Court had decided unanimously, at its meeting on February 26th, that Article 66 (6) of the Rules of Court should cover appeals in general, and not some particular form of appeal. But, unlike the preceding paragraph, paragraph 6 of M. Fromageot's draft seemed only capable of applying to appeals in the sense of certain national systems of law. It seemed, therefore, that this paragraph would be better omitted, or dealt with in another article.

The PRESIDENT cited some extracts from the four treaties [2] which confer appellate jurisdiction on the Court, and which appeared to confirm M. Anzilotti's opinion.

M. FROMAGEOT took the case in which the Court had to consider an appeal from the decision of a Mixed Arbitral Tribunal, and in which the appellant, in the course of the proceedings, put forward a fresh claim; under what clause in the Rules, he asked, could the Court refuse to entertain such a claim, if it did not adopt the proposed text ? He thought it would be regrettable if there was a gap in the Rules in regard to that point.

M. NEGULESCO said he agreed with M. Anzilotti. The Court should lay down principles in the Rules that would apply to all kinds of appeals. But the proposed text covered only appeals in the strict sense of that term. It should not, therefore, be inserted.

M. FROMAGEOT admitted that his paragraph 6 applied only to appeals; but he pointed out that, if only provisions applicable to every case were to be admitted, there might be a considerable loss of clarity.

Jonkheer VAN EYSINGA emphasised that Article 36 of the Statute must always be taken as the starting-point; that article gave the parties complete liberty to submit any matter they chose to the Court. M. Fromageot's proposal would have the effect of restricting that liberty. The parties were free to adopt a formula of that kind in their agreements with each other, but the Court had no right to do so in the Rules.

M. FROMAGEOT thought, on the contrary, that it would be better to provide for the question by a clause in the Rules, rather than have to decide it in a particular case, without being able to point to any provision that was applicable in the matter.

Count ROSTWOROWSKI considered that the Rules ought not to restrict the effect of the provisions that were proposed solely with a view to appeals.

On the other hand, the Court had adopted the following text:

> " It shall be the duty of the parties to produce to the Court all useful and relevant material upon which the decision impeached was rendered."

In spite of that text, the parties were, no doubt, entitled to produce other papers and documents than those submitted during the original suit: that was a point which it would be useful to have expressly stipulated.

The PRESIDENT considered that the way to settle the question which M. Fromageot's proposal had in view was by interpreting the instrument conferring jurisdiction upon the Court, and not by the application of any rule. In support of this view, he cited the relevant clauses of certain international agreements giving the Court jurisdiction as an appellate tribunal. He put the following question to the vote:

> " Does the Court decide that the Rules should contain provisions to provide for the questions dealt with in No. 6 of M. Fromageot's draft ? "

The President added that, for the reasons he had just given, his own vote would be in the negative.

M. URRUTIA observed that M. Fromageot's proposal only had in view appeals in the strict sense of the term, and that in regard to such appeals it laid down a principle that was generally accepted; his own vote would be given in the affirmative.

By nine votes against two, the Court answered the question put by the President in the negative.

The PRESIDENT said that the question of appeals was concluded with this vote.

9.IV.35.*

Discussed as Article 71 of the Text prepared by the Drafting Committee.[1] *— First Reading.*

Paragraph 1.

M. WANG, in order to secure uniformity of terminology, proposed that in the second line of this paragraph the words " *sentence rendue* " should be used instead of " *décision rendue* " (no change was made in the English text), and that in the fourth line the word " present " should be inserted before " Rules ".

Paragraph 1 was adopted with these two changes.

Paragraph 2.

This paragraph was adopted without change.

Paragraph 3.

Count ROSTWOROWSKI, in order to eliminate all unnecessary qualifying terms, proposed that the sentence should begin " *L'acte . . .*" instead of " *Tout acte . . .*" (" the document ", instead of " every document ").

Paragraph 3 was adopted with this modification.

Paragraph 4.

Paragraph 4 was adopted without observation.

Paragraph 5.

M. ANZILOTTI was doubtful whether the wording was not open to misunderstanding in that it appeared to preclude the parties from submitting new documents once the " material and relevant documents " mentioned in the article had been presented.

The PRESIDENT said that, when the Court had discussed this paragraph [2], it had left open the question whether fresh documents could be presented. He himself felt some doubts in regard to this matter.

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* D 2, A. 3, pp. 356-357.

[1] See p. 276, footnote 1 in second column.

D 6, Treaties No. 237, p. 553 (Convention relating to the Statute of the Danube, July 23rd, 1921), No. 281, p. 582 (Treaty of commerce and navigation between Denmark and Latvia, November 3rd, 1924), No. 341, p. 620 (Agreement [No. II] for the settlement of questions relating to agrarian reforms and to the Mixed Arbitral Tribunals between Hungary, Roumania, Czechoslovakia and Yugoslavia, April 28th, 1930); *ibid.*, first addendum, No. 423, p. 39 (Treaty of conciliation, arbitration and judicial settlement between Luxemburg and Norway, February 12th, 1932).

* D 2, A. 3, pp. 444-446.

[1] *Ibid.*, p. 937.

[2] See p. 285.

M. ANZILOTTI would be satisfied if it were understood that the point was not prejudged by the Drafting Committee's text.

M. GUERRERO, Vice-President, wondered whether there would not be a danger that the text of paragraph 5 of Article 71 might give the impression that the presentation of new documents was forbidden. For the sake of clearness, therefore, M. Guerrero would prefer to delete the words: "upon which the decision impeached was rendered".

M. FROMAGEOT considered that to do this would be dangerous; it would make it possible for parties to withhold from the Court documents produced before the Court of first instance, if they did not consider them necessary or relevant, and the object of the paragraph was to oblige the parties to produce such documents.

M. SCHÜCKING appreciated M. Guerrero's misgivings when a remedial action was brought as a new case. The latter part of paragraph 5 was likely to give the impression that only documents relating to the first proceedings could be produced and no others. But in the view of the Court there might be cases in which new documents could be produced. Everything depended on the nature of the action.

Baron ROLIN-JAEQUEMYNS agreed with what MM. Guerrero and Schücking had said; he would prefer that a party should be left free to produce what documents it itself considered material and relevant, without having to be careful to select those which the tribunal responsible for the first award had taken into consideration.

M. FROMAGEOT supposed that the award impeached would itself indicate the documents which had been considered essential by the tribunal.

The PRESIDENT remarked that the Drafting Committee's text was based on the following text adopted by the Court: [1]

> "It shall be the duty of the parties to produce to the Court all useful and relevant material upon which the decision impeached was rendered."

M. SCHÜCKING thought that, if the Court recognised that the proposed text did not preclude the presentation of new documents, it could adopt it, subject to the interpretation which would be recorded in the minutes.

The PRESIDENT observed that, judging from the discussion which had taken place on February 26th, the Court were not agreed in regard to the question to which M. Schücking referred.

M. GUERRERO, Vice-President, said that, arguing *a contrario*, a party might suppose that it was not allowed to present new documents; that was the objection to the text which could be removed by the deletion suggested by him.

M. WANG observed that, if the Court deleted the words in question, paragraph 5 of Article 71 would cease to fulfil its object.

M. NEGULESCO thought that the text of paragraph 5 of the proposed article seemed to have been drafted with a view to appeals in the strict sense of the term; to make it applicable to other sorts of remedial action, a phrase covering all possibilities would have to be used, such as:

> "It shall rest with the parties to produce to the Court all relevant and material documents and exhibits in support of their claim."

[1] See p. 285.

M. ANZILOTTI thought that in that case it would be better to delete the paragraph altogether.

M. GUERRERO thought that it would be going too far to delete paragraph 5 entirely.

Count ROSTWOROWSKI said that the Court had wished to emphasise the desirability of its having before it the documents which had been considered necessary and relevant by the tribunal responsible for the first award; but that it had not meant to preclude the possibility of producing new documents. The Court had not meant to limit the scope of the article to cases submitted to it as original suits; but nor had it meant to exclude such cases, which might occur, for instance, when the parties before it were not the same as before the first tribunal. Paragraph 5 of Article 71 must embody these ideas.

Jonkheer VAN EYSINGA observed that what the text of paragraph 5 had been intended to do was to preclude the presentation to the Court of the documents in a case by the tribunal responsible for the award impeached, should provision for that course be made by the convention on which the appeal was based. If the whole paragraph were deleted, this would once more become possible, and that was why Jonkheer van Eysinga would be in favour of its deletion.

M. FROMAGEOT said that the purpose of paragraph 5 was to make it clear that it was not for the Court to obtain data regarding the first award, but for the parties to produce it. The text which he had originally proposed began: "*Il appartient aux parties . . .*" (It shall be for the parties . . .), in order to make this clear.

In view of the foregoing observations, the PRESIDENT thought it would perhaps be better to revert to the text adopted by the Court and abandon that proposed by the Drafting Committee.

M. ANZILOTTI said that his remarks, which had given rise to the whole discussion, had really referred to the words: "upon which the decision impeached was rendered", which appeared in both texts. If, therefore, it were understood that these words did not preclude the presentation of new documents—that was to say that they left open the question of their admissibility—he was prepared to accept either text. If it were desired to avoid giving the impression that the paragraph concerned only appeals, they might perhaps say: ". . . useful and relevant for the purposes of the action brought before the Court".

M. FROMAGEOT would prefer simply to revert to the text adopted by the Court.

M. URRUTIA agreed. That text clearly conveyed the idea that it was for the parties to produce the documents in the case referred to the Court, and that it was not for the Court to obtain these documents nor for the tribunal responsible for the award impeached to produce them.

The PRESIDENT took a vote on the following question:

> "Does the Court prefer the text adopted by it on February 26th, 1935, to that proposed by the Drafting Committee?"

By eight votes to four, the Court answered the question in the affirmative.

In the French text, it was agreed that, for the sake of uniformity, the words "*appartiendra*" and "*décision*" in the text adopted would be replaced by "*appartient*" and "*sentence*".

Count ROSTWOROWSKI asked that a vote should be taken on the deletion of the whole of paragraph 5.

Baron ROLIN-JAEQUEMYNS would prefer that the Court should first vote on the proposed deletion of the words: " upon which the decision impeached was rendered ".

The PRESIDENT took a vote on the question whether these words should be deleted.

By eight votes to four, the Court answered the question in the negative.

The PRESIDENT asked the Court whether they adopted paragraph 5, retaining the words: " upon which the decision impeached was rendered ".

By seven votes to five, the Court answered the question in the affirmative.

Count ROSTWOROWSKI wished to state that he had voted in favour of the retention of the paragraph on the understanding that it did not preclude the production of new documents.

M. ANZILOTTI had voted in favour of the motion on the understanding that the text adopted did not prejudge the question whether any new documents produced would be admissible.

The PRESIDENT declared Article 71 adopted in first reading with the changes made during the meeting.

Text adopted:

" 1. When an appeal is made to the Court against a decision given by some other tribunal, the proceedings before the Court shall be governed by the provisions of the Statute of the Court and of the present Rules.

" 2. If the document instituting appellate proceedings must be filed within a certain limit of time, the date of the receipt of this document in the Registry will be taken by the Court as the material date.

" 3. The document instituting appellate proceedings shall contain a precise statement of the grounds of complaint against the decision complained of, and these constitute the subject of the dispute referred to the Court.

" 4. An authentic copy of the decision impeached shall be attached to the document instituting appellate proceedings.

" 5. It shall be the duty of the parties to produce to the Court all useful and relevant material upon which the decision complained of was rendered."

27.II.36.*

APPEALS TO THE COURT

Article 67. — Second Reading.

The PRESIDENT recalled that this article, which was new, was based on the experience already gained by the Court, experience which had shown the desirability of a provision of this kind. In 1935, the text had been adopted in first reading after exhaustive discussion.

Paragraph 1.

Paragraph 1 of Article 67 was adopted without observation.

Paragraph 2.

The PRESIDENT said that this paragraph was one of the points reserved for the second reading (see pp. 281-282).

M. URRUTIA, referring to these minutes, recalled that he had been responsible for the reservation of this paragraph, his intention having been to propose that the principle stated in the paragraph under discussion should be embodied in a rule of general application.

As, however, the changes made in the course of the second reading of the Rules satisfied him, M. Urrutia withdrew his reservation.

The PRESIDENT, in these circumstances, declared paragraph 2 adopted.

Paragraph 3.

Paragraph 3 of Article 67 was adopted without observation.

Paragraph 4.

The PRESIDENT asked that the adjective in the English text of the article corresponding to " *authentique* " in the French text should be " authenticated ", which, upon reflection and in the light of information received by him from an authoritative source, seemed to him the most appropriate word.

Replying to a question from M. Nagaoka, who wished to know the precise meaning of the expression " *une expédition authentique* " (an authenticated copy), M. FROMAGEOT explained that this expression meant a document certified to correspond precisely to the original by the authority competent to draw or sign the original document.

Baron ROLIN-JAEQUEMYNS pointed out that the need for an authenticated copy would arise only if a discussion arose as to the terms of the original document. If the other party was in agreement, the authenticity of the copy would naturally follow from that very fact.

There being no further observations, the PRESIDENT declared paragraph 4 adopted.

Paragraph 5.

The PRESIDENT recalled that, indeed, this paragraph had given rise to a discussion at the first reading regarding the question of the production of new documents—*i.e.*, documents which had not been produced before the tribunal which had originally tried the case. Ultimately, however, the Court had agreed that the text of this paragraph might be considered satisfactory in that the question was not necessarily decided either one way or the other.

M. ANZILOTTI wanted to know what was the precise meaning of the expression " useful material ".

The PRESIDENT observed that this expression had from the very first been in the text now before the Court.

M. FROMAGEOT thought that the expression had been chosen because it was more comprehensive than the word " documents ". Judging from the previous discussions, M. Fromageot considered that the use of this expression did not preclude the production of documents other than those in the record.

Baron ROLIN-JAEQUEMYNS, in a civil case, hardly saw what other " material " *(éléments)* there could be besides documents.

The REGISTRAR had the impression that the word " material " *(éléments)* had been adopted in 1935 in order not to oblige parties to produce the whole record of the original proceedings and to allow them to select the documents which they thought essential, though of course their choice would be controlled by the other party. This view was borne out by the 1935 Minutes.

* D 2, A. 3, pp. 651-652.

In view of the fact that there was no concrete proposal for the amendment of this paragraph, the PRESIDENT declared it adopted in second reading as it stood and likewise the whole of Article 67.

11.II.36.*

APPEALS TO THE COURT

Article 67. — Final Adoption.

The PRESIDENT said that no changes were proposed in the French text of this article.

As regards the English text, the Drafting Committee proposed, in paragraph 2, to say " the appeal " instead of " appellate proceedings "; it was a better translation of " *recours* ". In paragraph 3, it proposed to say " the grounds of the objections " instead of " the grounds of complaint "; and in paragraph 5, " it lies upon " instead of " it shall be the duty of ".

There being no observations, Article 67 was finally *adopted* as thus amended.

ARTICLE 68 *(Article 61, Paragraphs 1 and 2, old Rules).*

AGREEMENT IN SETTLEMENT OF THE DISPUTE

22.II.35.**

Discussed as Article 61 and Article 61 bis.

Article 61.

The PRESIDENT opened the discussion on Article 61. He observed that the Co-ordination Commission proposed [1] that this article should be divided into three distinct articles. For the rest, the draft submitted by the Co-ordination Commission was almost identical with the proposals of the Third Committee.[2] Both Commissions had agreed that there were gaps which required filling up in the existing text of the article.

M. FROMAGEOT, though he regarded the proposals of the Co-ordination Commission as justified, observed that they appeared to require supplementing in certain respects. For instance, the proposed text of Article 61 concluded with the words: " . . . the Court shall officially record the conclusion of the agreement ". It was not, however, stated how this was to be done; in practice it was done by way of an order. It would be a good thing to say so in the Rules, adding that the Court would order the case to be struck out of the list. The same observation also applied to Articles 61 *bis* and 61 *ter*, except, of course, in the circumstances contemplated by the last sentence of Article 61 *ter*: " If the respondent objects to the breaking-off of proceedings, the proceedings shall continue."

Furthermore, in M. Fromageot's opinion, it might be a good thing to say that proceedings might be broken off at any stage before the delivery of judgment.

Lastly, M. Fromageot pointed to a case which was not covered by the Co-ordination Commission's proposals: a case where the respondent party, without having arrived at a friendly agreement with the other party, recognised the justice of the latter's claim.

The PRESIDENT thought that in that case Article 53 of the Statute would operate, for the other party would be failing " to defend its case ".

M. ANZILOTTI thought that, if the respondent made a declaration of this kind, the applicant itself would break off the proceedings, and in that case the matter would again come under Article 61 *ter*.

The REGISTRAR pointed out that, in the circumstances contemplated by M. Fromageot, the applicant would always have the right, if it did not break off proceedings, to obtain judgment in its favour; an order would not therefore suffice.

Jonkheer VAN EYSINGA saw no difficulty in meeting M. Fromageot's suggestion that the fact that the Court's decisions would take the form of orders should be mentioned in the articles under discussion. With regard to M. Fromageot's suggestion that it should be stated that proceedings might be broken off at any time before the delivery of judgment, that seemed to be covered by the existing text of the articles, since no limitation of time was mentioned. As regards unilateral abandonment of proceedings by the respondent, Jonkheer van Eysinga thought that as a rule there would be an agreement regarding the settlement of the case, so that Article 61 would apply. It did not therefore appear necessary to make special provision for this contingency.

M. FROMAGEOT also wished to change the heading of the whole section. The word " agreement " was not sufficiently explicit as an indication of its contents. It would be better to head the section: " Settlement and abandonment of proceedings."

The PRESIDENT thought that the Court could leave it to the Drafting Committee to propose a new heading; but would not simply " Abandonment of proceedings " suffice ?

M. SCHÜCKING would prefer to keep the word " agreement " (*accord*), which, in German law, had a precise legal meaning, distinct from that of " abandonment of proceedings ", which was a unilateral proceeding.

M. FROMAGEOT explained that, in French procedure, the word " *désistement* " (abandonment of proceedings) also

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* D 2, A. 3, p. 734.

** D 2, A. 3, pp. 313-318.

[1] Text of this proposal:

"*Article 61.*

" If the parties conclude an agreement as to the settlement of the dispute and give written notice of such agreement to the Court before the close of the proceedings, the Court shall officially record the conclusion of the agreement.

"*Article 61* bis.

" If the parties, in a case submitted to the Court either by special agreement or by application, notify the Court in writing, by mutual agreement, that they intend to break off the proceedings, the Court shall officially record the fact and proceedings shall be terminated.

"*Article 61* ter.

" In a case submitted to the Court by application, the applicant may notify the Court in writing that it intends to break off the proceedings. If, when the Court receives this notification, the respondent has not yet taken any step in the proceedings, the Court shall officially record the breaking-off of the proceedings and shall inform the respondent accordingly, whereupon the proceedings shall be terminated. If at the moment referred to above, the respondent has already taken some step in the proceedings, the Court, or the President if the Court is not sitting, shall fix a period within which the respondent must state whether it opposes the breaking-off of proceedings. If the respondent does not object thereto, the Court shall officially record the fact and shall inform the applicant accordingly, whereupon the proceedings shall be terminated. If the respondent objects to the breaking-off of proceedings, the proceedings shall continue." (See D 2, A. 3, p. 877).

[2] D 2, A. 3, p. 780.

covered agreement, because abandonment of proceedings necessarily followed upon a settlement.

M. NEGULESCO felt some hesitation in adopting M. Fromageot's proposal to introduce the word " order " into the articles under discussion, by reason of the terms of Article 61. For the expression: " if the parties conclude an agreement regarding the settlement of the dispute and give written notice of such agreement to the Court . . ." (. . . *et notifient cet accord par écrit* . . .) might cover both the case of the conclusion of an agreement which the Court must record and that of an agreement which must be embodied in a judgment. He had always considered that, where the Court relinquished jurisdiction in a case, for instance, by embodying in its decision an agreement reached between the parties, the decision given should be described as a " judgment ". That was why he would prefer to leave the text as it stood.

M. GUERRERO, Vice-President, did not agree with M. Negulesco. All the cases covered by the draft article were cases of abandonment of proceedings in which all the Court had to do was to make an order terminating the proceedings. There was therefore no objection to using the word " order " in Articles 61, 61 *bis* and 61 *ter*, so as to indicate what form the Court's decision would take. The question of judgment by consent, referred to by M. Negulesco, did not arise in connection with these articles.

M. FROMAGEOT also thought that that was an entirely different question. In this connection, however, the word " *accord* " (agreement, consent) might give rise to misunderstanding, and the words " *arrangement amiable* " (settlement) were preferable. The word " *accord* " might in fact, if retained, appear to refer to " *jugements d'accord* " (judgments by consent), with which it did not seem expedient to deal in the Rules. That, however, did not mean that that form of judgment could not be given or that it might not in some circumstances give excellent results. In such a case, the Court would render judgment in certain terms proposed by the parties, after satisfying itself that these terms did not contravene international law, the Court's jurisprudence, or the principles of public policy and morality; the advantage of the proceeding would be that the parties would obtain from the Court a decision which, as regards their respective countries, would possess the force of *res judicata*, which a settlement would not have. M. Fromageot thought that the possibility of a solution of this kind should be left open, but that no reference to it should be made in the Rules.

Baron ROLIN-JAEQUEMYNS observed that, if it was laid down in the Rules that in these cases the Court's decision must take the form of an order, it could not give its decision by judgment. It would therefore be better to leave the Court entirely free to adopt either course according to circumstances.

M. FROMAGEOT emphasised that the three situations contemplated in the Co-ordination Commission's draft were quite different from what was known as a judgment by consent. In these situations the Court must, as it had hitherto done, give its decision in the form of an order. In a case where a decision by consent was given, there would of course be a judgment, but that was an entirely different question.

Jonkheer VAN EYSINGA, who agreed with M. Fromageot, recalled that the question had been considered in 1922 [1] and 1926, [1] and that as a result it had been decided to say nothing in the Rules and to leave the solution of the matter to be evolved by practice.

M. FROMAGEOT asked for an explanation on another point. In Article 61 of the Rules, when it said that if the two parties conclude an agreement regarding the settlement of the dispute, they would give " written notice of such agreement . . .", it was not clear whether the parties were to communicate the terms of the agreement or simply to announce the fact that an agreement had been reached, without stating its terms.

The REGISTRAR recalled that this provision had been applied in the Chorzów case, [2] when the two parties had come to an agreement regarding the settlement of the dispute. The question had then been exhaustively considered, because the parties, though they communicated the text of the agreement to the Court, stipulated that its terms were not to be published. In its order, the Court had got out of the difficulty by treating the exchange of notes, which announced the conclusion of the agreement but which did not embody its terms, as constituting the agreement within the meaning of Article 61. In the Castellorizo case, [3] which had also been terminated by agreement, the parties had notified the Court, first of the fact that an agreement had been concluded, and later of the general tenor of that agreement; the terms of the agreement had, however, been communicated only after the order had already been made and simply for information.

M. FROMAGEOT referred to the various precedents in connection with the abandonment of proceedings, and observed that in every case the Court had given its decision in the form of an order.

The PRESIDENT proposed that the Court should vote on the question of principle raised by M. Fromageot—namely, whether the word " order " should be inserted in the appropriate places in Articles 61, 61 *bis* and 61 *ter*.

Before voting, however, he asked his colleagues whether they did not think that the terms of the draft before the Court were so wide that they would cover judgment by consent, a subject which several judges wished to have reserved.

M. SCHÜCKING observed that, according to what M. Fromageot had said, both parties must ask for a judgment by consent. The text under consideration, however, simply said that the parties had reached agreement regarding a settlement and made no mention of a request addressed by them to the Court. The proposed text therefore left open the question of judgment by consent.

M. ANZILOTTI thought that the determining factor was that, in the case of judgment by consent, the terms of the agreement reached became the terms of the judgment; whereas, in the circumstances contemplated by Article 61, the Court simply recorded the fact that an agreement—which was not embodied in the decision—had been reached.

M. FROMAGEOT suggested that, in order to avoid giving the impression that the actual terms of the agreement must be communicated to the Court, whereas notification of the existence of the agreement was all that was required, they might say in Article 61, instead of " *notifient cet accord* ", " *font connaître qu'elles sont tombées d'accord* " (announce that they have concluded an agreement).

[1] D 2, pp. 121, 202.

[1] D 2, A., p. 167.

[2] See A 18/19, pp. 11-13; C 16, Vol. II.

[3] See A/B 51; C 61.

The PRESIDENT took a vote on the following question, it being understood that it did not affect the last sentence of Article 61 *ter*:

" Is the Court in favour of using the word ' Order ' in Article 61 as an indication of the method whereby proceedings would be terminated ? "

By eight votes to three, the Court answered the question in the affirmative.

The REGISTRAR understood this decision to have been taken in order to confirm the Court's practice. According to that practice, however, the President did not make orders of this kind. If a case was abandoned between two sessions of the Court, the President would inform the parties that he would notify the Court and that the Court would make an order when it met.[1]

The PRESIDENT said that the Court would take note of the Registrar's observation and pass it on to the Drafting Committee.

M. ANZILOTTI wished to explain that he had voted in the affirmative because the decision taken simply confirmed a practice which did no more than apply Article 48 of the Statute, which provided that the Court would make orders for the conduct of the case.

Baron ROLIN-JAEQUEMYNS wondered whether the words " *par écrit* " (*written* notice) in Article 61 might not lead to some misunderstanding.

M. URRUTIA thought it necessary that a step so important as the abandonment of proceedings should be taken in writing.

M. SCHÜCKING supported Baron Rolin-Jaequemyns' suggestion. The Drafting Committee might delete the words " *par écrit* " (written notice) in Article 61 and say: " *notifient le fait de l'accord* " (give notice of the fact).

Jonkheer VAN EYSINGA observed that here the Co-ordination Commission had simply kept the text of the existing rule. It was, moreover, doubtful whether the Covenant of the League of Nations, to which the Court owed its existence, warranted the insertion in the Rules of a provision under which an agreement between parties might remain secret. According to the Preamble to the Covenant, the High Contracting Parties, " in order to promote international co-operation and to achieve international peace and security ", considered it essential to prescribe " open, just and honourable relations between nations ". The proposed provision did not seem altogether in harmony with this great principle.

The PRESIDENT thought that, so far as that was concerned, if the parties wished their agreement to remain secret, they could proceed under Article 61 *bis* and abandon the proceedings.

He asked the Court to vote on the following question, which related to a proposal made by M. Fromageot:

" Does the Court decide to replace the word ' *notifient* ' by the words ' *le font connaître* ' ? "

By eight votes to three, the Court answered the question in the affirmative.

The PRESIDENT recalled that there was a suggestion by Baron Rolin-Jaequemyns to the effect that the words " *par écrit* " (written) should be deleted.

Baron ROLIN-JAEQUEMYNS said that the vote just recorded satisfied him, and that he did not press his suggestion.

[1] C 69, pp. 71-72 (documents 51-53); A/B 54.

M. FROMAGEOT also wished it to be said in Article 61 that the Court would order the case to be removed from the list.

The PRESIDENT took a vote on this proposal for the addition at the end of Article 61 of the words: " and order the case to be removed from the list ".

This proposal was unanimously adopted.

The PRESIDENT took a vote on the draft Article 61 proposed by the Co-ordination Commission, with the amendments just adopted.

The Court adopted this text unanimously.[1]

M. NEGULESCO made the following declaration:

The text of Article 61, as submitted by the Co-ordination Commission, had left an element of uncertainty. As a result of the amendments now adopted by the Court, that uncertainty had been removed; the text no longer covered judgments by consent. It seemed, however, that the Court was agreed that it could always render judgment in terms agreed upon by the parties.

M. ANZILOTTI recalled that this point had been reserved. It had only been agreed that the question remained open.

Article 61 bis.

The PRESIDENT opened the discussion on Article 61 *bis* as submitted by the Co-ordination Commission:[2]

M. ANZILOTTI observed that, in order to bring the article into line with Article 61, the words " order the removal ", etc., should be added.

M. FROMAGEOT asked why the Co-ordination Commission had added to the existing text the words: " in a case brought before the Court either by special agreement or by application ".

M. ANZILOTTI said that no doubt it was in order to contrast it with the following article, which related only to cases brought by application.

Jonkheer VAN EYSINGA recalled that doubts had arisen as to whether the second paragraph of the existing text, which corresponded to the new Article 61 *bis*, covered only cases brought before the Court by special agreement; the words in question had been inserted to make it clear that the article covered cases of both kinds.

M. FROMAGEOT thought it would be curious to include these words in Article 61 *bis* and not in Article 61 *ter*. In both cases the parties announced that they intended to abandon proceedings. He therefore proposed that the words " in a case brought before the Court either by special agreement or by application " in Article 61 *bis* should be deleted.

The Court unanimously adopted M. Fromageot's proposal.

Baron ROLIN-JAEQUEMYNS asked why the words " *d'un commun accord* " were not placed as in the existing text of the Rules. If there were no special reason for this, it would be better to replace them where they were before.

The PRESIDENT said that the Drafting Committee would bear this observation in mind.

[1] This text was as follows:

" If the parties conclude an agreement as to the settlement of the dispute and inform the Court of the fact in writing before the close of the proceedings, the Court shall make an order officially recording the conclusion of the agreement and order the case to be removed from the list."

[2] See p. 289, footnote 1.

9.IV.35.

First Reading as Article 72 (61 and 61 bis combined).

The following text submitted by the Drafting Committee was adopted unchanged by the Court:

> " If the parties conclude an agreement as to the settlement of the dispute and inform the Court in writing before the close of the proceedings, or if, by mutual agreement, they inform the Court in writing that they abandon the proceedings, the Court shall make an order officially recording the conclusion of the friendly settlement or the fact that they are abandoning the proceedings; in both cases the order shall prescribe the removal of the case from the list."

27.II.36.*

FRIENDLY SETTLEMENT AND ABANDONMENT OF PROCEEDINGS

Article 68. — Second Reading.

The PRESIDENT expressed the opinion that the expression " *désistement* " in the French text should be rendered by " discontinuance " in the English text.

It was agreed that this suggestion should be referred for consideration to the Drafting Committee, which would be called upon to review the Rules as a whole.

In connection with Article 68 itself, Jonkheer VAN EYSINGA drew the Court's attention to the words " *avant la clôture de la procédure* " (before the close of the proceedings) in the first paragraph. Did these words really ensure that it would be possible for the parties to come to an agreement until the last moment—*i.e.*, until the delivery of judgment, which appeared always to have been the Court's intention ? The uncertainty was increased by the fact that the English text, " before the close of the proceedings ", left even more room for doubt than the French text.

Article 61 of the Statute, which concerned revision, used the expression " *avant le prononcé de l'arrêt* " (when the judgment was given) in a similar connection. Would it not be better to use this expression in Article 68 of the Rules ?

Moreover, in the existing draft, the words " before the close of the proceedings " clearly referred to the case of agreement dealt with in the first part of the paragraph, but was it clear that they also referred to the case of discontinuance dealt with in the latter part of the paragraph ?

The PRESIDENT considered that in any case the Court would agree that proceedings could not be discontinued after delivery of judgment establishing the rights of the parties.

A reference to the closure of the hearing was to be found in Article 54 of the Statute, which ran as follows:

> " When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed."

Was not this really the moment after which discontinuance would no longer be possible ?

Jonkheer VAN EYSINGA referred to an observation by M. Fromageot during the first reading of the Rules (p. 289); M. Fromageot had said:

" Furthermore, it might be a good thing to say that proceedings might be broken off at any stage before the delivery of judgment."

Jonkheer van Eysinga agreed with this view.

The REGISTRAR referred to the definition of the Court's procedure given in Article 43 of the Statute:

> " The procedure shall consist of two parts: written and oral.
>
> " The written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases and, if necessary, Replies; also all papers and documents in support.
>
> . . . . . .
>
> " The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates."

The word " procedure " *(procédure)* was used in both texts to describe these arrangements as a whole.

The terms of this article pointed to the conclusion that Article 68, in the form proposed, did not cover the whole period up to the delivery of judgment, but only the period up to the end of the oral proceedings.

M. FROMAGEOT agreed with Jonkheer van Eysinga that the words " the close of the proceedings " should be replaced by " the delivery of judgment ".

The PRESIDENT wished to know whether the Court desired to provide in the Rules for a contingency which had never arisen—namely, the possibility of the parties desiring to discontinue proceedings at a time when the Court was actually considering its judgment. If the words " before the delivery of judgment " were used, the question of allowing discontinuance in that case would be settled.

M. NEGULESCO remarked that directly the parties had reached an agreement the dispute ceased to exist. The Court therefore could not proceed with its deliberation. He agreed with Jonkheer van Eysinga's suggestion that the words " before the close of the proceedings " should be replaced by " before the delivery of judgment ".

Count ROSTWOROWSKI emphasised that the principle governing both the Statute and Rules was that the will of the parties should be respected as far as possible. If their will was to conclude an agreement, the Court should do everything in its power to make this possible. Accordingly, he supported what MM. van Eysinga and Negulesco had said.

M. URRUTIA shared this view. Agreement should be possible up to the time of the delivery of judgment.

The PRESIDENT asked the Court whether they decided to substitute the words " before the delivery of judgment " for the words " before the close of the proceedings " in the third line of Article 68.

The Court unanimously answered the question in the affirmative.

M. FROMAGEOT, referring to Jonkheer van Eysinga's second observation in regard to Article 68 (see above), proposed that, to meet his point, the paragraph should be worded as follows:

> " At any time before judgment has been delivered, if the parties conclude an agreement as to the settlement of the dispute and inform the Court in writing or if, by mutual agreement," etc.

The words " before judgment has been delivered " would then apply to the whole paragraph.

Jonkheer VAN EYSINGA thought that this wording made Article 68 perfectly clear.

* D 2, A. 3, pp. 652-655.

M. NAGAOKA wondered whether the words "*renoncent à poursuivre la procédure*" (discontinue the proceedings) were quite suitable in this article. According to the definition given in Article 43 of the Statute and quoted by the Registrar, the procedure appeared to terminate with the oral proceedings.

M. NEGULESCO said that, in his opinion, the procedure of necessity also included the Court's deliberation and the delivery of judgment. There was therefore no objection to using the expression "*renoncent à poursuivre la procédure*" (discontinue the proceedings).

The REGISTRAR having proposed the substitution of the word "*instance*" for "*procédure*", M. FROMAGEOT approved this suggestion, as an "*instance*" was, by definition, the series of steps undertaken with a view to the bringing of a dispute before a Court, the examination of the case, and the obtaining of judgment.

The PRESIDENT remarked that the use of the word "*instance*" in the French text would not involve any change in the English text. Article 68 would therefore read as follows:

"If at any time before judgment has been delivered, the parties conclude an agreement as to the settlement of the dispute and so inform the Court in writing, or by mutual agreement inform the Court in writing that they are not going on with the proceedings, the Court will make an order", etc.

There being no objections, the President declared Article 68 adopted in second reading with this wording.

11.III.36.*

SETTLEMENT AND DISCONTINUANCE

Article 68. — Final Adoption.

In the English text, in accordance with a previous decision of the Court, the Drafting Committee had substituted "discontinuance" for "abandonment of proceedings". They also proposed to use the word "settlement" as the best translation of "*arrangement amiable*".

There being no observations, Article 68 was finally *adopted* as thus amended.

ARTICLE 69 *(New Article).*

UNILATERAL NOTICE OF DISCONTINUANCE

Note. — For references to Article 61 *ter* (Article 69 of the Rules of 11.III.35), during the discussion on Article 61 (Article 68 of the Rules of 11.III.36), see Article 68, pp. 289-291.

22.II.35.*

Discussed as Article 61 ter.[1]

The PRESIDENT said that Article 61 *ter*, which concerned discontinuance by one party only, was a new proposal submitted by the Co-ordination Commission.

M. FROMAGEOT asked why the Commission had used the expression: "the applicant . . . may notify . . .". That seemed to be self-evident.

Jonkheer VAN EYSINGA said that the provision had, in the first place, been proposed by the Third Committee.[2] The latter's object had been, in view of a discussion which had once taken place in the Court on the question whether unilateral discontinuance was possible under Article 61,[3] to supplement the terms of that article. Hitherto, the Court had only been agreed as to the possibility of the joint abandonment of proceedings by both parties. The Commission's intention was now, by means of Article 61 *ter*, definitely to provide for unilateral discontinuance.

M. FROMAGEOT was afraid that the proposed text seemed to make future provision for a possibility which had not

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* D 2, A. 3, pp. 318-319.

[1] For text, see note to p. 289.

[2] D 2, A. 3, p. 877.

[3] Extract from the minutes of the 3rd meeting of the 28th Session, held on May 12th, 1933:

"9. — *The appeals of the Czechoslovak Government (Distr. 2919 and 2927). Court's Order terminating the Proceedings.*

"M. FROMAGEOT explained that, after consideration, he had come to the conclusion that Article 61 of the Rules applied only in the case of a special agreement.

"Baron ROLIN-JAEQUEMYNS thought that there was an essential difference between a case in which the Court had received independent declarations from each party withdrawing their suits, and a case in which a Government had noted the other Government's declaration of withdrawal; the result of this was to constitute an agreement between the parties, so that Article 61 was applicable.

"M. ANZILOTTI admitted that the unsatisfactory wording of Article 61 was capable of bearing the interpretation placed upon it by M. Fromageot. The intention, however, of Article 61, paragraph 2, as adopted by the Court when drawing up the Rules in 1922, was probably that it should be applicable regardless of the way in which a case had been brought before the Court, but that, if a case had been submitted by application, it did not rest with the applicant alone to

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* D 2, A. 3, pp. 734-735.

break off proceedings begun by him. That rule was applied in Italian procedure.

"M. FROMAGEOT confirmed that, in French procedure also, once proceedings had been commenced, the withdrawal of his suit by the claimant was not valid unless agreed to by the defendant. The present case was really one of a withdrawal of the suit acquiesced in by the respondent, and not of a friendly settlement between the parties. There was nothing in the Rules applicable to such a case.

"Jonkheer VAN EYSINGA observed that, according to Dutch law, in civil proceedings, the withdrawal of a suit by the plaintiff sufficed to remove it from the Court, provided that the defendant had not yet submitted his reply; once the reply had been submitted, the consent of the defendant was requisite. He thought that the Court should decide whether the unilateral withdrawal of a suit sufficed to terminate proceedings begun before it.

"M. SCHÜCKING remarked that in German law a suit could also be withdrawn unilaterally.

"M. NEGULESCO pointed out that some systems of law drew a distinction according to whether issue had been joined or not, as for instance when a suit was withdrawn before notice of it had been served. In that case unilateral withdrawal sufficed.

"At the request of the President, the REGISTRAR recalled that, when the Rules had been drawn up, a preliminary questionnaire submitted to the Court included under No. III—4 the following question:

"'Can the parties remove a case from the Court, once they have submitted it?'

"In this question, 'the parties' no doubt meant 'one or other of the parties' as well as 'the parties acting in agreement'. This was proved by the fact that, when the question came up for discussion, M. Huber drew a distinction between the case of a suit withdrawn by the mutual agreement of the parties and the case where the applicant alone withdrew his application. The Court eventually decided that the parties should be entitled to 'remove a case from

previously existed. As a matter of fact, however, it had existed, and the best proof of that was that there had been several instances of it. The point seemed really to be one of drafting.

The PRESIDENT agreed that this point should be considered by the Drafting Committee, which would propose the best way of expressing the idea to be conveyed in regard to which the Court was agreed.

M. FROMAGEOT, observing that the article covered two quite distinct cases: discontinuance before any proceeding had been taken by the other party and discontinuance at a later stage, thought it would be desirable to divide the article into two separate paragraphs.

The PRESIDENT believed that (except, of course, as regards the circumstances contemplated in the last sentence — *i.e.*, when the respondent party opposed discontinuance) the Court would be in favour of inserting the word " order " and the phrase " order the removal of the case from the list " in this article, in the same way as in the preceding ones.

This was agreed to.

Article 61 *ter* was adopted with the amendments indicated above.

9.IV.35.

First Reading as Article 73.

The article was adopted with the following text:

" 1. If, in the course of proceedings instituted by means of an application, the applicant informs the Court that it abandons the proceedings and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court shall make an order officially recording the abandonment of the proceedings and prescribing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

" 2. If, at the date of receipt of the notice of abandonment of the proceedings, the respondent has already taken some step in the proceedings, the Court, or the President if the Court is not sitting, shall fix a time-limit within which that party must state whether it opposes the abandonment of the proceedings. If no objection is made to the abandonment of the proceedings before the expiration of the time-limit, the other party will be held to have acquiesced and the Court will make an order officially recording the abandonment of the proceedings and prescribing the removal of the case from the list. Otherwise, the proceedings shall continue."

the Court by mutual agreement after having submitted it ' and made no distinction between cases brought by application and those brought by special agreement. Article 61 embodied this decision. Moreover, the two cases in which Article 61 had been applied before 1933 had been cases submitted by application. In this connection, he cited the orders made by the Court in 1929 in the Sino-Belgian and Chorzow cases.

" Sir Cecil HURST considered that, if the parties were agreed to remove a case, the Court's jurisdiction ceased and there was not even anything to make an order upon, since its jurisdiction was derived exclusively from the agreement between the parties. In his view, withdrawal by the applicant did not suffice by itself to put an end to the jurisdiction of the Court; for that purpose, it must be accompanied by the consent of the other party. He thought that Article 61, which only dealt with the case of an agreement between the parties, did not cover the present case."

27.II.36.*

Article 69. — Second Reading.

Paragraph 1.

The PRESIDENT observed that Article 69 concerned unilateral discontinuance. He questioned whether there was any need for the last sentence of the first paragraph of this article; it concerned the sending of a copy of the order recording the discontinuance of proceedings to the respondent party. That went without saying, and the special provision made for it seemed somewhat to impair the general application of the Rules.

The REGISTRAR said that the object in sending this order to the respondent was to inform him officially that the Court had relinquished the case.

Jonkheer VAN EYSINGA referred to the new Article 34 [1] of the Rules which the Court had adopted, and according to which, " when a case is brought before the Court by means of an application, the Registrar shall immediately transmit to the party against whom the claim is brought a copy of the application certified by him to be correct ".

It had been contended that this article was superfluous in view of the provision in Article 40, paragraph 2, of the Statute. It had, however, been maintained, in view of the special importance of the step mentioned therein. Apparently it was for the same reason that the last sentence of paragraph 1 of Article 69 had been adopted at the first reading.[2]

There being no further observations on paragraph 1, the PRESIDENT declared it adopted, and passed to paragraph 2.

Paragraph 2.

M. ANZILOTTI asked what was the meaning of the words " has already taken some step in the proceedings " in the second paragraph. Was it to be understood that the respondent must have filed his Counter-Memorial ? Or did the expression cover such steps as, for instance, the appointment of an agent ?

The REGISTRAR recalled that, at the first reading,[3] reference had been made to the distinction to be drawn, under Article 43 of the Statute, between a *document (pièce)* of the written proceedings and a step in the *proceedings (acte de procédure)*. It had, for instance, been agreed that an application was not a document of the written proceedings within the meaning of Article 43, but that its presentation nevertheless constituted a step in the proceedings. Similarly, the appointment of an agent was doubtless a step in the proceedings in this sense.

Baron ROLIN-JAEQUEMYNS laid stress on the difference between the expressions " *acte de procédure* " and " *faire acte de procédure* ". The latter meant " to take a step in the proceedings ". It was not therefore liable to involve confusion with the word " *acte* " in the sense of a document (" *pièce* ") of the written proceedings.

M. FROMAGEOT thought the expression " *faire acte de procédure* " was quite clear.

The PRESIDENT having observed that the corresponding English expression was ". . . has already taken some step in the proceedings ", Baron ROLIN-JAEQUEMYNS said that these words made it still clearer what was meant by the words " *faire acte de procédure* ".

* D 2, A. 3, pp. 655-656.

[1] Article 33 of the Rules of 11.III.36.

[2] Meetings of 1.VI.34 and 4.IV.35, p. 104.

[3] Meetings of 26.II.35 and 28.II.35, pp. 280, 281-282 and 298.

Jonkheer VAN EYSINGA proposed that the words " or if the Court is not sitting " should be replaced by " during the judicial vacations ".

On being put to the vote by the PRESIDENT, this proposal was rejected by eight votes to one, with one abstention.

Count ROSTWOROWSKI suggested that, at the end of the same paragraph, the word " *instance* " should be substituted for " *procédure* ".

Baron ROLIN-JAEQUEMYNS proposed that they should say: " *l'instance se poursuit* " instead of " *la procédure continue* ".

The PRESIDENT declared these suggestions approved. Paragraph 2 of Article 69 would therefore conclude with the words: " *Dans le cas contraire, l'instance se poursuit* " (Otherwise the proceedings shall continue).

There being no further observations, the PRESIDENT declared Article 69 adopted in second reading as thus amended.

11.III.36.*

Article 69. — Final Adoption.

In paragraph 2 of the French text, the Drafting Committee proposed to say: " *s'il est fait opposition* ", in order to avoid the expression " *dans le cas contraire* ", which was not perhaps very clear.

In the English text, a corresponding change was proposed (" if objection is made . . .").

As in Article 68, " discontinuance " was also substituted for " abandonment of proceedings ".

Article 69 was finally *adopted* as thus amended.

ARTICLE 70 *(Article 67, old Rules).*

RULES FOR PROCEDURE BEFORE THE CHAMBERS OF THE COURT

27.II.35.*

Discussed as Paragraph 1 of Article 66 (7) of the Draft.

The PRESIDENT next opened the discussion on Article 66 (7), which contained a new proposal by the Co-ordination Commission. This article was worded as follows: [1]

> " 1. The provisions governing the procedure before the full Court shall apply, so far as possible, to the procedure before the Special Chambers referred to in Articles 26 and 27 of the Statute.
>
> " 2. When the Chamber has met to examine the case submitted to it, the powers conferred on the President of the Court under Articles 29 to 33 of the Rules shall be exercised by the President of the Chamber. The first sitting of the session of a Chamber shall, however, be summoned by the President of the Court."

The REGISTRAR pointed out that the last sentence of that article had already been inserted in the new Article 29 of the Rules,[2] and should therefore be omitted from this text.

The PRESIDENT stated the reasons which had led to the insertion of the new article. The Rules at present in force contained the heading: " Section B. — Procedure before the Court and before the Special Chambers (Articles 26 and 27 of the Statute) ". That heading was the only indication that the articles in that part of the Rules applied to procedure before the Special Chambers. The Co-ordination Commission had felt that in this case there was an omission which ought to be made good.

M. FROMAGEOT thought that the Commission had been right. What it proposed was that the procedure before the Special Chambers should be conducted in the same way as before the full Court, subject, however, to the special provisions of Articles 26 and 27 of the Statute. That was the reservation implied in the expression " so far as possible ". Speaking generally, that expression was one to be avoided in the text of a rule; but in this case it was necessary to make a reservation of some kind, for the ordinary rules would not all be applicable in the case of Special Chambers.

The PRESIDENT observed that there was no opposition, in principle, to the insertion of this clause.

He asked if there were any observations concerning details.

M. FROMAGEOT pointed out that, when a clause concerning a special point was inserted in a set of rules, it was well to indicate, by its opening words, the special point with which it was concerned. It might therefore be better to begin this clause with the words: " Before the Special Chambers. . . ."

He also suggested that it might be wise to insert the new Article 66 (7) in the same subdivision of the Rules as the articles concerning summary procedure, under the heading: " Procedure before the Special Chambers and before the Chamber for Summary Procedure."

M. ANZILOTTI doubted whether it was wise to limit the powers conferred upon the President under this article to those laid down by Articles 29 to 33 of the Rules. The idea which the article sought to express was surely that, when a case was tried by a Special Chamber, the powers of the President of the Court were exercised by the President of the Chamber.

Jonkheer VAN EYSINGA agreed with the Registrar that the last sentence of Article 66 (7) might be omitted, as it duplicated Article 29.

In regard, however, to what M. Anzilotti had said, he would have to make a reservation in regard to the new Article 29, which laid down that the first act of procedure before the Chamber must necessarily be performed by the President of the Court.

The PRESIDENT said that, if the proposal which had been drawn up before the session in May 1934 was approved in principle, the Drafting Committee would have to harmonise the text with those which the Court had adopted at that session.

He noted that the article was adopted, subject to that reservation.

He observed that the whole question of the subdivision of the Rules into sections, and of their headings, was, generally speaking, reserved.[1]

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* D 2, A. 3, pp. 357-360.

[1] *Ibid.*, p. 879.

[2] Article 28 of the Rules of 11.III.36. See p. 71, meeting of 18.V.34.

* D 2, A. 3, p. 735.

[1] *Ibid.*, p. 142.

Discussed as Article 67.

The PRESIDENT next opened the discussion on Article 67 of the Rules, which was the first article of the Rules dealing with summary procedure. The existing text of Article 67 was worded as follows:

> " Except as provided under the present section, the rules for procedure before the full Court shall apply to summary procedure."

The Co-ordination Commission had proposed the following text: [1]

> " Except as provided in Articles 68 to 70 of the Rules, the rules governing procedure before the full Court shall apply, so far as possible, to summary procedure."

The words " so far as possible " having been criticised by several of the judges, Jonkheer VAN EYSINGA said that they were indispensable, as the Co-ordination Commission had found that some of the articles concerning procedure before the full Court could not be applied to summary procedure. Furthermore, if that expression were to be struck out of this passage, it would also have to be deleted in the previous article concerning procedure before the Special Chambers.

Baron ROLIN-JAEQUEMYNS suggested inserting the words " by analogy " in place of: " so far as possible "; and M. NEGULESCO proposed to employ the formula: " to the extent that it recognises them as applicable ", which appeared in Article 68 of the revised Statute.

The PRESIDENT thought that the latter formula was appropriate when the object was to give the Court guidance in framing its Rules, but that such an expression could not well be employed in the Rules themselves.

M. ANZILOTTI, in regard to the expression: " by analogy ", said that it could be used appropriately with reference to a clause which related to one particular case, and was applied to a different case. There were several clauses of the Statute and the Rules of Court which also covered proceedings before the Chambers. They could not therefore be properly described as being applied by analogy to that procedure. The real question was whether there were some provisions which, in certain circumstances, were not applicable.

The PRESIDENT thought it would be best to regard the words " so far as possible " as deleted in the text proposed by the Co-ordination Commission for Article 67, leaving open the possibility of reconsidering the question if it was found that there were provisions which, owing to their nature, were inapplicable to summary procedure. He noted that, except for the omission of these words, Article 67 could be worded in the manner proposed by the Co-ordination Commission.

Baron ROLIN-JAEQUEMYNS pointed out that, in view of what the Court had now decided, it was necessary to consider whether the expression " so far as possible " should be retained in Article 66 (7) which the Court had just adopted.

In reply to a question by M. FROMAGEOT, the PRESIDENT explained that the Co-ordination Commission had replaced the reservation " except as provided under the present section " by a reservation in regard to Articles 68 to 70, in order to make it possible, if required, to incorporate the provisions relating to the Special Chambers and to the Chamber for Summary Procedure in a single section.

[1] D 2, A. 3, p. 879.

9.IV.35.*

Discussed as Article 74.

M. FROMAGEOT, who regarded the text proposed [1] as not very satisfactory from the point of view of phraseology, proposed the following amended form as an improvement:

> " Procedure before the Special Chambers mentioned in Articles 26 and 27 of the Statute and before the Chamber for Summary Procedure shall, subject to the special provisions of the Statute and of the following articles of the present Rules, be governed by the provisions concerning procedure before the full Court."

. . . . . .

First Reading as Article 74.

The PRESIDENT opened the discussion on M. Fromageot's text designed to replace Article 74 of the draft, which had been reserved.

M. ANZILOTTI suggested that the words " *dispositions particulières* " (special provisions) should be replaced by: " *dispositions du Statut les concernant* " (provisions of the Statute regarding them), an expression used in the article proposed by the Drafting Committee.

The PRESIDENT proposed to replace the words " the following articles " by the words: " Articles 75 to 77 ".

M. URRUTIA, instead of the suggestions made by M. Anzilotti and the President, proposed the expression: " subject to the provisions of the Statute and of the Rules regarding them ", which already occurred in the Drafting Committee's text.

M. ANZILOTTI observed that the word " present " should be inserted before the word " Rules ".

The PRESIDENT put the following question:

> " Does the Court prefer the expression ' provisions of the Statute and of the present Rules regarding them ' to the expression ' special provisions of the Statute and of Articles 75 to 77 of the Rules ' ? "

By nine votes to three, the Court answered the question in the affirmative.

Baron ROLIN-JAEQUEMYNS wished to make two slight changes of wording; (1) to say: " *des dispositions les concernant du Statut et du présent Règlement* "; and (2) in order to avoid repeating the word " *concernant* ", to say: " *les prescriptions* relatives à *la procédure* ".

The PRESIDENT took a vote on the following question:

> " Does the Court adopt the following text to replace the text for Article 74 proposed by the Drafting Committee:
>
> " ' Proceedings before the Special Chambers mentioned in Articles 26 and 27 of the Statute of the Court and before the Chamber for Summary Procedure shall, subject to the provisions of the Statute

* D 2, A. 3, pp. 447 and 450.

[1] Text proposed:

" Before the Special Chambers mentioned in Articles 26 and 27 of the Statute and before the Chamber for Summary Procedure, the procedure shall, subject to the provisions of the Statute and Rules concerning them, be regulated according to the provisions relating to procedure before the full Court."

and of these Rules relating to the Chambers, be governed by the provisions as to proceedings before the full Court ' ? "

By ten votes to one, with one abstention, the Court answered the question in the affirmative. (Adopted in first reading.)

Second Reading and Final Adoption.

On 27.II.36, Article 70 was adopted in second reading [1] and, on 11.III.36, it was finally *adopted*, the word " procedure " being substituted for " proceedings " in the English text.

ARTICLE 71 *(Articles 35, Paragraph 3, Sub-paragraph 1, and 68, old Rules, with a New Last Paragraph).*

CONVOCATION OF THE CHAMBERS OF THE COURT

24.V.34.

See under Article 32, pp. 93-94, for discussion of old Article 35, paragraph 3 (subsequently paragraph 1 of Article 71).

25.V.34.

See under Article 32, p. 94, for a reference to old Article 35, paragraph 3, and its inclusion in a new and separate article (eventually Article 71).

31.V.34.

See under Article 32, pp. 95-96, for discussion of Article 35, paragraph 4, of the Co-ordination Commission's draft (paragraph 3 of the old Article 35).

1.VI.34.

See under Article 32, p. 100, for adoption of paragraph 4 of draft Article 35 (paragraph 3 of old Article 35).

27.II.35.

See under Article 70, p. 295, for discussion of paragraph 2 of Article 66 (7) of the draft (which subsequently became paragraph 4 of Article 71).

27.II.35.*

Discussed as Article 68 (of the old Rules).

The PRESIDENT asked the Court to examine Article 68, and read the text at present in force, as follows:

" Upon receipt by the Registrar of the document instituting proceedings in a case which, by virtue of an agreement between the parties, is to be dealt with by summary procedure, the President of the Court shall, as soon as possible, notify the members of the Chamber referred to in Article 29 of the Statute. The Chamber or, if it is not in session, its President, shall fix the time within which the first document of the written procedure, provided for in the following article, shall be filed.

" The President shall convene the Chamber at the earliest date that may be required by the circumstances of the case."

The President added that the Co-ordination Commission had proposed an amended text, which was worded as follows: [1]

" 1. Upon receipt by the Registrar of the document instituting proceedings in a case which by virtue of an agreement between the parties is to be dealt with by summary procedure, the President of the Court shall notify the members of the Chamber for Summary Procedure. He shall summon the agents to a meeting as soon as they have been appointed, as laid down in Article 33 of the Rules.

" 2. The President of the Court shall convene the Chamber at the earliest date that may be required by the circumstances of the case.

" 3. When the Chamber has met to examine the case submitted to it, the powers conferred upon the President of the Court under Articles 29 and 33 of the Rules shall be exercised by the President of the Chamber."

M. URRUTIA felt some doubt in regard to the last part of paragraph 1 of the text proposed by the Co-ordination Commission: " He shall summon the agents to a meeting as soon as they have been appointed, as laid down in Article 33 of the Rules." Did not that clause, he asked, duplicate the terms of Article 67, which laid down that the rules concerning procedure before the full Court were applicable in principle in the summary procedure ?

M. ANZILOTTI asked, in that connection, whether the summoning of the agents was the duty of the President of the Court, or whether it should not be done by the President of the Chamber.

The PRESIDENT observed that, according to the system contemplated by the Co-ordination Commission, it was the President of the Court who issued the first summons to the Chamber. Under that system, the agents were also summoned by the President of the Court, for it was only in the light of the information that he thus obtained that he could summon the Chamber. It was still to be seen whether that system would be maintained, after the amendments adopted by the Court.

M. ANZILOTTI pointed out that the conversation with the agents would concern not only the first summoning of the Chamber, but the whole question of the procedure in the case. Would it be possible to separate those two matters ? If not, was there not some risk that the powers of the President of the Court might overlap those of the President of the Chamber ? In regard to this aspect of the question, he thought that the second paragraph of the Co-ordination Commission's text required some clarification.

M. ALTAMIRA considered that, in view of the provisions of the new Article 29 adopted in May 1934, paragraph 3 of the proposed Article 68 should be omitted.

The REGISTRAR added that, speaking generally, the wording of Article 68 required to be harmonised with the text then adopted for Articles 29 to 33 of the Rules.[2]

* D 2, A. 3, pp. 360-361.

[1] *Ibid.*, p. 879.

[1] In the text submitted for second reading, the words " Articles 26 and 27 of the Statute of the Court and before the Chamber for Summary Procedure " were replaced by " Articles 26, 27 and 29 of the Statute of the Court ".

[2] D 2, A. 3, p. 919; or see in this volume, under Articles 28 to 31, 35 and 37, the texts adopted in 1934.

For instance, in the last sentence of paragraph 1 of Article 68, it was laid down that the President must summon the agents as soon as they had been appointed, whereas, according to the new Article 33, he might summon them if he wished.

Baron ROLIN-JAEQUEMYNS proposed to omit the last sentence of paragraph 1 of Article 68, which he thought superfluous having regard to the terms of paragraph 3, which brought out the essential point—namely, that the President of the Court acted only so long as the Chamber was not yet functioning. If, at that time, he thought it advisable to summon the agents, he was free to do so.

M. ANZILOTTI was in favour of Baron Rolin-Jaequemyns' suggestion to omit the last sentence of paragraph 1; that would, of course, not prevent the President of the Court from getting into touch with the agents; but his duty was to summon the Chamber as soon as possible, and to hand the entire procedure over to it.

M. FROMAGEOT thought that the work of harmonising the text of Article 68 as proposed by the Co-ordination Commission with the wording of Articles 29 to 33 as already adopted should be entrusted to the Drafting Committee.

The PRESIDENT put the following question to the vote:

> " Does the Court decide to omit the last sentence of paragraph 1 of Article 68, as proposed by the Co-ordination Commission ? "

By ten votes against one, the Court answered this question in the affirmative.

The PRESIDENT said he had answered in the negative because it was incumbent upon the President of the Court to take steps for the efficient working of the Court, in case the latter had to sit at the same time as the Chamber for Summary Procedure.

As there was no objection, in principle, to the adoption of Article 68, as thus amended, the President declared it adopted. It was agreed that the Drafting Committee was to harmonise its wording with that of the corresponding articles adopted in May 1934.

28.II.35.*

Discussed as Article 68.

Articles 68 and 69.

The PRESIDENT observed that, as a result of the decision to retain Article 69 of the existing Rules concerning summary procedure, it would be necessary to reconsider Article 68; for that article, as adopted by the Court [1], did not include the following clause, which would, however, appear to be indispensable:

> " The Chamber or, if it is not in session, its President, shall fix the time within which the first document of the written procedure, provided for in the following article, shall be filed."

There was no corresponding provision in Article 69 as adopted by the Court.

M. ANZILOTTI had understood that, in summary procedure, the Case should be filed together with the document instituting proceedings, for Article 69 said: " Summary proceedings are opened by the presentation of Cases." Thus, it would not be necessary to fix a time-limit for the Case, but only for the Counter-Case, if any.

Jonkheer VAN EYSINGA thought that an action was brought by means of the document instituting proceedings, and that it was the proceedings, in the technical sense of Article 43 of the Statute, which were begun by the filing of the Case, as in ordinary procedure.

M. ANZILOTTI, in that case, would like the beginning of Article 69 to be made clearer; but he did not press the point.

The PRESIDENT asked the Court whether they wished to add to Article 68 of the Rules as adopted on February 27th, 1935, the last sentence of the first paragraph of the existing Article 68:

> " The Chamber or, if it is not in session, its President, shall fix the time within which the first document of the written procedure, provided for in the following article, shall be filed."

By eight votes to two, the Court decided to add this sentence.

M. ALTAMIRA said that he had voted against the motion because he preferred the system according to which the Case must be filed together with the document instituting proceedings, so as to shorten the proceedings as much as possible.

9.IV.35.*

Discussed as Article 75 and in connection with Article 29, Paragraph 2 (Article 28 of the Rules in force).

In paragraph 1, M. FROMAGEOT proposed that the word " *réglée* " (dealt with), in line 3, should be replaced by " *jugée* " (tried).

It was decided accordingly.

In the fifth line, M. Fromageot proposed to say: " *en fait la notification* ", instead of: " *le notifie* ".

Count ROSTWOROWSKI thought that the word " communication " should be used here. According to the terminology adopted, " notifications " were addressed to the Court, whereas " communications " were made by it.

The PRESIDENT replied that it was not a question of transmitting to members of the Court the text of the instrument instituting proceedings, but of informing them that the parties had agreed that the case should be dealt with by a particular Chamber.

The REGISTRAR recalled that the Drafting Committee had in this connection deliberately selected the vague expression " *le notifie* ". These words had been retained by the Drafting Committee, notwithstanding the proposal made that the word " *notifie* " should be replaced by " *communique* ".

M. FROMAGEOT suggested that the words " *le notifie* " should be replaced by " *en donne communication* ", which would cover both notification of the fact and transmission of the instrument; he saw no objection in the fact that it was already laid down in Article 35 of the draft Rules that the transmission of the instrument should be undertaken by the Registrar.

It was decided accordingly.

The PRESIDENT declared Article 75 adopted in first reading with the alterations approved above. The text was as follows:

> " 1. Upon receipt by the Registry of the document instituting proceedings in a case which by virtue of an agreement between the parties is to be tried either by

* D 2, A. 3, pp. 370-371.

[1] See above.

* D 2, A. 3, pp. 447-448.

one of the Special Chambers referred to in Articles 26 and 27 of the Statute of the Court or by the Chamber for Summary Procedure, the President of the Court shall communicate the document to the members of the Chamber concerned.

" 2. The President of the Court shall convene the Chambers at the earliest date compatible with the requirements of the procedure.

" 3. As soon as the Chamber has met to go into the case submitted to it, the powers of the President of the Court in respect of the case shall be exercised by the President of the Chamber. "

Article 29, Paragraph 2.

The PRESIDENT remarked that the Court had reserved [1] the question whether paragraph 2 of Article 29 duplicated Article 75, the second paragraph of which dealt with the same matter as the second sentence of paragraph 2 of Article 29, and the third paragraph of which overlapped the first sentence of the same paragraph of that article.

Baron ROLIN-JAEQUEMYNS considered that these two provisions harmonised and supplemented each other quite satisfactorily.

M. GUERRERO, Vice-President, having asked in connection with paragraph 3 of Article 75 whether, in the event of abandonment of proceedings in a case submitted to a Chamber, the order terminating proceedings would be made by the President of the Chamber or the President of the Court, the PRESIDENT said that, according to the Court's practice as formulated for instance in Article 72 of the draft, it would be for the Chamber itself to make the order. If the Chamber were not sitting and if the case could not wait until the next session of the Court, a special meeting of the Chamber would have to be convened.

The PRESIDENT noted that, in the general opinion of members of the Court, no modification of Article 29 seemed to be made necessary by the adoption of Article 75.

18.II.36.

See under Article 32, p. 102, for discussion of paragraph 1 of Article 71 as paragraph 4 of draft Article 33 and as Article 70 *bis* of a proposal by M. van Eysinga.

19.II.36.*

Discussed as Article 33, Paragraph 4.

The PRESIDENT said that, as had been decided, he and some other members of the Court had prepared texts to give effect to the decisions adopted in regard to paragraph 4 of Article 33.

The proposals made were as follows:

1. Delete paragraph 4 of Article 33; [2]
2. Draft Article 7 as follows; [3]
3. Draft Article 71 as follows:

" 1. A request that a case should be referred to one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court shall be made in the document instituting proceedings or shall accompany that document. Effect will be given to the request if it is found that the parties are in agreement on the point.

" 2. Upon receipt by the Registry of the document instituting proceedings in a case brought before one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute, the President of the Court shall communicate the document to the members of the Chamber concerned and shall, if necessary, take all requisite and appropriate steps with a view to the application of Article 31, paragraph 4, of the Statute.

" 3. The President of the Court shall convene the Chamber at the earliest date compatible with the requirements of the procedure.

" 4. As soon as the Chamber has met in order to go into the case submitted to it, the powers of the President of the Court in respect of the case shall be exercised by the President of the Chamber."

The PRESIDENT explained that it was proposed to delete paragraph 4 of Article 33 and to add a paragraph 3 to Article 7; an alteration would also be made in Article 71 of the Rules. It would, however, be best not to discuss Article 71 until it was reached in the course of the examination of the Rules. . . .

27.II.36.*

Article 71. — Second Reading.

The PRESIDENT recalled that the texts now before the Court were those presented on 19.II.36.[1]

As Jonkheer van Eysinga had circulated a text for paragraph 1 of Article 71 which varied only slightly in wording from that of the Drafting Committee, the President submitted Jonkheer van Eysinga's text for discussion:

Article 71, Paragraph 1. — " A request that a case should be referred to one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court shall be made in the document instituting proceedings or shall accompany that document. Effect will be given to the request *if the parties are in agreement.*"

The President assumed that the Court were agreed on the principle that the method of submission of a request that a case should be referred to a Chamber should be dealt with at the beginning of Article 71 of the Rules and not in Article 33.

It was decided accordingly.

Count ROSTWOROWSKI wished to know what the implication of the last sentence of this text was: if the parties were not agreed, with whom would the decision rest ?

Jonkheer VAN EYSINGA said that, under Article 26, 27 and 29 of the Statute, the two parties must be in agreement to enable a case to be referred to a Chamber.

The PRESIDENT confirmed this interpretation. If the parties were not agreed, the case would not be referred to a Chamber, but would automatically go before the full Court.

Had Jonkheer van Eysinga, he asked, intentionally omitted the words " if it is found " *(" constaté ")* ?

Jonkheer VAN EYSINGA said that he had merely intended thereby to bring paragraph 1 of Article 71 into line with paragraph 3 of Article 7 as proposed by the Committee.

The PRESIDENT supposed that it was also to make the wording of this paragraph correspond to that of paragraph 3 of Article 7 of the Rules that Jonkheer van Eysinga had begun his text with the words " *Toute demande* ". But, in order to avoid beginning the corresponding English

* D 2, A. 3, pp. 581-582.
[1] See p. 71 (meeting of 3.IV.35).
[2] See p. 103, under Article 32.
[3] See p. 34, under Article 7.

* D 2, A. 3, pp. 656-659.
[1] See above.

text with the word " Any ", might not both paragraph 1 of Article 71 and paragraph 3 of Article 7 begin with the words " *La demande* " ?

Jonkheer VAN EYSINGA agreed.

M. NEGULESCO wanted an explanation in regard to the words " Effect will be given to the request ". Who was to give effect to it, the full Court or the Chamber ?

The PRESIDENT said that there was no need to summon the members of the full Court in order to give effect to this request; the parties being in agreement, it was merely a question of a formality to be discharged by the Registry.

There being no further observations, the President declared the text proposed by Jonkheer van Eysinga adopted for paragraph 1 of Article 71 (subject to the substitution of the word " *La* " for the word " *Toute* ").

Paragraph 2 (see preceding page).

M. FROMAGEOT suggested the deletion of the word " appropriate " *(utiles)*.

This was agreed to.

M. ANZILOTTI wondered whether, from the point of view of drafting, it would not be more logical first to mention the steps which the President might have to take with a view to the application of Article 31 of the Statute—*i.e.*, the constitution of the Chamber; before communicating the document instituting proceedings to the members of the Chamber concerned, the President must know what the composition of the Chamber would be.

The REGISTRAR recalled that, under the revised Statute, a party might be entitled to appoint a judge *ad hoc* to sit in a Special Chamber or in the Chamber for Summary Procedure; this appointment might take a certain time. The intention, however, of this article of the Rules was that the President should notify the existing members of the Chamber as soon as possible.

M. GUERRERO, Vice-President, thought that the members forming the Chamber concerned should at once be notified of the submission of the case and that any new member of the Chamber should be notified subsequently. It would seem hardly courteous not to communicate the document instituting proceedings to a judge who was a member of the Chamber concerned simply because he might later be replaced by another judge.

The REGISTRAR observed that there were two possibilities. If one of the members of the Court was a person of the nationality of one of the parties to a case, but was not a member of the Chamber, it would be logical to proceed as suggested by M. Anzilotti. On the other hand, if the Court included no member of the nationality of a party concerned, the President would request one of the members of the Chamber to give place to a judge *ad hoc*, but only if the party concerned wished to appoint one; in a case of this kind, it would be very difficult to inform a member of the Chamber that he might have to give up his seat if a party wished subsequently to appoint a judge *ad hoc*.

In order to meet M. Anzilotti's point, the PRESIDENT submitted the following text for paragraph 2 of Article 71:

> " 2. Upon receipt by the Registry of the document instituting proceedings in a case brought before one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute, the President of the Court shall communicate the document to the members of the Chamber concerned. He shall also, if necessary, take the requisite steps with a view to the application of Article 31, paragraph 4, of the Statute."

Count ROSTWOROWSKI proposed a slight change in the French text of the last sentence.

There being no further observations, the PRESIDENT declared the text which he had just read adopted for paragraph 2 of Article 71, subject to the amendment proposed by M. Rostworowski as a result of which the English text ran: " He shall also take such steps as may be necessary to assure the application ", etc.

Paragraphs 3 and 4.

> " 3. The President of the Court shall convene the Chamber at the earliest date compatible with the requirements of the procedure.
>
> " 4. As soon as the Chamber has met to go into the case submitted to it, the powers of the President of the Court in respect of the case shall be exercised by the President of the Chamber."

Paragraphs 3 and 4 of Article 71 were adopted without observation and the article was adopted in second reading.

11.III.36.*

Article 71. — Final Adoption.

The PRESIDENT said that no change was proposed in the French text.

In the English text, the word " must " was twice substituted for " shall ".

There being no observations, Article 71 was finally *adopted* as thus amended.

ARTICLE 72 *(Article 69, old Rules, with New Paragraph 1).*

PROCEDURE BEFORE THE CHAMBER FOR SUMMARY PROCEDURE

27.II.35.*

Discussed as Article 69.

The PRESIDENT observed that the existing text of Article 69 was as follows:

> " Summary proceedings are opened by the presentation of Cases according to the provisions of Article 39, paragraph 1, of the present Rules. If a Case is presented by one party only, the other party or parties shall present a Counter-Case. In the event of the simultaneous presentation of Cases by the parties, the Chamber may invite the presentation, under the same conditions, of Counter-Cases.
>
> " The Cases and Counter-Cases, which shall be communicated by the Registrar to the members of the Chamber and to opposing parties, shall mention all evidence which the parties may desire to produce.
>
> " Should the Chamber consider that the documents do not furnish adequate information, it may, in the absence of an agreement to the contrary between the parties, institute oral proceedings. It shall fix a date for the commencement of the oral proceedings.

* D 2, A. 3, pp. 361-369.

* D 2, A. 3, p. 735.

"At the hearing, the Chamber shall call upon the parties to supply oral explanations. It may sanction the production of any evidence mentioned in the documents.

"If it is desired that witnesses or experts whose names are mentioned in the documents should be heard, such witnesses or experts must be available to appear before the Chamber when required."

The President pointed out that, according to the above text, there would always be written proceedings; but there would be no oral proceedings unless the Chamber felt that the information furnished by the documents was inadequate; and, even so, if there was an agreement to the contrary between the parties, any oral proceedings were precluded. Modern systems, however, attached more weight, as a rule, to oral than to written proceedings. It was mainly for that reason that the Co-ordination Commission had proposed the following text [1]:

"1. The documents of the written proceedings are communicated by the Registrar to the judges composing the Chamber and to opposing parties.

"2. In the absence of an agreement between the parties to dispense with oral proceedings, the documents of the written proceedings shall indicate all the evidence which the parties may wish to produce. The witnesses or experts who are to be heard must be at the disposal of the Chamber in good time."

The Co-ordination Commission's report contained the following passage on this subject:

"The new text differs from that at present in force in that it makes oral proceedings obligatory before the Chamber for Summary Procedure (except, of course, in the case of an agreement to the contrary having been concluded between the parties); whereas the existing Rule only contemplated oral proceedings before the Chamber as a possible and exceptional contingency. The Commission is aware that in 1922 the Court had desired to institute summary proceedings which, in principle, would be exclusively in writing, by way of experiment; but it considers that the only time this experiment was tried it did not give very desirable results. The Commission therefore proposes to adopt the method which is generally recognised in summary proceedings."

In reply to a question by M. FROMAGEOT, the REGISTRAR said that the experiment referred to in the report was made in the case of the interpretation of the Treaty of Neuilly, which was decided in 1924-1925.[2]

Baron ROLIN-JAEQUEMYNS pointed out that, according to the Co-ordination Commission's text, it was the parties which were given the right of insisting on oral proceedings, whereas, in the existing text, it was the Court itself which instituted oral proceedings, if it desired more adequate information. But nothing should be done to increase the length of summary proceedings—on the contrary.

M. GUERRERO, Vice-President, was in favour of the Co-ordination Commission's proposal, which was that oral proceedings should be the rule, and that their omission, with the consent of the parties, should be the exception. However, the text needed clarifying in one point: it seemed to say that it was only when there were oral proceedings that the parties were required to mention in the documents of the written proceedings the evidence which they might desire to produce. But, surely, even if there were no oral proceedings, the documents in question should still mention the evidence to be produced.

M. SCHÜCKING said that he would confine his remarks, in the first place, to the question whether oral proceedings should be contemplated as a general rule. In regard to that point, Baron Rolin-Jaequemyns had expressed a fear, if oral proceedings were insisted upon, that the summary character of the proceedings might be affected; that argument was certainly of weight, but the delay caused by the innovation would not be very great. Besides, it was the Court's duty to ascertain the truth about the case; and for that purpose it was important that the Chamber should have an opportunity of hearing oral arguments and putting questions to the parties. Therefore, speaking generally, the introduction of oral proceedings into the summary procedure should be regarded as important progress.

Baron ROLIN-JAEQUEMYNS observed that, under Article 69 of the present Rules, the Chamber already possessed power to institute oral proceedings, in the absence of an agreement to the contrary between the parties: in the latter case, it had no right to oppose their wishes. This rule was useful; but one should avoid making summary proceedings liable to all the delays of normal proceedings by laying down that the right of instituting or refusing oral proceedings was no longer vested in the Chamber.

M. ALTAMIRA said he preferred the existing text of the Rules to that proposed by the Co-ordination Commission.

M. GUERRERO, Vice-President, said that the rapidity of an expeditious form of procedure was not attained by the suppression of necessary stages. When the Court adjudicated as a Chamber for Summary Procedure it must, like any other tribunal, be able to command all the means for obtaining the information which would enable it to deliver a sound judgment. The summary character of the proceedings was primarily to be attained by the curtailment of the time-limits.

M. FROMAGEOT pointed out to M. Guerrero that the Court was under no obligation in ordinary cases to allow time-limits of any particular length. The length of the time-limits was fixed according to the nature of the dispute, and must always—whether in summary proceedings or others—be adapted to the circumstances of the case. On the other hand, a summary character might well be given to a procedure by simplifying it, for instance by letting the Court decide the case on the basis of the written Memorials, or solely on the basis of oral proceedings. The former method would appear to be the most suitable for the Permanent Court of International Justice. Indeed, proceedings that were exclusively oral might offer more objections than advantages.

According to the Co-ordination Commission's text, the so-called summary procedure would be exactly the same as ordinary procedure. The provisions of the existing Rules were therefore preferable, for they made a really summary procedure possible by cutting out the oral proceedings. If this simplification disappeared, the system was not different from that of ordinary procedure.

M. ALTAMIRA was also of opinion that it would not be possible to have both written and oral proceedings.

M. SCHÜCKING thought that the summary character of the procedure in question consisted above all in the

[1] D 2, A. 3, p. 879.
[2] A 3 and A 4.

smaller number of judges composing the Chamber. He was aware that some members of the Court would prefer, in Article 69, to retain the existing text of the Rules. If their opinion prevailed, he would at any rate press for the omission of the words: " in the absence of an agreement to the contrary between the parties ", in the third paragraph. For the Court must be allowed to institute oral proceedings, if it thought it necessary, in order to obtain full information about the case.

M. ALTAMIRA said that, in principle, he would be prepared to agree with M. Schücking, were it not for the fact that the employment of the summary procedure resulted from the wishes of the parties. The Court could not act in opposition to their wishes if they desired to dispense with oral proceedings.

M. FROMAGEOT thought that the reason which had hitherto deterred States from submitting more cases to the Chamber for Summary Procedure was the fact that it was composed of a limited number of judges.

The REGISTRAR thought that another reason was that, under the existing Statute, there were no national judges in the Chamber.

In reply to a question by Baron ROLIN-JAEQUEMYNS, M. ANZILOTTI explained that, under the system laid down in Article 29 of that Statute, it was impossible to admit national judges to the Bench of the Chamber for Summary Procedure.

M. ALTAMIRA asked whether, pending the possible entry into force of the revised Statute, the Court could not be content to retain the article as it stood.

M. URRUTIA referred to the manner in which the Chamber for Summary Procedure would be composed under the revised Statute, and the machinery which that Statute provided (Article 31, paragraph 4) for the admission of judges *ad hoc* to the Chamber: the President would ask one or, if necessary, two of the members to vacate their seats in favour of the judges *ad hoc*.

The PRESIDENT asked the Court whether it decided to reject Article 69, as proposed by the Co-ordination Commission.

M. ANZILOTTI said he would abstain from voting, because the idea of summary procedure, as contemplated by the Statute, seemed to him far from clear. Of course, a Chamber consisting of three or five judges would deliberate more rapidly than a Court of eleven or fifteen judges; but that did not render the procedure any more or less summary. He had never been able to understand the advantage—or even the possibility—of making a distinction between two kinds of procedure under a system like that of the Court's Statute, in which the procedure was determined either by the wishes of the parties, or by the Court, in each case and having regard to the nature of that case. There was nothing to prevent the adoption, in any given case submitted to the Court, of the most summary procedure of all—namely, a simple oral discussion; a question concerning the interpretation of a convention would lend itself very well to such treatment. On the other hand, there was nothing to prevent the parties from submitting to the Chamber for Summary Procedure a case which involved recourse to forms of evidence incompatible with a simple and expeditious procedure.

The Court rejected the text of Article 69 as proposed by the Co-ordination Commission by six votes against three; two judges abstained from voting.

The PRESIDENT observed that the Court would therefore have to examine the existing text of Article 69 of the Rules.

M. SCHÜCKING asked that the words: " in the absence of an agreement to the contrary between the parties ", in paragraph 3, should be omitted, for the reasons that he had already given.

The PRESIDENT, before consulting the Court on this point, asked whether any amendments were proposed to paragraphs 1 and 2 of Article 69.

He read the first paragraph.

M. ANZILOTTI criticised the phrase: " Summary proceedings are opened by the presentation of Cases. . . ." As a fact, he said, they were opened by the notification of the special agreement.

The PRESIDENT observed that a case could also be brought before the Chamber by an application, if its jurisdiction had been accepted in an agreement between the parties.

The REGISTRAR pointed out that the phrase which M. Anzilotti had criticised probably referred to procedure in the sense in which that term was used in Article 43 of the Statute; it was that procedure which was regarded as opened by the submission of the first written Memorial.

M. ANZILOTTI said that, in any case, the text of the article was so worded as to give the impression that what was intended was that the proceedings could be opened by the submission of a Memorial, which would thus take the place of the document instituting proceedings. But he was convinced that that had not been the intention.

As no other observation was made, the PRESIDENT considered that paragraph as having been adopted by the Court.

He read the second paragraph.

As no observations were made, the PRESIDENT declared that the second paragraph was adopted.

He then passed on to the third paragraph.

In this connection, he recalled that M. Schücking had moved to omit the words: " in the absence of an agreement to the contrary between the parties ".

M. FROMAGEOT pointed out that oral proceedings might merely consist of oral explanations given by the parties at the request of the Court. In such a case, M. Schücking's proposal would appear sound. But the same consideration would not apply in regard to oral proceedings in which the advocates of the parties would be free to develop their arguments as they thought fit.

M. GUERRERO, Vice-President, thought that M. Schücking was perfectly right in asking for the omission of these words. The parties were entitled to mention in the written Memorials the evidence which they might desire to produce, and it was possible that they might wish to call experts. But the evidence of experts would render oral proceedings indispensable, even if the parties concerned had not agreed to them.

Baron ROLIN-JAEQUEMYNS urged that the paragraph should be retained in its present wording which, he gathered, appeared satisfactory to M. Fromageot. The phrase which M. Schücking wished to omit had its use and did not seem to involve any danger. For, if the Chamber asked for explanations concerning the arguments in the written Memorials, the parties could hardly oppose such a course; and their opposition would have weight only if they were agreed in offering it. It was scarcely conceivable that a party, desirous of producing a witness, should agree with

the other party to prevent the holding of any oral proceedings.

M. ALTAMIRA feared that there was some contradiction between the second and fourth paragraphs of the article, on the one hand, and the third paragraph on the other hand. For, indeed, it was inconceivable that the parties, after mentioning all the evidence that they meant to produce—evidence which could be taken only in oral proceedings—could then oppose the holding of oral proceedings.

M. ANZILOTTI thought that the passage in question sought to provide for the case in which the parties had agreed together to dispense with oral proceedings and the hearing of witnesses or experts, and had decided that the proceedings should be exclusively of a written character.

Baron ROLIN-JAEQUEMYNS thought that what it had been desired to exclude was the possibility of pleadings which might involve a loss of time and considerable expense; but that would not preclude the hearing of oral evidence.

M. NEGULESCO wished to preserve the Chamber's power to ask for explanations, if it did not find adequate information in the documents. Moreover, if witnesses were produced, the parties must be allowed to comment on their evidence.

M. GUERRERO, Vice-President, continued to support M. Schücking's proposal to omit the words: " in the absence of an agreement to the contrary between the parties ". If these words were retained, the Chamber might find itself unable to resort to the procedure laid down in Article 50 of the Statute, although it might wish to make use of it for the better administration of justice. The Court must always be able to order an expert enquiry, if it thought it necessary.

The REGISTRAR pointed out that, when Article 69 of the Rules was being drawn up in 1922,[1] two totally different conceptions were prevalent: some of the judges desired that summary procedure should consist solely of oral proceedings, while others wished to have only written proceedings. Finally, a compromise was adopted, according to which written proceedings became obligatory and oral proceedings were made optional. Once that was realised, the system of the article was not difficult to understand. The parties were given an opportunity of mentioning evidence of an oral kind, in case there were going to be oral proceedings. By giving them also the right to exclude oral proceedings, by mutual consent, their right to waive the production of the oral evidence already indicated had been recognised. The fourth paragraph seemed to deal only with the case in which the parties had mentioned evidence of an oral character, and had not renounced their right to produce that evidence by agreeing mutually to dispense with oral proceedings.

In 1922 it was no doubt recognised that the result of allowing the parties to dispense with oral proceedings might perhaps be to make it impossible to have recourse to an expert enquiry. But it was considered that the Statute itself gave the Court complete liberty to make such an exception to the general provisions of the Statute; for Article 30 lays down that: " In particular, it [the Court] shall lay down rules for summary procedure."

The PRESIDENT asked the Court if it decided to omit the words: " in the absence of an agreement to the contrary between the parties ", which appeared in paragraph 3 of Article 69.

[1] D 2, pp. 100 *et sqq.*

By seven votes against four, the Court decided to omit those words.

M. SCHÜCKING asked whether the text which had just been adopted excluded oral pleadings, so that only requests for oral explanations, the production of evidence, etc., would be allowed.

M. FROMAGEOT thought that there was no clear evidence that such a restriction was intended in the text. A request for oral explanations was not incompatible with oral pleadings.

M. URRUTIA said that, if provision were made for oral proceedings, the latter would be governed by the general provisions for the conduct of ordinary proceedings, as laid down in Article 67.

The PRESIDENT said that, if paragraphs 3 and 4 were read in conjunction, it was quite clear what was intended: " Should the Chamber consider that the documents do not afford adequate information, it may ask the parties to supply oral explanations." But he did not think any amendment was needed to formulate that intention.

M. FROMAGEOT, on the other hand, thought that a formula combining the third and fourth paragraphs would help to clarify the intention of the article, thus: " Should the Chamber consider that the documents do not furnish adequate information, it may, at any stage, and in all circumstances, call upon the parties to supply oral explanations, and may sanction the production of any evidence that is mentioned in the documents."

M. GUERRERO, Vice-President, asked that the article should be referred to the Drafting Committee, which would frame a text bringing out the idea that what was contemplated was not a regular oral procedure, but merely the fixing of a hearing in order to give the Court an opportunity of calling on the parties for oral explanations.

M. NEGULESCO proposed to replace the passage: " it may institute oral proceedings . . . ", by the following words: " it may call upon the parties to supply oral explanations . . . ", thus combining paragraphs 3 and 4.

The PRESIDENT asked the Court to say whether it desired to replace the words: " it may . . . institute oral proceedings ", in paragraph 3 of Article 69, by the words: " it may call upon the parties to supply oral explanations ". If the proposal were accepted, paragraph 3 would be worded as follows:

> " Should the Chamber consider that the documents do not furnish adequate information, it may call upon the parties to supply oral explanations. It shall fix a date for the commencement of these proceedings."

Only a part of the fourth paragraph would then be left, namely:

> " It may sanction the production of any evidence mentioned in the documents."

M. ALTAMIRA pointed out that, in voting on M. Negulesco's proposal, the Court was really re-opening a question which it had already voted upon when it decided that summary proceedings should consist partly of oral proceedings. He did not, however, think that the Court could thus reverse a decision already taken.

He would see no objection, after the decision the Court had already adopted, to adding a sentence to paragraph 3, but it must not be a sentence which provided merely

for a request for oral explanations, in place of allowing an opportunity for oral proceedings.

The PRESIDENT answered that M. Negulesco was availing himself of the right possessed by every judge to have a question which he had formulated put to the vote. When the question had been voted upon, he added, the necessary steps could be taken to avoid any confusion.

He asked the Court to say if they wished to replace the words: " it may . . . institute oral proceedings ", in paragraph 3, by the words: " it may call on the parties to supply oral explanations ".

The Court adopted the proposal by six votes against four, one member abstaining.

The PRESIDENT observed that paragraph 3 would accordingly be worded as follows:

> " Should the Chamber consider that the documents do not furnish adequate information, it may call upon the parties to supply oral explanations. It shall fix a date for the commencement of these proceedings."

He then put this text to the vote, and it was adopted by six votes against four, one member abstaining.

The PRESIDENT next took a vote on paragraph 4 of Article 69, which would now only consist of the second sentence of the existing text:

> " It may sanction the production of any evidence mentioned in the documents."

The Court adopted this text by ten votes, one member abstaining.

The PRESIDENT passed on to paragraph 5 of Article 69:

> " If it is desired that witnesses or experts whose names are mentioned in the documents should be heard, such witnesses or experts must be available to appear before the Chamber when required."

M. ANZILOTTI asked for an explanation concerning the passage: " such witnesses or experts must be available to appear before the Chamber when required ".

The PRESIDENT said he thought the intention was to exclude the taking of evidence on commission, since the resort to that method would deprive the procedure of its summary character.

M. ALTAMIRA believed that the intention had been to leave the Court some latitude in deciding whether or not it would hear the witnesses indicated in the written procedure.

The REGISTRAR said that, from an historical point of view, the intention had simply been that any witness whom a party wished to call must be present from the outset of the oral proceedings, so that he could be heard by the Court whenever the latter saw fit, without delaying the proceedings.

The PRESIDENT asked the Court if it adopted paragraph 5.

The Court adopted this paragraph unanimously.

M. GUERRERO, Vice-President, recurring to the question he had already raised regarding the possibility for the Court of ordering an expert enquiry, asked whether, in view of the provisions which the Court had just adopted, that possibility continued to exist.

M. FROMAGEOT said he thought that it did. The text that had been adopted said that the Chamber " may sanction the production of any evidence . . . ". Having regard to the terms of Article 67, which made the rules for procedure before the full Court applicable to summary procedure, the effects of this clause were not confined to the evidence indicated in the documents, but extended to evidence which the Court might ask to be produced.

M. SCHÜCKING did not agree with this view. Article 30 of the Statute gave the Court the possibility, in regard to summary procedure, of modifying the principles of ordinary procedure. In the absence of an express provision to that effect, it was not possible, in summary procedure, for the Court to order an expert enquiry *proprio motu*.

The PRESIDENT thought it would be better to continue the discussion on February 28th, as the question raised by the Vice-President required to be studied at leisure. Moreover, having regard to the result of the vote upon Article 69, it would also be necessary to go back to Article 68. Finally, amendments to Article 70 might still be sent in.

28.II.35.

See under Article 71, p. 298, for discussion of Articles 68 and 69 of the old Rules (Articles 71 and 72 of the Rules of 11.III.36).

6.III.35.*

Discussed as Article 69.

M. SCHÜCKING, in connection with the minutes of the 28th meeting, which the Court had just approved,[1] recalled that, according to these minutes, the Court appeared to have envisaged an exchange of views in regard to the import of the new Article 69 which it had adopted. That exchange of views, which had not yet taken place, would be most valuable with a view to avoiding different interpretations of that article in the future.

The two points to be cleared up were: first, whether Article 69, as adopted by the Court on February 27th, permitted oral argument in summary proceedings beyond what was necessary if the Court desired to obtain further information from the parties, and, secondly, whether the new text also permitted the Court, *proprio motu*, to order an expert enquiry in summary proceedings.

In regard to the first point, M. Schücking, for his part, felt no doubt that the text, as a general rule, precluded the oral argument which formed part of the Court's normal procedure. With regard to the second point, the original version of Article 69 had been based on Article 90 of the Rules adopted at The Hague in 1907. These Rules provided for exclusively written proceedings, but they allowed experts to be heard at the instance of the parties or of the Court. In any case, if the Court did not for the moment see fit to hold the contemplated exchange of views, the Drafting Committee might doubtless bear these considerations in mind.

The PRESIDENT observed that the question raised by M. Schücking seemed to relate to the interpretation of a provision of the Rules. The Court, however, could not commit itself beforehand with regard to the future interpretation of a text just adopted by it. If, however, the point mentioned by M. Schücking raised a question of principle, it would be better for the Court to take a decision before the Drafting Committee continued its work. The President noted that M. Schücking proposed no amendment.

M. GUERRERO, Vice-President, proposed that the Court should ask the Drafting Committee, when preparing the text of Article 69 of the Rules, to consider whether an amendment seemed desirable. The Committee, if it came

* D 2, A. 3, pp. 407-408.

[1] See above, meeting of 27.II.35.

to the conclusion that the text of Article 69, as adopted, precluded the interpretation advocated by M. Schücking, might call the Court's attention to the fact.

The PRESIDENT noted that there was no objection to the Vice-President's proposal and accordingly declared it adopted.

9.IV.35.*

First Reading as Article 76.

Paragraph 1.

Paragraph 1 was adopted without observations.

Paragraph 2.

The PRESIDENT thought that, in line 1, the word "*transmis*" introduced by the Drafting Committee should be replaced by "*communiqué*"; it was not expressly said that a text was to be transmitted.

M. WANG, for the sake of uniformity, suggested that in line 4 of this paragraph the word "*employer*" (use) should be replaced by "*produire*" (produce).

M. ANZILOTTI thought that the expression "*font mention de tous les moyens de preuve*" (shall mention all evidence) was not clear. In order to make it quite clear that evidence to be produced during the oral proceedings was meant, he proposed that they should say: "Cases and Counter-Cases . . . *shall contain all documents in the annex* and shall mention all evidence. . . ." The text as thus amended would also be in harmony with Article 44 of the draft.

The PRESIDENT observed that paragraph 1 of Article 76 was concerned only with the presentation of Cases and not with their contents. That was why it contained a reference to Article 42 of the draft (39 of 1931) and not to Articles 43 or 44 (40 of 1931).

M. FROMAGEOT supported M. Wang's proposal to replace the word "*employer*" by "*produire*". This had already been done in the case of Article 49 (old 47), where the position was the same. The new wording was based on the English text of the existing Rules.

The PRESIDENT declared M. Wang's suggestion adopted.

Paragraph 2, as thus amended, was adopted.

Paragraph 3.

M. WANG, in line 3, proposed that the word "*verbales*" should be replaced by "*orales*".

There being no objection, the PRESIDENT said that this amendment would be made.

The Court also adopted a proposal of the Registrar to the effect that the words "*et en fixe*" should be replaced by "*dont elle fixe*".

Paragraph 3, as thus amended, was adopted.

Paragraph 4.

M. ANZILOTTI proposed the following amendment: instead of "*dans la procédure écrite*" (in the written proceedings), "*dans les pièces de la procédure écrite*", (in the documents of the written proceedings).

As the members of the Drafting Committee did not accept this amendment, M. Anzilotti did not press it.

Paragraph 5.

M. GUERRERO, Vice-President, proposed that "witnesses or experts" should be replaced by "witnesses and experts".

The PRESIDENT observed that the text of the existing Rules said "witnesses or experts"; if it made no difference, it would be well to keep the existing text.

Baron ROLIN-JAEQUEMYNS in any case wished the same wording to be used throughout all articles of the Rules.

M. GUERRERO, Vice-President, agreed with Baron Rolin-Jaequemyns; he would like the words "witnesses and experts" to be used throughout.

The REGISTRAR recalled that, in Articles 49 and 53 of the draft, the expression "witnesses and experts" was used, whereas in Articles 54, 55 and 56, "witnesses or experts" occurred.

M. FROMAGEOT said that, the question had been raised by M. Negulesco in connection with Article 54 at the last meeting. The Court had then decided to use the expression "witnesses or experts". In order to avoid re-opening the discussion, he proposed that the word "or" should be retained.

Paragraph 5 was adopted.

The PRESIDENT declared Article 76, amended as indicated above, adopted in first reading.

M. ANZILOTTI said that, when the time came for the second reading, he intended to submit proposals in regard to Article 76, the wording of which did not satisfy him, and was perhaps even inconsistent with the Statute. For instance, it seemed to make it possible for the Chamber for Summary Procedure to refuse to hear witnesses or experts called by the parties.

The PRESIDENT noted M. Anzilotti's intention.

Text adopted:

"1. Before the Chamber for Summary Procedure, proceedings are opened by the presentation of Memorials as provided in Article 42 of the present Rules. If a Memorial is presented by one party only, the other party or parties shall present a Counter-Memorial. In the event of the simultaneous presentation of Memorials by the parties, the Chamber may invite the presentation of Counter-Memorials under the same conditions.

"2. The Memorials and Counter-Memorials shall be communicated by the Registrar to the members of the Chamber and to opposing parties, and shall mention all evidence which the parties may desire to produce.

"3. If the Chamber considers that the documents of the written proceedings do not furnish adequate information, it may call upon the parties to supply oral explanations and for these it shall fix a date.

"4. It may sanction the production of any evidence mentioned in the written proceedings.

"5. Witnesses or experts whose names are mentioned in the written proceedings must be available to appear before the Chamber when required."

4.II.36.

See under Article 3, p. 22, for a reference to Article 72.

26.II.36.

See under Article 62, pp. 258-259, for references to Article 72 in connection with Article 62.

27.II.36.*

Article 72.[1]

The PRESIDENT opened the discussion on paragraph 1.

* D 2, A. 3, pp. 448-449.

* D 2, A. 3, pp. 659-662.

[1] Text submitted: text adopted in first reading, see above.

Baron ROLIN-JAEQUEMYNS wanted the wording of this paragraph to be made clearer.

The REGISTRAR said that paragraph 1 of Article 72 covered two sets of circumstances: first when a case was brought before the Chamber for Summary Procedure by means of an application; in that case, in accordance with the Court's general rules of procedure, the documents of the written proceedings would be presented in succession; secondly, when a case was brought before the Chamber for Summary Procedure by means of a special agreement; in that case, according to the same general rules, the documents of the written proceedings would normally be presented simultaneously.

M. FROMAGEOT remarked that the documents would not always be presented simultaneously in all cases submitted by special agreement. It might be provided in a special agreement that one party would present a Memorial on one date and the other party would be allowed a certain time for presenting a Counter-Memorial. Paragraph 1 of Article 72 provided for both contingencies: simultaneous and alternate presentation of the written proceedings.

M. ANZILOTTI, assuming that paragraph 1 of Article 72 was adopted as it stood, wished to propose the following amendment for paragraph 3:

> "3. If the parties present a Memorial and Counter-Memorial in succession, or if they present Memorials simultaneously but the Chamber does not exercise the right conferred upon it by the last sentence of paragraph 1 of this article, the oral proceedings provided for in the last paragraph of Article 43 of the Statute of the Court shall be obligatory. The same holds good if the parties make a joint request to that effect, or if the hearing of witnesses or experts is included among the evidence relied upon.
>
> "In other cases, the Chamber may decide that there will be no oral proceedings. It may also confine itself to calling upon the parties to supply oral explanations for which it shall fix a date."

He explained the reasons for his amendment: in most, if not all, laws of procedure, the essential characteristic of summary procedure was that it was above all an oral procedure; this enabled a case to be dealt with more rapidly.

On the other hand, the text adopted by the Court in first reading provided first and foremost for written proceedings, oral proceedings being relegated to a subordinate rôle, so much so that they might even be dispensed with.

But even if this system were adopted, it was essential that parties should be given an opportunity of discussing the arguments put forward on either side.

Paragraph 1 of the proposed Article 72, however, made provision for this only in so far as the Court might, in a case where Memorials were presented simultaneously, order the presentation of Counter-Memorials. In a case where the documents were presented successively, there would be only two documents, so that the applicant would be unable to answer the arguments of the respondent.

There was in this arrangement something inconsistent with the fundamental principles of judicial proceedings, for, before giving judgment, the Court must have given the parties an opportunity not only of stating their own standpoint but also of discussing the views and arguments of the other side.

The text proposed by M. Anzilotti for paragraph 3 would increase the extent to which oral procedure would be used, with a view to ensuring observance of this fundamental principle; in all cases where no opportunity was afforded for the discussion of the respective arguments in the written proceedings, oral proceedings would be obligatory. Further, oral proceedings should always be held if the parties agreed in asking for them, and also in the case of the examination of witnesses and experts, since, under Article 43 of the Statute, that formed part of the oral procedure.

In all other cases, the Chamber might decide that there would be no oral proceedings, or confine itself to asking the parties for oral explanations for which it would fix a date. This was provided for in paragraph 3 of Article 72 as submitted to the Court, but it did not take the place of oral proceedings which, under Article 43 of the Statute, were something entirely different.

The PRESIDENT fully recognised the importance of the proposals made by M. Anzilotti, especially seeing that in the course of the fifteen years of the Court's existence only one case had been brought before a Chamber, and that the revised Statute had made some changes in the composition of the Chambers, probably with the hope of making recourse to the Chambers easier for parties desirous of securing a judicial settlement of their disputes.

M. GUERRERO, Vice-President, adverting to the procedure followed in several countries, agreed with M. Anzilotti as to the importance of the oral proceedings in summary procedure. The extent to which recourse was had to the Chambers would depend upon the safeguards afforded by the procedure to prospective parties.

M. URRUTIA was in favour of M. Anzilotti's proposal for paragraph 3 of Article 72; it constituted a compromise between two extremes: the abolition of the oral proceedings or the abandonment in practice of the written proceedings. It would always be desirable for the members of the Chambers to have before them some written documents, in view of the diversity of the cases which would come before them. But, apart from providing for these written documents, summary procedure must be made very simple and very short. M. Anzilotti's proposal fulfilled both these desiderata.

Baron ROLIN-JAEQUEMYNS agreed that, in Article 72 as submitted to the Court, the written proceedings were already much abbreviated; though provision was made for a Counter-Memorial in answer to a Memorial, there was no provision for a Reply or Rejoinder; similarly, the written proceedings were much abbreviated when a case was brought by special agreement. The effect of M. Anzilotti's proposal would be to make oral proceedings necessary even if the Chamber itself desired to dispense with them, whereas, according to the present text, these would be oral proceedings only if the Court and a party so desired.

Personally, Baron Rolin-Jaequemyns would be inclined to provide in the Rules that the Chamber might proceed very rapidly and, accordingly, to allow the Chamber itself to decide whether or not there should be oral proceedings.

He would also have some changes of wording to propose in paragraph 1, *e.g.*: "If one party is called upon to present a Memorial, the other party or parties shall be invited to present a Counter-Memorial . . .". And again: "In the event of all parties being invited simultaneously to present Memorials, the Chamber may invite them . . .". The point was that parties should be invited to present Memorials.

The PRESIDENT wished first to know whether all the members of the Court were agreed that, when Memorials were presented simultaneously, the submission of Counter-Memorials would not be obligatory. On the other hand, the Court would probably not consider that paragraph 1

of Article 72 precluded a party from asking the Court to sanction the presentation of Counter-Memorials.

M. FROMAGEOT would prefer to leave the article as it was. Its terms were sufficiently elastic either to allow the presentation of Counter-Memorials or, on the other hand, to allow the Court to adjudicate on the basis of the Memorials alone, as the case might be. If a party considered that the contentions of the other side required answering, it would inform the Court, and of course the Court would never refuse to sanction a Counter-Memorial.

There were two opposite systems: the system under which the procedure derived its summary character from the fact that the members of the Court would adjudicate solely on the basis of written documents, and the system under which there was no written proceedings and the Chamber would adjudicate on the basis of oral argument. The latter system was possible before a municipal Court, *where everyone would understand one another perfectly;* but it would be difficult to employ it before an international Court, where the desirability of having the parties' contentions, arguments and conclusions in writing amounted to a necessity. A purely oral procedure would not be suitable to the international composition of the Court.

On the other hand, there might be objections to a purely written procedure. Accordingly, the rule must be made sufficiently elastic to enable such objections to be overcome. They must not, however, run the risk of unduly complicating summary procedure; the more complex it was made, the more nearly would it resemble ordinary procedure.

If the parties considered that their case was sufficiently important to warrant a procedure comprising Memorial, Counter-Memorial, Reply, Rejoinder and oral argument, the ordinary procedure was open to them. Before the Chamber for Summary Procedure, on the other hand, the idea was to simplify the procedure as much as possible. Accordingly, what was required was a rule which avoided undue complication of the procedure, but at the same time was sufficiently elastic to meet all contingencies which might arise.

The PRESIDENT gathered that M. Fromageot did not think that the last sentence of the present first paragraph precluded a party from asking the Court to order the presentation of Counter-Memorials.

M. FROMAGEOT confirmed that that was his opinion.

Jonkheer VAN EYSINGA recalled that, in regard to summary procedure, the authors of the original Statute had taken as their guide the procedure contemplated in the Hague Conventions of 1899 and 1907 for the Court of Arbitration and the Court of Arbitral Justice; at that time a tribunal of three members and a purely written procedure had been contemplated.

In any case, neither under the Hague Convention of 1899 nor under the Statute of the Court had the Chamber for Summary Procedure become an institution to which frequent recourse was had; it had simply remained available.

The revised Statute had modified this institution in a manner calculated to infuse more life into it and to enable it to play a much more useful part in international jurisprudence. This change was not in the procedure, but in the composition of the Chamber, which was to consist of five judges, including two of the nationality of the parties. Ideally speaking, that was the best composition for an international tribunal, though of course one which, for political considerations, was impossible for a full World Court such as the Court of Justice.

While it was to be hoped that this change would tend to make recourse to the Chamber for Summary Procedure more frequent, the Court should also make every effort to ensure that the rules of procedure adopted for this Chamber would contribute to this result. M. Anzilotti's amendment seemed well calculated to do so.

M. NEGULESCO thought that the option provided for in paragraph 1 of Article 72 referred only to a case where proceedings were instituted under a special agreement. There was no justification for this differentiation between cases brought by application and those brought by special agreement, because the Court had always held that, no matter how a case was brought before it, the parties should be treated in the same way. Accordingly, the system should be perfected by amending paragraph 1 of Article 72 so as to enable the Court in all cases to arrange for a further exchange of written documents.

The PRESIDENT proposed to postpone further discussion till the next meeting. At the beginning of that meeting, the Court might appoint a Drafting Committee to examine the text of articles already adopted.

28.II.36.*

Article 72.

In reply to a question by M. URRUTIA, the PRESIDENT said that, in view of the amendments submitted and the amplitude of the discussion, he thought it preferable first to conclude the general exchange of views concerning Article 72 which had been begun at the previous meeting. On the completion of this exchange of views, the paragraphs of the article would be submitted in succession for the approval of the Court.

M. GUERRERO, Vice-President, speaking on the general arrangement of the clauses relating to summary procedure, considered that it was beyond dispute that the Chamber for Summary Procedure had been created to afford the parties a means of obtaining a settlement of their differences more expeditiously than by the procedure before the full Court. It was therefore desirable to make the procedure before the Chamber as brief as possible without losing sight, on the one hand, of the legitimate desire of the parties to make a full statement of their case, or, on the other hand, of the desire of the judges to receive all possible information about the case on which they were to adjudicate. As the cases would always be international disputes, submitted to judges of different nationalities, it seemed essential to retain the written procedure. But it appeared equally indispensable to provide for the hearing of oral arguments, in the course of which the parties might be asked to elucidate any doubtful points.

Written procedure, no doubt, required more time than oral procedure, but the advantages of both methods might be combined by providing, in the written procedure, for the submission—simultaneously or successively, according to the manner in which the proceedings were instituted—of one Memorial only by each of the parties. The saving of time effected in the written proceedings by limiting the number of Memorials to one for each party would have its counter-part in a saving of time in the oral proceedings, owing to the composition of the Chamber, which was limited to five members.

The PRESIDENT asked M. Guerrero whether he meant that the parties would not be entitled to submit a second written Memorial, even if they wished to do so; and that

* D 2, A. 3, pp. 663-670.

the Chamber itself would not have power to request a party to submit a Counter-Memorial, even if it felt that it had not received adequate information.

M. GUERRERO, Vice-President, explained that he wished to avoid a second interchange of Memorials, a process which was not indispensable if there were to be oral proceedings, for these would give the parties an opportunity of offering arguments and counter-arguments.

M. NAGAOKA agreed with what Jonkheer van Eysinga had said at the beginning of the last meeting, and observed that the chief value of the Chamber for Summary Procedure lay in its composition. It was necessary, however, that the summary procedure should be simple and expeditious. From that standpoint, it would appear advisable not to make oral proceedings an invariable rule, but to lay down that, if both parties desired an interchange of oral arguments, the Chamber would not refuse the right to do so. If such a request were made by one party only, paragraph 2 of Article 69 would no doubt be applicable by analogy.

In order to clarify the point, he submitted a draft in the following terms, to replace paragraph 3 of Article 72:

> "1. If the parties are agreed in desiring oral proceedings, the Chamber will take due note of their wishes.
>
> "2. Should one of the parties make a request to that effect, the Chamber shall fix a period within which the other party must state whether it objects to the request.
>
> "3. If no objection has been made within the appointed period, the request shall be regarded as allowed. If objection has been made, the Court will decide."

M. URRUTIA, recurring to the historic evolution of the idea of summary procedure, alluded to Article 90 of the Hague Convention of 1907. That article contemplated only written proceedings. The Rules of Court adopted in 1922 [1] contemplated the submission of only one written Memorial by each party. In the light of the experience gained in the case concerning the interpretation of the Treaty of Neuilly —the only case hitherto submitted to the Court under the system of summary procedure—the Chamber considered it necessary that Counter-Memorials should be filed, and the practice thus instituted was codified by the Court in Article 69 of the Rules of 1926.[2]

In this respect, M. Urrutia was not of the same opinion as M. Guerrero: he did not believe that the Court should revert to the system of the original Rules and exclude Counter-Memorials in the summary procedure, for cases might arise in which Counter-Memorials were indispensable. The Court should therefore retain the power, which it acquired in 1926, to call for Counter-Memorials if it thought necessary.

So far as concerned the general system of the article, M. Urrutia agreed with M. Nagaoka that, in the minds of the authors of the draft of the revised Statute, the summary character of the procedure was derived rather from the composition of the Chamber than from the procedure itself.

In regard to oral proceedings, he saw no difficulty in accepting M. Anzilotti's proposal: the oral proceedings would assist the functioning of the Chamber, and they would be conducted under the supervision of the President.

M. ANZILOTTI agreed with the arguments of the Vice-President. Neither written nor oral proceedings should be entirely excluded from summary procedure before an international Court. The written proceedings might indeed be limited, as a general rule, to the filing of one Memorial by each of the parties, if they were to be followed by oral proceedings, in which the arguments advanced by either side in the written Memorials would be open to debate. The submission of a second written Memorial would not appear necessary in all cases, and there might, not inconceivably, be objections to it.

In these circumstances, would it not be advisable, in the case of summary procedure, also to make it possible for the Chamber to adopt a special arrangement in particular cases? The Rules might lay down what should be the normal procedure, but at the same time, they might provide for the possibility of this procedure being modified in one way or another by the Chamber, should the latter have to deal with a case presenting special features.

There was indeed a fundamental difference between summary procedure under national legal systems and summary procedure before the Court. In the national legal systems, the allotment of cases for trial by summary procedure or by ordinary procedure ensued from the nature of the cases themselves. Summary procedure was designed, as a general rule, for cases based entirely upon written evidence. Whenever it became necessary to receive evidence from witnesses or experts, the case had to be dealt with by the ordinary procedure. But, in this respect, the Court's position was altogether different. The parties were at liberty to submit to the Chamber for Summary Procedure any case which they wished to have settled in that manner, and the Rules had to provide for the possibility of cases of a rather complicated nature being brought before that Chamber.

M. FROMAGEOT drew M. Anzilotti's attention to Article 31 of the Rules,[1] which was applicable to the article under discussion, and which entitled the parties to suggest any simplifications or alterations in the procedure which they desired.

M. ANZILOTTI thought that a reference to that article would perhaps be appropriate in Article 72.

M. FROMAGEOT saw no objection to such a reference. However, in regard to the substance, it still remained to be decided which system was to prevail: documentary procedure—*i.e.*, exclusively written proceedings—or exclusively oral proceedings.

At the Hague Conferences in 1899 and in 1907, preference was given to documentary procedure—*i.e.*, exclusively written proceedings. In the Rules of Court, it was thought necessary to allow for the possibility of oral proceedings being preferred. This was done, to a certain extent, in the text that was adopted—that of the Rules at present in force.

The essential point was that the procedure was rendered summary by reason of the small number of judges composing the Chamber; this number had been purposely kept small in order to simplify the procedure; the main object to be borne in mind was the simplification of the proceedings, and of the procedural acts, rather than the shortening of the time-limits in the case.

It was, however, essential that the Chamber should be apprised of the respective standpoints of the parties by the submission of Memorials, or of a Memorial and a Counter-

[1] See D 2, p. 575.
[2] See D 2, A., pp. 182-183, 271.

[1] Article 31 of Rules of 11.III.36. For text in first reading see p. 86.

Memorial. It might well happen that the Chamber would find it desirable, in order to gain a thorough insight into the views of the parties, to have before it the reply of one party to the Memorial of the other party. It was for that reason that paragraph 1 of Article 72 had laid down that, when each of the parties had filed a Memorial, the Court might call for the submission of a Counter-Memorial—*i.e.*, of a reply—if it did not feel that it had adequate information.

There remained the question of " oral explanations ", which must be distinguished from the oral proceedings proper: if the Court did not feel that the documents of the written proceedings furnished adequate information, it could ask the parties for oral explanations. Was it desirable to go further, as M. Nagaoka proposed, and make provision for these oral explanations, not only when the Court considered them necessary, but also when both the parties requested them ? The text suggested by M. Nagaoka might be simplified, by making it read:

> " If the Chamber considers that the documents of the written proceedings do not furnish adequate information, and if the parties so request, it may call upon them to offer oral explanations, for which it shall appoint a date. If the parties are not agreed, the Chamber shall decide."

On the other hand, if M. Anzilotti's suggestion were adopted, the procedure would be almost identical with that before the full Court. Such a result would be scarcely compatible with the idea of summary procedure, which, by its very nature, ought to be a simple procedure.

If a case was complicated, not only by reason of the questions which had to be answered, but also owing to the documents and points of detail which had to be examined and to the multiplicity of arguments and contentions, it ought not to be submitted to the Chamber for Summary Procedure, and the parties would no doubt be willing that it should be tried by the full Court. When Governments addressed themselves to the Chamber for Summary Procedure, it was because they considered the case as one of *minor importance, not necessarily as regards its consequences*, but in the sense that the problems and difficulties to which it gave rise lent themselves to a simple solution.

Such were the objects of the Chamber for Summary Procedure. The text adopted at the first reading appeared entirely to fulfil these objects.

The PRESIDENT asked if it would not be possible for the clauses concerning proceedings before the Chamber for Summary Procedure to be so worded as to bring out clearly, as the governing idea, that what the parties desired was an expeditious form of procedure. Hitherto, the Court had the experience of only one case to guide it—a fact which suggested that the system laid down had not commended itself to parties.

The revised Statute had introduced a new composition for the Chamber, but it was really not possible to foresee exactly what object two States would have in mind, in a given case, when they submitted a dispute to the Chamber for Summary Procedure. True, Article 29 of the Statute, which dealt with the Chamber for Summary Procedure, opened with the words: " With a view to the speedy despatch of business. . . ." But it was possible that the parties might be actuated by other motives. Was it certain that their object would, in every case, be to obtain a speedy decision ? Suppose, for example, that they submitted to the Chamber a dispute which was not of first-rate importance, but which had long been outstanding between them ?

From the foregoing considerations, it appeared to follow that the summary procedure ought to be very flexible, so that it could be modified to meet the needs of particular cases. If the case were one calling for prompt settlement, it must be possible to adopt an abbreviated procedure. If the case referred to the Chamber was not of an urgent kind, it should be possible to simplify the procedure, if the parties so desired; if they did not, the Chamber should be entitled to adopt a procedure similar to that which was customary before the full Court.

M. GUERRERO, Vice-President, felt unable to accept the system explained by M. Fromageot, which would amount to dispensing with oral proceedings as a rule, and resorting to them only if the Court considered them necessary, or if the parties agreed in demanding them.

The method proposed would leave the parties uncertain as to the situation in regard to oral proceedings, a result which would be contrary to the aim of the revision of the Rules; the parties ought to know beforehand what means were allowed them by the procedure to expound their cases. He therefore preferred M. Anzilotti's proposal, for it was more flexible.

Jonkheer VAN EYSINGA wondered whether the provisions of Article 32 of the Rules, to which M. Fromageot had referred, would entirely meet M. Anzilotti's desire to ensure flexibility in Article 72 of the Rules. In Article 32, it was presumed that the request was made jointly by both parties.

M. ANZILOTTI said that he had indeed desired to give more freedom of action to the Chamber.

M. URRUTIA saw no reason why oral proceedings should not be allowed, as of right, in certain cases, if one party asked for them, even if the other party did not agree. So far from deterring States from resorting to the summary procedure, such a guarantee would, he believed, have an opposite effect; the parties would feel assured that all the means necessary to enable them to defend their rights before the Chamber would be at their disposal.

The PRESIDENT asked M. Anzilotti to explain what form and what terms he had in mind for paragraph 1 of Article 72.

M. ANZILOTTI thought that the principle might be expressed, for example, in the following terms: " Before the Chamber for Summary Procedure, the written proceedings shall, unless otherwise decided by the Chamber itself, consist of the presentation of one Memorial by each party ".

The PRESIDENT pointed out that, under that system, the parties would not be given the right to reply in writing to arguments used in the Memorials, in cases submitted by special agreement—*i.e.*, when the two Memorials were filed simultaneously.

M. ANZILOTTI admitted that it would be so. Even when the Memorials were filed in succession, the writer of a Memorial could not reply to the arguments in the Counter-Memorial, unless there was a further exchange of documents. This showed the need for oral proceedings in all cases in which only one written Memorial could be submitted by each party. But the Chamber would retain its right of allowing a second written Memorial to be filed, if it thought necessary, in cases in which the Memorials were filed simultaneously.

M. NEGULESCO thought the text of paragraph 1 of Arti-

cle 72 rather lacking in clarity, as it did not bring out plainly that the number of written Memorials prescribed was the same in cases submitted by an application as in cases submitted by special agreement. On the other hand, the idea of the Vice-President—and on this point M. Negulesco agreed with him and with M. Anzilotti—was that each of the parties should be given an equal right to present one Memorial; and that, exceptionally, or if the parties agreed, it would be possible to allow the submission of a second Memorial by all the parties, no matter whether the case was submitted by a special agreement or by an application. For these reasons, M. Negulesco did not think it was necessary to amend paragraph 1 of Article 72.

M. ANZILOTTI, at the President's request, submitted the following text:

> "Subject to any arrangements which the Chamber may prescribe in a special case, the written proceedings will be limited to the submission of one Memorial by each party."

The PRESIDENT asked if there was any opposition to the idea embodied in this text.

M. FROMAGEOT thought that M. Anzilotti's text was very similar to paragraph 1 of the existing Rules. It said that the parties would each submit one Memorial, and that the Court might ask them to submit others.

M. ANZILOTTI observed that the existing Rules provided for that contingency only in cases in which the Memorials were filed simultaneously. But he did not think the Court should be debarred from such a course in special cases, whatever method might be adopted for the exchange of Memorials.

M. FROMAGEOT believed that the power to act thus was implicitly conferred by Article 32. But if, as Jonkheer van Eysinga had pointed out, that article did not suffice, it seemed natural to lay down, in advance, that the Chamber might call for additional Memorials to be submitted in special cases.

The principle observed would therefore be the following: one Memorial would be filed by each party, and the Court would have power to call for additional Memorials. The really essential point was, of course, that each of the parties should be able to state its case. For the rest, the clause must possess a certain degree of elasticity.

M. GUERRERO, Vice-President, thought that the best way of ascertaining the Court's decision would be to put a series of questions to it, and then leave the Drafting Committee to draw up the texts on the basis of the Court's replies.

The first question to be settled would be whether provision should be made for written proceedings, and whether these written proceedings should be confined to the submission of a single Memorial.

The second question would be whether the Court ought to reserve the power, in every case, of calling for a second written Memorial.

Lastly, there would be the question of the oral proceedings.

The PRESIDENT agreed with what the Vice-President had said, and asked the Court to give its opinion on the following question:

> "Does the Court accept the idea, embodied in M. Anzilotti's suggestion, that, subject to any arrangements which the Court might prescribe in special cases, the written proceedings shall be confined to the submission of one Memorial by each party?"

The Court unanimously answered the question in the affirmative.

M. GUERRERO, Vice-President, observed that the effects of the vote were that the Court declared, in principle, that there would be only one Memorial, but that the Chamber would retain the power of ordering the submission of a second Memorial by each party, if required.

The PRESIDENT said he interpreted the text as also giving a party the right to request the Court to exercise that power. If a request were made, the other party might agree to it or oppose it, and the Court would then decide.

Baron ROLIN-JAEQUEMYNS wondered whether, if both parties were agreed in asking for a second exchange of Memorials, the Court would be free to refuse the request, or whether it would not, on the contrary, be bound by the agreement between the parties. The same question arose in regard to the oral proceedings.

The PRESIDENT said that the Drafting Committee would bear in mind Baron Rolin-Jaequemyns' observation.

The REGISTRAR desired to point out that summary procedure, according to the terms of the Statute, was an optional procedure. But, if one had to make a choice, one needed to know what were the alternatives. If the summary procedure were left in the Rules as an indefinite procedure, which the Chamber would regulate in each particular case, it was to be feared that the parties might feel unable to choose the summary procedure, as they would not, in fact, know what it consisted of. Would it not be necessary—as was indeed required by Article 30 of the Statute—to lay down a somewhat rigid procedure, so that the parties might make their choice with a full knowledge of the facts?

M. ANZILOTTI admitted that the general lines of the summary procedure must be settled by the Rules. But the fact that the Chamber was enabled to modify the procedure in individual cases would not prevent the States concerned from ascertaining what the summary procedure consisted of, or from deciding, with a knowledge of the facts, whether they should resort to it, or not, in a given case. Moreover, the Chamber would, naturally, not modify the provisions of the Rules without being regardful of the requirements of a summary procedure.

Baron ROLIN-JAEQUEMYNS asked whether it was proposed to make provision for regular oral proceedings, or merely for asking the parties for explanations.

M. GUERRERO, Vice-President, said that both M. Anzilotti and he were of opinion that what was contemplated was an oral procedure as prescribed by the Statute.

M. ANZILOTTI pointed out that, if provision was made for one Memorial only, and if one party could not reply in writing to the arguments of the other party, it must be given an opportunity of doing so during the oral proceedings. Even if one only of the parties wished to avail itself of this provision, it ought not to be possible to prevent it from doing so.

The PRESIDENT asked the Court to vote on the two following questions:

> "1. Does the Court adopt the principle that, unless otherwise agreed between the parties, there will always be oral proceedings in cases submitted to the Chamber for Summary Procedure?

"2. Does the Court adopt the principle that, even if oral proceedings are excluded by agreement between the parties, the Court retains the right of asking the parties for oral explanations?"

Count ROSTWOROWSKI said he would answer the two questions put to the Court in the affirmative; he considered that the first question related to the rights of the parties, whereas the second chiefly concerned the Court. It was the Court which, feeling itself inadequately informed, would ask for explanations. But it was necessary, in the first place, to recognise the right of the parties to be heard; that was the essential point. Once that principle had been adopted, the Chamber might be given the right to ask for explanations, if necessary.

There was, however, an essential difference between the oral proceedings, which were instituted in the interests of the parties, and the explanations which were asked for solely in the interests of the Chamber.

The PRESIDENT asked the Court to vote upon the following proposition:

"Unless otherwise agreed between the two parties, there will always be oral procedings in cases submitted to the Chamber for Summary Procedure."

By six votes to three, with one abstention, the Court adopted the above text.

The PRESIDENT asked the Court to answer a second proposition, in the following terms:

"Even if oral proceedings are excluded by agreement between the parties, the Chamber retains the right of asking the parties for oral explanations."

M. URRUTIA said he agreed with the principle, but was not in favour of inserting a special provision to that effect in the Rules; for, under Article 49 of the Statute, the Court was always entitled to ask the parties for explanations, and this right was not subject to the wishes of the parties.

M. ANZILOTTI said that he understood M. Urrutia's idea, but he thought that, nevertheless, it might be well to insert a special clause in the Rules. The contingency in view was that the parties had agreed to dispense with oral proceedings, but the Court felt that it required some oral explanations.

The PRESIDENT thought that this was a point for consideration by the Drafting Committee; the latter would also be mindful of Article 49 of the Statute. But it would be useful to have a vote on the question of principle. Accordingly, he took a vote on the question formulated above.

The Court answered it unanimously in the affirmative.

M. FROMAGEOT said that he had answered in the affirmative, having regard to Article 49 of the Statute.

The PRESIDENT, adverting to the Registrar's observation, said he thought that, as a result of the decisions that had just been voted by the Court, the summary procedure would be defined with sufficient precision in the Rules.

The REGISTRAR agreed that that would be so, provided that neither the Court nor the Chamber could take the initiative *proprio motu* in modifying the procedure laid down, and that modifications were only made at the request of one or both of the parties, with the assent of the Court. The principle stated by M. Anzilotti seemed, however, to go further than that, and there was a danger that, if a sufficiently precise summary procedure were not laid down, cases which were ill-adapted for decision by the full Court, but which were suitable for the summary procedure, would not be referred to the Court.

M. ANZILOTTI observed that he had been content to indicate principles. His aim, in proposing the words "subject to any provisions which the Chamber may prescribe", had been to avoid laying down a hard-and-fast rule that, in all cases, there could be only one exchange of written Memorials.

M. FROMAGEOT thought that it would be easy to avoid any difficulty by wording the text, for example, as follows:

"Subject to any arrangements which the Chamber may adopt in a particular case, *after the parties have been heard*, the written procedure will be limited to the submission of one Memorial by each party."

The PRESIDENT said that he would ask the Drafting Committee to draw up a text which would be submitted at one of the next meetings, bearing in mind the three principles which the Court had adopted.

29.II.36.*

Article 72. — Second Reading.

The PRESIDENT laid before the Court the new text for Article 72, prepared by the Drafting Committee in accordance with the decision taken at the last meeting. This text was as follows:

"1. The procedure before the Chamber for Summary Procedure shall consist of two parts: written and oral.

"2. The written proceedings shall consist of the presentation of a single statement by each party in the order indicated in Article 42 [1] of the present Rules; documents in support must be attached. The Chamber may, however, either in accordance with an agreement between the parties or in view of the circumstances and after hearing the parties, deviate from the provisions of this paragraph in any way which may seem appropriate to the case before it.

"3. The written statements shall be communicated by the Registrar to the members of the Chamber and to opposing parties, and shall mention all evidence, other than the documents referred to in the preceding paragraph, which the parties desire to produce.

"4. When the case has become ready for hearing, the President of the Chamber shall fix a date for the opening of the oral proceedings, unless the parties agree to dispense with them; even if there are no oral proceedings, the Chamber always retains the right to call upon the parties to supply verbal explanations.

"5. Witnesses or experts whose names are mentioned in the written proceedings must be available so as to appear before the Chamber when their presence is required."

The object of paragraph 1 was to make it quite clear that summary procedure consisted of two parts. The object of paragraph 2 was to endow the written proceedings with the requisite flexibility in accordance with the principle adopted at the preceding meeting. Paragraph 3 dealt only with evidence other than the documents which were to be attached to the written statements. The wording was somewhat different from that of Article 49 of the Rules,

* D 2, A. 3, pp. 672-676.

[1] Article 41 of Rules of 11.III.36.

so as to avoid the difficulties involved by the application of that article.

Jonkheer VAN EYSINGA considered that this draft accurately reproduced the principles adopted by the Court.[1] The institution of this procedure, which as a rule would consist of two parts and which was very flexible, would be in accordance with the ideas which he had himself expressed when he had said that, apart from the expeditious character of summary procedure, he foresaw in the new Chamber of five judges possibilities for a development, which had hitherto been impossible, in the use made of the summary form of international judicial proceedings.

With regard to the wording of the text, the second sentence of the second paragraph ran: " The Chamber may, however . . . in accordance with an agreement between the parties. . . " Did this mean a formal agreement, submitted for instance in a special document ?

The PRESIDENT did not think so.

Jonkheer VAN EYSINGA had asked this question because there was a risk of the text being so construed. Would is not be better to use the formula employed in several articles of the Statute (for instance, Article 27) when the meaning was that the parties were agreed in submitting a request and simply to say " when desired by the parties " or " if the parties so request " ?

The PRESIDENT said that the second sentence of paragraph 2 would then read:

> " The Chamber may, however, if the parties so request or in view of the circumstances and after hearing the parties, deviate from ", etc.

M. GUERRERO, Vice-President, preferred the wording of the Drafting Committee, because that proposed by Jonkheer van Eysinga might give the impression that the intention was to exclude an understanding recorded in a special agreement. On the other hand, in the draft before the Court, the word " agreement " would cover any understanding between the parties, whether embodied in a special agreement or reached in the course of the exchange of views which would take place between the President and the parties' agents before the proceedings.

The PRESIDENT thought that there was practically no difference between the two wordings proposed. The meaning in both cases was an arrangement in a broad sense which must be arrived at during the first stage of the written proceedings.

Jonkheer VAN EYSINGA said that, in his view, the second sentence of paragraph 2 would cover a second exchange of Memorials. The arrangement might therefore be reached either after the first exchange of Memorials or earlier.

In any case, since the sort of agreement contemplated was a quite informal one, it would perhaps be inadvisable to use a wording which seemed to imply something of a formal character.

M. ANZILOTTI thought that paragraph 2 of the draft proposed by the Drafting Committee was rather designed to cover the case of a clause in a special agreement regarding the presentation of a second document in the written proceedings. Anything else seemed to be covered by the latter part of the text. If, after the presentation of the first document of the written proceedings, a need were felt for another written statement, one of the parties would suggest it to the Court, which, having regard to the circumstances and after hearing the parties, might call for further written statements.

Baron ROLIN-JAEQUEMYNS remarked that the Chamber must not be bound by an agreement between the parties.

M. GUERRERO, Vice-President, emphasised that, in the view of the Drafting Committee, the word " agreement " did not necessarily imply the existence of a document previously signed by the parties, but would cover also a simple understanding between the latter. On the other hand, the second possibility was purely a matter for the Court; it had nothing to do with an agreement between the parties. The Court, in special circumstances or because the written statements already presented did not afford sufficient data for it to go upon, might decide to make an exception to the general rule.

Baron ROLIN-JAEQUEMYNS pointed out that it was not a question of a right conferred on the parties, but of an option given to the Chamber. It was not said that the latter was obliged to give effect to an agreement between the parties if they were agreed, or even if the Chamber considered that there were reasons for so doing. The most radical deviation from the rule would be the suppression of the written proceedings, but there might also be deviations *on points of lesser importance.*

In any case, as the paragraph said that the Court might —and not must—do something, the question was not of great importance. The Court was entirely free to have regard to circumstances.

Count ROSTWOROWSKI considered that the second sentence of the second paragraph contemplated not the omission of the written proceedings, but rather their extension. The word " however " *(toutefois)* seemed clearly to suggest this meaning. If the word " agreement " appeared too restrictive, it might be replaced by " understanding ", which was perhaps a rather wider term.

M. NAGAOKA recalled the observations made by him at the previous meeting in regard to oral proceedings. It seemed necessary, however, that there should in all circumstances be written proceedings. Did the words " deviate . . . in any way " contemplate the possibility of there being no written proceedings ?

The PRESIDENT thought that it followed from the first two paragraphs read in conjunction that there would in all circumstances be written proceedings.

M. NAGAOKA, in those circumstances, did not oppose the adoption of this paragraph.

Jonkheer VAN EYSINGA, with regard to the question raised by M. Nagaoka, observed that Article 32 of the existing Rules would still remain in force. Accordingly, if, under that article, the parties said that they would be satisfied with purely oral proceedings, in a case to be dealt with by summary procedure, it must be possible to arrange accordingly.

M. FROMAGEOT, in order to avoid the difficulty mentioned by M. Nagaoka, proposed the following wording:

> " The Chamber may, however, in accordance with an agreement between the parties (or: if the parties so request), or in view of the circumstances and after hearing the parties, call for the presentation of such other written statement as may appear fitting in the case before the Chamber."

The PRESIDENT took the opinion of the Court on the question whether, in the second sentence of paragraph 2 of Article 72, the words " may . . . in accordance with

[1] Pp. 310-311.

an agreement between the parties " should be replaced by " may . . . if the parties so request ".

By six votes to four, the Court decided that this change should be made.

The PRESIDENT *next put the following question:*

" Does the Court decide that the words ' deviate from the provisions of this paragraph in any way . . .' in the second sentence of the second paragraph, be replaced by the words: ' call for the presentation of such other written statement as may appear fitting in the case before the Chamber ' ? "

The whole sentence would then read:

" The Chamber may, however, if the parties so request, or in view of the circumstances and after hearing the parties, call for the presentation of such other written statement as may appear fitting in the case before the Chamber."

The President gathered that he might consider paragraph 2 as thus amended adopted, wthout proceeding to take a vote.

M. NEGULESCO observed that some parties, in accordance with the practice provided for in their own municipal codes, might desire to reverse the order of the written and oral proceedings; accordingly, he raised the question whether, seeing that Article 32 allowed parties to propose modifications in the procedure, some reference should not be made, after the first paragraph, to possible agreements between the States concerned either to dispense with one of the two parts of the procedure or to reverse their order.

The PRESIDENT pointed out that, under Article 32, an agreement between the parties did not by itself suffice to modify the procedure. The proposed modification must also be considered appropriate by the Court. The powers of parties in this respect were not unlimited.

Count ROSTWOROWSKI observed that, in adopting the principles on which the Drafting Committee had prepared a text, the Court had been guided by the idea that summary procedure, though it should retain a certain flexibility, should be defined in the Rules with some degree of precision. M. Negulesco's proposal might involve a danger that parties would not be so clear in their minds what to expect.

The PRESIDENT said that, unless there were any other observations or suggestions in regard to the other paragraphs of Article 72, he would regard paragraphs 1, 3, 4 and 5 as adopted.

M. NAGAOKA, in regard to paragraph 4, said that he maintained the view expressed by him on February 28th. Summary procedure, as its name indicated, implied something simple and short. But the system contemplated in paragraph 4 might result in a procedure inconsistent with that conception.

M. Nagaoka therefore still thought that there should be no oral proceedings in summary procedure, unless the parties so desired.

The PRESIDENT asked the Court whether they adopted Article 72 in the form submitted by the Drafting Committee, subject to the amendments already decided upon.

Baron ROLIN-JAEQUEMYNS observed that, in the course of the discussion, it had apparently been proposed to dispense either with the written proceedings or with the oral proceedings. Before voting on the whole article, should not the Court express an opinion in regard to these suggestions ? In any case, it was essential to vote on paragraph 1.

M. GUERRERO, Vice-President, desired to explain the general plan of Article 72, which was based on the three principles adopted by the Court on February 28th. In summary procedure there would normally be written proceedings and oral proceedings. The former would consist of the presentation of a single written statement by each party.

If the parties agreed, or if the Court considered it necessary, it might order one or more subsequent exchanges of written statements. Finally, the Chamber would also hold oral proceedings, unless the parties agreed to dispense with them.

M. NEGULESCO wondered whether, in practice, the system proposed for summary procedure would not result in a procedure identical with that before the full Court and quite as long. M. Negulesco would therefore be obliged to vote against paragraph 4 of the text proposed by the Drafting Committee, since a real difference between procedure before the Chamber and procedure before the full Court could be established only by providing that in a case where each party filed two written statements there would be no oral proceedings proper but merely verbal explanations.

The PRESIDENT asked the Court whether they adopted paragraph 4 of Article 72 as submitted by the Drafting Committee.

By seven votes to three, this paragraph was adopted.

The PRESIDENT proposed to submit paragraphs 1, 2, 3 and 5 of Article 72 all together for adoption by the Court.

There being no observations, he declared these paragraphs adopted subject to the amendments made in paragraph 2 in the course of the meeting. Accordingly, Article 72 as a whole was adopted in second reading.

*11.III.36.**

Article 72. — Final Adoption.

The PRESIDENT said that, in paragraph 2, the Drafting Committee proposed to delete the words " . . . *à l'affaire dont la Chambre est saisie* " (to the case before the Chamber), which was difficult to render in English. The reference to Article 42 would have to be corrected, because, the Committee's proposal having been accepted, the reference should now be to Article 41. In paragraph 4, the Drafting Committee proposed to delete the word " *toujours* " (always), which seemed superfluous.

M. NAGAOKA, observing that, in Article 47, the text adopted read " *après que l'affaire est en état* ", omitting the word " *devenue* " (" is ready " instead of " has become ready "), suggested that the same change should be made in paragraph 4 of Article 72.

This was agreed to.

There being no further observations, Article 72 was finally *adopted* as thus amended.

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* D 2, A. 3, p. 735.

ARTICLE 73 *(Article 70, old Rules).*

JUDGMENTS GIVEN BY THE CHAMBERS OF THE COURT

28.II.35.*

Discussed as Article 70 (old Rules).

The PRESIDENT invited the Court to take up Article 70, which was as follows in the existing Rules:

> " The judgment is the judgment of the Court rendered in the Chamber for Summary Procedure. It shall be read at a public sitting of the Chamber."

He added that the Co-ordination Commission had not proposed any change in this article, the purpose of which was to make it clear that a decision given by the Chamber was really a decision of the Court.

M. URRUTIA, referring to certain discussions which had taken place previously [1], said that this article seemed clearly to differentiate between two distinct proceedings: the rendering of judgment by the Court in the Chamber for Summary Procedure, and the reading of the judgment at a public sitting of the Chamber.

The PRESIDENT put the following question to the Court:

> " Does the Court adopt Article 70 of the Rules (with the text at present in force) ? "

By eight votes to two, the Court adopted this article.

9.IV.35.**

Adopted in First Reading as Article 77.

Text discussed:

> " The judgment is the judgment of the Court rendered either in one of the Special Chambers or in the Chamber for Summary Procedure. It shall be read at a public sitting of the Chamber."

Jonkheer VAN EYSINGA proposed, unless there were some definite reason to the contrary, to add after the words: " in one of the Special Chambers " *(en Chambre spéciale)*, the words: " referred to in Articles 26 and 27 of the Statute "; the Drafting Committee had inserted these words everywhere else where the Special Chambers were concerned.

M. URRUTIA had nothing to say regarding the substance of the article, but wondered whether it would not be better to place the article, suitably worded, under the heading devoted to judgments.

M. FROMAGEOT explained that the only object of Article 77 was to make it known that, although judgment was rendered by a Special Chamber, it was to be regarded as judgment by the Court. The wording of the article did not satisfy M. Fromageot, because it did not clearly bring out this main idea; he therefore proposed the following text:

> " Judgments given by the Special Chambers or by the Chamber for Summary Procedure shall be regarded as judgments rendered by the Court. Nevertheless, they shall be read at a public sitting of the Chamber."

With regard to the position of the article, as it stated that the judgment would be read at a sitting of the Chamber —a provision peculiar to Chambers—M. Fromageot preferred to keep it in the present section.

The REGISTRAR recalled that, besides the notion alluded to by M. Fromageot, there had been a wish to prescribe in the present Article 70—which was represented by Article 77 of the draft—that the formula at the beginning of a judgment rendered by a Chamber should be: " The Court, sitting as a Chamber for Summary Procedure (Special Chamber) . . . " (*cf.* Judgment No. 3, of 1924).

In view of this observation, M. FROMAGEOT proposed to say in the text suggested by him: " . . . *are* judgments rendered by the Court ".

The PRESIDENT took a vote on the following question:

> " Does the Court prefer for Article 77 the following text to that proposed by the Drafting Committee:
>
> " ' Judgments given by the Special Chambers or by the Chamber for Summary Procedure are judgments rendered by the Court. Nevertheless, they shall be read at a public sitting of the Chamber ' ? "

By eleven votes to one, the Court answered the question in the affirmative.

The PRESIDENT recalled Jonkheer van Eysinga's proposal to add the words " referred to in Articles 26 and 27 of the Statute " after the words " Special Chambers ".

Baron ROLIN-JAEQUEMYNS considered that this addition was unnecessary, since Articles 26 and 27 of the Statute had already been mentioned in Article 74, which was placed at the beginning of Section 4.

Jonkheer VAN EYSINGA did not press the point.

Adopted in first reading.

28.II.36.

Article 73. — Second Reading.

The article was adopted with a minor change in the French text.

11.III.36.*

Article 73. — Final Adoption.

The PRESIDENT said that the Drafting Committee proposed to substitute the word " *séance* " for " *audience* " (the English text already contained the word " sitting ").

Jonkheer VAN EYSINGA wondered whether, as the parties would be present, the word " *audience* " would not be more appropriate.

The REGISTRAR explained that, with regard to judgments, the Statute (Article 58) laid down that they would be read " *en séance publique* " (open Court). In the case of advisory opinions, it said (Article 67) that they would be delivered " *en audience publique* " (open Court); but that was simply because Article 67 reproduced the text of the old Rules, which were themselves an interpretation of the original Statute. In any case, the Drafting Committee had considered that, as the provision of the Statute regarding judgments used the word " *séance* ", the same word should be used here.

In the English text the words " Nevertheless, they shall be read " were replaced by " They will be read, however ".

There being no further observations, Article 73 was finally *adopted* with the amendment proposed.

* D 2, A. 3, p. 371.
** D 2, A. 3, pp. 449-450.
[1] P. 318 (Article 74).

* D 2, A. 3, pp. 735-736.

ARTICLE 74 *(Article 62, old Rules).*

JUDGMENTS

22.II.35.*

Discussed as Article 62 (old Rules).

The PRESIDENT opened the discussion on the articles relating to judgment (Articles 62-65) as submitted by the Co-ordination Commission.[1] He observed that, in Article 62, paragraphs (*a*), (*b*) and (*c*) had not been amended by the Co-ordination Commission. In paragraph (*d*), after the words: " the agents ", the words " and counsel " had been added. The Court would probably now wish also to add " advocates ".

M. ANZILOTTI asked whether it was necessary to state the names of all counsel and advocates, who were sometimes very numerous.

The PRESIDENT said that the Co-ordination Commission had proposed no changes in paragraphs (*e*), (*f*), (*g*) or (*h*).

In paragraph (*i*), the Commission proposed to say: " the decision, if any, in regard to costs "; this referred, of course, to the costs mentioned in Article 64 of the Statute.

In paragraph (*j*), instead of: " the number of judges constituting the majority contemplated in Article 55 of the Statute ", the Commission proposed simply to say: " the number of judges constituting the majority ", deleting the rest of the sentence.

In paragraph 2 of Article 62, no change was proposed by the Commission.

Date on which a Judgment shall be regarded as adopted.

M. URRUTIA asked for an explanation in regard to paragraph (*a*) of Article 62.

Was the Court's judgment dated the day on which the Court finally voted upon it at the deliberation, or the day on which it was read in open Court ?

The PRESIDENT drew M. Urrutia's attention to Article 64 of the Rules, which appeared to supply the answer to his question.

M. URRUTIA said that that article referred only to the date on which the judgment took effect. The Statute contained provisions the import of which was different: Article 56 said that the judgment would state the reasons on which it was based and contain the names of the judges who had taken part in the decision, and Article 58 said that the judgment would be read in open Court, due notice having been given to the agents.

It was therefore possible to conceive two stages: the judgment being dated the day on which the final vote was taken at the deliberation; and the reading of the judgment in open Court being merely a subsequent solemn formality.

The PRESIDENT said that, if that view were taken, a judge who had taken part in the vote on the second reading could be absent when judgment was delivered and yet be regarded as having taken part in the decision.

M. GUERRERO, Vice-President, still felt some doubt as to the soundness of the Court's present practice of mentioning as having taken part in the decision only judges who were present when a judgment was read out in open Court. For, if a judge had sat in a case from the beginning until the final text of the judgment was adopted, and then, for some reason, was unable to be present at the sitting held for delivery of judgment, his vote was not reckoned and all the work done by him became of no avail. Would it not be equitable to reckon such a judge's vote and to include his name amongst those of the judges who had taken part in the decision ? If the Court were prepared to agree to an amendment of its practice in this sense, paragraph (*b*) of Article 62 might be amended to read: " the names of the judges who have participated *in the proceedings until the vote upon the judgment* ".

M. ALTAMIRA recalled that the Court's idea, when it had laid down that the judgment was to bear the date of the day on which the public sitting for its delivery was held, had been to leave open until the last moment the possibility, if need be, of modifying it; this might become necessary, for instance, if in the interval between the vote and the delivery of judgment one or more judges altered their opinions. For this reason, M. Altamira did not think it possible to modify the Court's practice in the manner suggested, without disturbing a position which was essential, if the possibility of varying the judgment up to the last moment was to be kept open.

Jonkheer VAN EYSINGA emphasised that international justice also was dominated by a great principle which must govern all legal proceedings—namely, publicity. And the reading of the judgment in open Court was an essential element of publicity. The reading of a judgment, therefore, was not merely the formal promulgation of an instrument already existing: it constituted the judgment. The importance of this great principle of law was shown, *inter alia*, by the fifth reservation made by the Senate of the United States of America in 1926 with regard to the accession of the United States to the Court's Statute: " That the Court shall not render any advisory opinion except publicly."

M. GUERRERO, Vice-President, considered that the question of publicity did not enter into the matter which the Court was considering. Many arbitral awards were given without being delivered in public, and that fact had not affected their authority. The danger foreseen by M. Guerrero was of another kind: the existing practice might, if a judge were unable to attend the public sitting, result in reversing the majority attained when the final vote on the judgment was taken. It should therefore be laid down that the judgment of the Court became definitive when the vote on the second reading was taken, and not on the date of its delivery in open Court.

M. ANZILOTTI did not think that the question should be regarded from too narrow a standpoint. The contingency envisaged by M. Guerrero might arise between the first and second readings just as easily as between the second reading and the delivery of judgment, and he did not think it possible to base the solution of a question of this kind on difficulties which might arise in any case. Moreover, the importance attached in some countries to the public delivery of judgment was so great that M. Anzilotti thought it would be difficult to adopt a rule other than that established by practice.

The question, however, was really a different one. In making his observation, M. Urrutia had doubtless had in mind, not the practice just referred to, but that according to which judges who left before the delivery of judgment

* D 2, A. 3, pp. 319-324.

[1] *Ibid*, p. 877.

were allowed to add to it a note—which, incidentally, was devoid of any legal significance—recording that they had taken part in the deliberation and how they had voted.[1]

Whatever had been the reasons which had led the Court to adopt this practice, it was certain that there had been no intention to weaken the rule to the effect that the decisive date was that on which judgment was read in open Court, but merely to reconcile this rule with the fact that some judges were sometimes obliged to leave before delivery of judgment.

M. GUERRERO, Vice-President, said that his remarks were directed solely to the rule concerning the indication of the judges participating in a judgment.

He was not criticising the reading of judgment in open Court, or the fact that a judgment bore the date of the day on which it was read.

The REGISTRAR traced the historical origin of the practice according to which only judges present when judgment was delivered were shown as having participated therein.

In the Hague Convention of 1899, it was laid down that the judgment was to be signed by all members of the Arbitral Tribunal. This provision was modified in 1907, and the Statute of the Court, which provided that only the President and the Registrar should affix their signatures, followed the 1907 Convention in this respect.

Nevertheless, the idea underlying the 1899 Convention had not been completely abandoned, and a trace of it was to be found in the fact that, in the judgment, were mentioned only the names of judges who would have been able to sign it if the Statute had laid down that they must do so. A judge who left after the vote but before delivery of judgment would not be able to sign. Another thing which reflected this idea was the word "*présents*" (before) at the head of the list of judges given at the beginning of every judgment.

In reply to a question put by certain judges, M. ANZILOTTI explained that, if a judgment had been duly adopted at the deliberation but, on the day on which it was to be delivered, there was no quorum, the judgment could not be delivered.

M. FROMAGEOT pointed out that until judgment had been delivered there was no judgment.

M. SCHÜCKING also found it very difficult to accept the reasoning of the Vice-President. The latter's system would in effect give rise to two categories of judgments: those adopted in private, which, though unalterable, had no binding force, and those which had been made public and thereby acquired binding force. But, under the Statute, a judgment only came into existence upon its delivery.

The PRESIDENT noted that M. Urrutia proposed no amendment. The Vice-President, on the other hand, wished to add some words to paragraph (*b*) of Article 62, in order to take into account M. Urrutia's observations in regard to paragraph (*a*). Accordingly, there was no amendment to paragraph (*a*), which might therefore be regarded as adopted.

Paragraph (*a*) was adopted.

The PRESIDENT opened the discussion on paragraph (*b*):

"(*b*) The names of the judges participating".

M. GUERRERO, Vice-President, again submitted his proposal that paragraph (*b*) should be worded as follows:

"(*b*) The names of the judges who have participated in the proceedings until the final vote upon the judgment".

The PRESIDENT said that he would vote against the amendment because it seemed to be inconsistent with the general system of the Statute.

According to Article 54 of the Statute, the deliberation extended from the close of the oral proceedings until judgment was delivered. If the last paragraph of Article 54 was to be observed, everything which happened in the Court during this period must be treated as secret. But to refer in the Rules to decisions taken during the deliberation would seem inconsistent with this.

M. ANZILOTTI, in connection with what had already been said by the Registrar, observed that dissenting opinions could be signed only just before judgment was read in open Court. In any case, therefore, a judge who went away must give up his right to append a dissenting opinion. That seemed to prove that the idea of the authors of the Statute was that, until read in open Court, a judgment did not exist.

Baron ROLIN-JAEQUEMYNS, on the contrary, thought that, after the second reading, a judgment did exist, though it remained secret. That was why, in the case of a judge obliged to leave The Hague before the delivery of judgment, it would seem normal to mention his name and how he had voted. In Baron Rolin-Jaequemyns' view, however, this did not involve any amendment of the provision under discussion.

Jonkheer VAN EYSINGA thought that the Statute, when it spoke of the judges who had taken part in the judgment, meant: "who had been present at the delivery of judgment". The English text, moreover, left no doubt on this point.

M. NEGULESCO said that he had always considered that the Court's decision dated from the delivery of judgment, and that all that had taken place before, including the votes on the first and second readings, formed part of the deliberation. The practice of allowing judges who left before the delivery of judgment to append declarations to the judgment did not seem to him in conformity with the Statute.

M. FROMAGEOT wished the text to be left as it was. The Court must not appear, by the adoption of an amendment to the Rules, on the lines of M. Guerrero's proposal, to be departing from the terms of the Statute, which simply said: "the judges who have taken part in the decision", and nothing more.

The PRESIDENT invited the Court to express their opinion in regard to M. Guerrero's amendment to the effect that paragraph (*b*) should be worded as follows:

"(*b*) The names of the judges who have participated in the proceedings until the final vote upon the judgment."

The amendment was rejected by eight votes to three.

The PRESIDENT said that that being so, paragraph (*b*) was adopted in its existing form.

He observed that paragraph (*c*), "the names and style of the parties", had not been altered by the Co-ordination Commission; and, there being no observations, he declared paragraph (*c*) adopted.

The President said that, in paragraph (*d*), the Co-ordination Commission proposed to add the words "and counsel" after the words "the agents". Being himself responsible for this proposal, however, he announced his intention of withdrawing it.

[1] *Cf.*, for instance, A/B 63, p. 89; 61, p. 250, etc.

There being no observations, the President declared paragraph (*d*) adopted in its existing form.

He added that paragraph (*e*), " the conclusions of the parties ", had not been altered by the Co-ordination Commission.

There being no observations, he declared it adopted.

In connection with paragraph (*f*), " the matters of fact ", which the Co-ordination Commission had not proposed to amend, the REGISTRAR observed that, in practice, the judgment also contained a record of the proceedings (" *qualités* "). Was that to be regarded as covered by the matters of fact ?

M. FROMAGEOT would prefer it to be expressly mentioned.

The PRESIDENT noted that the Court was agreed that a new head covering a summary of the proceedings should be inserted between (*d*) and (*e*).

M. FROMAGEOT asked whether, instead of: " *circonstances de fait* ", they might not say: " *exposé des faits* ".

The PRESIDENT noted that there was no objection to this suggestion.

There being no observations with regard to (*g*), " the reasons in point of law ", the President considered that paragraph adopted.

Paragraph (*h*), " the operative provisions of the judgment ", was similarly disposed of.

The President observed that the Co-ordination Commission proposed to replace the existing text of (*i*) by the following: " the decision, if any, in regard to costs ".

M. GUERRERO, Vice-President, proposed the deletion of this paragraph. The question of costs should be dealt with in the operative part of the judgment, but there was no need expressly to say so in the Rules.

The PRESIDENT pointed out that usually the operative provisions followed the lines of the submissions, but that there was nothing in Article 64 to prevent the Court from awarding costs against a party even if the other party had not put in a claim for them.

M. ANZILOTTI referred to the fundamental principle that a judge could not go beyond what was claimed by the parties. In his view, this principle also held good with regard to an award of costs.

The PRESIDENT, whilst observing that in English practice a statement of claims did not necessarily mention costs, thought that, if an award of costs were regarded as implicitly covered by the words " operative provisions ", there would be some difficulty from the point of view of Anglo-Saxon law.

M. SCHÜCKING supported the proposal to delete this head. For, if a decision as to costs had to be given, it would always have to be embodied in the operative part of the judgment; and it would have to be indicated in the grounds why this decision as to costs had been included in the operative provisions.

23.II.35.*

Discussed as Article 62.

The PRESIDENT invited the Court to resume the discussion of Article 62 of the Co-ordination Commission (contents of judgments),[1] at head (*i*), concerning the decision, if any, taken by the Court under Article 64 of the Statute. He recalled that the Vice-President had proposed the deletion of this head. The President, after studying the question, wished to ask M. Guerrero not to press his proposal. Apart from reasons based on Anglo-Saxon practice, according to which costs were left entirely to the discretion of judges, he had a reason of a general nature for making this request; for, if the Court amended the provisions in the Rules in regard to costs, it was to be feared that the inference might be drawn that the Court intended henceforward to adopt the practice of making awards of costs.

M. GUERRERO, Vice-President, saw no objection to retaining the provision in its existing form without the amendments proposed by the Co-ordination Commission. If the existing text were retained, he could withdraw his proposal.

The PRESIDENT thanked M. Guerrero: the Court might therefore retain head (*i*) in its existing form. Perhaps, however, the Court would have no objection to the deletion of the reference to Article 64 of the Statute.

There being no observations, the President said that head (*i*) would be referred to the Drafting Committee, which would be guided by what had just been said.

He opened the discussion on head (*j*), which, in its existing form, was as follows:

> " (10) The number of the judges constituting the majority contemplated in Article 55 of the Statute."

The Co-ordination Commission proposed the deletion of the reference to the Statute.

M. URRUTIA wondered whether it would not be better to say: " the names of the judges ", rather than: " the number of the judges ".

M. ANZILOTTI pointed out that, as a rule, the names could be ascertained by comparing those of dissenting judges.

The PRESIDENT had not heard any objection to the deletion of the words: " contemplated in Article 55 of the Statute ".

Jonkheer VAN EYSINGA observed that, in the revised Rules, there were four articles containing lists—namely, 39, 40, 55 and 62.

In three of these articles, the lists were exhaustive; only in Article 55, which contained the words " in particular ", was the list intended merely to indicate a minimum. Perhaps it would be a good thing to allow the Drafting Committee to consider whether the words " in particular " should not likewise be added in Article 62.

M. GUERRERO, Vice-President, thought that the proposed draft of head (*j*) presupposed that the majority had been constituted when the judgment was adopted and consequently before its delivery.

M. URRUTIA said that the same objection had occurred to him on reading the second paragraph of the article:

> " Dissenting judges may, if they so desire, attach to the judgment either an exposition of their individual opinion or the statement of their dissent."

That seemed to imply that a judgment was already in existence when individual opinions were prepared. M. Urrutia thought that it followed that a distinction should be drawn between the final adoption of the judgment and its delivery in open Court.

M. ANZILOTTI thought that the French text of head (*j*) should be brought into line with the English. The word

* D 2, A. 3, pp. 324-326.

[1] *Ibid.*, p. 877.

" constituting " was used in the English text, which might be translated by " *constituant* ". The English text did not say " *ayant constitué* " (having constituted).

M. FROMAGEOT said that the same observation applied to head (*b*), where the English text said " participating ", whereas the French said " *qui y ont pris part* ".

Jonkheer van Eysinga's proposal to add the word " *notamment* " (in particular) to Article 62 might also be referred to the Drafting Committee.

Baron ROLIN-JAEQUEMYNS was not in favour of inserting this word; there might be a temptation to take advantage of it to introduce a series of new points in the judgment.

M. ANZILOTTI, with regard to paragraph 2 of Article 62, reiterated the objection frequently recorded by him in respect of the practice of allowing dissenting judges to attach to the judgment a statement of their dissent without giving reasons, a thing for which no provision was made in the Statute.

The REGISTRAR, with reference to this point, recalled that, in allowing this practice, the Court had argued as follows[1]: under the Statute, judges composing the minority might or might not append their individual opinion to a judgment; it followed that, if dissenting opinions were not appended to a judgment, it might be supposed that the judgment had been unanimous, whereas in reality it might have been adopted by a very narrow majority. Unless the number of judges voting for and against were published, the optional publication of dissenting opinions might therefore result in an erroneous impression.

The publication, however, of the numerical result of the vote gave rise to another difficulty; for, if it were stated that six judges voted for the judgment and five against, and if only one dissenting opinion were appended, it would be wondered who were the four other dissenting judges. That was why it had been seen fit to encourage such judges to indicate how they had voted.

As, however, under the Statute, the Court could not compel a judge to publish a dissenting opinion, all that could be done was to give judges the option of simply stating the fact that they dissented.

Date on which the Judgment shall be regarded as adopted.

M. NEGULESCO wished for an explanation as to the import of the words: " *les noms des juges qui y ont pris part* ", in head (*b*). These words were also to be found in Article 56 of the Statute. Did they mean the judges present when judgment was delivered, or the judges who had taken part in the deliberation upon and adoption of the judgment ?

The PRESIDENT observed that, in the Court's practice, this phrase was taken as meaning the judges who had taken part in the judgment in the sense that they were present on the Bench when judgment was delivered in open Court.

M. GUERRERO, Vice-President, asked whether this practice was really in conformity with the Statute, which did not say that the vote was to be taken at the hearing for the delivery of judgment, but seemed to presuppose that it was an already existing judgment which was read at the hearing.

Baron ROLIN-JAEQUEMYNS thought that, at all events in theory, a judge could change his opinion between the final vote and the delivery of judgment, even if that would involve a shifting of the majority.

M. URRUTIA said that, in order to avoid prolonging the discussion, he would vote for the proposed text, though he maintained his opinion that the judgment came into existence with the decision taken by the Court in second reading, and that the reading of the judgment in open Court constituted simply a promulgation which might take place with judges who had not participated in the voting upon the Bench, provided that there was a quorum.

If the article were adopted as it stood, M. Urrutia would, however, raise these points again in second reading.

M. GUERRERO, Vice-President, accepted M. Urrutia's suggestion. The question was a very important one, and if the Court, in revising the Rules, came to the conclusion that its present practice was inconsistent with the intention of the Statute, it should not hesitate to change it.

Jonkheer VAN EYSINGA was quite prepared to take the question up again in second reading, but he thought it should not be forgotten that the essential function of a judge was to deliver judgment, and that was done *viva voce* and in open Court. It was impossible to substitute for this proceeding a decision taken in private and which really formed part of the preparatory work done by the judges.

M. FROMAGEOT thought that, at the second reading, they should discuss not only Article 62, but also Article 31 of the Rules concerning deliberations. The question would be whether the latter article should be amended so as to read: " the Court shall sit in private to deliberate *and adjudicate* . . .".

Article 62 (continued).

The PRESIDENT proposed that the Court should vote upon Article 62 as amended. He noted that M. Urrutia had reserved the right to present observations regarding the second paragraph of the article in second reading and that the Vice-President, Count Rostworowski and M. Negulesco associated themselves with M. Urrutia's reservation.

Article 62, as amended, was voted upon and unanimously adopted, subject to this reservation.

10.IV.35.

Adopted as Article 82 in First Reading.

The article was adopted with the following text:

" 1. The judgment shall contain:

" The date on which it is pronounced;
" The names of the judges participating;
" A statement of who are the parties;
" The names of the agents of the parties;
" A summary of the proceedings;
" The submissions of the parties;
" A statement of the facts;
" The reasons in point of law;
" The operative provisions of the judgment;
" The decision, if any, in regard to costs;
" The number of judges constituting the majority.

" 2. Dissenting judges may, if they so desire, attach to the judgment either an exposition of their individual opinion or a statement of their dissent."

[1] *Cf.* D 2, A., pp. 172, 200 *et sqq.*

28.II.36.*

Article 74.[1] *— Second Reading.*

Paragraph 1.

M. FROMAGEOT proposed that, in the ninth line, the words "*Les motifs de droit . . .*" should be substituted for "*raisons de droit*".

M. NAGAOKA asked whether the enumeration given in paragraph 1 of Article 74 was meant to be exhaustive. Would it not be wiser to preface this enumeration by the words "in particular"?

The PRESIDENT did not think that this addition was necessary: the words "The judgment shall contain . . ." did not preclude the mention, if need be, of some other items, reference to which might be found necessary or desirable.

The object of inserting this enumeration in Article 74 was to describe the manner in which the Court applied the provision of the Statute.

The PRESIDENT put M. Fromageot's proposal to the vote, and it was adopted by eight votes, with two abstentions.

The President observed that the Court's decision would not entail any alteration in the English text.

Paragraph 2.

M. URRUTIA drew the attention of the Drafting Committee to the expression "dissenting judges". Would it not be better to say: "the judges who do not agree with the decision"?

The REGISTRAR pointed out that the term "dissenting judges" occurred in Article 57 of the Statute.

M. NAGAOKA pointed out that the Court had already adopted a paragraph (paragraph 7) in Article 31 of the Rules, mentioning the time at which the opinions of dissenting judges should be submitted. In these circumstances, was there, he asked, any object in retaining the second paragraph of Article 74, which had the same object in view?

The PRESIDENT pointed out that the Statute merely laid down that dissenting judges were entitled to deliver a separate opinion. However, it was the practice of the Court to allow a judge simply to record the fact of his dissent. The object of the second paragraph was to confirm that practice. Personally, he felt that it was the duty of a judge who differed from the opinion of the majority to explain his reasons for so doing.

The PRESIDENT declared paragraph 2 of Article 74, and also that article as a whole, adopted in second reading.

Final Adoption.

On 11.III.36, Article 74 was finally *adopted* with the English text of the first reading unchanged.

ARTICLE 75 *(Article 63, old Rules).*

COMMUNICATION OF THE JUDGMENT

23.II.35.**

Discussed as Article 63.

The PRESIDENT opened the discussion on Article 63. The first paragraph, in regard to which the Co-ordination Commission had proposed no change, read as follows:

> "When the judgment has been read in public, duly signed and sealed copies thereof shall be forwarded to the parties."

The REGISTRAR observed that this provision was not quite in accordance with practice. In order to bring it into conformity with practice, it should run: "at the public reading of the judgment". In point of fact, the official copies of the judgment were handed to the agents as soon as the President had begun to read it. Perhaps, however, the point was of too slight importance to necessitate a change.

The PRESIDENT asked whether the Court thought that this discrepancy between the wording of the rule and practice was sufficiently important to justify the amendment of the paragraph.

M. FROMAGEOT would be inclined to amend the wording.

M. GUERRERO, Vice-President, on the contrary thought it would be better not to alter the wording, which made it possible to distribute the copies of the judgment shortly after the judgment had been read, should it prove impossible to do so earlier.

The REGISTRAR explained that the reason for the adoption of the practice was that the agents naturally wished to be able to follow the reading of the judgment, which was a lengthy proceeding. It was impossible, however, to give them an unofficial copy, without at the same time handing them the official copy.

M. FROMAGEOT proposed that the words "When . . . has been read . . ." should be replaced by: "At the reading".

The PRESIDENT gathered that the Court would prefer to retain the existing text of paragraph 1 of Article 63, it being understood that there was no need to modify the practice hitherto followed.

He opened the discussion of the second paragraph of Article 63, for which the Co-ordination Commission proposed the following text:[1]

> "The text of the judgment shall forthwith be communicated by the Registrar to Members of the League of Nations and to States entitled to appear before the Court."

The Commission had therefore deleted from the existing text the words: "through the channels agreed upon".

The REGISTRAR, on being asked by the President to explain the reason for this deletion, said that the Co-ordination Commission had considered these words superfluous. The phrase "through the channels agreed upon" referred to cases where an agreement existed between the Court and a Government as to the method of transmitting documents, but such an agreement would of course be applied, whether it was so stated in the article or not.

Jonkheer VAN EYSINGA recalled that these arrangements were already referred to in Article 36 of the Rules.

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* D 2, A. 3, pp. 670-671.

** *Ibid.*, pp. 326-327.

[1] See Explanatory Note, p. VIII, and meeting of 9.IV.35, p. 86 (under Article 31) for decision as to position of articles concerning judgments.

[1] D 2, A. 3, p. 877.

The PRESIDENT asked the Court whether they adopted the second paragraph of Article 63 in the form proposed by the Co-ordination Commission.

The Court unanimously adopted this paragraph.

10.IV.35.*

Adopted in First Reading as Article 83.

M. FROMAGEOT said he preferred the expression "*audience*"—which was more correct in judicial procedure—to "*séance*" in paragraph 1 of Article 83, and also in Article 84; the PRESIDENT thereupon drew attention to the terminology of Article 58 of the Statute, and after a short exchange of views, he put the following question to the Court:

> "Does the Court decide to replace the word '*séance*' in Articles 83 and 84 by the word '*audience*'?"

The Court answered the question in the negative by six votes to five.

Baron ROLIN-JAEQUEMYNS observed that the Statute employed the terms "*audience publique*" (Articles 46, 47) and "*séance publique*" (Article 58) indiscriminately; he reserved his right to return to the point at the second reading.

The PRESIDENT took note of this reservation.

As no other observations were offered, the President declared that Article 83 was adopted in first reading with the following text:

> "1. When the judgment has been read in public, duly signed and sealed copies thereof shall be forwarded to the parties.
>
> "2. A copy of the judgment shall be sent forthwith by the Registrar to Members of the League of Nations and to States entitled to appear before the Court."

28.II.36.**

Article 75. — Second Reading.

Paragraph 1.

The PRESIDENT pointed out that M. Fromageot had made a reservation at the first reading.[1]

M. FROMAGEOT said he had expressed the view that the normal procedure would be for the original of the judgment to be retained in the archives of the Court, and that only authenticated copies should be given to the parties; however, he would not press his reservation.

The REGISTRAR drew attention, in the same connection, to an omission in Article 75, paragraph 1. It laid down that a copy of the judgment was to be given to each of the parties, but it did not say that a copy was to be placed in the archives of the Court. In the case of advisory opinions, Article 85 laid down that one copy of the opinion was to be placed in the Court's archives, and that another copy was to be sent to the archives of the League of Nations. For the sake of symmetry, it would, he thought, be desirable to add, in this clause, that one copy of the judgment was to be placed in the Court's archives.

The PRESIDENT noted that the Court agreed, in principle, to amend the first paragraph of Article 75, by laying down in it that one copy of the judgment should be placed in the Court's archives; it would be left to the Drafting Committee to find an appropriate wording.

Paragraph 2.

M. GUERRERO, Vice-President, asked whether the copies referred to in the second paragraph were sent to the Members of the League of Nations directly, or through the Secretary-General.

The REGISTRAR said that the copies were sent through the Secretary-General. In 1935,[1] the words "through the channels agreed upon", which appeared in the draft of the competent Commission, had been deleted, as being superfluous.

As no other observations were offered, the PRESIDENT declared that the second paragraph of Article 75, and the article as a whole, adopted in second reading.

11.III.36.*

Article 75. — Final Adoption.

The PRESIDENT asked the Registrar to explain the amendments proposed by the Drafting Committee in paragraph 1; these were to say ". . . one original copy, duly signed and sealed, shall be placed in the archives of the Court and another shall likewise be forwarded. . . ."

The REGISTRAR recalled that the drafting of Article 75 as a whole had been reserved; the Court had merely decided in principle to insert a provision to the effect that a signed and sealed copy would be placed in the archives of the Court. On the other hand, it had definitely adopted a provision—Article 85—which corresponded as regards advisory opinions to this rule in regard to judgments; the Drafting Committee had considered that Article 75 should be drafted as far as possible on the lines of Article 85, the wording of which had been approved by the Court.

Jonkheer VAN EYSINGA raised the question whether, in order to secure this conformity with Article 85, the word "duly" should not be deleted. Furthermore, the words "likewise" seemed to add nothing to the meaning already conveyed by the words "another".

The PRESIDENT took the opinion of the Court and noted that they were agreed to delete the word "likewise" in paragraph 1 of Article 75.

Baron ROLIN-JAEQUEMYNS thought that the word "duly" was necessary in this article. He wished it to be maintained.

The PRESIDENT noted that there was no objection to the retention of the word "duly" in paragraph 1 of Article 75; it being understood that this word would also be inserted in Article 85.

There being no further observations, Article 75 was finally *adopted* as thus amended.[2]

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* D 2, A. 3, p. 457.

** *Ibid.*, pp. 671-672.

[1] In connection with Article 75, old Rules (Article 88 of draft in first reading), which was deleted, see Explanatory Note, pp. VIII-IX.

* D 2, A. 3, p. 736.

[1] P. 319.

[2] The word "forthwith" in paragraph 2 was also deleted as superfluous.

ARTICLE 76 *(Article 64, old Rules).*

DATE ON WHICH THE JUDGMENT SHALL BE REGARDED AS TAKING EFFECT

22.II.35.

See under Article 74, p. 315, for discussion of Article 76 as Article 64, old Rules, in connection with a proposed amendment to Article 62, old Rules (Article 74 of Rules of 11.III.36).

23.II.35.*

See under Article 74, p. 318, for discussion of Article 76 as Article 64, old Rules, in connection with Article 62, old Rules, at this meeting.

Discussed as Article 64.

The PRESIDENT opened the discussion on Article 64. The existing text of this article was as follows:

> " The judgment shall be regarded as taking effect on the day on which it is read in open Court, in accordance with Article 58 of the Statute."

The Co-ordination Commission proposed the deletion of the words: " in accordance with Article 58 of the Statute ", which they regarded as superfluous.

Baron ROLIN-JAEQUEMYNS, on the contrary, thought that references to the Statute in the Rules were useful.

The REGISTRAR said that, when the Court had first drawn up the Rules, the principle had been to include nothing which was already to be found in the Statute. These somewhat frequent references to the Statute had been made in order to emphasise this supplementary character of the Rules and replaced an insertion of the terms of the Statute. Some of them had disappeared, however, in 1926 and in 1931, and now it was proposed to eliminate them entirely.

M. FROMAGEOT would like the text to be made clearer. No doubt, the meaning was that the judgment acquired binding effect only after it had been read out as prescribed by Article 58—that was to say, due notice having been given to the agents. If that was the meaning, the reference to Article 58 of the Statute was not superfluous.

The PRESIDENT considered that, if any members of the Court attached importance to these words, it would be better to retain them. However, he took a vote on Article 64 in the form proposed by the Co-ordination Commission—*i.e.* omitting the words: " in accordance with Article 58 of the Statute ".

By seven votes to four, the Court adopted Article 64 in the form proposed by the Co-ordination Commission.

Proposal by M. Fromageot: Setting-aside of Judgments.

M. FROMAGEOT recalled that he had made a proposal [1] in regard to which he would like to have the opinion of the Court; his proposal consisted in the addition to Article 64 of the existing Rules of a new second paragraph running as follows:

> " No plea can be entertained for the setting-aside of judgments delivered or orders made under Article 53 of the Statute in cases of default. Only application for their revision may be made under Article 61 of the Statute and Article 66 of the existing Rules."

M. Fromageot thought that everyone would agree that, under the Statute, no plea could be entertained for the setting-aside of the Court's judgments even in the case of those rendered by default. Would it not, however, be a good thing expressly to tell the Governments so by inserting a provision to that effect in the Rules ?

M. SCHÜCKING agreed with the Co-ordination Commission which had thought it better to make no reference to the question of a plea for the setting-aside of a judgment by default. Since the Statute did not provide any special procedure for the impeachment of such judgments, all parties should realise without being told that a judgment by default possessed the same binding effect as any other judgment of the Court.

M. GUERRERO, Vice-President, agreed with M. Schücking and the Co-operation Commission. There was no need to include in the Rules provisions the only object of which was to confirm those of the Statute.

The PRESIDENT noted that the opinions expressed by the Vice-President and M. Schücking represented the general opinion of the Court.

10.IV.35.

Adopted in First Reading as Article 84.

The text approved on 23.II.35 (see above), was adopted unchanged in first reading.

17.II.36.

See under Article 30, pp. 78-81, for discussion of Article 76 in connection with an amendment proposed to Article 31, paragraph 1 (Article 30, paragraph 1, of Rules of 11.III.36).

Second Reading and Final Adoption.

Article 76 was adopted in second reading on 28.II.36, and finally *adopted* on 11.III.36 unchanged.

ARTICLE 77 *(Article 56, old Rules).*

STATEMENT OF COSTS

15.II.35.**

Discussed as Article 56 (old Rules).

The PRESIDENT opened the discussion on Article 56, which was worded as follows in the existing Rules:

> " The party in whose favour an order for the payment of costs has been made may present his bill of costs after judgment has been delivered."

M. SCHÜCKING thought it would be useful to elaborate this article, and insert some provisions—which might be very brief—in the Rules concerning the application of the principle stated therein. If the Court did not agree with this view, he would propose simply to omit the article.

M. GUERRERO, Vice-President, did not consider that

* D 2, A. 3, pp. 327-329.
** *Ibid.*, p. 266.
[1] *Ibid.*, p. 877.

the Court should remove this article from the Rules. Hitherto, the Court had never ordered a party to pay the costs of a case, but it must have power to do so, if it thought right. He was of opinion that there were serious objections both to maintaining the present text and to going back to the situation existing before 1926 [1]; he therefore proposed that the Court should ask M. Schücking to submit a text, prescribing a special procedure for this question.

Jonkheer VAN EYSINGA said he had no objection, in principle, to examining a detailed proposal which M. Schücking might submit, but he must reserve his opinion as to whether it might not be wiser to allow the gap—which certainly existed—to be filled by the practice of the Court.

M. ANZILOTTI having explained the economy of Article 56, as it was worded in 1922, the PRESIDENT said the Court would be most willing to examine a text if M. Schücking would be good enough to prepare it.

M. SCHÜCKING said he would submit the text as soon as possible.

16.II.35.*

Discussed as Article 56.

The PRESIDENT recalled that, to complete its examination of the Rules concerning the oral proceedings, the Court had still to consider the text proposed by M. Schücking for Article 56 of the Rules. This text was as follows:

> " If the Court, in a judgment rendered in favour of one party, decides that the other party must pay the costs of the former party, the Court will fix in its judgment a time-limit for the presentation, by the party awarded costs, of its bill of costs.
>
> " The party which has to pay the costs of the other party may require the vouchers in support of the bill to be deposited with the Registry in order that it may examine them and it may, within three months, lodge objections to the amount of the bill of costs. Should these three months elapse without an objection being lodged by the debtor party, the President of the Court will make an order fixing the amount of the costs to be paid.
>
> " In the event of an objection being lodged, the decision of the Court and the grounds on which it is based will be given in the form of an order; there will be no oral proceedings."

M. SCHÜCKING said that, in drafting his text, he had first of all asked himself at what moment special proceedings in regard to the question of costs would be possible; that could only be after the principal judgment had been delivered. Secondly, he had thought it necessary to fix a time within which the party which was to obtain payment of its costs under the terms of the principal judgment should present its bill of costs. After reflection, however, M. Schücking had thought it better that no fixed time-limit for this should be laid down in the Rules, but that a time should be indicated in the judgment. In any case, the bill would obviously, in accordance with generally accepted principles, be presented through the Registry. Thirdly, if the party called upon to bear the costs disputed the amount, it could require the vouchers in support of the bill to be deposited with the Registry for inspection by it. If, after examining these vouchers, it wished to lodge objections, the proposal was that it should be allowed three months as from the presentation of the bill in order to do so. If no objection were lodged within this time, the Registry would inform the President, and the latter would make an order—which in that case would be a purely formal one—fixing the amount of the costs to be paid. Lastly, if the parties disagreed, it seemed better that the decision should be given by the Court in the form of an order containing a statement of reasons, but without any previous oral proceedings. It was true that the main proceedings would then be terminated, but the Court's jurisdiction to render judgment certainly also comprised jurisdiction to make an order as to costs even after the termination of proceedings. In his draft, no time-limit for the making of an order by the Court was laid down. If the judges were absent from The Hague, the parties could very well wait until the next session—that was to say, at the most until February 1st of the following year—for a decision upon this matter.

The PRESIDENT understood that M. Schücking had not intended to rule out the possibility of a friendly settlement between the parties. To cover that, it would suffice to insert the words: " failing a friendly settlement between the parties ".

Baron ROLIN-JAEQUEMYNS wished for an explanation concerning the last sentence of the second paragraph of M. Schücking's proposal: The fact that no objection was lodged by the debtor party would seem to amount to tacit consent to pay. That being so, was an order by the President really necessary, since in any case it would simply be confined to confirming the agreement between the parties ?

M. SCHÜCKING said that in such case an order by the President would give the winning party a better title than a mere arrangement with the other party.

M. FROMAGEOT thought that the expression " *dépens* " (costs), as applied to proceedings before the Court, was incorrect, as the Court had no legally fixed scale of costs. It would therefore be difficult to say exactly what an " order to pay costs " in a case before the Court represented, as there were no data to go upon. Should the fees of counsel and travelling expenses be included ? In some countries these were not regarded as " costs ". On the other hand, expenses of printing, which were easily verified, might be included.

Subject to these remarks, the more detailed provisions proposed by M. Schücking were in themselves sound, especially the provision that the Court should fix a time-limit to enable the debtor party to examine the bill of costs.

M. SCHÜCKING thought that the question as to what costs were to be refunded should be left to the discretion of the Court. According to some systems of law, an order to pay costs covered not only taxed costs but also other expenses, such as the cost of an expert report prepared by a scientist.

Jonkheer VAN EYSINGA said that, when a country brought a case before the Court, it would keep an account of its expenses; this account should be examined for the purpose of fixing the costs of the proceedings.

The procedure provided for by M. Schücking seemed to Jonkheer van Eysinga very sound. Perhaps in the last paragraph, where it was provided that there would be no oral proceedings, it would be better to say that there would be written proceedings, and to lay down the number of documents constituting these proceedings; a Memorial and a Reply would probably suffice.

* D 2, A. 3, pp. 272-274.

[1] *Ibid.*, p. 875.

M. van Eysinga also asked whether, in a case where the parties disagreed and the party ordered to pay costs lodged an objection, Article 60 of the Statute would not be applicable.

M. SCHÜCKING did not think that Article 60 of the Statute had in view a dispute as to the amount of costs when it provided for a special procedure for the interpretation of a judgment. The Court, therefore, had an entirely free hand.

M. FROMAGEOT observed that it was always possible, in a judgment awarding costs against a party, to say that these costs would be fixed by means of a procedure indicated therein. Then no question either of interpretation or revision of the judgment would arise.

M. GUERRERO, Vice-President, considered that, in the quite exceptional event of a party being ordered to pay costs, it would be wiser, all things considered, to leave the fixing of the costs to be paid to the Court's discretion. He had thought of inserting a provision to the following effect:

> "Should it be decided that one party is to pay the costs of the other party, the Court will fix the amount in the same judgment."

This would present the advantage of not leaving to the parties the fixing of an amount which might be difficult to determine; of leaving the Court free to choose whatever basis it considered fair for the calculation of costs; and, finally, of not giving rise to further proceedings after the judgment.

M. SCHÜCKING was afraid that, under such a system, the Court would experience great difficulty in fixing the amount of costs, and that an award of costs would thus remain an empty gesture.

The PRESIDENT said that, in the Vice-President's suggestion that the Court should fix the amount of costs in its judgment, he saw a danger that the decision would assume the form of a penalty; at all events, it would be difficult to avoid its having that appearance.

He next asked if the Court wished to vote upon the principle underlying M. Schücking's proposals.

M. ANZILOTTI would prefer the opinion of the Court first to be taken on the question whether Article 56 should not be deleted and no reference made to the matter in the Rules.

M. URRUTIA was doubtful whether the Court, after judgment had been given and in the absence of an agreement between the parties, had jurisdiction even for questions solely relating to costs, which, in his view, appertained rather to the execution of the judgment.

M. SCHÜCKING, on the contrary, thought that the fixing of the amount of costs constituted a part of the judgment and did not come under the heading of execution. The question of the execution of a judgment would only arise if the party against which costs were awarded refused to pay. In that case, the League of Nations would intervene under the terms of the Covenant.

The PRESIDENT proposed that further discussion should be adjourned till the next sitting.

18.II.35.*

Discussed as Article 56.

M. URRUTIA recalled that, at the previous sitting, he had raised a question of principle upon which the opinion of the Court might be taken: After the Court had delivered judgment, had it jurisdiction to concern itself with the execution thereof even in so far as concerned an award of costs? Personally, M. Urrutia thought that, with the delivery of judgment, the Court's jurisdiction in the case decided was exhausted, save in the event of an application for revision or interpretation.

The PRESIDENT thought that the logical consequence of M. Urrutia's observations would be the deletion from the Rules of any article in regard to an award of costs.

M. URRUTIA thought that the fixing, in the judgment itself, of the costs to be refunded by one party to the other was possible in theory. In practice, however, would not the mention of costs in a judgment be likely to create an unfortunate impression in the case of a dispute between States? Moreover, it would, he thought, be difficult for the Court, before delivery of judgment, to discuss the amount to be paid by the losing party.

Baron ROLIN-JAEQUEMYNS observed that the main proposal of the Co-ordination Commission [1] was to restore the article as drafted in 1922. The effect of that clause, which was consistent with Article 64 of the Statute, would be to ensure that the Court, before delivering judgment, obtained sufficient information on the question of costs to be able, in principle, to arrive at a decision, or even to fix an amount.

Jonkheer VAN EYSINGA agreed that, in principle, the Court's function terminated upon the delivery of judgment. Article 64 of the Statute, however, established an exception to this rule. If, in a particular case, the Court decided in its judgment that a party must pay the costs of the other party, it would be introducing a factor which, of necessity, could not be precisely determined in the judgment itself. For this reason, M. Schücking had proposed the establishment of a special procedure designed to fill an inevitable gap. The rules suggested by him seemed, in M. van Eysinga's opinion, to be sound and practical. Moreover, Article 60 of the Statute showed that the Court could amplify a judgment if it wished to do so. In any case, M. van Eysinga thought it would be better not to delete Article 56 of the Rules, as that might create an impression that the Court, as now composed, had definitely abandoned any intention to apply Article 64 of the Statute, which, however, they had no power to abrogate. He could accept either M. Schücking's proposal or that of the Co-ordination Commission.

M. ANZILOTTI would prefer no reference to be made in the Rules to the question of an award of costs.

If, however, the Court desired to make rules governing the matter, he was convinced that this could not be done under Article 60 of the Statute. But he thought that the Court could and should fix the amount of costs in the judgment itself. As to how this should be done, one solution might be to revert to the original provision in the Rules (of 1922) ("Before the oral proceedings are concluded, each party may present its bill of costs"), adding thereto: ". . . together with vouchers in support". To this clause might be appended a paragraph to the effect that "The Court shall give its decision in the judgment after having afforded the other party an opportunity of presenting its observations." At any rate, to provide for the matter to be argued before the Court or the President, after the delivery of judgment, seemed scarcely consistent with the Statute.

* D 2, A. 3, pp. 274-279.

[1] D 2, A. 3, p. 875.

The PRESIDENT, after summarising the various proposals made, said that the Registrar had suggested to him a return to the text of the article as it had been before 1926, but with an ingenious modification linking the presentation of a bill of costs to that of a claim for payment of costs:

> " If one party prays the Court, in conformity with Article 64 of the Statute, to order the other party to refund its costs, the party making this request shall present its bill of costs before the delivery of judgment."

Replying to a question from M. Anzilotti, the REGISTRAR explained that the 1922 text was amended in 1926 as a result of a criticism made by M. de Bustamante and based on certain systems of municipal law.[1]

The PRESIDENT said that, if the various proposals were voted upon, he would begin with that for the deletion of any reference to the question of costs from the Rules.

M. GUERRERO, Vice-President, proposed that the Court should choose between the three following courses: first, the deletion from the Rules of any article concerning costs; second, the fixing of the amount of costs in the judgment; and third, the fixing of the amount by a special procedure after the delivery of judgment. Having made its choice between these three courses, the Court could leave the Drafting Committee to prepare a text.

M. URRUTIA observed that the question of an award of costs raised the question of the execution of the Court's decisions. What would happen if the party against whom costs were awarded did not pay the sum fixed ?

M. GUERRERO, Vice-President, pointed out to M. Urrutia that it was not the Court's business to make rules for the collection of costs, but only for the fixing of their amount.

M. SCHÜCKING, with reference to the suggestion that Article 56 should be entirely deleted, observed that the Statute had in view a case where justice required that the losing party should bear the costs of the other. The Rules must make express provision for the carrying-out of this principle, which was binding on the Court.

The PRESIDENT proposed that the Court should vote on the following question:

> " Does the Court decide to delete from the Rules any reference to costs ? "

Baron ROLIN-JAEQUEMYNS said that he could not commit himself to a final opinion on this question.

M. GUERRERO, Vice-President, feared the consequences which might ensue from the deletion from the Rules of any reference to the question of costs and said that he would vote against this deletion, which would be inconsistent with the duties laid on the Court by Article 30 of the Statute.

M. URRUTIA, who had no wish that an affirmative vote on the question proposed by the President should be able to be construed as an abandonment by the Court of the possibility of awarding costs against a party, suggested that it would be better to vote on the following question:

> " Does the Court decide to delete from the Rules any article concerning the fixing of costs in a case where the Court awards costs against one of the parties ? "

The PRESIDENT took a vote on M. Urrutia's question.

By nine votes to two, the Court answered the question *in the negative.*

[1] D 2, A., pp. 146 *et sqq.*

The PRESIDENT, observing that, as a result of this vote, the question of costs must be dealt with in the Rules, invited the Court to express its opinion on the method suggested by the Vice-President, consisting in the fixing in the judgment of a definite amount which the party against which costs were awarded must pay.

M. ANZILOTTI suggested the following draft:

> " Before the closure of the hearings, a party which claims that its costs should be borne by the other party shall present a bill of costs together with vouchers in support. The Court shall give its decision in the judgment after having afforded the other party an opportunity of presenting its observations."

He said that the idea of this draft was to avoid the danger pointed out by the President, and inherent in the fixing of a lump sum, of giving an award of costs the appearance of a penalty.

M. GUERRERO, Vice-President, though he regarded his own text as more flexible, was prepared to accept that of M. Anzilotti.

M. FROMAGEOT pointed out that it would be difficult for a party, unaware whether the Court was going to give judgment in its favour, to assemble sufficiently quickly the accounts of its costs to be able to produce them before the Court delivered judgment.

On the other hand, it would perhaps be possible for the Court to decide in principle in its judgment that one party should be ordered to pay costs, leaving the amount of the costs to be refunded for subsequent decision. That, after all, was the method adopted in the case of an award of damages. The Court itself had adopted this method in the Chorzów case.[1] In such cases the decision as to the amount forms part of the judgment, because it is reserved therein.

M. GUERRERO, Vice-President, observed that this method was not unknown as regards an award of costs in modern arbitration practice.

M. SCHÜCKING thought that the Court had jurisdiction, even after the delivery of judgment, to fix the amount of costs by order. But if any doubt were felt in the Court *on this point, such jurisdiction might be expressly reserved* in the judgment, as suggested by M. Fromageot.

M. ALTAMIRA raised the following point: If the Court had to fix the amount of costs in its judgment, it would have to discuss that amount with the other party, on the basis of the bill of costs presented; but, by so doing, would it not be revealing the tenor of the judgment beforehand and would it not thus deprive itself of freedom to modify its opinion up to the last moment ?

M. GUERRERO, Vice-President, considered that M. Anzilotti's proposal would not affect this point at all because, if the Court discussed the question of costs before delivering judgment, it would do so on the basis of the parties' claims and the bill of costs presented by them.

M. NEGULESCO would prefer the method proposed by M. Schücking to that advocated by the Vice-President, because, if it adopted the latter, the Court would perhaps be obliged to wait until the parties had presented all vouchers for their costs before it could deliver judgment. M. Negulesco thought, however, that, before M. Schücking's method could be adopted, the important question of jurisdiction raised by M. Urrutia must first be disposed of. *Was the Court's jurisdiction exhausted upon the delivery*

[1] See A 17, p. 64, Nos. 7-9, and pp. 99 *et sqq.*

of judgment ? He thought it was, but he added that there was nothing to prevent the Court from giving judgment on the merits, making an award of costs and reserving the amount for decision in a subsequent judgment. That was what the Court had done in an analogous case of damages —the Chorzów case—and there was no reason why the Court should not adopt the same course in regard to costs. Moreover, the two methods might be combined: *i.e.*, if on receipt of the vouchers the Court realised that there would be no dispute on the question of costs, it could both award and fix the amount of costs in the judgment; and if there were difficulties, it could adopt the method suggested by M. Schücking.

M. FROMAGEOT, at the request of the President, handed in the following text embodying the suggestion previously made by him:

> " If, in accordance with a request presented to it and in application of Article 64 of the Statute, the Court decides that one party shall bear the whole or a part of the costs of the other party, it shall record its decision in its judgment, reserving if necessary the fixing of the amount of the award until after the vouchers have been produced."

M. SCHÜCKING was prepared to accept this amendment, but was not sure that the proposed text was sufficiently explicit as regards procedure subsequent to the judgment. Might it not be supposed that the Court's decision would always be determined by the vouchers ? Whereas in reality, after receiving all the vouchers, the Court must be in a position to fix the costs awarded at a lower figure, if it saw fit. This right must be expressly reserved to the Court by the Rules.

Jonkheer VAN EYSINGA observed that, in order to overcome the inevitable difficulties involved by the fixing of an exact amount of costs in the judgment itself, M. Fromageot had proposed to reserve this point in the judgment, whilst M. Schücking proposed a procedure subsequent to judgment for the purpose of assessing costs. The two suggestions came very much to the same thing.

M. ANZILOTTI pointed out the legal difference between the two methods. M. Fromageot's suggestion was that the Court, instead of delivering a complete judgment, should reserve its decision on one point for a subsequent judgment; this would be quite consistent with the Statute.

M. FROMAGEOT, with reference to M. Schücking's fear lest the expression " after the vouchers have been produced " might be construed as implying that the Court must make an award of costs for the full amount demanded, thought that, to prevent any misunderstanding, it would suffice to draft the last sentence of his text as follows: " until after it has considered the vouchers to be produced for its inspection ". That would signify that the Court would consider whether the claim was reasonable or excessive.

M. SCHÜCKING observed that there was still no reference to the possibility of the other party disputing the amount claimed.

M. FROMAGEOT thought that it was for the Court alone to decide, without any intervention by the parties, whether and to what extent one party should be ordered to pay the costs of the other.

M. URRUTIA, observing that Article 56 of the Rules had already been amended in 1926, wondered whether it was desirable to draft a new article, seeing that the article adopted in 1926 appeared never to have been applied.

Jonkheer VAN EYSINGA shared these doubts. Moreover, he still saw no essential difference between the proposals of MM. Schücking and Fromageot, though the former offered some practical advantage over the other.

The PRESIDENT pointed out that the question now under discussion had never been raised before the Court since the coming into force of the Rules. If the Court amended the article and embodied in the Rules detailed provisions concerning the fixing of costs, it might be inferred that the Court's intention was henceforth to order the losing party to pay costs whenever it considered such payment justified. That being so, he was doubtful whether there was any sound reason for altering the existing position.

M. FROMAGEOT, for the same reason, thought that, though the existing text of Article 56 was certainly imperfect, it would perhaps be better to leave it alone. It gave rise to no real difficulty.

M. SCHÜCKING, supported by M. Guerrero, did not share this opinion, seeing that everyone agreed that the article was imperfect.

The PRESIDENT proposed that the Court should vote on the following question:

> " Does the Court decide to retain Article 56 of the Rules in its existing form ? "

The Court, by six votes to five, decided to leave Article 56 in its existing form.

The PRESIDENT said that this vote concluded the examination of the chapter concerning the oral proceedings. The Drafting Committee would therefore now be able to prepare the text of the articles in this chapter.

First and Second Readings and Final Adoption.

The article was adopted unchanged in first reading on 10.IV.35 under the number 85.

It was read a second time on 28.II.36, having in the meantime been renumbered 77, and, on 11.III.36, it was finally *adopted* unchanged.

ARTICLE 78 *(Article 66 (1), old Rules).*

REQUEST FOR REVISION: APPLICATION

23.II.35.*

Discussed as Article 66, Paragraph 1.

Turning to the articles relating to the revision and interpretation of judgments, the PRESIDENT opened the discussion upon Article 66, which contained a number of paragraphs which the Court would take in succession.

The first paragraph of the existing Article 66 was as follows:

> " Application for revision shall be made in the same form as the application mentioned in Article 40 of the Statute."

* D 2, A. 3, pp. 329-333.

The Co-ordination Commission proposed to amend this paragraph as follows: [1]

> " A request for the revision of a judgment shall be presented by means of an application as provided by Article 40 of the Statute."

M. URRUTIA asked whether a special chapter might not be devoted to revision and another to interpretation.

Jonkheer VAN EYSINGA recalled that point (1) of the existing Article 66 concerned revision, point (2) interpretation, and points (3), (4) and (5) both. The Co-ordination Commission's proposal was that these points should henceforward become separate articles. Nevertheless, as the last three articles would concern both revision and interpretation, these subjects could not be dealt with in separate chapters.

The PRESIDENT asked whether there were any objections to the amendment proposed by the Co-ordination Commission to paragraph (1) of Article 66.

M. URRUTIA did not see in what way the new draft of the Co-ordination Commission was better than the existing text.

M. SCHÜCKING, on the other hand, thought it was desirable expressly to mention the application.

The PRESIDENT observed that the word " application " was used in letter (*b*) of paragraph 2 of the existing text.

Jonkheer VAN EYSINGA thought it was a good thing to state, as the Co-ordination Commission's text did, that an application for revision could be made only in respect of a judgment.

The PRESIDENT was doubtful if there was really any advantage in inserting the word " judgment " in the text. The Court's experience had shown that it might be necessary to embody in an order a decision of the Court which, normally, would take the form of a judgment.[2] It might be as well not to exclude the possibility of an application for the revision of an order of this kind.

Jonkheer VAN EYSINGA said that the Court was bound by Article 61 of the Statute, which spoke only of judgments.

The PRESIDENT took the opinion of the Court regarding the insertion of the words " of a judgment " in paragraph 1 of Article 66.

There being no objection, he regarded the insertion of these words as approved. He said that the Court had next to express its opinion in regard to the amendment of the latter part of the paragraph:

> ". . . by means of an application, as provided by Article 40 of the Statute."

M. FROMAGEOT was not sure if the Co-ordination Commission's text was sufficiently clearly worded. In order clearly to convey the meaning intended, would it not be better to say: " by means of an application drawn up in the same manner as the application mentioned in Article 40 of the Statute " ?

Jonkheer VAN EYSINGA thought that the words " as provided by Article 40 of the Statute " might be deleted, leaving simply the mention of the fact that the request for revision must be made by way of " application ".

The PRESIDENT said that the Court might leave the Drafting Committee to draft the first paragraph of Article 66 on the basis of the views which had been expressed.

The President then proceeded with No. 1 of the existing Article 66:

> " It shall contain:
>
> " (*a*) A specification of the judgment impeached *(attaqué)*."

M. ALTAMIRA wished to substitute some other expression for the word " *attaqué* ".

M. FROMAGEOT said it was the expression commonly used in France in connection with appeals.

The PRESIDENT said that the Court might leave the Drafting Committee to find a wording for letter (*a*).

The existing text of the article continued as follows:

> " (*b*) The facts upon which the application is based ";

but the Co-ordination Commission proposed to say:

> " (*b*) Particulars of the facts upon which the application is based."

M. SCHÜCKING recalled that the principle of the Statute was that an application for revision could be made only on the basis of new facts. It was important also to emphasise this principle in the Rules.

After an exchange of views regarding the terminology of Article 61 of the Statute, which used both the word " fact " and the expression " new fact ", and as to the meaning of the latter term (an objectively new fact or a newly discovered fact), M. SCHÜCKING proposed that letter (*b*) of Article 66 should be worded as follows: " particulars of the fact discovered ".

M. GUERRERO, Vice-President, to express the same idea, proposed: " particulars as to the discovery of the fact on which the application is based ".

M. ALTAMIRA supported the modification proposed by the Vice-President, adducing his personal recollections of the opinion prevailing on this subject in the Committee of Jurists in 1920, and also with regard to the difference between the discovery of the fact which was in this sense a " new " fact and the question of its legal importance as regards the question debated between the parties.

M. ANZILOTTI, all things considered, would be in favour of leaving the existing text of the Rules. It said substantially what was intended. No doubt, according to the Statute, discovery was the principal consideration, but it must be the discovery of a fact of such a nature as to be a decisive factor. If it were desired to go into details, not merely discovery should be mentioned, but the whole of the provision in the Statute should be reproduced. Moreover, to say " the facts on which the application is based " was all that was required; it was then for the reader to refer to the Statute to see what sort of facts justified the submission of an application for revision.

M. NEGULESCO thought that, in letter (*b*) of Article 66, a reference to Article 61 of the Statute should be made for the sake of clarity.

They might say: " particulars of the facts specified in Article 61 of the Statute ".

Jonkheer VAN EYSINGA was afraid there was some confusion. The word " fact " did not mean the same thing in Article 61 of the Statute as in Article 66 of the Rules. To be precise, therefore, all that was contained in Article 61 of the Statute should be repeated in Article 66 of the Rules.

[1] D 2, A. 3, p. 878.

[2] For instance, Orders of August 19th, 1929, and December 6th, 1930. (A 22 and 24.)

M. GUERRERO, Vice-President, would prefer to say: " (*b*) the information required under Article 61 of the Statute ".

M. ANZILOTTI observed that Article 66 in its existing form was evidently not intended to cover the whole of the contents of the application. For instance, there would probably be a statement of the grounds on which it was based.

M. GUERRERO, Vice-President, amended his previous proposal as follows:

" (*b*) Full particulars concerning the conditions required under Article 61 of the Statute."

M. FROMAGEOT would prefer:

" Particulars of the new fact required under Article 61 of the Statute and on which the application is based."

Jonkheer VAN EYSINGA, referring to the second paragraph of Article 61 of the Statute, suggested the following:

" Particulars of the fact presenting the characteristics required in order to lay the case open to revision ".

The PRESIDENT read another wording prepared by the Registrar:

" The application shall contain. . . .

" (*b*) The particulars necessary to show that the conditions laid down by Article 61 of the Statute are fulfilled."

Jonkheer VAN EYSINGA was prepared to accept this wording.

The PRESIDENT considered that the Registrar's text would serve for the purpose of a vote on the question whether Article 66 should or should not contain a reference to Article 61 of the Statute. He took the opinion of the Court on the following question:

" Does the Court adopt for paragraph (*b*) of Article 66, No. 1, of the Rules, the following text:

" ' (*b*) The particulars necessary to show that the conditions laid down by Article 61 of the Statute are fulfilled ' ? "

By nine votes to two, the Court answered the question in the affirmative.

The PRESIDENT said that letter (*b*) as thus amended would be referred to the Drafting Committee.

He opened the discussion upon letter (*c*), which was worded as follows in the existing Rules:

" (*c*) A list of the supporting documents; these documents shall be attached to the application."

He added that the Co-ordination Commission proposed to delete the words: " *qui sont annexées* " (these documents . . . to the application), and to replace them by: " *copie de ces pièces doit être jointe en annexe à la requête* " (copies of these documents shall be attached to the application). This text would be very close to the English text of the existing Rules.

After a short exchange of views, the President noted that the Court adopted the text proposed by the Co-ordination Commission for letter (*c*) of Article 66, No. 1.

Turning next to the second paragraph, the President observed that the existing text ran as follows:

" It shall be the duty of the Registrar to give immediate notice of an application for revision to the other parties concerned. The latter may submit observations within a time-limit to be fixed by the Court, or by the President should the Court not be sitting."

He added that the changes proposed by the Co-ordination Commission were purely verbal.

There being no observations, the President said that the text proposed by the Co-ordination Commission for paragraph 2 of Article 66 was adopted.

Turning to paragraph 3, the existing text of which was as follows:

" If the Court, under the third paragraph of Article 61 of the Statute, by a special judgment makes the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar, and proceedings in revision shall be stayed pending receipt by the Registrar of proof of previous compliance with the original judgment and until such proof shall have been accepted by the Court ",

he said that the text proposed by the Co-ordination Commission was the following:

" If the Court makes the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar and proceedings in revision shall be stayed pending receipt by the Court of proof of compliance with the judgment."

M. SCHÜCKING observed that the existing Rules expressly provided for a special judgment recording this very important decision; there was no corresponding provision in the text proposed by the Co-ordination Commission.

M. ANZILOTTI pointed out that the judgment in question was that required under the Statute to open proceedings in revision. Seeing that it was mentioned in the Statute, perhaps the Commission had thought it unnecessary to refer to it in the Rules.

M. URRUTIA saw some advantages in the Co-ordination Commission's draft, especially in the final phrase: " pending receipt by the Court of proof of compliance with the judgment ".

The PRESIDENT noted that the Court approved the draft proposed by the Co-ordination Commission for paragraph 3 of Article 66.

8.IV.35.

Adopted in First Reading as Article 67.

The article was adopted with the following text:

" 1. A request for the revision of a judgment shall be made by an application.

" The application shall contain:

" A specification of the judgment of which the revision is desired;

" The particulars necessary to show that the conditions laid down by Article 61 of the Statute of the Court are fulfilled;

" A list of the supporting documents; these documents shall be attached to the application.

" 2. The request for revision shall be communicated by the Registrar to the other parties. The latter may submit observations within a time-limit to be fixed

by the Court, or by the President if the Court is not sitting.

"3. If the Court makes the admission of the application conditional upon previous compliance with the judgment to be revised, this condition shall be communicated immediately to the applicant by the Registrar and proceedings in revision shall be stayed pending receipt by the Court of proof of compliance with the judgment."

10.IV.35.

A decision concerning the arrangement of the articles of Heading II of the Rules resulted in a decision to place the raticles concerning requests for the revision or interpretation of a judgment in a section which would come after the section concerning judgments. The articles in question were accordingly numbered 78 to 81 and placed in a section numbered 5 in the draft in first reading, but which eventually became No. 4. (See Explanatory Note, p. IX, and, for full discussion, D 2, A. 3, pp. 461-463.)

Second Reading and Final Adoption.

Article 78 was read a second time on 29.II.36, and finally *adopted* on 11.III.36 with the text of the first reading unchanged save for a minor alteration of wording in the English of paragraph 1: the words "list of the supporting documents" being replaced by "list of the documents in support".

ARTICLE 79 *(Article 66 (2), old Rules).*

REQUEST FOR INTERPRETATION: SPECIAL AGREEMENT OR APPLICATION

23.II.35.*

Discussed as Article 66 (2).

The PRESIDENT opened the discussion on No. 2 of the existing Article 66, which was to become a new Article 66 (2); this article concerned proceedings for interpretation. The existing text of paragraph 1 was as follows:

"A request to the Court to construe a judgment which it has given may be made either by the notification of a special agreement between all the parties or by an application by one or more of the parties."

He added that the only change proposed by the Co-ordination Commission was the addition (in the French text), after the words "*en interprétation*", of the words "*d'un arrêt*" (the English text not being affected).

M. ANZILOTTI observed that if, in the preceding article, reference was made to an application "as provided in Article 40 of the Statute", the same expression should be used in this article.

There were no further observations in regard to paragraph 1.

The PRESIDENT said that the second paragraph of Article 66, No. 2, ran as follows:

"The agreement or application shall contain:

"(*a*) A specification of the judgment the interpretation of which is requested;

"(*b*) An indication of the precise point or points in dispute."

The Co-ordination Commission proposed no change in this text.

Baron ROLIN-JAEQUEMYNS observed that letter (*b*) of paragraph 2 spoke of the "points in dispute"; but the two parties might ask for an interpretation by common consent, in which case it would not really be a dispute. The Drafting Committee could perhaps find another wording.

The REGISTRAR said that, in Judgment No. 11 (the interpretation of Judgments Nos. 7 and 8—the Chorzów Factory),[1] this expression was discussed.

The PRESIDENT read the relevant passage from this judgment:[1]

"Whereas Article 35 of the Rules, which deals with an application instituting ordinary proceedings, requires 'an indication of the claim', Article 66 provides for 'an indication of the . . . points in dispute'. And whereas, in the case of ordinary procedure, Article 40 of the Rules provides for the compulsory submission of Cases containing, as an essential part, 'a statement of conclusions', Article 66 only mentions optional 'observations' and 'further explanations' to be furnished upon the invitation of the Court.

"The Court therefore considers that it should interpret the 'submissions' of the German application of October 18th, 1927, as simply constituting an indication, within the meaning of Article 66 of the Rules, of the points the meaning and scope of which are in dispute between the Parties. Construed in any other way, the application in question would not satisfy the express conditions laid down by the above-mentioned article; and the Court, as it has already had occasion to observe in previous judgments, may within reasonable limits disregard the defects of form of documents placed before it."

There were no further observations in regard to paragraph 2 of Article 66 (2).

The President turned to paragraph 3 of No. 2 of the article; the existing text was as follows:

"If the request for interpretation is made by means of an application, it shall be the duty of the Registrar to give immediate notice of such application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court or by the President, as the case may be";

and the Co-ordination Commission proposed no changes.

There were no observations.

The President read the existing text of paragraph 4:

"The Court may, whether the request be made by agreement or by application, invite the parties to furnish written or oral explanations."

* D 2, A. 3, pp. 333-334.

[1] A 13.

[1] A 13, p. 16.

The Co-ordination Commission proposed the following text for this paragraph:

" The Court may, whether the request be made by agreement or by application, invite the parties to present further written or oral observations."

Baron ROLIN-JAEQUEMYNS preferred the expression: " *supplément d'information* " (further . . . explanations) used in the existing text.

The PRESIDENT said that the Drafting Committee would note Baron Rolin-Jaequemyns' preference.

Subject to this observation, he declared the text proposed by the Co-ordination Commission for Article 66 (2) adopted by the Court.

8.IV.35.

First Reading as Article 68.

The article was adopted with the following text:

" 1. A request to the Court to interpret a judgment which it has given may be made either by the notification of a special agreement between the parties or by an application by one or more of the parties.

" 2. The special agreement or application shall contain:

" A specification of the judgment of which the interpretation is requested;

" Mention of the point or points in dispute.

" 3. If the request for interpretation is made by means of an application, the Registrar shall communicate the application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

" 4. Whether the request be made by special agreement or by application, the Court may invite the parties to furnish further written or oral explanations."

Second Reading and Final Adoption.

The article, renumbered 79 [1], was adopted in second reading on 29.II.36 and finally *adopted* on 11.III.36 with the text of the first reading unchanged.

ARTICLE 80 *(Article 66 (3), old Rules).*

REQUESTS FOR REVISION AND INTERPRETATION: FULL COURT OR CHAMBERS OF THE COURT

23.II.35.*

Discussed as Article 66 (2).

The PRESIDENT opened the discussion on Article 66 (3), which, like Articles 66 (4) and (5), applied both to applications for revision and requests for interpretation.

M. FROMAGEOT wished to know whether, in giving judgment upon a request for interpretation, the Court must be composed of the same judges as had rendered the judgment to be construed, or whether it might be differently composed.

He also asked whether the request for interpretation could relate only to the operative part of the judgment, or whether it might relate also to the grounds.

Jonkheer VAN EYSINGA said that, with regard to the first point, the Co-ordination Commission proposed a modification of the existing text, which ran: " the provisions of Article 13 of the Statute shall apply in all cases ". That provision might give rise to complications and might even be impossible to apply, since a request for interpretation might be made many years after a judgment had been rendered. In view of this difficulty and others, the Co-ordination Commission had deleted the sentence.

With regard to the second question raised by M. Fromageot, Jonkheer van Eysinga thought that it was left for the Court to decide in each particular case.

The REGISTRAR, in regard to this question, observed that the solution adopted in practice was to be found in the interpretative judgment given in the Chorzów case. In that case, the Court had decided that the interpretation might relate not only to the operative part of the judgment, but also to those portions of the grounds which constituted the essential basis of the operative provisions. In other words, according to this decision, the interpretation could not relate to mere *obiter dicta* [1]. He added that M. Anzilotti had delivered a separate opinion in which he expressed the view that only the operative provisions could be construed [2].

M. FROMAGEOT would be sorry if the Court could not settle this point in the Rules, which were designed to avert possible disputes.

The PRESIDENT read the text of Article 66 (3), which, after the Co-ordination Commission had deleted the last sentence of the existing text, ran as follows:

" If the judgment impeached or to be construed was pronounced by the full Court, the application for revision or the request for interpretation shall also be dealt with by the full Court. If the judgment was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute, the application for revision or the request for interpretation shall be dealt with by the same Chamber."

He noted that the Court approved the proposed deletion and adopted the text just read for Article 66 (3).

8.IV.35.

First Reading as Article 69.

The article was adopted with the following text:

" If the judgment to be revised or to be interpreted was rendered by the full Court, the request for its revision or for its interpretation shall equally be dealt with by the full Court. If the judgment was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute of the Court, the request for revision or for interpretation shall be dealt with by the same Chamber."

Second Reading and Final Adoption.

The article, renumbered 80 [1], was adopted unchanged in second reading on 29.II.36 and finally unchanged save for the deletion of the word " equally " as superfluous, on 11.III.36.

* D 2, A. 3, pp. 334-335.

[1] A 13, p. 21. *Cf.* p. 17.

[1] See under Article 78, p. 328, meeting of 10.IV.35.

[2] A 13, p. 23, No. 2.

ARTICLE 81 *(Article 66 (5), old Rules).*

REQUESTS FOR REVISION OR INTERPRETATION: JUDGMENT

23.II.35.*

Discussed as Article 66 (5).

The PRESIDENT read the existing text:

> " 5. Il est statué par arrêt sur les demandes en revision et en interprétation " (The Court's decision on requests for revision or interpretation shall be given in the form of a judgment),

and that of the Co-ordination Commission (which effected a change in the French text only):

> " La Cour statue par un arrêt sur les demandes en revision ou en interprétation."

There being no observations, he declared the text proposed by the Co-ordination Commission for Article 66 (5) adopted.

The President next took a vote on Articles 66 to 66 (5) of the Rules as now amended by the Court.

The Court adopted these articles unanimously.

8.IV.35.**

First Reading as Article 70.

The Registrar observed that, according to this article, the Court gave its decision upon " *la demande* " (request), whereas, according to Article 64, paragraph 5, its decision was upon " *la requête* " (application).

This difference was no doubt explained by the fact that Article 70 referred to requests submitted not only by application but also by special agreement.

The article was adopted in the form approved on 23.II.35, save for the substitution of " The decision of the Court " for " The Court's decision ".

29.II.36.*

Second Reading as Article 81.[1]

Jonkheer VAN EYSINGA said that Articles 78 to 81 corresponded to the various paragraphs of Article 66 of the existing Rules. The old paragraph 4, however, of Article 66 was no longer reproduced in the text now submitted to the Court. That article, with slight modifications, had been adopted by the Court in 1935 (see p. 256, meeting of 23.II.35), subject to the examination of certain points which was left to the Drafting Committee. In the documents, no trace was to be found of the reasons why the Committee had not considered it necessary to include this paragraph in the revised Rules.

The PRESIDENT admitted that that was a gap in the records of the work of revision. There would be no recurrence of such gaps as regards the second reading, as the Drafting Committee formed on February 28th was, in accordance with Jonkheer van Eysinga's suggestion, to accompany the text produced by it with a report.

There being no further observations, he declared Article 81 adopted in second reading.

11.III.36.

Article 81 was finally *adopted* unchanged.

ARTICLE 82 *(New Article).*

ADVISORY OPINIONS: APPLICATION OF THE PROVISIONS OF THE STATUTE AND RULES WHICH APPLY IN CONTENTIOUS CASES.

19.V.34 and 23.V.34.

See under Article 31, pp. 82 *et sqq.*, for discussion of advisory procedure in connection with Article 32 (Article 31 of Rules of 11.III.36).

28.II.35.***

Discussed without a Number.

Advisory Opinions.

The PRESIDENT proposed to devote the remainder of the meeting to a general discussion on the question whether or not any important amendments should be made in the articles dealing with advisory opinions.

M. NEGULESCO recalled that, after the proceedings of the Fourth Committee and the report made by the Co-ordination Commission, the proposed amendments were reduced to the inclusion in the Rules of an article corresponding to Article 68 of the revised Statute and of an article enumerating the rules relating to contentious procedure which would also apply always in advisory procedure.

M. SCHÜCKING, supported by M. GUERRERO, Vice-President, and M. NEGULESCO, suggested the introduction of a simplified and more or less summary procedure for opinions upon a " question ".

M. ANZILOTTI observed that what was really required was to adapt the procedure to the requirements and nature of each particular case; and that was already possible, thanks to the very flexible terms of Article 73 of the Rules.

M. URRUTIA pointed out that, so long as there was the possibility of the revised Statute coming into force, it would, of course, be premature to embody in the Rules provisions which were not consistent with those of the revised Statute.

Jonkheer VAN EYSINGA, with reference to M. Negulesco's remarks, said that the inclusion in the Rules of an article enumerating the rules concerning contentious procedure which would always apply in advisory procedure, would involve serious difficulties, especially in view of the distinction between opinions upon an existing dispute and those upon a " question ". He thought therefore that it would be better that the Court should not amend the Rules on this subject. In his view, even the inclusion of a rule corresponding to Article 68 of the revised Statute was undesirable, for the time being; moreover, it was unnecessary, because in practice the Court already followed the guidance of that article.

For the rest, Jonkheer van Eysinga thought that the present Article 73 was sufficiently flexible and gave the

* D 2, A. 3, p. 336.
** *Ibid.*, p. 443.
*** *Ibid.*, pp. 371-372.

* D 2, A. 3, p. 677.
[1] See under Article 78, p. 328, meeting of 10.IV.35.

Court a sufficiently free hand to make advisory procedure as expeditious as possible.

M. NEGULESCO, in reply to Jonkheer van Eysinga, said that the inclusion in the Rules of a provision corresponding to Article 68 of the revised Statute had been considered by the Court, on the proposal of Jonkheer van Eysinga amongst others, as early as 1931.[1] He also pointed out that the Court, by introducing the second paragraph of Article 71 of the Rules in 1927, had recognised the distinction between an opinion on a " dispute " and an opinion on a " question ", a distinction which, moreover, was made in Article 14 of the Covenant of the League of Nations.

M. URRUTIA was in favour of provisionally including in the Rules an article corresponding to Article 68 of the revised Statute.

The PRESIDENT observed that in any case it was essential to remember that the Court had been established, after the Great War, as a judicial body for the final settlement of disputes which might arise between States. In all circumstances the judicial character of the Court must be strictly preserved.

I.III.35.*

Discussed as Article 71, New Text proposed by the Co-ordination Commission.

Advisory Opinions.

The PRESIDENT gathered that, with regard to the articles concerning advisory proceedings, there seemed to be two questions of principle which the Court might consider and decide. First, there was M. Negulesco's suggestion that a provision should be included in the Rules laying down that, in advisory proceedings, the Court should as far as possible be guided by the articles relating to contentious procedure.[2] The object of this proposal seemed to be to provide a legal basis for the existing practice of the Court.

Then there was the question raised by the Co-ordination Commission in its draft[3]—namely, the proposal to include a new Article 73 *ter* designed to provide more detailed rules with regard to the written proceedings in connection with advisory opinions for which the Court was asked. The four paragraphs of Article 73 *ter*[4] constituted a development of Article 73, paragraph 2, of the existing Rules; for instance, they made the presentation of a second written statement compulsory, whereas hitherto only one was provided for, though the Court had the right, if it saw fit, to order a second one to be filed.

Jonkheer VAN EYSINGA, with regard to the questions of principle mentioned by the President, was afraid that, if the Court were to adopt these principles, the result would be to lengthen the procedure; but this was certainly not the intention.

If the Court were now to embody in the Rules Article 68 of the revised Statute, it would give the impression that the intention was to modify its advisory procedure so as to assimilate it more closely to contentious procedure. In actual fact, however, there would be no change, since the article simply confirmed present practice; but there would be a danger of misunderstandings. In particular, the consequences, from the point of view of procedure, of the distinction between the two categories of advisory opinions—those concerning " disputes " and those concerning " questions "—were not always grasped. In connection with this complex question, he referred to M. Hammarskjöld's article in *Festgabe für Max Huber* (December 28th, 1934).[1] In Jonkheer van Eysinga's opinion, the same observation applied with regard to the adoption of the Article 73 *ter* proposed by the Co-ordination Commission. The adoption of that draft—which provided that there should always be two Memorials—would destroy the whole advantage of the flexibility of the existing Article 73, No. 2, and would also, as a result of the reservation respecting agreements between agents or representatives, make it possible for States or organisations allowed to furnish information to direct to some extent the procedure; this was inadmissible in advisory proceedings.

M. NEGULESCO could not agree with Jonkheer van Eysinga. It was most important that Article 71—which simply reproduced the terms of Article 68 of the revised Statute—should be embodied in the Rules. All it did was to confirm the practice of the Court, which had always held that, even when giving an opinion, it was acting as an independent judicial body, with its own special rules of procedure and having powers which it could exercise only within the limits of its jurisdiction. It was essential to its existence that it should exercise no secret function. This provision would serve the purpose of a legal basis for future practice.

M. Negulesco thought that the Court would be ill advised to refuse to include in the Rules a provision similar to Article 68 of the revised Statute.

M. URRUTIA observed that the results of the work of revision upon which they were engaged would be published only after a second reading. There would therefore be no objection to the provisional inclusion in the Rules of the provisions of Article 68 of the revised Statute; if the revised Statute did not come into force, these provisions could, if necessary, be replaced by others.

M. ANZILOTTI saw no objection to the inclusion in the Rules of the Article 71 proposed by the Co-ordination

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* D 2, A. 3, pp. 372-377.

[1] D 2, A. 2, p. 294 (Nos. 25 and 27).

[2] Article 71 of the Co-ordination Commission's text, which was as follows:

" In addition to cases specially provided for by the present Rules, the Court shall be guided, in the exercise of its advisory functions, by the provisions of the Statute and of the Rules which apply in contentious cases to the extent to which it recognises them to be applicable."

[3] D 2, A. 3, pp. 880 and 881.

[4] This article was as follows:

" 1. Subject to any agreement to the contrary between the agents or representatives of States or organisations taking part in the proceedings ensuing upon a request for an advisory opinion, each such State or organisation shall submit to the Court written observations within the time-limit fixed by an order made under Article 33 of the Rules and, subsequently, within a time-limit similarly fixed, a second statement commenting upon the first observations filed by the other State or interested organisation.

" 2. Each of these statements shall present in detail the views of the State or interested organisation and its submissions. A copy of every document cited in the statement or on which the views presented are based shall be annexed to the statement in question, and a list of these documents shall be included following the submissions.

" 3. Should one of such documents be very voluminous, it will suffice to print the relevant extracts therefrom, but in that case a copy of the whole document must be communicated to the Registrar for the use of the Court and of the other States or interested organisations, unless the document has been published and is of a public character.

" 4. Any document submitted amongst the annexes and presented in a language other than French or English must be accompanied by a translation into one of the official languages of the Court."

[1] " Quelques aspects de la fonction consultative de la Cour permanente de Justice internationale " (*Festgabe für Max Huber zum sechzigsten Geburtstag, 28. Dezember 1934;* Zürich, Schulthess & Co., 1934; pp. 146-166).

Commission, which was simply a reproduction of Article 68 of the revised Statute, since it merely amounted to the recognition and confirmation of the Court's practice.

For the rest, he preferred the last paragraph of the existing Article 73 of the Rules to the Article 73 *ter* proposed by the Co-ordination Commission. The advantage of the existing rule was that it left the Court a wide measure of discretion and enabled it to adapt the procedure to the needs of each particular case. The Co-ordination Commission's proposal seemed to stereotype the procedure and diminish the latitude left to the Court.

The PRESIDENT was personally in favour of the inclusion of the Article 71 proposed by the Co-ordination Commission in the Rules, for the following reason: there were a series of articles relating to contentious procedure which the Court in practice applied by analogy to advisory procedure. But so far there had been nothing in the Rules affording a legal basis for this practice. This legal basis would be supplied by the insertion of the proposed Article 71 in the Rules.

As regards the Article 73 *ter* proposed by the Co-ordination Commission, the President agreed with M. Anzilotti. That text would make a second written statement compulsory, unless the agents agreed not to present one. This might adversely affect the flexibility and rapidity of the procedure.

The REGISTRAR wished to advert to certain opinions which had been expressed in the Co-ordination Commission and in the Court regarding the inclusion in the Rules of a provision corresponding to Article 68 of the revised Statute.

In the first place, underlying the inclusion of this article in the revised Statute was the desire in the United States to bind the Court, by means of a statutory provision which it had no power to modify, to observe the well-known principle which it had enunciated in the Eastern Carelian case. The insertion of a corresponding provision in the Rules would not have the desired effect, because the Court could always amend its Rules.

In the second place, the really important point about Article 68 of the Statute was that it clearly stated that, even in advisory cases, the final decision as to its jurisdiction rested with the Court. But, placed in the Rules, Article 68 of the revised Statute was ineffective in this respect because nothing could be laid down in the Rules concerning the Court's jurisdiction, which was derived either from the Statute or from an agreement between the parties.

Thirdly, the system adopted in the Rules was not to include anything already contained in the Statute. If, therefore, Article 68 of the revised Statute was included in the Rules and if the revised Statute came into force, it would once more have to be deleted in order to avoid overlapping between the Statute and Rules. It was true that at the moment the Court was working on the basis of the existing Statute; but it was also true that in its work it had been able, in practice, to apply Article 68 of the revised Statute without inserting it in the Rules.

M. SCHÜCKING thought that, if they kept to the decision to base the revision of the Rules on the existing Statute, and to adapt the Rules to the Court's practice, it seemed necessary to insert Article 68 of the revised Statute in the Rules and slightly to alter some other articles concerning advisory procedure.

Count ROSTWOROWSKI did not think that the same considerations applied with regard to the inclusion in the Rules of Article 68 of the revised Statute and that of the Article 73 *ter* proposed by the Co-ordination Commission. As regarded the former, which formed a sort of introduction to the chapter concerning advisory opinions, Count Rostworowski agreed with the President: it would be most useful. On the other hand, he thought that Article 73 *ter*, which amplified and complicated the procedure, might hamper the Court in the future and that it would be better not to adopt it.

Again, if the Court simply inserted Article 68 of the revised Statute as it stood in the Rules, it would appear to be placing opinions upon a " dispute " and opinions upon a " question " on the same footing and would create the impression that requests for opinions upon " questions " must necessarily be treated in the same way as contentious cases. To overcome this objection, Count Rostworowski suggested that they should add to the text proposed by the Co-ordination Commission the following sentence: " the application of this article to advisory opinions upon a question is reserved ". This addition would enable the Court in the future to make the procedure for an opinion upon a " question " more flexible and expeditious.

M. ANZILOTTI observed that the proposed Article 71 ran: " The Court shall be guided . . . by the provisions of the Statute and Rules which apply in contentious cases to the extent to which it recognises them to be applicable." If the Court were giving an opinion on a " question ", it would hold that certain provisions were not applicable. There would be a risk that the distinction suggested by Count Rostworowski between opinions on a " question " and opinions on a " dispute " would not be very clearly understood. Moreover, the Court must not give the impression that it intended to deal with opinions on a " question " by some non-judicial method.

Jonkheer VAN EYSINGA agreed that the phrase " to the extent to which it recognises them to be applicable " made it possible for the Court in practice to deal with opinions on a " question " differently from opinions on a " dispute ".

M. GUERRERO, Vice-President, thought that the inclusion in the Rules of the Co-ordination Commission's Article 71—*i.e.* Article 68 of the revised Statute—would serve two purposes: it would codify practice and it would let it be known by States concerned in a case referred to the Court for advisory opinion that the case would be examined under the same conditions as governed the procedure in contentious cases. On the other hand, M. Guerrero thought that the amendment proposed by Count Rostworowski should not be adopted, because it was important to keep to the terms of Article 68 of the revised Statute.

As regarded the Article 73 *ter* proposed by the Co-ordination Commission, M. Guerrero thought that it should be examined paragraph by paragraph, before it was decided to adopt any or all of it.

Count ROSTWOROWSKI was prepared to vote in favour of the inclusion of Article 71 of the Co-ordination Commission's text as it stood and to withdraw the addition which he had proposed.

With regard to the suggestion that the Co-ordination Commission's Article 73 *ter* should be examined in detail in order to see whether some particulars might not be embodied in the corresponding provision of the existing Rules, Baron ROLIN-JAEQUEMYNS thought that, by doing this, the Court would be embarking on a far-reaching attempt at reform which would perhaps be superfluous and even dangerous.

The PRESIDENT took a vote on the following question:

" Does the Court decide to insert the following provision in Heading 2 of Chapter II of the Rules: [for text see footnote 2, p. 331.]

By eight votes to one, the Court answered this question in the affirmative.

The PRESIDENT, with regard to the second question alluded to at the beginning of the sitting, observed that the new Article 73 *ter* concerned the same questions as were dealt with in the existing Article 73, No. 2, of which it was simply an extension. The President therefore thought that the Court could express its opinion on the question of principle without for the moment entering upon a detailed discussion.

M. SCHÜCKING thought that a provision might be inserted here to the effect that, in the case of an urgent request for an opinion upon a " question ", the time allowed for the filing of written observations should never exceed fifteen days. That would expedite the procedure. In the same way, it might also be provided that the parties would never be allowed to present to the Court both a written Memorial and an oral statement in the case of an urgent request for an opinion on a " question ".

M. GUERRERO, Vice-President, also thought that the Court might make some changes in Article 73 with a view to differentiating, as regards procedure, between opinions upon a " dispute " and opinions upon a " question ". For instance, the possibility of having two written statements might be maintained in the case of opinions upon a " dispute ", but not in the case of opinions upon a " question ".

M. ANZILOTTI was afraid that a provision of that kind would unnecessarily tie the Court's hands. Under the existing article, the Court could proceed as suggested, if it saw fit, having regard to all the circumstances of the case. If M. Guerrero's suggestion were adopted, it would perhaps be obliged to dispense with a second written statement in a case where it might think it desirable to have one.

Baron ROLIN-JAEQUEMYNS was not in favour of the distinction which it was sought to establish between opinions on a " dispute " and opinions on a " question ". The essential thing was to leave the Court as free a hand as possible to act in accordance with circumstances. It was therefore better not to proceed on the lines of the Co-ordination Commission's Article 73 *ter*.

The PRESIDENT suggested that the Co-ordination Commission's text might be rejected, without, however, ruling out the insertion in Article 73 of the existing Rules of such amendments as members of the Court might see fit to introduce.

After taking the opinion of the members of the Co-ordination Commission present, he noted that they did not press the adoption of Article 73 *ter*.

The President then asked the Court whether they decided against the adoption of the Co-ordination Commission's Article 73 *ter*.

The Court unanimously answered the question in the affirmative.

The PRESIDENT asked the members of the Court whether they had any amendments to propose in regard to the other articles concerning advisory procedure.

There being no further amendments, the President suggested that the Court should allow him, with the assistance of a Committee, to examine Articles 71 to 74 of the Rules and subsequently to submit to the Court a revised text, taking into account the trends of opinion expressed during the discussion.

M. URRUTIA requested the future Committee to consider the advisability of retaining the existing text of Article 72 rather than of replacing it by the text proposed by the Co-ordination Commission [1]; he also suggested that it might consider the best arrangement of the various provisions in Articles 71 to 74, and likewise the wording of paragraph 2 of the existing Article 73.

Baron ROLIN-JAEQUEMYNS observed that, generally speaking, the Committee would no doubt take as its basis the existing text of the Rules and not the text of the Co-ordination Commission.

The PRESIDENT said that it was understood that the Committee would examine all the articles concerning advisory procedure. When the time came, a short report would be submitted to the Court indicating all the amendments which the Committee thought it desirable that the Court should consider.

7.III.35.*

Advisory Opinions. Report of the Study Committee.

The PRESIDENT drew the Court's attention to the report of the Study Committee and the draft provisions concerning advisory opinions appended thereto.[2] For an explanation of these drafts, the President referred them to the commentaries embodied in the report.

Article 71 [3].

Count ROSTWOROWSKI, whilst paying tribute to the work of the Study Committee, whose proposals were strictly in accordance with the votes previously recorded by the Court, felt obliged to observe, with regard to the text as a whole, that, according to that text, advisory procedure in regard to a " question " would necessarily follow the lines of contentious procedure, for no reservation was made respecting advisory opinions of this class.

Of course, it had been said that the terms of the proposed Article 71 were so wide that the Court could, do as it liked. Perhaps that was true, but it was also true that parties did not know what the attitude of the Court would be. It might therefore happen that States would imagine that the Court had only one sort of advisory procedure and that that very closely followed contentious procedure. That was why, in Count Rostworowski's view, there should be some reference in the Rules to the fact that, in the case of an opinion upon a " question ", the Court intended to reserve the right to adopt a special method of procedure, for instance with regard to the communications to be made to States.

M. GUERRERO, Vice-President, supported what Count Rostworowski had said. Like him, he thought that some differentiation should be made in the Rules between pro-

* D 2, A. 3, pp. 408-415.

[1] The Commission's text was as follows:

" The original of a request for an advisory opinion shall be signed by the President of the Assembly or by the President of the Council of the League of Nations, or by the Secretary-General of the League of Nations. It shall be transmitted by the latter to the Court."

[2] See D 2, A. 3, Annex 3, p. 926. For the composition of the Committee, see *idem*, p. 407, under: " Further programme of work."

[3] The text proposed by the Study Committee was that drafted by the Co-ordination Commission; see p. 331, footnote 2.

cedure in regard to opinions upon a " dispute " and upon a " question ". The main object of the Rules was to let States know how they should proceed before the Court. The confusion prevailing between the procedure applicable in the case of an opinion on a question and that applicable in the case of an opinion on a dispute was likely to increase the difficulty of submitting cases to the Court for advisory opinion.

M. NEGULESCO considered that the Court could choose between two methods: it might either refer the question back to the Committee, asking it to prepare a text differentiating between opinions on a " question " and those on a " dispute ", or else it might simply vote in first reading on the text submitted by the Committee and leave until the second reading the discussion of this distinction, which was of great importance both to the Court and to interested parties.

M. ANZILOTTI suggested that members of the Court who considered that a distinction should be made between the procedure applicable in the case of opinions upon a " dispute " and that applicable in the case of opinions upon a " question " might submit a draft representing their views.

M. NEGULESCO referred to the proposals previously submitted by the Fourth Committee.[1]

M. ANZILOTTI, for his part, preferred the draft now before the Court. Though it might be possible in a particular case to differentiate between the two categories of opinions, it was on the other hand very difficult to lay down general rules governing the matter.

M. NEGULESCO observed that Article 71, paragraph 2, of the existing Rules drew this distinction.

M. ANZILOTTI thought that that article simply left it to Court to draw the distinction in each particular case.

Moreover, the case contemplated in Article 71, paragraph 2, was that of an " existing dispute between two or more States or Members of the League of Nations ". That was an entirely different thing from a theoretical distinction between a so-called opinion on a " dispute " and a so-called opinion on a " question ".

M. GUERRERO, Vice-President, did not think that there was any need to embody in the Rules a definition applicable in all cases, but simply to provide for two different procedures between which the Court would choose whenever an actual case came before it.

M. ANZILOTTI observed that Article 73, the terms of which were very flexible, made it possible to adapt the procedure to the requirements of different cases. This would be done on the basis of the information obtained by the President and that furnished to him by the agents of the interested Governments at the conversation provided for in Article 33 of the revised Rules. This would certainly suffice to enable the procedure to be adapted to the special characteristics of the opinion asked for.

Jonkheer VAN EYSINGA pointed out that the Study Committee had confined itself to putting Articles 71 to 74 into final shape on the basis of the votes recorded by the Court. As he had already observed at the first discussion on the subject of advisory opinions, on March 1st, 1935,[2] the proposed Article 71 might be construed as indicating that the procedure for contentious cases would be followed automatically and likewise in the case of an opinion upon a " question "; but that was certainly not the intention of the Court. Moreover, the Court could always make use of Article 73, which possessed all the requisite flexibility.

The PRESIDENT, in view of what had been said by Count Rostworowski and supported by the Vice-President and M. Negulesco, proposed that the Court should vote upon the following question:

> " Does the Court wish the Rules to prescribe two distinct procedures for advisory opinions: one for opinions on a ' question ' and another for opinions on a ' dispute ' ? "

Count ROSTWOROWSKI thought that this question went too far in saying: " prescribe two distinct procedures ". What was required was simply to establish the distinction between the two categories of opinions in the Rules themselves, by inserting a reservation so as to warn interested parties.

Count Rostworowski recalled that, in the course of the discussion on March 1st, he had suggested in this connection that the words " the case of advisory opinions upon a question is reserved " should be added to Article 71. This suggestion, however, had not met with approval, and he had withdrawn it.[1] Nevertheless, it showed that Count Rostworowski's idea was not to lay down a special procedure for opinions upon a " question ", but simply to leave open the possibility of arranging such a procedure.

M. SCHÜCKING observed that in practice the Court had already established a very definite distinction between opinions on a " question " and opinions on a " dispute "; but, on reading the text submitted by the Study Committee, one found no trace of this distinction except the provision in Article 73 *bis* regarding judges *ad hoc*. In particular, the rule concerning the invitation to be sent to States " likely to be able to furnish information " was inadequate in advisory cases in which States appeared as parties before the Court. The Court might appoint a committee to submit to it concrete proposals with a view to filling the gaps at present existing.

M. NEGULESCO recalled that an authoritative interpretation of Article 68 of the revised Statute—which corresponded to Article 71 of the draft—had been given by the signatories of the Protocol of the Permanent Court of International Justice assembled at Geneva for the Conference of 1929.

M. Fromageot, the French delegate, had spoken as follows at the Conference regarding the interpretation of Article 68 of the revised Statute: [2]

> " When the Court or anyone else was asked for an advisory opinion, it was essential, if this opinion was to have any value, for the person consulted to have all the relevant documents and information at his disposal. In contentious cases, when a decision had to be pronounced, the procedure naturally had to provide for both parties to be heard. Both parties stated their case, and the judges therefore had all the arguments before them. The same ought to be the case in advisory opinions.
>
> " When an advisory opinion was asked for, the latter could have no value unless the person consulted could know all the relevant facts of the case in the same way as in contentious cases; he should know the arguments of both parties and both parties should adduce their evidence.

[1] D 2, A. 3, p. 782.
[2] See p. 331.

[1] See p. 332.
[2] Document of the L. N. C.514.M.173.1929.V, p. 48.

> " It would be quite useless to give an advisory opinion after hearing only one side. For the opinion to be useful, both parties must be heard. It was therefore quite natural to lay down in the Statute of the Court that, in regard to advisory opinions, the Court should proceed in all respects in the same way as in contentious cases."

M. Politis (Greece) had asked that it should be recorded in the minutes that Article 68 should definitely be taken in the sense just indicated by M. Fromageot. The President of the Conference said that M. Fromageot's observation would be inscribed in the minutes and would naturally be taken into account. On September 12th, 1929, the President had addressed to the President of the Assembly, in lieu of a report, a letter containing the foregoing declaration.[1]

Now, in M. Negulesco's opinion, this declaration related to advisory opinions in connection with contentious cases —*i.e.*, opinions upon a " dispute ". It did not concern opinions upon a " question " given in non-contentious cases. In the former, there were " parties " which appeared before the Court, and the provisions relating to contentious procedure were applicable, including Article 31 of the Statute. In the case of an opinion upon a " question "—*i.e.*, an opinion on a non-contentious subject—there were no parties but simply informants, and the provisions of Article 31 of the Statute were not applicable.

In conclusion, M. Negulesco supported the proposal to the effect that a committee composed of a few judges should be appointed to prepare a new draft.

M. URRUTIA thought that the Court should not at the moment deviate from the terms of Article 68 of the revised Statute, which had been approved by an international conference of the signatory Powers and by the League of Nations. When they undertook the second reading of the revised Rules and knew whether the revised Statute was coming into force or not, the question of the distinction between opinions on a " question " and opinions on a " dispute " would assume quite a different aspect. It would therefore be better to leave it open until the second reading.

M. GUERRERO, Vice-President, did not think that the introduction into the Rules of a distinction between the procedure in the case of opinions upon a " dispute " and that in the case of opinions upon a " question " was inconsistent with Article 68 of the revised Statute, which laid down that contentious procedure should be applied in the case of advisory opinions " to the extent to which the Court recognises it to be applicable ", and which thus gave the Court every latitude.

The PRESIDENT observed that Count Rostworowski's idea seemed to be that the provisions of the Rules should be confined to the case of opinions upon a " dispute ", the procedure to be adopted in the case of opinions upon a " question " being left unregulated in the Rules. Of course the Court would probably apply some provisions of the Rules in such cases; but States would not be told which.

Count ROSTWOROWSKI agreed that that was his idea. It was desirable to make it possible for the Court, in proceedings connected with a request for an opinion upon a " question ", to modify the normal procedure, but without indicating in what way it would be so modified; States should simply be informed beforehand that they might expect some modifications to be made.

[1] Document of the L. N. C.514.M.173.1929.V, p. 78, Annex 10.

M. GUERRERO, Vice-President, wanted to go further than Count Rostworowski and to proceed at once to work out the procedure to be followed in the case of opinions upon a " question "; but it would simply be a matter of fixing the procedure without defining the cases in which it would apply.

Jonkheer VAN EYSINGA observed that, when a State took part in proceedings before the Court, the communications which it would receive from the Court would keep it sufficiently informed regarding the details of the procedure. And the last words of the proposed Article 71 would afford the Court all the necessary latitude. The whole question was whether the new text might not give the false impression that advisory proceedings would always follow the lines laid down in the case of an opinion on an existing dispute. Jonkheer van Eysinga suggested that, in order to avert this danger, Article 71 might be worded as follows:

> " In circumstances other than those specially provided for by the present Rules, the Court shall be guided, in the exercise of its advisory functions, by the provisions of the Statute and of the Rules which apply in contentious cases to the extent to which it recognises them to be applicable, on the one hand, to opinions asked for upon a matter concerning an existing dispute between two or more States or Members of the League of Nations and, on the other hand, to opinions asked for upon a question."

To go further did not seem expedient at the moment.

M. FROMAGEOT submitted the following draft, observing that it closely resembled that proposed by Jonkheer van Eysinga:

> " Subject to the provisions of this heading, the Court shall be guided in the exercise of its advisory functions by the general provisions of the Statute and of the Rules to the extent to which it recognises them to be applicable, according as it is asked for an opinion on a dispute or on a question."

M. Fromageot added that he had substituted the words " general provisions " for the expression " provisions which apply in contentious cases ", because the latter seemed to him in itself to imply a tendency to assimilate all advisory opinions, including opinions upon a " question ", to contentious cases.

Count ROSTWOROWSKI drew the attention of M. Fromageot and Jonkheer van Eysinga to the fact that, according to their proposals, only in circumstances other than those specially provided for by the Rules would the distinction between the procedure in the case of an opinion upon a " question " and that in the case of an opinion upon a " dispute " operate. It would be better if the last part of both these proposals were made to follow immediately after the words: " In circumstances other than those specially provided for by the present Rules ", in order to make it clear that this part of the provision governed the whole matter.

M. FROMAGEOT suggested that the articles which applied particularly to opinions upon a dispute—Article 73 and Article 73 *bis*—should begin with the words: " When the question upon which an advisory opinion is sought relates to an existing dispute. . . ."

M. GUERRERO, Vice-President, was afraid that, from a practical point of view, the modification proposed by Jonkheer van Eysinga and M. Fromageot would not suffice. Supposing that a request for an advisory opinion were

submitted to the Court at a time when it was not in session, who would decide which of the two possible procedures the first steps to be taken were to follow? It would at all events be necessary, for instance, to give the President of the Court special authority if the Court should not be in session.

M. NEGULESCO said that the proposal made by Jonkheer van Eysinga and M. Fromageot corresponded precisely to the ideas of the Fourth Committee which, in applying the provisions of the Statute and Rules to advisory procedure, differentiated between opinions on a " dispute " and those on a " question ". Accordingly, he supported the proposal of Jonkheer van Eysinga and M. Fromageot. Nevertheless, in order to avoid misunderstanding, which he was afraid might result from the fact that Article 71 began with the words: " In circumstances other than those specially provided for by the present Rules ", and that, consequently, if no rule were laid down, the Court appeared to be at liberty to apply or not to apply any particular provision relating to contentious procedure, M. Negulesco proposed to go one step further and to enumerate all the rules which would invariably apply to advisory procedure and all those which would invariably apply to an opinion upon a " dispute ".

This course had been proposed by the Fourth Committee, which, after giving the substance of Article 68 of the revised Statute, went on to enumerate, in a second paragraph, the rules which were always applicable to every kind of opinion and those which were specially applicable to opinions on a " dispute ".[1]

M. ANZILOTTI recalled that the Court had decided to embody the new Article 71 in the Rules, on the understanding that that article would contain the text of Article 68 of the revised Statute. Now it was proposed to modify this article in a way inconsistent with Article 68, which did not differentiate between general and special provisions—between opinions on a " question " and those on a " dispute ". In effect, it was now sought to introduce an entirely new article, notwithstanding the fact that the revised Statute might quite possibly come into force. M. Anzilotti was unable on principle to concur in this proposal, especially seeing that the rules corresponding to the new Articles 71 and 72 had hitherto functioned satisfactorily both for so-called opinions on a " dispute " and for so-called opinions on a " question ". Incidentally, the difference between these two kinds of opinions was not so great as it was now sought to make out. In any case it did not warrant leaving opinions on a " question ", so to speak, outside the Rules and outside the sphere of application of judicial procedure.

The PRESIDENT wished to read the following passage from the report adopted by the Committee of Jurists which sat at Geneva in 1929 in regard to the revision of the Statute:[2]

> " It [the Committee] also proposes that a final article numbered 68 should be added to this chapter in order to take account of the fact that the Court may be called upon to give advisory opinions both in contentious and in non-contentious matters. The effect would be that, in the former case, the Court would apply the provisions relating to contentious procedure referred to in the previous chapters of the Statute, whereas those provisions would not always be applicable when the Court gave an opinion on a non-contentious matter. Thus, for example, Articles 57 and 58 should apply in all cases, but Article 31 (*ad hoc* judges) would apply only when an advisory opinion was asked on a question relating to a dispute which had already arisen."

This passage seemed to show that the Committee considered that the new Article 68 which it proposed would suffice to meet all contingencies.

Furthermore, the President asked whether, supposing that a definite distinction was made in the Rules between an opinion on a " question " and an opinion on a " dispute " and that different rules were laid down for each of them, it would not be necessary to establish a special preliminary procedure to decide the question whether an opinion sought related to a " question " or to a " dispute ". Would that be calculated to expedite the procedure?

Jonkheer VAN EYSINGA considered that neither his proposal nor that of M. Fromageot was inconsistent with the passage quoted by the President from the report of the 1929 Committee of Jurists. Moreover, the possibility of having to arrange a preliminary procedure to decide whether an opinion was upon a " question " or upon a " dispute " already existed, as was shown by experience. With regard to the proposed drafts, Jonkheer van Eysinga preferred that of M. Fromageot, provided that the latter did not insist on using the expression: " the general provisions of the Statute and Rules ", which did not appear in Article 68 of the revised Statute.

M. FROMAGEOT explained that he had used this expression chiefly in order to avoid limiting the scope of the article to those provisions of the Statute and Rules which applied to contentious proceedings. If, however, the Court held that there was no objection to the corresponding expression used in Article 68 of the revised Statute, let it be retained. He wished, however, to add the provision at the end of the draft proposed by him, because there were some provisions in regard to contentious proceedings which were inherently inapplicable in the case of an opinion upon a " question ". For the rest, the distinction made between opinions on a question and opinions on a dispute was merely a reproduction of the terms of Article 14 of the Covenant.

M. ANZILOTTI observed that this distinction, from which certain important consequences might be deduced, did not appear in the Statute. The essential point, however, in his view, was that opinions upon a " question ", as opposed to opinions upon a " dispute ", had never been defined.

M. GUERRERO, Vice-President, considered that the passage from the report of the 1929 Committee of Jurists, which the President had read, tended to confirm the desirability of embodying in the Rules, as he and some other judges had suggested, a provision indicating that, in the opinion of the Court, there was a distinction between opinions upon a " dispute " and opinions upon a " question ", and that distinct procedures must be arranged for the two kinds of opinion. Further, the passage referred to clearly showed that there was no inconsistency between Article 68 of the revised Statute and the distinction which it was proposed to make in the Rules. Again, though the wording of Article 68 was adequate in the Statute, which simply laid down principles, it was not so in the case of the Rules.

In conclusion, M. Guerrero suggested that the Court should proceed to vote on the article in the form proposed by Jonkheer van Eysinga and amended by M. Fromageot.

[1] *Cf.* D 2, A. 3, p. 786.
[2] Document of the L. N. C.166.M.66.1929.V, p. 125.

and that, if a majority was in favour of this text, the question of the working out of a special procedure for opinions upon a " question " should be left until the second reading.

The PRESIDENT, who thought it would be better to have successive votes on the points of principle, proposed that the Court should vote on the following question, which he had already suggested:

> " Does the Court decide that the Rules shall comprise two distinct procedures for advisory opinions, one for opinions on a question and the other for opinions on a dispute ? "

M. NEGULESCO asked what was meant by " distinct procedures "; for, even under the present system, the two procedures were distinct. He also suggested that, rather than vote at once, it would be better to ask MM. Guerrero, Schücking, Count Rostworowski and himself to submit to the Court a draft representing their views on this point.

The PRESIDENT said that by " two distinct procedures " he meant two series of provisions in the Rules, one applicable to opinions on a " question " and the other to opinions on a " dispute ".

By seven votes to three, the Court answered the President's question in the negative.

The PRESIDENT noted that Count Rostworowski had withdrawn the suggestion made by him at a previous sitting to the effect that a reservation respecting opinions on a " question " should be added to the new Article 71.

M. ANZILOTTI had understood that Count Rostworowski, though he had withdrawn this suggestion, had proposed that something should be added to the articles of the Rules relating solely to opinions on a dispute indicating that they applied only to such opinions. M. Fromageot had thought that this idea might be carried out by adding at the beginning of Article 73 some such words as: " in the case of an opinion upon a dispute . . .". M. Anzilotti, however, thought that the insertion of these words would have very serious consequences, because the result would be that the Rules would no longer contain a single provision relating to opinions upon a " question ".

Count ROSTWOROWSKI said that he could accept the idea underlying the drafts proposed by M. Fromageot and Jonkheer van Eysinga, which was that some words differentiating between the two kinds of opinion should be added to Article 71, but without otherwise modifying the Rules.

Jonkheer VAN EYSINGA read a draft upon which he and M. Fromageot had agreed:

> " Subject to the provisions of the present heading, the Court shall be guided, in the exercise of its advisory functions, by the provisions of the Statute and of the Rules which apply in contentious cases to the extent to which it recognises them to be applicable, according as it is asked for an opinion on a dispute or on a question."

The PRESIDENT took a vote on this text, which was approved by seven votes to three.

The PRESIDENT said that the text thus adopted would replace the Article 71 submitted by the Study Committee.

10.IV.35.*

Adopted in First Reading as Article 78.

M. ANZILOTTI said he might have some further observations to make at the second reading in regard to the last part of Article 78, with which he did not feel satisfied.

The PRESIDENT took note of this statement.

Count ROSTWOROWSKI asked if the word " present " should not be inserted in the third line of the article, in accordance with the general rule that had been observed.

After a short exchange of views as to the desirability of employing this expression, the PRESIDENT put the following question to the Court:

> " Does the Court decide to insert the word ' present ' before the word ' Rules ' in the third line of Article 78 ? "

The Court answered the question in the affirmative by nine votes to two.

As the result of a proposal made by MM. Negulesco and Fromageot, the PRESIDENT announced, after a discussion, that, whenever the Statute was cited for the first time in any article of the revised Rules, the expression " Statute *of the Court* " should be employed. The Registrar was instructed to see that effect was given to this decision in the printed text of the revised Rules.

As no other observation was offered, Article 78 was adopted in first reading with the amendment which had just been voted.[1]

2.III.36.*

HEADING III. — PROCEDURE IN CONNECTION WITH ADVISORY OPINIONS

Article 82.[2]

The PRESIDENT read the text of Article 82, as adopted at the first reading, with the alterations that had been thought necessary as a result of the coming into force of the revised Statute:

> " Subject to the provisions of Chapter IV of the Statute and to those of the present heading of the Rules, the Court shall be guided in the exercise of its advisory functions by the provisions of the present Rules, applying in contentious cases, to the extent to which it recognises them to be applicable, according as it is asked for an opinion on a ' dispute ' or on a ' question '."

M. ANZILOTTI asked whether the reservation made in the first line in regard to the provisions of the Statute was necessary.

M. FROMAGEOT observed that the procedure in advisory cases had previously been laid down in the Rules; as the provisions of the Rules relating thereto had since been inserted in the revised Statute, this procedure was now governed by the Statute. It would not be fitting to reproduce the same provisions in the Rules of Court.

On the other hand, it was desirable that the text of the Rules should inform the reader as to the procedure to be observed in proceedings connected with advisory opinions; it therefore seemed proper to mention in Article 82, in an incidental phrase, that the procedure in advisory cases was governed by the Statute.

It appeared, further, desirable to allude to Article 14 of the Covenant in order to throw light on the use of the two expressions: advisory opinion on a " question " and advisory opinion on a " dispute ".

* D 2, A. 3, p. 456.

* D 2, A. 3, pp. 678-684.

[1] Text adopted was the same as that approved at the meeting on 7.III.35 (see above) save for the insertion of the word " present ".

[2] For explanation of change of numbering, see Explanatory Note, pp. VIII-IX.

M. Fromageot then submitted the following text:

> " In proceedings in regard to advisory opinions, in which the procedure is regulated by the provisions of Chapter IV of the Statute of the Court, the Court shall apply the provisions of the present Rules which apply in contentious cases to the extent to which it recognises them to be applicable, according as the advisory opinion for which it is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a ' dispute ' or to a ' question '."

M. ANZILOTTI said that the distinction between advisory opinions on a " question " and advisory opinions on a " dispute " had now assumed a novel and more complicated aspect.

For the revised Statute had laid down the procedure without making any such distinction. That being so, was it possible to make the distinction in the Rules ?

M. FROMAGEOT observed that Article 68 of the Statute concluded with the words: ". . . to the extent to which it [the Court] recognises them to be applicable ". The Court, in considering how far the provisions relating to contentious procedure would be applicable to advisory procedure, had reached the conclusion that a distinction would have to be made according as the matter at issue was a " question " or a " dispute ". It must indeed be admitted that this distinction, though clear in certain cases, was much less clear in some others, in which it might be difficult to draw the line of demarcation.

M. ANZILOTTI recognised that, in any given case, the Court would apply the provisions which seemed to be called for by the special nature of the opinion that it was asked to give. But that consideration did not dispel the doubt that had arisen in his mind as to the possibility of making a distinction in the Rules, in connection with the procedure, between an opinion on a " question " and an opinion on a " dispute ", seeing that such a distinction would find no basis in the Statute.

The PRESIDENT asked M. Anzilotti if he considered that it would be necessary to delete Article 85, as adopted at the first reading.[1]

M. ANZILOTTI did not think that it would be necessary to do so, for that article dealt with a particular case; it provided for the application of one of the rules of contentious procedure to procedure in advisory cases.

However, if the Court considered that the distinction to which he had referred was not in conflict with the Statute, he would bow to its opinion.

M. NEGULESCO agreed with the suggestions made by M. Fromageot. The latter had proposed to add the words " as provided in Article 14 of the Covenant of the League of Nations ". Now Article 14 was incorporated in the Court's Statute, for at the head of the revised Statute there was written: " Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations "; and in Article 1 of the Statute it was declared that: " A Permanent Court of International Justice is hereby established in accordance with Article 14 of the Covenant of the League of Nations." Since the Rules of Court gave effect to the Statute, it was quite logical to introduce into them the two expressions, an advisory opinion on a " question " and an advisory opinion on a " dispute ", seeing that these expressions were used in Article 14 of the Covenant, which was itself embodied in the Statute.

[1] Article 83, of 11.III.36.

Moreover, this distinction was to be found, implicitly, in the existing Rules, which contained the words, in Article 71: ". . . on a question relating to an existing dispute ".

Finally, the Court's jurisprudence showed that on some occasions it had expressed an opinion on this subject, when it had to decide, in certain advisory cases, whether it should, or should not, authorise the appointment of a judge *ad hoc* (under Article 31 of the Statute).[1]

Count ROSTWOROWSKI also desired to support M. Fromageot's proposal.

That proposal would enable the Court, at its discretion, to be guided by the provisions of the Rules relating to contentious procedure to the extent to which it recognised them to be applicable to proceedings in advisory cases. There were two sources of this discretionary power: first, it was conferred upon the Court by the provisions of the Statute—Article 68 of the Statute was the source from which the Court derived its powers in this case; secondly, it was conferred upon the Court by the Rules, for Article 82 of the Rules allowed the Court to be guided by the earlier provisions of the Rules which were applicable to advisory procedure.

It would suffice, without repeating the terms of the Statute, to decide upon the provisions of the Rules relating to advisory procedure, and to lay down that the Court would be guided by the provisions of the Rules relating to contentious procedure to the extent that it recognised them to be applicable.

In regard to the distinction between an opinion on a " question " and an opinion upon a " dispute ", Count Rostworowski agreed with M. Negulesco that the maintenance of this distinction was in no way inconsistent with the Statute; it was indeed sanctioned by Article 14 of the Covenant, to which M. Fromageot had alluded in his text.

Jonkheer VAN EYSINGA pointed out a difference between the wording of the text submitted by M. Fromageot and that of the text read by the President.

M. Fromageot's proposal referred only to the provisions of Chapter IV of the Statute, without mentioning the provisions of the Rules which related to advisory procedure.

In order to bring the two texts into harmony with each other, it would suffice to insert in M. Fromageot's text the words: " . . . Chapter IV of the Court's Statute *and by the present Rules* . . .".

It seemed difficult to contend that the revised Statute made no distinction between the two categories of advisory opinions. Article 68 appeared to have been introduced with this very distinction in view. Thus, it was said in the report of the Committee of Jurists of 1929 (p. 125):[2]

" It [the Committee] also proposes that a final article numbered 68 should be added to this chapter [advisory opinions] in order to take account of the fact that the Court may be called upon to give advisory opinions both in contentious and in non-contentious matters. The effect would be that, in the former case, the Court would apply the provisions relating to contentious procedure referred to in the previous chapters of the Statute, whereas those provisions would not always be applicable when the Court gave an opinion on a non-contentious matter. Thus, for example, Articles 57 and 58 should apply in all cases, but Article 31 [*ad hoc* judges] would apply only when an advisory opinion was asked on a question relating to a dispute which had already arisen."

[1] A/B 41, p. 89; 65, pp. 69-71.

[2] Minutes of the session held at Geneva from March 11th to March 19th, 1929 (L. N. document C.166.M.66.1929.V).

M. FROMAGEOT said that he had intentionally omitted to lay down, in the text that he had submitted, that the Court would apply the provisions that followed below. The preceding heading " Procedure in connection with advisory opinions " showed that the section of the Rules which followed that heading contained a certain number of provisions applicable to opinions of that kind; the first of these clauses provided for the possible assimilation of contentious and advisory procedure. The succeeding articles dealt, in the first place, with questions raised by the application of Article 31 of the Statute; next they laid down that advisory opinions would be given after deliberation by the full Court, and that dissenting judges might attach their individual opinions, etc. These were all useful details given by the Rules in connection with advisory procedure.

The sole object of Article 82 was the possible assimilation of the advisory procedure and the contentious procedure.

Jonkheer VAN EYSINGA thought that, nevertheless, it would be necessary to mention in M. Fromageot's text that the procedure in advisory cases was also regulated under the present heading of the Rules.

M. URRUTIA supported M. Fromageot's proposal, in regard to which he did not share the doubt that had occurred to Jonkheer van Eysinga. As the heading which preceded that article was entitled " Procedure in connection with advisory opinions ", it followed that the articles that came under that heading related to advisory procedure; it was not necessary to repeat that fact in Article 82. Furthermore, M. Urrutia saw no objection to mentioning that the distinction between an advisory opinion on a " question " and on a " dispute " was made in accordance with Article 14 of the Covenant of the League; for that article was incorporated in the Court's Statute.

In reply to a question by the President, M. FROMAGEOT explained that the reason why he had proposed to amend the text submitted for the Court's approval was, in the first place, that he wished to avoid employing the expression " subject to ",[1] which he did not think sufficiently clear, and secondly, because it seemed desirable to emphasise the fact that the procedure in connection with advisory cases, formerly set forth in the Rules, was now inserted in the revised Statute.

M. ANZILOTTI still felt some doubts in regard to the following passage in M. Fromageot's text: " In proceedings in regard to advisory opinions, the procedure in connection with which is regulated by the provisions of Chapter IV of the Court's Statute. . . ." The immediately preceding heading was worded " Procedure in connection with advisory opinions ": it followed that the entire procedure was not regulated by the Statute, for, if it was, there would be no need to legislate for it in the Rules. He himself preferred the text which the President had read, because it avoided this difficulty.

M. NAGAOKA asked whether it was really necessary to retain Article 82 in the Rules in any form. This article added nothing to Article 68 of the Statute, except the last phrase " according as it is asked for an opinion on a dispute or on a question ". Was this addition sufficient by itself to justify the retention of Article 82 ?

The PRESIDENT did not think it was correct to say, as was done in the text proposed by M. Fromageot: " In proceedings in regard to advisory opinions, the procedure in connection with which is regulated by the provisions of Chapter IV of the Court's Statute . . .", if these words were meant to convey that the advisory procedure was regulated by Chapter IV of the Statute. The revised Statute regulated only a part of that procedure—namely, that relating to what might be called the preparation of cases. As regards the part of the procedure which was most important—especially from the standpoint of jurists of foreign countries responsible for the conduct of cases referred to the Court for advisory opinions—it was necessary that the Rules should contain provisions specifying that the Rules concerning contentious procedure which were considered applicable would be applied in advisory procedure.

M. GUERRERO, Vice-President, said that he saw no *prima facie* objections to M. Fromageot's proposals, but he thought it would be possible to avoid the difficulty pointed out by the President by making the article begin with the following words: " In proceedings in regard to advisory opinions, the Court shall apply the provisions of its Statute and also the provisions of the present Rules . . .", etc. The remainder would continue as in M. Fromageot's text.

M. FROMAGEOT suggested the following text:

> " In proceedings in regard to advisory opinions the Court shall apply, in addition to the provisions *(outre les dispositions)* of Chapter IV of its Statute, the provisions of the present Rules. . . ."

Baron ROLIN-JAEQUEMYNS thought that it would be possible to indicate the provisions which were applicable in connection with advisory opinions by the words: " The Court shall apply, *apart from* (en dehors *des dispositions*) the provisions of Chapter IV of the Statute, the provisions of the present Rules ", etc.

The above wording would, he believed, meet the objection to which the President had alluded.

In regard to another point, was it, he asked, desirable to mention the distinction between advisory opinions on a " question " and advisory opinions on a " dispute " ?

The text might, he considered, refer to the latter only. It would read: " The Court shall apply the provisions of the present Rules relating to contentious cases to the extent to which it considers them applicable." The last part of M. Fromageot's text: ". . . according as the advisory opinion for which it is asked relates, in the terms of Article 14 of the Covenant . . .", might be omitted.

Jonkheer VAN EYSINGA thought that M. Nagaoka's proposal simply to omit Article 82 would be going too far.

In order clearly to bring out the necessity for this article, the words " subject to the provisions of Chapter IV of the Statute and to those of the present heading of the Rules . . .", in the first text read by the President, might be omitted.

In the same way, the words ". . . the procedure in which is regulated by the provisions of Chapter IV of the Court's Statute ", etc., in M. Fromageot's text might be omitted; this would avoid repeating something which held good juridically whether it was said or not.

Moreover, in all the headings of the Rules of Court there were provisions which were necessarily applicable. If, therefore, it was thought necessary to make a reservation or to insert a statement to the effect that the procedure in connection with advisory cases was regulated by Chapter IV of the Statute, it would be necessary to add " as also by the present Rules ".

The PRESIDENT noted that the Court recognised the necessity of substantially modifying the text of Article 82, as drawn up in 1935, after the first reading.

[1] *Cf.* pp. 335, 337.

He observed that, as a result of the amendments proposed by Baron Rolin-Jaequemyns, the text of this article would be worded as follows:

> " In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Chapter IV of the Statute, apply the provisions of the present Rules relating to contentious cases, to the extent to which it recognises them to be applicable."

All the provisions of the Statute applied automatically, without need of any special reference to them in the Rules; apart from the provisions of Chapter IV of the Statute, the Court would be guided by the clauses of the present Rules relating to contentious cases, to the extent to which it considered them to be applicable.

M. GUERRERO, Vice-President, recalled the formula which he had proposed.

M. URRUTIA observed, in connection with the passage in M. Fromageot's text: ". . . the procedure in connection with which is regulated by the provisions of Chapter IV of the Court's Statute ", that the provisions of Chapter IV of the Court's Statute were always applied, without there being any need to say so in the Rules. The article might therefore confine itself to saying that the Court would apply in advisory cases the provisions of the Rules which were laid down for contentious proceedings and which it recognised as applicable.

Moreover, the words " subject to " might be omitted, since it could not be truly said that in advisory proceedings the procedure was regulated by the provisions of the Statute.

Finally, the suggestion made by M. Nagaoka would find some satisfaction, for the article, though not omitted altogether, would at any rate be abridged.

M. ANZILOTTI thought that the difficulty in which the Court found itself was due, in part, to the absence of any distinction between two categories of Rules which appeared both in the Statute and in the Rules of Court.

Both in the Statute and in the Rules of Court, there were some clauses directly concerned with advisory opinions; but the provisions of the Statute and of the Rules relating to contentious proceedings were applicable only by analogy in advisory proceedings: the Court was guided by them, but it did not apply them as they stood.

In wording the text, it was necessary to bear this distinction always in mind.

In proceedings in regard to advisory cases, the Court applied: (1) the provisions of the Statute relating to procedure in advisory cases; (2) the provisions of the Rules of Court relating to advisory proceedings; (3) the provisions of the Statute relating to contentious proceedings; (4) the provisions of the Rules relating to contentious proceedings.

But, in regard to the two latter, there was application only by analogy.

M. FROMAGEOT suggested the following formula:

> " In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Chapter IV of its Statute, apply the following provisions and also those of the present Rules relating to proceedings in contentious cases."

The words " in addition " *(en dehors)* would show that, apart from the provisions of the Statute, which were obligatory, there were also the provisions of the Rules, which followed. Furthermore, the Court would also apply such of the provisions of the Statute relating to contentious proceedings as were recognised to be applicable to proceedings in advisory cases.

M. NAGAOKA pointed out that the Statute contemplated the application of certain rules by analogy; it was therefore possible to proceed in the same way in the Rules.

Jonkheer VAN EYSINGA thought that the reservation inserted in Article 82 was not necessary; but if it was to be retained, the distinction referred to by M. Anzilotti must be observed.

In advisory proceedings, the Court must, in all cases, apply the articles of the Statute. But apart from these, there were provisions relating to contentious proceedings which the Court might apply, according as the advisory opinion was asked on a " question " or on a " dispute ".

The new text suggested by M. Fromageot made mention, in addition to the articles of the Statute, of the articles of the Rules appearing under Heading III. But there were articles in other parts of the Rules which the Court was also bound to apply in proceedings in advisory cases.

Instead of saying: " in addition to the provisions of the Statute and to the provisions of Heading III of the Rules ", it would be better to say only " of the Rules " and to omit the words " of Heading III ".

If the Court had decided to adopt the first formula proposed by M. Fromageot, it would have had to insert in his text, after the words " of the Court " in the third line: " and by the present Rules ". That expression would have covered the whole of the Rules.

However, Jonkheer van Eysinga was also in agreement with what M. Anzilotti had said.

3.III.36.*

Article 82.

The PRESIDENT invited the Court to consider certain new drafts submitted for Article 82, beginning with that proposed by M. Anzilotti, which ran as follows:

> " I. In proceedings in regard to advisory opinions, the Court shall be guided by the provisions of these Rules which apply in contentious cases, to the extent to which it recognises them to be applicable.
>
> " II. In proceedings in regard to advisory opinions, the Court shall apply the provisions of Chapter IV of its Statute and those contained in the present Heading of its Rules. In addition, it shall be guided by the provisions which apply in contentious cases to the extent to which it recognises them to be applicable."

M. ANZILOTTI said that these drafts were submitted by him as alternatives.

The first covered all that it was necessary to say. It must be included in the Rules, as it was not to be found anywhere else. This was the draft which he would prefer.

His second draft reproduced in a different form the text before the Court.[1] M. Anzilotti had adopted this wording in order to avoid the use of the words " subject to ", which had encountered objections. The word " proceedings " *(procédure)* had been designedly used because this rule was for the regulation of the procedure. This second draft was designed to put before the reader all provisions concerning procedure in the case of advisory opinions.

M. Anzilotti added that the provisions of the Rules concerning the constitution and working of the Court applied as a matter of course in the case of advisory opinions. On the other hand, the provisions of the Rules

* D 2, A. 3, pp. 684-693.

[1] See p. 337—meeting of 2.III.36.

in regard to contentious cases were not *ipso facto* applicable. Accordingly, it must be explicitly stated that the rules concerning procedure in contentious cases would be taken by the Court as a guide in cases for advisory opinion.

M. NEGULESCO observed that the main reason for the inclusion by the Court in the Rules of provisions relating to advisory proceedings was to afford information to prospective interested parties. Following out this idea, M. Negulesco proposed the following text:

> " The rule laid down in Article 68 of the Statute to the effect that the Court will be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognises them to be applicable, shall also be followed as regards the provisions of the Rules which apply in contentious cases.
>
> " These provisions shall be applicable according as the opinion for which the Court is asked relates to a ' question ' (non-contentious cases), or to a ' dispute ' (contentious cases)."

The first paragraph indicated that the principle laid down in Article 68 of the Statute might be applied also to the provisions of the Rules; the second brought out the fact that the opinions rendered by the Court might, in the terms of the Covenant, relate either to a " question " or to a " dispute ".

The Committee of Jurists at Geneva in 1929 had not used these expressions, but, with reference to opinions on a " question " and opinions on a " dispute ", it had used the following expressions: " opinions in contentious cases " and " opinions in non-contentious cases ".

Combining these two modes of expression, M. Negulesco had made use of the terms " a question " (non-contentious cases) and " a dispute " (contentious cases).

Baron ROLIN-JAEQUEMYNS said that he withdrew his own proposal in favour of M. Anzilotti's second text.

M. NAGAOKA said that he had also drafted a proposal, the text of which, based on Article 33, paragraph 1, of the Rules,[1] was as follows:

> " When the Court is asked for an advisory opinion upon a ' dispute ' or a ' question ', in the terms of Article 14 of the Covenant of the League of Nations, the provisions of the Statute and of the present Rules regarding contentious cases shall be applied to the extent to which the Court recognises them to be applicable in each case."

The PRESIDENT gathered that this article was designed to replace the proposed Article 82, but would leave all the articles following it unchanged.

The PRESIDENT observed that the texts of M. Negulesco and M. Anzilotti both contained the expression " the Court shall be guided by ". Though this expression was quite proper in the Statute, was it appropriate to the Rules ?

M. GUERRERO, Vice-President, shared this doubt: in framing rules for its procedure in the case of advisory opinions, the Court should lay down only clear and unambiguous provisions.

Count ROSTWOROWSKI observed that, with regard to advisory procedure, the Court had contented itself with stating a general principle in the Rules.

Accordingly, the expression " shall be guided ", which referred to the way in which the Court would proceed for the future, was quite appropriate.

M. FROMAGEOT quite understood the scruple felt by the President and M. Guerrero, but pointed out that, in actual practice, it would really be a question of applying some particular article.

The word " apply " was qualified by the words " to the extent to which it recognises them to be applicable ".

Count ROSTWOROWSKI emphasised that the freedom reserved to the Court in the Statute was transported into the Rules. The rules in question were provisions which applied only in contentious cases and which the Court would take as a guide in making corresponding rules for cases of another kind.

The words " shall be guided " were perfectly clear.

Jonkheer VAN EYSINGA thought that, with regard to articles concerning contentious procedure in the *Rules*, the same wording as was used in Article 68 of the *Statute* should be employed, and that nothing further should be added; accordingly, the words " shall be guided " should be retained.

M. FROMAGEOT proposed and explained the following text:

> " In proceedings in regard to advisory opinions, the Court shall apply the provisions of these Rules which apply in contentious cases, to the extent to which it recognises them to be applicable according as the advisory opinion for which it is asked does or does not relate to a dispute."

Count ROSTWOROWSKI observed that both M. Fromageot and M. Negulesco had simply used the word " dispute " in their texts. Had they intentionally omitted the technical expression " existing " *(actuellement né)* ?

M. FROMAGEOT said that he had. But, if thought necessary, the word could be inserted.

Count ROSTWOROWSKI considered that, if the reference to Article 14 of the Covenant which used the words " question " and " dispute " were omitted, the expression " existing dispute ", which was used elsewhere in the Rules, should be retained.

M. URRUTIA wished to get the questions in order.

First there was the question whether Article 82 should simply lay down that in advisory procedure the Court would " be guided by "—or " apply "—the provisions of the Rules applying in contentious cases to the extent to which it recognised them to be applicable.

Having settled that question, they had to consider whether it was necessary to say that advisory procedure was regulated by Chapter IV of the Statute.

Lastly, there was the question whether mention should be made of the difference between a " question " and a " dispute " under Article 14 of the Covenant.

The PRESIDENT observed that the object of Article 82 was to make good all the lacunæ which would subsist with regard to advisory procedure if the Court were to rest content with the provisions in the Statute concerning the procedure applicable in the case of advisory opinions, and with the articles concerning procedure in other sections of the Rules. Accordingly, the Court must adopt rules which would provide an answer to any questions which might arise in all conceivable situations.

M. FROMAGEOT was prepared to accept the proposal to delete a reference to the Statute and to the provisions of the Rules, because it was self-evident that the Court would apply both.

M. NAGAOKA was not satisfied that there was any need

[1] Article 32 of Rules of 11.III.36.

to abandon the standpoint taken up by him at the previous meeting, when he had proposed the deletion of Article 82 of the Rules.

It was only because the majority of the Court seemed to wish notwithstanding to retain a provision of the type of Article 82 that he had proposed a draft which was more in the nature of a reflection.

M. GUERRERO, Vice-President, considered that, while it was not indispensable to repeat in the Rules what was said in an article of the Statute, it was nevertheless most desirable that parties should know that there were provisions both in the Statute and the Rules governing procedure in the case of advisory opinions.

In M. Guerrero's opinion, the various proposals made really differed only in wording. Personally, he preferred that of M. Nagaoka.

Jonkheer VAN EYSINGA repeated that all that was necessary was to say at the beginning of this heading of the Rules what was said in the new Article 68 of the Statute in regard to the provisions of the Statute, omitting the word " further ", since this was the first article in the Rules regulating procedure in regard to advisory opinions, and substituting the word " Rules " for " Statute ".

The PRESIDENT was afraid that a misunderstanding had arisen in the course of the discussion. The Statute was evidently binding on the Court. But, though a given provision in the Statute indisputably determined the procedure in contentious cases, it did not follow that this provision was *ipso facto* binding on the Court in regard to the procedure to be followed in an advisory case.

He gathered that the Court was agreed on this point. It might be said that the Court, in its advisory functions, would be guided by the provisions of the Statute to the extent to which it recognised them to be applicable; but, unless the Court said something, the provisions of the Statute in regard to contentious procedure would not apply to procedure in an advisory case. The advantage of M. Nagaoka's text was that it made the provisions of the Statute governing the procedure for contentious cases applicable to advisory procedure, whereas M. Anzilotti's made applicable only the provision in Chapter IV to the effect that the Court " shall be guided ", etc.

M. ANZILOTTI observed that Chapter IV of the Statute laid down the procedure in regard to advisory opinions. When a request for an advisory opinion was presented, the Court must apply the rules concerning the procedure in such cases to be found, partly in Chapter IV of the Statute and partly in the Rules of Court. If these rules did not suffice in the particular case, then, and then only, would the rules concerning contentious procedure come into play.

M. GUERRERO, Vice-President, in order to meet M. Anzilotti's ideas, proposed that M. Nagaoka's text should be amended as follows. After the words " and of the present Rules regarding . . ." might be added: " advisory cases and contentious cases . . . ". This addition would make it clear that the Court must first apply the rules concerning advisory proceedings and then those concerning contentious proceedings, to the extent to which the Court recognised them to be applicable.

The PRESIDENT thought it would be better to draft the text as follows: " It shall apply the provisions of the Statute and of the Rules regarding advisory proceedings and, to the extent to which the Court recognises them to be applicable, those applying in contentious cases. . . ."

The PRESIDENT thought that the remarks of M. Guerrero and M. Fromageot were concerned not with the substance of the article, but merely with the method of stating the principle.

M. FROMAGEOT considered it superfluous to say that, when the Court was asked for an advisory opinion, it would apply the provisions of the Rules relating to advisory proceedings. The real object of the proposal was to indicate that, in advisory proceedings, the Court would apply the provisions of the Rules in regard to contentious cases to the extent to which, etc.

Baron ROLIN-JAEQUEMYNS observed that there were three kinds of rules to be applied: special rules in the Statute, special rules in the chapter of the Rules of Court concerning advisory procedure, and general rules for contentious procedure which were applied or used as a guide if held to be applicable.

The last-mentioned category should at all events be mentioned.

The PRESIDENT proposed as a compromise to say:

> " The Court shall apply not only the provisions of the Statute and of the present Rules concerning advisory proceedings, but also, to the extent to which it recognises them to be applicable, those applying in contentious cases."

The REGISTRAR recalled that at one time, in 1935, the following expression had been adopted:

> " *In addition to* cases specially provided for by the present Rules." [1]

M. FROMAGEOT proposed the following text:

> " In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of the Statute of the Court, apply the following provisions . . . and, also, those of the present Rules which apply in contentious cases to the extent to which it recognises them to be applicable, according as the advisory opinion for which it is asked does or does not relate to a dispute."

Count ROSTWOROWSKI observed that M. Fromageot made no reference to provisions in the Statute concerning contentious proceedings. Was this omission intentional ?

M. FROMAGEOT said that it was. Such provisions were indirectly covered, since Chapter IV of the Statute included Article 68, which referred to the provisions applicable in contentious cases.

M. GUERRERO, Vice-President, commenting on the large number of drafts proposed, thought that the best way of arriving at a solution would be either to take Article 82 of the original draft Rules and amend it, or else to take that one of the various proposals which most closely resembled the original Article 82.

He thought that M. Nagaoka's text fulfilled this condition.

The PRESIDENT would be willing to take M. Nagaoka's text as a basis. Did M. Guerrero maintain his amendment to that text ?

M. GUERRERO, Vice-President, was prepared to abandon it.

Count ROSTWOROWSKI considered that, before proceeding further, the Court should decide a question of expediency:

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[1] P. 331, footnote 2.

should mention be made in the Rules only of provisions in the Rules themselves which the Court would apply by analogy ? Or should there also be a reference to the provisions of the Statute ?

The PRESIDENT would prefer a definite question to be formulated in cases where decisions of principle were in issue upon which the Court might vote.

Count ROSTWOROWSKI explained that, in his view, the question was whether or not it was desirable that the Rules should contain a reference to the Statute. By settling this question, the Court would enable the Drafting Committee, no matter what formula were agreed on for Article 82, to find a suitable wording.

M. FROMAGEOT wondered whether it would not be better to take the opinion of the Court on the question of expediency raised by Count Rostworowski.

The PRESIDENT was afraid that the discussion had brought to light a fundamental difference of opinion regarding the effects of Article 68 of the Statute. Personally, he questioned whether Article 68 was sufficient by itself to render a provision in Chapter III of the Statute, which applied only to contentious proceedings, also applicable in advisory proceedings. He regarded Article 68 as a provision for the Court's guidance in preparing its Rules.

M. FROMAGEOT thought that Article 68 gave the Court power under the Statute to apply such a provision.

Jonkheer VAN EYSINGA thought that the expression " the Court shall be guided " left no doubt on the point.

M. ANZILOTTI, in connection with Article 68 of the revised Statute, believed that he remembered that the Committee of Jurists at Geneva had had no intention, when adopting that article, of conferring powers on the Court with a view to the preparation of its Rules.[1] The procedure for advisory opinions had been settled: for this purpose, the provisions which had been included in the Rules were embodied in the Statute, so that henceforth the Court could not amend them. Finally, these rules had been completed by the addition of the general provision contained in Article 68.

M. FROMAGEOT referred to the following passage in the report of the 1929 Jurists' Committee (Chapter IV, § 2, p. 117):

> " It [the Committee] also proposes that a final article number 68 should be added to this chapter in order to take account of the fact that the Court may be called upon to give advisory opinions both in contentious and in non-contentious matters. The effect would be that, in the former case, the Court would apply the provisions relating to contentious procedure referred in the previous chapters of the Statute, whereas those provisions would not always be applicable when the Court gave an opinion on a non-contentious matter. Thus, for example, Articles 57 and 58 should apply in all cases, but Article 31 would apply only when an advisory opinion was asked on a question relating to a dispute which had already arisen."

M. NAGAOKA thought that, to make good an omission in his draft which had been pointed out by some members of the Court, the words " besides the provisions of Chapter IV of the Statute and of this heading of the Rules " might be inserted before the words " the provisions of the Statute ". Personally, however, M. Nagaoka did not see the utility of this expression in Article 82.

[1] Minutes, pp. 66-68.

The PRESIDENT said that M. Nagaoka's text would then read:

> " When the Court is asked for an advisory opinion upon a ' dispute ' or a ' question ', in the terms of Article 14 of the Covenant of the League of Nations, besides *(en même temps que)* the provisions of Chapter IV of the Statute and of this heading of the Rules, the provisions of the Statute and of the present Rules relating to contentious cases shall be applied to the extent to which the Court recognises them to be applicable in each case."

M. ANZILOTTI did not think he could support this text, which would not correspond to his views. Moreover, he hardly thought it possible to apply *en même temps* the provisions directly concerning advisory procedure and those concerning contentious procedure. The latter could be applied only in so far as there was no appropriate rule in regard to advisory procedure.

M. NAGAOKA, in these circumstances, withdrew his proposal for this addition.

The PRESIDENT said that he would like the opinion of the Court in regard to the adoption of M. Nagaoka's draft for Article 82, without the proposed addition; he would then ask members of the Court who voted against this draft to give their reasons, for the information of the Drafting Committee.

He took a vote on M. Nagaoka's text (see p. 341).

By six votes to four, the Court was in favour of this text.

M. URRUTIA said that he had voted in favour of the text in the hope by so doing to facilitate the adoption of a generally accepted wording, but the text voted upon did not altogether satisfy him.

Jonkheer VAN EYSINGA again observed that, if the Court's intention was simply to say in Article 82 of the Rules what Article 68 of the Statute said with reference to the provisions in the Statute applying in contentious cases, the clearest method and that most in keeping with the terms of the Statute was simply to repeat the words of Article 68 of the Statute, merely substituting the words " of the present Rules " for the words " of the Statute ", and deleting the word " further ".

M. ANZILOTTI emphasised that the provisions of the Statute in regard to contentious cases were applicable—though he reserved his opinion regarding the use of this word—under Article 68 of the Statute; that being so, was there any use in repeating this here ? Unless it was desired in general to indicate all the sources of advisory procedure, it would suffice to say in the Rules that the provisions applying in contentious cases might be applied in advisory cases if the Court recognised them to be applicable. The Rules did not make the Statute applicable; the Statute was so in itself.

Count ROSTWOROWSKI's objections were the same. Furthermore, the reference to Article 14 of the Covenant should not be at the beginning of the article, but at the end, where it would better represent the ideas of the Committee of Jurists, which wished to lay stress on the distinction which was contemplated.

Baron ROLIN-JAEQUEMYNS thought the latter point was a question of drafting. It would, however, be desirable to add something to M. Nagaoka's text drawing a distinction between rules necessarily applicable in the case of requests for an advisory opinion and rules of procedure which the Court considered it appropriate to apply. They

might say: ". . . in addition to the special provisions of Chapter IV of the Statute and of the present heading of the Rules concerning procedure in the case of advisory opinions, the Court shall apply the general rules of the Statute and Rules concerning contentious cases, to the extent to which it recognises them to be applicable ".

The PRESIDENT asked the Court to vote upon the amendment proposed by Baron Rolin-Jaequemyns to the text proposed by M. Nagaoka for Article 82.

Jonkheer VAN EYSINGA wished to ask Baron Rolin-Jaequemyns, with regard to the text proposed by him, whether it was really a case of special and general rules.

Baron ROLIN-JAEQUEMYNS said that, in his view, there were special rules for advisory opinions in the sense that rules were specially framed in Chapter IV of the Statute and in Heading III of the Rules for advisory opinions. Apart from these rules, there were rules applying to all proceedings, even proceedings for advisory opinions, which might be regarded as general rules. That, however, was a question of drafting which the Drafting Committee could consider. The essential thing was to have a vote indicating a principle for the guidance of the Committee. Personally, Baron Rolin-Jaequemyns would not accept M. Nagaoka's text without the addition he had suggested.

The PRESIDENT asked the Court to indicate their views in regard to Article 82 with the wording proposed by Baron *Rolin-Jaequemyns*.

M. GUERRERO, Vice-President, understood that, if the Court voted in favour of this text, it would be revised by the Drafting Committee.

By six votes (one accompanied by a reservation regarding the use of the expression " general rules ") to three, with one abstention, the Court was in favour of this text.

M. ANZILOTTI wondered whether it would not be well to have the opinion of the Court with regard to one of the drafts—either that of M. Fromageot or that of Jonkheer van Eysinga or M. Anzilotti's own—which simply said what their authors thought essential: namely, that the Court would be guided by the provisions of the Rules applying in contentious cases.

On the proposal of Count Rostworowski and M. Negulesco, the PRESIDENT first took the opinion of the Court on M. Fromageot's text, which was as follows:

> " In proceedings in regard to advisory opinions, the Court shall apply the provisions of these Rules which apply in contentious cases, to the extent to which it recognises them to be applicable according as the advisory opinion for which it is asked does or does not relate to an existing dispute."

He said that, personally, he would vote against this text for the reasons he had already indicated.

M. NAGAOKA regretted that he also would be unable to support this text, because it might give a reader the impression that no real purpose was served by the inclusion of Article 82 in the Rules; that had been M. Nagaoka's sole reason for proposing a different formula.

By six votes to four, the Court was in favour of the text under discussion.

Baron ROLIN-JAEQUEMYNS said that he had voted against this text because he preferred M. Anzilotti's second draft.

The PRESIDENT invited the Court to vote on Jonkheer van Eysinga's draft, which was as follows:

> " In the exercise of its advisory functions, the Court shall be guided by the provisions of the present Rules which apply in contentious cases, to the extent to which it recognises them to be applicable."

M. URRUTIA wondered whether the words " applicable according as the case concerns a dispute or a question " should not be added.

Jonkheer VAN EYSINGA did not think so; for it clearly appeared from the report of the 1929 Jurists' Committee that the purpose of Article 68 was precisely to establish the distinction between opinions on a " question " and those on a " dispute ".

By six votes to four, the Court decided against the wording proposed by Jonkheer van Eysinga for Article 82 of the Rules.

The PRESIDENT next invited the Court to vote on M. Anzilotti's draft.

M. ANZILOTTI wondered whether that was necessary; except for the words " shall be guided ", his text was the same as those of Jonkheer van Eysinga and M. Fromageot. M. Anzilotti would not, however, object to the addition to this text of a phrase differentiating between opinions on a " dispute " or a " question ".

M. NEGULESCO asked M. Anzilotti whether he would consent to add to his text the words " according as the opinion for which it is asked relates to a ' dispute ' or to a ' question '."

M. ANZILOTTI left this to the Court.

The PRESIDENT took the opinion of the Court upon M. Anzilotti's proposal:

> " In proceedings in regard to advisory opinions, the Court shall be guided by the provisions of these Rules which apply in contentious cases, to the extent to which it recognises them to be applicable according as the opinion for which it is asked relates to a ' dispute ' or to a ' question '."

By six votes to four, the Court approved this text.

M. NEGULESCO observed that the text of Article 82 as adopted in first reading [1] had not been voted upon. Ought not the Court to vote upon the principles stated in that text ?

The PRESIDENT said that the text referred to by M. Negulesco ran as follows:

> " Subject to the provisions of Chapter IV of the Statute and of the present heading of the Rules, the Court shall be guided in the exercise of its advisory functions by the provisions of the present Rules applying in contentious cases, to the extent to which it recognises them to be applicable according as it is asked for an opinion on a dispute or on a question."

M. GUERRERO, Vice-President, said that he could accept this text only if the word " apply " were substituted for " be guided by ".

M. ANZILOTTI said that he would vote in favour of this text precisely because it contained the expression " shall be guided by ", which was used in Article 68 of the Statute and seemed to him quite appropriate here.

Baron ROLIN-JAEQUEMYNS wanted a reference to Article 14 of the Covenant to be inserted in order to show the origin of the expression " on a dispute or on a question ".

The PRESIDENT hoped that M. Negulesco would not press for an immediate vote on the text which he had just

[1] See p. 337, meeting of 2.III.36.

read and which would probably furnish the best basis for the drafting of a wording which would obtain the largest measure of support in the Court.

M. NEGULESCO, in these circumstances, did not press for an immediate vote.

M. NAGAOKA laid before the Court a new draft for Article 82 which he had prepared on the basis of Article 70 of the Rules, relating to the Chambers:

> " Procedure in the case of advisory opinions shall, subject to the relevant provisions of the Statute and of these Rules, be governed by the provisions applying in contentious cases to the extent to which. . . ."

4.III.36.*

Article 82. — Second Reading.

The PRESIDENT invited the Court to resume the discussion of Article 82, which had been adjourned on March 3rd. At the end of the meeting, M. Nagaoka had submitted a new text.

M. NAGAOKA recalled that he had proposed this text in order to meet the wish of the President to endeavour to secure the greatest possible measure of support. His draft, which was submitted tentatively, was modelled on Article 70 of the Rules. It read as follows:

> " Procedure in the case of advisory opinions shall, subject to the relevant provisions of the Statute and of these Rules, be governed by the provisions applying in contentious cases to the extent to which the Court recognises them to be applicable in each case."

The words " in each case " might, if thought preferable, be replaced by " according as the opinion for which it is asked does or does not relate to an existing dispute ".

M. ANZILOTTI would have some difficulty in accepting this wording. It said: " Procedure . . . *shall* . . . *be governed* by the provisions. . . ." That seemed to mean that the provisions relating to contentious procedure applied also to advisory procedure; that did not correspond to the expression in the Statute according to which " the Court shall be guided " by these provisions. A distinction must be drawn between the rules concerning advisory procedure, which were directly applicable because they were meant for advisory procedure, and the rules concerning contentious procedure, which applied only to the extent to which the Court recognised them to be applicable.

M. NAGAOKA would have no objection, if desired, to substituting the expression " shall be applied " for the expression " *shall be governed by* ". But he still felt doubtful about the use of the expression " shall be guided ". The Statute recommended the Court to be guided by the provisions applying in contentious cases, but the Court, *following* the guidance of this article of the Statute, said that it would *apply* such and such an article; this mode of expression seemed clearer in a set of Rules.

M. FROMAGEOT, with regard to M. Nagaoka's text, thought that it would be better to say " in proceedings in regard to advisory opinions, the Court . . ." than to use the words " procedure "; for they were not solely concerned here with procedure; there were also provisions relating to the composition of the Court, the question of judges *ad hoc* and the working of the Court.

Again, the word " governed " seemed too positive; lastly, it would be better to say " apply " than " be guided by ", for the reasons given by M. Nagaoka.

For the rest, the text proposed by M. Nagaoka was substantially very much the same as the Article 82 adopted in 1935 at the conclusion of the first reading.

M. NAGAOKA said that he had used the expression " procedure in connection with advisory opinions " simply because the heading preceding Article 82 consisted of those very words. If that expression was not sufficiently comprehensive, it should also be changed in the heading.

Jonkheer VAN EYSINGA, with regard to the word " procedure ", would also be inclined to amend the heading of this part of the Rules. For instance, Article 85 of the draft Rules now under examination related to judges *ad hoc;* that was a question of the composition of the Court rather than of procedure. Having altered the heading, the word " procedure " could also be changed in the text of the article.

As regards substance, Jonkheer van Eysinga thought, like M. Fromageot, that M. Nagaoka's text went perhaps rather too far. He also thought that the word " governed " was not very suitable.

Baron ROLIN-JAEQUEMYNS was of the same opinion regarding the use of the word " governed ". Article 68 of the Statute said that the Court would be " guided "; the use of the word " governed " would seem to imply an intentional deviation from the terms of the Statute.

All things considered, Baron Rolin-Jaequemyns had the impression that none of the texts proposed was preferable to the text adopted for Article 82 in first reading; if it was thought necessary to retain this article, it would be better to leave it in the form adopted in that reading. But Article 82 might very well be deleted.

M. GUERRERO, Vice-President, did not like the expression " subject to " in the text proposed by M. Nagaoka. When the expression " subject to " (some provision) was used in a text, it implied some inconsistency or some conflict between that provision and the text in which the reservation was made.

In view of the objections which M. Nagaoka's text had encountered, M. Guerrero felt justified in proposing the following wording:

> " In addition to the provisions of Chapter IV of the Statute and of the present heading of the Rules, the Court shall, in proceedings in regard to advisory opinions, apply the provisions which apply in contentious cases, to the extent to which it recognises them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a ' dispute ' or to a ' question '."

Count ROSTWOROWSKI recalled that the opposition of certain members of the Court to certain texts voted upon at the last meeting had seemed to be due to the fact that, in the opinion of these members, the texts in question went beyond the scope of the Rules and trespassed upon matters settled by the Statute. Could not the judges in question make a concession and agree to reference being made in the text proposed for Article 82 both to the provisions of the Rules and to those of the Statute ?

Personally, Count Rostworowski would be prepared to do so.

The PRESIDENT was not quite certain that the members of the Court, who at the last meeting had voted against

* D 2, A. 3, pp. 694-698.

certain texts, wanted the text of Article 82 of the Rules to be very limited in scope.

In any case, there still remained the text adopted in first reading for Article 82, which hardly differed from that now proposed by the Vice-President.

Baron ROLIN-JAEQUEMYNS observed that M. Guerrero, in his text, used the expression " shall apply " instead of " shall be guided by ". Article 68 of the Statute, however, in which the latter expression was used, envisaged something different from an " application " of the provisions relating to contentious cases. The Court must be very careful in its Rules not to appear to be, to some extent, going counter to the Statute.

Baron Rolin-Jaequemyns still thought that Article 82 was superfluous and should be deleted.

M. ANZILOTTI recognised the force of Baron Rolin-Jaequemyns' objection. The expression " shall apply " was certainly less emphatic than " shall be governed "; but M. Anzilotti felt much hesitation in departing from the words of the Statute.

M. FROMAGEOT on the whole would prefer to revert to Article 82 as adopted in first reading.

M. NAGAOKA pointed out that, since the adoption of that article, the revised Statute, incorporating some articles of the Rules, had come into force. The circumstances, therefore, were different. Moreover, Article 68 of the Statute said: " further . . .", which meant " subject to the provisions of the Statute ". Article 82 of the Rules, therefore, was merely a repetition of Article 68 of the Statute.

The PRESIDENT considered that Article 82 of the Rules as adopted in 1935 went rather further than the Statute; it laid down that the Court would also be guided by the provisions of the Rules applying in contentious cases.

M. GUERRERO, Vice-President, in order to satisfy Baron Rolin-Jaequemyns and M. Anzilotti, proposed to substitute " shall be guided by " for " shall apply " in the text which he had suggested.

The PRESIDENT said that he would take a vote on the text as thus amended.

M. ANZILOTTI asked that, if this text were adopted by the Court, latitude should be left for some slight improvements in the wording.

The REGISTRAR, in this connection, observed that the text read: ". . . the Court shall be guided by the provisions . . .". Should they not add " of the Statute and Rules " in order to indicate what provisions were meant ?

M. GUERRERO, Vice-President, said that he had meant the word " provisions " here to cover both the provisions of the Statute and those of the Rules.

M. URRUTIA said that he would vote in favour of the Vice-President's proposal, although personally, from the point of view of drafting, he preferred a text proposed by M. Anzilotti (text II; p. 340: meeting of 3.III.36). In order to enable the Court to adopt this text by a larger majority, M. Urrutia said that he would abandon his previous contention that the text of Article 82 should be confined to a simple formula such as that which M. Fromageot had proposed.

Baron ROLIN-JAEQUEMYNS asked whether the Court was going to vote on a text or on a principle.

The PRESIDENT said that he would take a vote on M. Guerrero's text with the words " shall be guided by " instead of " shall apply ", and subject to slight changes of wording if desirable.

Baron ROLIN-JAEQUEMYNS said that, if this reservation meant that the Drafting Committee might take the wording of the text of M. Anzilotti alluded to by M. Urrutia, he would vote against the Vice-President's proposal, in order to keep open the possibility of voting on M. Anzilotti's text.

The PRESIDENT put the following question to the Court:

> " Does the Court prefer the following draft for Article 82:
>
> > " ' In addition to the provisions of Chapter IV of the Statute and of the present heading of the Rules, the Court shall, in proceedings in regard to advisory opinions, be guided by the provisions which apply in contentious cases, to the extent to which it recognises them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a ' dispute ' or to a ' question ' ? "

By seven votes to three, the Court answered the question in the affirmative.

The PRESIDENT asked the Court whether they wished to vote on the text proposed by M. Anzilotti at the previous meeting.

M. URRUTIA said that what he had wanted was that the Drafting Committee should take the wording of that proposal into account in drafting the text. He did not, however, insist on a vote.

The PRESIDENT considered that it would be useful if members of the Court were to indicate by a vote whether they could, as a compromise, accept the text adopted for Article 82 in 1935; that text was as follows:

> " Subject to the provisions of the present heading, the Court shall be guided in the exercise of its advisory functions by the provisions of the Statute of the Court and of the present Rules applying in contentious cases to the extent to which it recognises them to be applicable according as it is asked for an advisory opinion on a ' dispute ' or on a ' question '."

M. ANZILOTTI pointed out that this text referred to the provisions " of the Statute of the Court ". In 1935, the Statute had contained no provisions relating to advisory procedure.

Baron ROLIN-JAEQUEMYNS agreed: they now had Article 68 of the Statute, the terms of which were explicit.

Jonkheer VAN EYSINGA wondered whether, in order to satisfy M. Anzilotti and Baron Rolin-Jaequemyns, the Court might not vote on the 1935 text, simply omitting the words " of the Statute of the Court and ".

The PRESIDENT put the following question to the Court:

> " Does the Court accept as the text of Article 82 the text adopted in 1935, subject to the deletion in line 3 of the words ' of the Statute of the Court and ' ? "

By seven votes to three, the Court answered this question in the affirmative.

The PRESIDENT, who was afraid that the difference of opinion existing between members of the Court was not altogether confined to questions of drafting, raised the question whether, before taking a final decision in regard to Article 82, further time should not be allowed for reflection.

M. NAGAOKA, having regard to the results of the votes taken, suggested that the President should ask the Court to choose by a vote between the text proposed by M. Guerrero, Vice-President, and that adopted for Article 82 in first reading.

The PRESIDENT, noting that M. Nagaoka's suggestion seemed to meet with the approval of the Court, put the following question:

> " Does the Court prefer as the text for Article 82 text A (*i.e.*, the text of M. Guerrero, Vice-President) or text B (*i.e.*, the text adopted for Article 82 in 1935 subject to the deletion of the words in line 3 ' of the Statute of the Court and ') ? "

By six votes to four, the Court decided in favour of text A (that of M. Guerrero).

The PRESIDENT said that, as the vote must be conclusive, he would once more take the opinion of the Court on M. Guerrero's text as presented by its author. If the Drafting Committee felt called upon to suggest some purely verbal changes, the Court would decide whether or not it would adopt them.

He read the text to be voted upon (see p. 346).

By eight votes to two, the Court adopted this text.

The article was adopted in second reading.

11.III.36.*

Article 82. — Final Adoption.

The PRESIDENT said that, in view of the discussion on the subject which had taken place at an earlier meeting, the Drafting Committee proposed to delete the words " *Procédure en matière . . .* " from the title of the Heading III and simply to say: " *Des avis consultatifs* " (Advisory opinions).

The Drafting Committee had also, in accordance with the instructions of the Court, revised the wording of this article.

The text submitted by the Committee, which was virtually identical with that of the Rules of 11.III.36, was finally *adopted* with slight purely verbal modification.

ARTICLE 83 *(Article 71, Paragraph 2, old Rules).*

ADVISORY OPINIONS: APPLICATION OF ARTICLE 31 OF THE STATUTE

2.III.35.

See under Article 3, pp. 12-14, for discussion of Article 71, paragraph 2 (old Rules), in connection with Article 4 *bis* (Article 3 of the Rules of 11.III.36).

7.III.35.*

Discussed as Article 73 bis.

The PRESIDENT observed that this article corresponded to paragraph 2 of the existing Article 71, though the wording had been slightly changed.

M. NEGULESCO wished some reference to Articles 4 *bis* and 4 *ter* of the draft Rules to be inserted in Article 73 *bis*. He said, however, that he would not ask for a vote, but would request the President to place on record that the Court was agreed that Articles 4 *bis* and 4 *ter* applied in the case of opinions upon a " dispute ".

The PRESIDENT noted M. Negulesco's remarks, and declared Article 73 *bis* adopted. The text was as follows:

> " If the question upon which an advisory opinion is requested relates to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute of the Court shall apply. In case of doubt, the decision shall rest with the Court."

10.IV.35.

First Reading as Article 81.

The article was adopted with the text approved on 7.III.35.

2.III.36.

See under Article 82, p. 338, for a reference to Article 85 (Article 83 of the Rules now in force) in connection with Article 82.

3.III.36.**

The Court, on being consulted by the President, unanimously decided against the retention in the revised Rules of Articles 83 and 84 of the draft adopted in first reading.[1]

The PRESIDENT accordingly declared these two articles deleted.

Article 83 (85).

The PRESIDENT read Article 85 (now Article 83, as a result of the decision just taken by the Court):

> " If the question upon which an advisory opinion is requested relates to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute of the Court shall apply. In case of doubt, the decision shall rest with the Court."

Baron ROLIN-JAEQUEMYNS wished for an explanation of the expression " in case of doubt ".

The REGISTRAR said that the history of this expression [2] showed that it envisaged the possibility of disagreement on the question whether a request for a particular opinion did or did not relate to an " existing dispute ".

Further, the Registrar observed that, in 1929, it had been decided to mention " Members of the League of Nations " before " States " in the revised Statute. Perhaps the same should be done in this article.[3]

M. NEGULESCO, at this point, wished it to be placed on record precisely what the Court understood by the expression " existing dispute ". The Court had always held that this expression meant a dispute existing at the time when the question was referred to the Court by the Council or Assembly. The expression had been used for the first time by the Committee of Jurists of 1920, which had drafted

* D 2, A. 3, p. 416.
** *Ibid.*, pp. 693-694.

* D 2, A. 3, p. 737.

[1] These draft articles were, save for minor changes, identical with Articles 72 and 73 of the old Rules which were embodied as Articles 65 and 66 in the revised Statute, which came into force on 1.II.36. In connection with the deletion of Articles 83 and 84, it was remarked that, generally speaking, the Court did not include in the Rules provisions taken from the Statute. For the actual text of the two deleted articles as adopted in first reading, see D 2, A. 3, p. 966.

[2] See *Statut et Règlement de la Cour permanente de Justice internationale—Eléments d'interprétation*, p. 196.

[3] This suggestion was adopted.

the original Statute. It had been used again in 1927 in the amendment made in the Rules regarding the application of Article 31 of the Statute in the case of an advisory opinion relating to an existing dispute. Members of the Court should express their views so that there should be some trace in the minutes of the interpretation placed on the words " existing dispute ".

The PRESIDENT was doubtful whether, seeing that the Court had already adopted a certain interpretation in 1927,[1] it was necessary for it, as now composed, to revert once more to the question.

M. FROMAGEOT felt some doubt as to the expediency of including Article 83, which concerned the application of Article 31 of the Statute. Article 31 of the Statute and Article 3 and the following articles of the Rules which concerned judges *ad hoc* were provisions relating to contentious cases. As was observed in the report of the 1929 Jurists' Committee,[2] this was a case where the provisions applying in contentious cases applied also in cases for advisory opinion.

Would it not be better to delete this provision, which referred only to Article 31 of the Statute, without, moreover, mentioning the corresponding provisions of the Rules which also applied ?

4.III.36.*

Article 83. — Second Reading.

The PRESIDENT invited the Court to proceed to consider Article 83.

He recalled that, at the end of the previous meeting, M. Fromageot had proposed the deletion of this article.

M. FROMAGEOT said that he withdrew this proposal.

M. NEGULESCO insisted on the maintenance of the provision in the Rules. If it were deleted, the whole question of advisory opinions would be governed by Article 82. But, under that article, it was open to the Court, which was simply to be guided by the provisions applying in contentious cases, to apply or not to apply the provisions of the Statute or Rules as it saw fit. If, therefore, Article 83 were deleted, the Court, in the case of an advisory opinion on a " dispute ", might conceivably refrain from applying Article 31 of the Statute.

There was, moreover, another provision—Article 3 of the Rules, providing for the application of Article 31 of the Statute—which should always apply in the case of an opinion on a " dispute ".

M. Negulesco therefore proposed to add, after the words ". . . Article 31 of the Statute of the Court ", the words: " and Article 3 of the Rules ".

M. FROMAGEOT agreed with M. Negulesco. He thought they should say: ". . . Article 31 of the Statute shall *always apply* ". That would be in accordance with the report of the 1929 Committee of Jurists, which said that in such cases the Court was bound to apply Article 31.[3] There were, however, other provisions besides Article 3 of the Rules which should be covered, such as Articles 2, 5 and 30.

Accordingly, the article should be drafted as follows:

> " Article 31 of the Statute shall always apply, as also the provisions of the present Rules concerning the application of that article."

* D 2, A. 3, pp. 698-700.

[1] See E 4, pp. 75-77.

[2] Prepared by MM. Fromageot and Politis (Minutes, p. 125).

[3] *Cf.* Minutes, p. 125.

The PRESIDENT did not think it essential to insert the word " always ". When a provision was stated in general terms to be applicable, it was " always applicable ".

M. NEGULESCO said that his insistence on a reference to Article 3 of the Rules in Article 83 was due to the terms of Article 82, which had been adopted by the Court. Since Article 83 provided for the application of Article 31 of the Statute, mention must also be made, in order to preclude any possible doubt, of those articles of the Rules which constituted the application of Article 31.

The PRESIDENT wondered whether the same result would not be achieved by simply amending Article 3 to read: " Any State which considers that it possesses and which intends to exercise the right to nominate a judge under Article 31 of the Statute *or under Article 83 of the Rules*. . . ."

By doing this, they would avoid the necessity for referring in Article 83—which belonged to the heading concerning advisory procedure—to an article relating to the stage preceding the procedure: namely, the constitution of the Court.

The PRESIDENT asked the Court whether they desired to add to Article 83, after the words " shall apply ", the phrase " as also the provisions of the present Rules concerning the application of that article ".

The Court unanimously adopted this text.[1]

11.III.36.*

Article 83. — Final Adoption.

No change was proposed by the Drafting Committee.[2]

Jonkheer VAN EYSINGA, without wishing to re-open the discussion, observed that, as the articles which, in the text adopted in first reading, had been between Articles 82 and 83 had now been deleted, it seemed somewhat curious

* D 2, A. 3, pp. 737-738.

[1] *Proposal regarding a provision designed to facilitate in certain cases the presentation of their views by interested parties in Advisory Procedure.*

On 4.III.36, following the adoption of Article 83 in second reading, a proposal was made to facilitate the presentation of their views by interested organisations which could not strictly be classified as " international ".

A request had been received for an opinion on a dispute submitted to the Council of the League of Nations between a Government and certain political parties. Though the latter had been able to state their case in writing, the Court had found it impossible to give them a hearing at the oral proceedings.

M. GUERRERO raised the question whether any inequality between parties, whoever they might be, could not be removed by means of a provision in the Rules.

The PRESIDENT said that, after the case referred to, he had intended to propose the deletion or alteration of the adjective " international " qualifying " organisation " in paragraph 3 of Article 84 as adopted in first reading (Article 73 (1), paragraph 2, old Rules). That provision, however, had now become part of the Statute. It was difficult to place on the word " international " a construction wide enough to cover a minority or political organisation.

It was agreed that it was impossible to put a provision in the Rules, though opinion differed as to whether the words " international organisation " should be construed broadly or strictly.

[2] In the text as " adopted in second reading ", however (see D 2, A. 3, p. 993), in addition to the insertion of the phrase approved on 4.III.36, the final sentence of the text approved in first reading is omitted, though it still appears in the text as quoted on 3.III.36 (p. 347). There appears to be no explanation of this deletion.

that Article 82 spoke of a " dispute ", while Article 83 used the expression " existing dispute " *(" différend actuellement né ")*. The reader would wonder what the difference was, whereas they really meant the same thing.

There being no further observations, the PRESIDENT declared Article 83 finally *adopted*.

ARTICLE 84 *(Article 71, Paragraphs 1 and 3, old Rules).*

ADVISORY OPINIONS: DELIBERATION BY THE FULL COURT AND DISSENT

7.III.35.*

Adopted as Article 74, Paragraphs 1 and 2.[1]

The PRESIDENT opened the discussion upon each of the five paragraphs of this article in turn; they were all adopted.[2]

10.IV.35.

See under Article 30, p. 77, for a reference to Article 86, paragraph 1 (Article 84 of the Rules of 11.III.36), in connection with Article 31 (Article 30 of the Rules of 11.III.36).

(Same meeting.) *First Reading.*

The article was adopted as paragraphs 1 and 2 of Article 86. (For text adopted, see footnote 1.)

4.III.36.**

Article 84.

The PRESIDENT invited the Court to examine Article 84.[3]

Paragraph 1.

" 1. Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of judges constituting the majority."

M. FROMAGEOT proposed to add, after the words " Advisory opinions ", the words " on whatever subject ".

This Article 84, which followed the provision concerning an existing dispute, applied to all cases, whether on " questions " or " disputes ".

Further, the three words " *en séance plénière* " (full) in the first sentence should be deleted in order in the French text to avoid confusion with the word " *audience* ".

The PRESIDENT agreed that the beginning of the paragraph should be altered. They might say: " Advisory opinions, either on a question or on a dispute, shall. . . ."

Count ROSTWOROWSKI proposed to change the order of the words, and to say: " *Les avis consultatifs sont, après délibération, émis par la Cour plénière.*"

M. FROMAGEOT thought that the provision would not be of much use if it simply reproduced the exact words of the Statute. It differed from the Statute in that the latter referred to the method of delivery of an opinion in open Court *(audience)*. Here, in the Rules, the point was the deliberation. The important word was not " given ", but " deliberation ".

The PRESIDENT observed that the words " full Court " implied that the Chambers had no jurisdiction to give advisory opinions.

The REGISTRAR was afraid that there was some slight confusion between the notions of " *séance plénière* " and " *séance publique* ". In this article the expression " *séance plénière* " meant a private sitting of the Court constituted as laid down in Article 25 of the Statute.

M. URRUTIA questioned whether it was necessary to retain the first part of the article; perhaps even the whole article might be deleted.

The REGISTRAR said that the first paragraph had been included in the Rules to remove doubts which had been raised in regard to two points: first, could the Court give advisory opinions, sitting as a Special Chamber or as a Chamber for Summary Procedure; secondly, should the Court, when giving advisory opinions, sit with all its members—*i.e.*, both ordinary and deputy judges ?

Originally, the purpose of the paragraph had been to supply a negative answer to both these questions.

The PRESIDENT asked M. Urrutia whether he wished the opinion of the Court taken on the deletion, which he had proposed, of paragraph 1.

M. URRUTIA said that Article 31 of the Rules expressly referred to advisory opinions. Moreover, it was said there that decisions were taken by a majority of the judges, and this applied not only to judgments but to all decisions of the Court.

Further, as regards the reference to judges, Article 56 of the Statute provided that the judgment should mention the names of the judges participating. That article applied to advisory opinions, under the provision to the effect that rules applying in contentious cases were also to be applicable in advisory proceedings.

Accordingly, paragraph 1 of Article 84 seemed superfluous.

The REGISTRAR pointed out, with regard to M. Urrutia's argument for the deletion of Article 84 based on Article 31 of the Rules, that the object of the latter article was to lay down that the deliberation would take place not in public but in private. Accordingly, the object of the article, which concerned not only the full Court but also the Chambers, was different from that of Article 84.

The PRESIDENT wondered whether there was not some advantage in retaining an article which clearly stated that all advisory opinions must be given by the full Court.

The President invited the Court to vote on the addition of the words *"quel qu'en soit l'objet"* (on whatever subject), proposed by M. Fromageot, in the first line of the first paragraph.

If it proved difficult to find a suitable English expression to correspond, the Drafting Committee would try to find some other expression conveying the same meaning.

M. NAGAOKA proposed: " Every advisory opinion. . . ."

M. FROMAGEOT emphasised that it certainly seemed to him desirable to word the article in such a way as to make it clear that it applied to all advisory opinions, whether on a " question " or on a " dispute ".

M. NEGULESCO thought the addition proposed by M. Fromageot unnecessary in view of the terms of Article 65

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* D 2, A. 3, p. 416.

** *Ibid.*, pp. 702-703.

[1] Text submitted:

" 1. Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of the judges constituting the majority.

" 2. Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent." (See the Report of the *Comité d'Etude*, March 4th, 1935, pp. 926-927 of D 2, A. 3).

[2] The third paragraph was subsequently suppressed on the coming into force of the revised Statute, as its terms are reproduced in Article 67 of that instrument. Paragraphs 4 and 5 became Article 85 (see under that article).

[3] Paragraphs 1 and 2 of Article 86 of the draft adopted in first reading, which paragraphs became Article 84 on the deletion of Articles 83 and 84 of that draft (see under Article 83, p. 347).

of the Statute: " Questions on which the advisory opinion of the Court is asked. . . ." This covered both opinions on a " question " *(point)* and opinions on a " dispute ".

5.III.36.*

Article 84. — Second Reading.

Paragraph 1 (continued).

The PRESIDENT requested the Court to resume its examination of Article 84, paragraph 1.

He recalled that M. Fromageot had made a proposal to the effect that paragraph 1 should be worded as follows:

> " Advisory opinions, on whatever subject, shall be given after deliberation by the full Court. They shall mention the number of judges constituting the majority."

M. FROMAGEOT said he was prepared to accept the wording proposed by M. Nagaoka at the previous meeting: " *Tout avis consultatif est émis* " (Every advisory opinion shall be given), and the maintenance of the words " *en séance plénière* " (by the full Court).

The PRESIDENT said that paragraph 1 of Article 84 would therefore be worded as follows:

> " Every advisory opinion shall be given after deliberation by the full Court. It shall mention the number of judges constituting the majority." [1]

As no observation was offered, the President declared that this paragraph was adopted.

Paragraph 2.

Paragraph 2 was adopted without remark.

The PRESIDENT noted that Article 84 as a whole was adopted in second reading.

11.III.36.

Article 84 was finally *adopted.*

ARTICLE 85 *(Article 74, Paragraphs 1 (Second Sentence) and 2, old Rules).*

ADVISORY OPINIONS: COMMUNICATION OF THE OPINION

7.III.35.**

Discussed and adopted as Article 74, Paragraphs 4 and 5 of the Draft. [1]

The PRESIDENT opened the discussion upon each of the five paragraphs of this article in turn; they were all adopted.[2]

In regard to paragraph 4, M. GUERRERO, Vice-President, once more referred to the question already raised by him in connection with Article 55 [3] of the Rules, as to the moment at which the Court's decision terminating a case was to be regarded as finally adopted (at the time of the vote in second reading, or when the decision was read out in open Court). For, he said, a difficulty might arise in a case where an advisory opinion had been adopted by a majority of one and where one of the judges forming the majority was unable, owing to the state of his health or for some other reason, to attend the sitting held for the delivery of the opinion. In that case, if the Council of the League of Nations received the opinion at the moment when the Court was about to deliver it, what would happen if the opinion was not regarded as validly adopted at the vote on the second reading ?

The REGISTRAR said that, under Article 74, paragraph 4, and according to the Court's practice, the sealed package containing the text of the Court's opinion and dispatched beforehand to Geneva was opened by the Secretary-General of the League only on receipt of a telephone message which was sent to him at the moment when the Court's opinion was about to be read in open Court. If any difficulty arose, this telephone message would not be sent, and the opinion would not be communicated to the Council.

The Registrar also earnestly requested the Court not to modify No. 4 of Article 74 without having got into touch with the Geneva authorities; for that paragraph confirmed a practice which was designed to reconcile the legitimate desire of the Council of the League of Nations to be the first to receive the opinion for which it had asked, and the necessity for ensuring that the Court's opinions should receive full publicity.

M. URRUTIA, in regard to the same paragraph and without making any concrete proposal, drew the Court's attention to the desirability of ensuring at the second reading that the provisions of the Rules in regard to the delivery of judgments were in harmony with Article 74 as proposed by the Study Committee.

There being no other observations, the PRESIDENT declared Article 74 adopted.

He also noted that the preparation of the final text of Articles 71 to 74 was entrusted to the Drafting Committee.

10.IV.35.

First Reading.

The article was adopted as paragraphs 4 and 5 of Article 86 of the draft without discussion (for text adopted, see footnote 1 in first column).

5.III.36.*

Article 85. — Second Reading.

The PRESIDENT pointed out that this article consisted of the last two paragraphs of the former Article 86, as adopted at the first reading.

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* D 2, A. 3, p. 704.

** *Ibid.*, p. 416.

[1] Text submitted:

" 4. The Registrar shall take the necessary steps in order to ensure that the text of the advisory opinion is in the hands of the Secretary-General at the seat of the League at the date and hour fixed for the meeting held for the reading of the opinion.

" 5. Signed and sealed original copies of advisory opinions shall be placed in the archives of the Court and of the Secretariat of the League. Certified copies thereof shall be transmitted by the Registrar to States, to Members of the League and to international organisations immediately concerned." (See the Report of the *Comité d'Etude* (4.III.35): D 2, A. 3, pp. 926-927).

[2] See footnote 2, p. 349.

[3] Article 59 of the Rules of 11.III.36.

* D 2, A. 3, pp. 704-705.

[1] The text was adopted in French and the wording of the English text was not correspondingly amended, but remains " Advisory opinions shall . . .".

Paragraph 1.

M. URRUTIA drew attention to the use of the words " at the seat of the League . . ." in this paragraph; he thought the term " League of Nations " would be better.

The PRESIDENT thought that, as the paragraph which preceded the present paragraph in the former text had been struck out, the addition proposed by M. Urrutia would be necessary.

M. NAGAOKA asked what was the origin of the practice laid down in this article according to which the text of the advisory opinion was sent in advance to the Secretariat, and was in the hands of the Secretary-General at the hour fixed for its delivery by the Court.

The REGISTRAR said [1] that this practice represented a compromise between two principles, equally justifiable but antagonistic. The first was that, as the opinion was rendered to the Council at its request, it ought to be in the hands of the Council before it was published. The second was that, as the Court was a Court of Justice, it must deliver its opinions in public, in the same way as its judgments.

The practice adopted provided for the despatch to Geneva of the text of the opinion under such conditions as would ensure that the Secretary-General should have cognisance of it only at the moment when it was delivered at The Hague.

Other solutions were conceivable, but it would be necessary, if it were intended to make a change, first to get into touch with the Secretary-General of the League, because this arrangement was rather in the nature of an agreement, which could not be altered by a unilateral decision.

As no other observation was offered, the PRESIDENT declared that paragraph 1 was adopted.

Paragraph 2.

M. FROMAGEOT wished to propose an alteration in the phrase " *l'avis consultatif est fait* " (literally: the advisory opinion shall be done). The word " *rédigé* " (drawn up) or " *établi* " (made) might be used instead.

The PRESIDENT observed that the French and English texts of this paragraph did not correspond with each other. Yet the French text had not been altered in 1935.

The REGISTRAR thought that the word " *fait* " had been used because the phrase " done in two copies " etc., appeared at the end of each advisory opinion.

M. NAGAOKA asked whether the copy referred to in paragraph 2 was the same as that referred to in paragraph 1.

The REGISTRAR explained that, to gain time, the copy referred to in paragraph 1, which was sent to Geneva before the public sitting, was a multigraphed copy; the copy referred to in paragraph 2 was printed, and bore the seal of the Court, as well as the written signatures of the President and the Registrar.

Baron ROLIN-JAEQUEMYNS thought that the English text might be improved. At present, it contained no mention of the number of copies in which the opinion was made.

The PRESIDENT proposed an English text in the following terms:

> " A signed and sealed original copy of every advisory opinion shall be placed in the archives of the Court and another in the archives of the League of Nations."

M. FROMAGEOT submitted a French text to correspond with the above English text.

The PRESIDENT noted that this wording did not encounter any objection, and declared it adopted.

In reply to a question by M. Anzilotti, regarding the nature of the copies of opinions sent to the States, the REGISTRAR explained that the copies sent to States not directly concerned were ordinary printed copies and not certified true copies.

The PRESIDENT noted that paragraph 2 of Article 85 would be worded as follows:

> " One original copy, signed and sealed, of every advisory opinion shall be placed in the archives of the Court and another in those of the Secretariat of the League of Nations. Certified copies thereof shall be transmitted by the Registrar to States, to Members of the League of Nations, and to international organisations directly concerned."

He noted that this text, and Article 85 as a whole, were adopted in second reading.

11.III.36.*

Article 85. — Final Adoption.

The PRESIDENT said that, in paragraph 2, the Drafting Committee, in order to conform to the wording of the revised Statute, proposed to say: " Members of the League of Nations, to States . . .". He also said that, in conformity with the wording adopted by the Court for Article 75, the word " duly " (" *dûment* ") should be added in the first line of this paragraph.

There being no observations, the President declared Article 85 *adopted* finally, as thus amended.

ARTICLE 86 *(New Article).*

FINAL PROVISION: THE TEXT OF THE RULES AS ADOPTED ON 11.III.36 REPEALS ANY TEXT ADOPTED BEFORE THAT DATE

11.III.36.*

FINAL PROVISION

Article 86.

The PRESIDENT said that the Drafting Committee proposed the following text for the final provision, which the Court had not yet discussed:

> " *Article 86.* — The present Rules, which repeal the Rules adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on September 7th, 1927, and February 21st, 1931, shall come into force on March . .th, 1936."

He asked what steps were necessary for the putting into force of the Rules.

The REGISTRAR explained that, if the Court did not wish to see a set of proofs before finally deciding, they could adopt the text of the new Rules that same day, after deciding when they were to come into force. As

* D 2, A. 3, pp. 738-744.

[1] *Cf.* p. 350.

* D 2, A. 3, p. 738.

regards communicating them to Members of the League of Nations and States entitled to appear before the Court, the precedents of 1926 and 1931 could be followed.

The PRESIDENT thought that the Court's final vote adopting the Rules might be taken at once. He reminded members that, once this vote had been taken, it would no longer be possible to change the text of the articles.

M. URRUTIA having asked whether the date left blank in the final provision should not first be fixed, the PRESIDENT suggested that the Court should adopt a date allowing two or three days for the printing of the text.

M. ANZILOTTI thought that the chief point to be considered was when the new text of the Rules would reach the various Governments; the Rules should not be put into force until a date by which the Governments would have had an opportunity of seeing them.

The REGISTRAR, in reply to a question from the President, said that the amendments made in 1931 had been regarded as amendments to a text already in force, so that the circumstances had been different from those in the present case. At all events, in 1931 the amendments had been put into force on the day on which they had been finally adopted by the Court. The text of the amendments had then been communicated to all States through the ordinary channels. On the occasion of the revision in 1926, the revised Rules—for on that occasion it had been a question of revised Rules—had also been put into force on the same day that they had been adopted; the complete text had been sent direct to States entitled to appear before the Court other than Members of the League of Nations and to the latter through the Secretary-General of the League. Furthermore, both in 1926 and 1931, a copy had been at once sent, for information, to Legations at The Hague. That, however, had not been regarded as the official notification.

The PRESIDENT thought that, as the Court had two cases pending, the new Rules should be put into force as soon as possible.

M. NAGAOKA questioned whether it was correct to apply the new Rules to these two cases which had been submitted under the old Rules.

The PRESIDENT considered that the changes made in the new Rules were not substantial amendments and, generally speaking, simply codified the Court's earlier practice.

M. GUERRERO, Vice-President, suggested the date March 20th, to leave the necessary margin for printing.

M. ANZILOTTI was afraid that there was a confusion between the date on which the Rules would be published and the date on which they were to become applicable. They might say that the Rules would be published on March 20th, and that they would become applicable on, for instance, April 15th, or 20th.

M. FROMAGEOT thought that M. Anzilotti's suggestion involved certain difficulties; for instance, even a period extending to April 15th, or 20th, might be too short to enable some States to receive the new Rules before their entry into force. It would be better simply to mention the date March 20th, which would leave an ample margin for printing and would obviate a change in the Court's practice.

M. ANZILOTTI maintained his standpoint that, in principle, a distinction should be drawn between the date of publication and the date on which the Rules would become applicable. The observance of rules could be insisted on only if those concerned were given an opportunity of knowing them.

M. NAGAOKA would have appreciated the force of M. Anzilotti's observation if it had been a question of basic rules; but the Statute constituted the Court's basic charter, and that had been in force since February 1st; the Rules were simply rules for the application of the Statute.

The PRESIDENT remarked that, if the Court were to follow out M. Anzilotti's idea, it would have to calculate the time required to enable the Rules to reach the seat of government of the most distant States, in order to fix the date of their entry into force; that would involve an interval of six or seven weeks between their publication and entry into force.

Count ROSTWOROWSKI asked whether the Rules would bear a date.

The REGISTRAR said that, in 1922 and 1926, an official copy, bearing the date of adoption, had been signed by the President and the Registrar, sealed and placed in the archives. Moreover, these dates had coincided with the dates of entry into force, as the Court had held that the Rules should come into force on the date of their adoption.

M. NAGAOKA suggested the adoption of the following wording for the final provision: "The present Rules, published on March 20th . . . shall enter into force on April 20th, 1936."

Jonkheer VAN EYSINGA observed that, as regards a possible transitory provision, they might simply say: "The new provisions in regard to procedure become applicable upon their entry into force." Personally, he saw no need, however, for an article containing any transitory provision.

There remained the question of the date of entry into force. Legally speaking, it was a simple one. Under Article 30 of the Statute: "The Court shall frame rules for regulating its procedure." These rules were framed once the Court had voted upon them. Accordingly, if the vote took place that day, that was the date to be taken. On the other hand, from a practical standpoint, Jonkheer van Eysinga thought it reasonable not to put into force on the same day that they were framed Rules which laid down how Governments were to proceed. It was true that, hitherto, the Court had done so without untoward results. As a general rule, however, Governments should be allowed time to become acquainted with new Rules before they came into force. Perhaps, in the present case, there were, however, special reasons for maintaining the practice hitherto followed.

Count ROSTWOROWSKI thought that Article 86 should give one date for the adoption of the Rules and another for their entry into force, the latter being neither too long after nor too close to the former. He proposed April 1st, which would allow the Registry sufficient time to inform Governments that the new Rules were coming into force. It would also enable the Registry unofficially to despatch roneographed copies before the League of Nations officially circulated the text. Count Rostworowski suggested this relatively early date because the Court could not continue to work with its old Rules, which were not in conformity with the Statute in force.

The REGISTRAR suggested that the date of entry into force should be fixed as April 6th—*i.e.*, the first day of the Easter vacation. The practical effect would be to leave the old Rules in force until the vacation began; when the

Court resumed its work, the new Rules would be in force. This extension of the time proposed by Count Rostworowski would have the advantage of making it possible at once to inform all States, whether Members of the League or not, that new Rules had been adopted, so that if any State intended to submit a case to the Court, it could procure the new text without waiting for it to be printed.

M. URRUTIA observed that, if a date were selected with the idea that States should by that time be acquainted with the Rules in force, that date must be so fixed that all States could receive notification beforehand; he also remarked, however, that, if the Rules were put into force at once, the situation would likewise be the same for all. On the other hand, a halfway measure—*i.e.*, the fixing of a date which would benefit some States at the expense of others—was out of the question.

Count ROSTWOROWSKI thought that preferably the Court should select a fairly early date. The new Rules had been framed in the interests of States for whose benefit they codified the practice of the Court, which was incorporated neither in the revised Statute nor in the old Rules.

The PRESIDENT read an extract from the minutes of February 16th, 1931:

> " M. URRUTIA proposed that the above question should be discussed [*i.e.* the coming into force of the revised Articles of the Rules of Court].
>
> " The REGISTRAR explained the practice hitherto followed in this matter. The revised Rules were brought into force on the date of their adoption by the Court. Copies of the revised Rules were despatched by courrier, on the same day, to the Secretariat at Geneva (where they arrived on the second day) for transmission to Members of the League; simultaneously, copies were marked (sent) to other Governments admitted to appear before the Court. The publisher had orders not to place copies on sale till the next (third) day. If the Rules were not put in force till all Governments had received them, this would involve a delay of several weeks.
>
> " After an exchange of views, it was agreed that the revised Rules should, subject to their definitive adoption, be brought into force on Saturday, February 21st.
>
> " . . . . . "

The President observed that there had thus been an interval of five days between the adoption and coming into force of the articles adopted in 1931.

The REGISTRAR said that it was true that this meeting had taken place on February 16th, and that the amendments had been finally adopted only on the 21st. On the 16th, however, it had simply been decided that the amendments would come into force on the date of their adoption, and that date had at the same time been fixed as February 21st, on which day the final vote had in fact been taken.

The PRESIDENT was concerned solely with the portion of the Rules relating to the working of the Court; the remainder merely codified practice. As the revised Statute, which was now in force, and the existing Rules were inconsistent, the President desired to curtail as far as possible the period during which this inconsistency would continue.

He proposed that the Court should successively decide the two following questions:

(1) The date to be selected for the final vote upon the new Rules;

(2) The date of their coming into force.

When these two points had been decided, the Court would be in a position to fill in the blank space left in the final provision of Article 86.

Baron ROLIN-JAEQUEMYNS agreed to an immediate vote upon the adoption of the new Rules if their coming into force was to be postponed until later; but if it was decided that they were to come into force in five days, he did not see why the date of the adoption of the Rules and that of their entry into force should not coincide.

M. FROMAGEOT asked whether there would be any objection to the Rules being adopted that day and coming into force at once. They might say: " The present Rules, which are adopted this eleventh day of March, 1936, repeal the previous Rules and enter into force at once."

The PRESIDENT, before taking the opinion of the Court on this proposal, asked the Registrar whether it involved any practical objections.

The REGISTRAR indicated the steps that would have to be taken by the Registry, but said that these did not involve any practical objection.

The PRESIDENT, before taking a vote, observed that the 1922 Rules and the 1926 Rules contained the words: " Done at The Hague . . .", above the signatures of the President and the Registrar. Why had these words been omitted from the 1931 edition ?

The REGISTRAR explained that a distinction had been drawn between the *revision* of 1926 and the *amendments* made in 1927 and 1931. This distinction had been drawn because a general revision had already been envisaged in 1931. That being so, it had been impossible to put " *Done this 21st day of February 1931* ", because the Rules were still the Rules of 1926, though amended in respect of certain articles. The sentence in question had therefore been intentionally omitted.

M. FROMAGEOT had no objection to inserting the date of adoption after the final provision and to say: " Done and adopted this 11th day of March. . . ." What was important was to state that they came into force at once.

M. NAGAOKA wondered whether it was necessary to retain the expression " shall come into force ". If they simply said: " The present Rules, which are adopted by the Court this 11th day of March, replace the Rules adopted on . . .", it would be sufficiently clear that the new Rules came into force at once.

Baron ROLIN-JAEQUEMYNS observed that all discussion regarding the question of entry into force could be avoided by simply saying: " adopted on . . .".

M. NAGAOKA explained that, if the Court adopted the wording proposed by Baron Rolin-Jaequemyns, the question of the date of entry into force would be automatically settled and the Rules would come into force on the date of their adoption.

The PRESIDENT said that the Court must in any case decide the two following points:

(1) The date on which the final vote would be taken;

(2) The date of the entry into force of the new Rules.

He would first take a vote on the following question:

"Does the Court decide at once to proceed to the final vote upon the adoption of the new Rules?"

The Court unanimously answered the question in the affirmative.

The PRESIDENT said that, as the Court had decided to hold the final vote at once, the terms of the final provision must be settled. It might be worded as follows:

"The present Rules, which repeal the Rules adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on . . . , etc., shall come into force on March 11th, 1936."

Baron ROLIN-JAEQUEMYNS, who thought that the Court were agreed to take the date March 11th, proposed to say: "They have been adopted this 11th day of March 1936", without adding anything as regards their coming into force.

M. URRUTIA suggested the following wording:

"The present Rules, which are adopted this 11th day of March 1936, repeal the Rules adopted on . . . , revised on . . . , and amended on . . .".

M. ANZILOTTI gathered that the question of allowing a certain time for Governments to become acquainted with the text of the new Rules would not be put.

The PRESIDENT considered that he should first put the following question to the Court:

"Does the Court decide to replace the text submitted by the Drafting Committee for the final provision by the following:

"'The present Rules, which are adopted this 11th day of March 1936, repeal the Rules adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on September 7th, 1927, and February 21st, 1931'?"

Jonkheer VAN EYSINGA, in explanation of his vote, said that he was not sure if it was wise to say nothing as to the date of the coming into force of the Rules. Legally, it was perhaps correct to say that silence implied that that date was the date of the adoption of the Rules by the Court. But since, under many legislative systems—which exercised some influence on the minds of the persons who would have to apply the Rules—it was the practice to allow an interval of time before a legislative measure came into force, it might be better to include a clause concerning the entry into force in the final provision.

M. GUERRERO, Vice-President, thought that, at the end of this provision, they might put: ". . . shall come into force as from the date of their adoption"; and then "Done and adopted at The Hague. . . ." However, he saw no objection to saying simply that the Court adopted the Rules; once the new Rules were adopted, it followed that they replaced the earlier Rules.

M. URRUTIA observed that there were also provisions concerning the working of the Court in the Rules. If the Rules could not come into force until a certain time had elapsed, the operation of all these provisions would be suspended.

Count ROSTWOROWSKI, in order to reconcile the opposing standpoints, proposed to add, after the word "repeal", the words "as from this date". Without referring to their entry into force, it would be stated that, as from the date of the adoption of the new Rules, the old Rules would be repealed.

The PRESIDENT put the following question to the Court:

"Does the Court decide to substitute the following text for that proposed by the Drafting Committee for the final provision:

"'The present Rules, which are adopted this 11th day of March 1936, repeal, as from this date, the Rules adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on September 7th, 1927, and February 21st, 1931'?"

By seven votes to three, the Court answered the question in the affirmative.

Jonkheer VAN EYSINGA suggested that it should be recorded in the minutes that the Court considered that a transitory provision was unnecessary; he observed that the question had been raised, but that no one had been desirous of inserting a provision of this kind.

The PRESIDENT said that this would be recorded in the minutes.

Jonkheer VAN EYSINGA asked whether the words "of Court" should not be added after "The present Rules" in the English text.

The PRESIDENT agreed.

The English text of the final provision was adopted, as thus amended.

FINAL VOTE

Judicial Year 1936, 45th Meeting (11.III.36).*

Revision of the Rules. — Final Vote.

The PRESIDENT said that he would now ask the Court to proceed to the final vote on the Rules.

M. ANZILOTTI, explaining that he would be obliged to vote against the new Rules, wished to accompany his vote by the following statement, which he desired to be recorded in the minutes:

"To my regret, I am obliged to vote against the adoption of the revised Rules. In several articles of these Rules, the provision to the effect that a function belonging to the Court may be exercised by the President 'if the Court is not sitting'—that is to say, if it is not in fact assembled—has been retained.

"This delegation of powers, however, although it may have been fully justified under the old Statute, appears to me scarcely consistent with the revised Statute, which lays down that 'the Court shall remain permanently in session' (Article 23, paragraph 1) and which, though it does not oblige judges to reside at The Hague, does oblige them 'to hold themselves permanently at the disposal of the Court' (Article 23, paragraph 3)—which evidently means that they must proceed to The Hague directly the Court has some duty to perform.

"I also find it impossible to attach any importance to the fact that the expression 'by the Court (or, should it not be sitting, by the President)' occurs in

* D 2, A. 3, pp. 744-746.

Article 66 of the revised Statute, an article which is simply taken word for word from Article 73 of the old Rules of Court. For it is obvious that this expression, which has thus inadvertently slipped into Article 66, cannot be taken as a basis for the interpretation of Article 23 of the Statute; rather should the words used in Article 66 be construed on the basis of Article 23 of the Statute.

" *In these circumstances, I cannot help thinking* that the articles of the revised Rules which authorise the President, when ' the Court is not sitting ', to perform certain functions which normally belong to the Court, are inconsistent with Article 23 of the Statute in force."

Jonkheer VAN EYSINGA, who also felt obliged to vote against the new Rules, wished to make the following statement for inclusion in the minutes:

" To my regret, I am unable to vote for the adoption of the revised Rules, because on an important point connected with the working of the Court they are not, in my opinion, consistent with the revised Statute. I refer to Article 23 of the Statute.

" Until February 1st, 1936, that article provided that there should be one ordinary session every year. It also provided that the President might summon an extraordinary session whenever necessary.

" While it is true that, even under the Statute before revision, it was certainly the duty of judges to hold themselves at the Court's disposal not only for the ordinary session, but also for extraordinary sessions (see, for instance, the minutes of the Committee of Jurists of 1929, p. 28), it is also true that some judges from overseas did not always attend extraordinary sessions during the colder part of the year; their places were then taken by deputy-judges, with the result that the Permanent Court had been composed in one way for the ordinary sessions and in quite a different way for extraordinary sessions (*loc. cit.*, p. 28).

" Article 23 of the Statute has been amended, *inter alia*, to obviate this unsatisfactory state of affairs.

" The new article lays down that, instead of an ordinary session and, if need be, extraordinary sessions, there shall be, not two ordinary sessions, as was also suggested in the 1929 Committee of Jurists, but a judicial year extending over the whole calendar year apart from the judicial vacations. Article 23, in fact, provides that the Court ' shall remain permanently in session ' *(' reste toujours en fonctions ')* except during the judicial vacations, the dates and duration of which shall be fixed by the Court. And even during the judicial vacations, members of the Court are bound to hold themselves permanently at the disposal of the Court, unless on regular leave (those members whose homes are situated at more than five days' normal journey from The Hague) or prevented from attending by illness or other serious reasons duly explained to the President.

" Though the Statute, apart from what is laid down in Article 22 in the case of the President, does not say that members of the Court must have their permanent residence at the seat of the Court, the latitude left them in this respect cannot affect the obligations laid down in Article 23 of the Statute.

" It follows that, under Article 23 of the revised Statute, the Court ' shall remain permanently in session '—*' reste toujours en fonctions '—must always be able to function*, except during the judicial vacations, and that, even during these vacations, the President can convene members of the Court if need be.

" The calendar year is accordingly divided into two portions: the permanent session and the judicial vacations. Every day of the year falls into one of these two portions. *Tertium non datur.*

" In my view, quite inconsistently with this, the revised Rules, in a large number of articles, introduce a third period into the calendar year—namely, the period ' when the Court is not sitting '. It appears from a large number of votes rejecting the proposal to substitute for these words the words ' during the judicial vacations ', that the period ' when the Court is not sitting ' is not regarded by the majority of the Court as identical with the judicial vacations. Apparently, the majority mean these words to cover the case where, at some time during the permanent session, the Court having nothing to do, members of the Court return to their homes, which need not be in The Hague. Should some action on the part of the Court be necessary in such circumstances, the latter, they hold, is at liberty to delegate its powers to the President by means of the Rules. I must confess that I consider the numerous articles in the revised Rules which delegate powers of the Court to the President ' if the Court is not sitting ' inconsistent with Article 23 of the revised Statute, which lays down that the Court will be permanently in session except during the judicial vacations and that, even during these vacations, the Court may be convened by the President in case of urgency.

" It has been contended that, in an article of the revised Statute itself—Article 66—the expression ' should it [the Court] not be sitting ' occurs twice. *With regard to this, it is to be noted that Article 66* of the revised Statute incorporates in the Statute Article 73 of the existing Rules of Court, which as such will now cease to exist. Before the new Statute had come into force, the words ' if the Court is not sitting ' were quite fittingly used in the Rules; for, under the Statute before its revision, whenever neither an ordinary nor an extraordinary session was in progress, the Court was not sitting. Now that Article 23 of the Statute has been amended and simply lays down that the Court will be in permanent session apart from the judicial vacations, the words ' should it [the Court] not be sitting ' in Article 66 of the revised Statute must be construed in the light of the revised Statute as a whole and particularly of Article 23; these words can now refer only to the periods of the judicial vacations; they certainly cannot refer to periods throughout the year which have been abolished by Article 23 of the Statute."

The PRESIDENT took note of these two statements, which would be recorded in the minutes.

He put the following question to the Court:

" Does the Court adopt as its Rules, within the meaning of Article 30 of the Statute, the draft Rules dated March 11th, 1936 ? "

By eight votes to two, the Court answered the question in the affirmative.

In reply to a question put by Count Rostworowski, the PRESIDENT said that an original copy of the new Rules, duly signed, sealed and dated, would be placed in the Court's archives.

RESOLUTION CONCERNING THE COURT'S PRACTICE (20.II.31): DISCUSSION AND MODIFICATION

17.III.36.*

Resolution concerning the Court's Practice.

The PRESIDENT proposed that the Court should amend the Resolution of February 20th, 1931,[1] by deleting the second paragraph, because that paragraph concerned matters which were now dealt with by a provision in the Rules of March 11th, 1936 (Article 52).

He noted that the Court agreed to this.

Count ROSTWOROWSKI proposed that the resolution on practice should be supplemented by a paragraph to the effect that judgments and advisory opinions were adopted after two readings and that separate opinions, if any, were communicated to the Court before the second reading.

M. URRUTIA wondered whether it would not be better to leave things as they were, without adopting fixed rules. Would there not be a danger of re-opening the discussion as to the moment when the terms of a judgment were to be regarded as finally settled ?

The PRESIDENT agreed with M. Urrutia that the Court should avoid tying its hands. He hoped, however, to be able at the afternoon meeting to submit a text which would satisfy both Count Rostworowski and M. Urrutia.

17.III.36.**

Resolution concerning the Court's Practice.

The PRESIDENT submitted drafts of two paragraphs which he had drawn up with the assistance of some of the members of the Court, to replace paragraph 9 (8, following the deletion of the old paragraph 2) of the Resolution of February 20th, 1931.

The first of these drafts was as follows:

> " 8. — The draft decision is circulated to the members of the Court, who may submit amendments to it in writing. When these amendments have been received, the Committee submits a revised text for discussion by the Court.
>
> " Judges who wish to submit a separate or dissenting opinion shall hand in the text thereof after the draft decision has been adopted at the first reading.
>
> " The time-limit for the submission of separate or dissenting opinions is fixed in such a way that their submission coincides with the submission of the draft decision prepared for the second reading."

The President observed that the above text was based on the Court's Resolution of February 17th, 1928 (see E 4, p. 291, English text; p. 284, French text). He thought that it gave a truer description of what took place than was found in the Resolution of February 20th, 1931.

M. URRUTIA feared that the fixing of a definite time-limit—as was done in the third sub-paragraph of the draft—was inconsistent with the opinion that the Court had already formed to the effect that a judge was free to change his opinion up to the last moment before the delivery of the judgment.

Baron ROLIN-JAEQUEMYNS objected that the text, as worded, would absolutely preclude a judge from submitting a dissenting opinion after the second reading of the draft judgment; he suggested the addition of the words " so far as possible " *(" autant que possible ")* in order to render the text more flexible.

After a discussion in which all the judges took part, M. GUERRERO, Vice-President, submitted an amended text which—after some further alterations had been accepted—was given the following form:

> " 8. — A preliminary draft of the decision is circulated to the judges, who may submit amendments in writing. When these amendments have been received, the Committee submits a draft decision for discussion by the Court.
>
> " Judges who wish to deliver a separate or dissenting opinion shall hand in the text thereof after the adoption of the draft decision in first reading and before the draft of the decision as prepared for second reading has been circulated."

Baron ROLIN-JAEQUEMYNS said that the amended text did not meet his objection; nevertheless, he would not vote against it.

M. ANZILOTTI was prepared to accept the amended draft provided that it was recorded in the minutes that the new text did not imply any modification of the Court's practice.

It was decided accordingly.

Draft Paragraph 9 of the Resolution.

The PRESIDENT opened the discussion on the draft, which was worded as follows:

> " 9. — Members of the Court who have taken part in the final vote on the draft of a judgment or advisory opinion must also be present at the public sitting at which the judgment or opinion is read."

He observed that such a clause would strengthen the President's hand in dealing with requests by judges to leave The Hague before the delivery of the Court's decision in a case under examination.

M. GUERRERO, Vice-President, was convinced that it was the general desire of the Court that judges should not go away before the conclusion of a case that was under examination. He therefore proposed, in place of the words " must also be present at . . ." *(" devront assister également à . . .")* to say: " are bound, unless prevented by ill-health, to be present . . ." *(" sont tenus, sauf empêchement pour cause de maladie, d'assister à . . .")*.

M. FROMAGEOT suggested that the text should first make reference to the clause in Article 27 of the Rules, relating to reasons for absence *(" empêchements ")*, and should then go on to state that " judges may not fail to be present at . . ." *(" les juges ne peuvent pas se dispenser d'assister à . . .")*.

Jonkheer VAN EYSINGA considered that the paragraph should not have a mandatory form, nor appear to impose an obligation, but should merely constitute a record of the Court's existing practice in the matter. It might be worded as follows: " The judges who have taken part in the final vote on the draft decision will also be present . . ."

* D 2, A. 3, p. 748.
** *Ibid.*, pp. 748-750.
[1] See D 2, A. 2, p. 300 (document 44).

(" *assistent également* "). He, however, doubted whether such a clause should be inserted in the resolution on practice, for it rather tended to modify earlier practice.

The PRESIDENT referred to a number of cases in which judges,[1] after taking part in the deliberations, had left The Hague before the Court's decision was delivered (or even finally adopted), and had nevertheless been allowed to subjoin statements to it to the effect that they agreed (or disagreed) with the finding. Such a practice was, he thought, irregular and should not continue.

M. URRUTIA held that judges were already bound, under the revised Statute, permanently to remain at the Court's disposal, and that therefore no resolution was needed to prevent them from leaving before the case was concluded.

M. ANZILOTTI said that the irregularity that had occurred in the cases referred to by the President consisted, not in the departure of a judge before the conclusion of the case, but in the appending of his opinion to the decision.

M. Anzilotti considered, like Jonkheer van Eysinga, that the draft paragraph should not be included in the Resolution, the object of which was to codify the Court's practice.

The PRESIDENT said that, in that case, it would suffice to record in the minutes that, in the Court's opinion, a judge who was not present at the public sitting held for the delivery of a decision could not append to it a statement mentioning, together with the fact that he had taken part in all, or part of, the deliberations, what his opinion on the case was.

It was decided accordingly.

M. NAGAOKA asked whether the resolution on the Court's practice would be printed and included in the new edition of the Statute and Rules. This would be useful for practical purposes.

The REGISTRAR recalled the reasons for which, in 1931, it had been decided that the resolution should not be published; these reasons seemed now to have lost most of their force.

After discussion, it was decided that the new resolution should be printed as a separate pamphlet and not as an integral part of the new edition of the Statute and Rules.[1]

ARTICLE 31 OF THE STATUTE

(Question of Its Interpretation in connection with the Question of the Possibility of the Nomination of a Judge " ad hoc " of a Nationality other than that of the State nominating Him and the Consequent Possibility of there being more than One Judge of the Same Nationality on the Bench.)

17.V.34.*

In connection with the discussion of Article 30 of the old Rules (29 of the Rules in force), the Court considered the question whether a non-national might be nominated by a State entitled to appoint a judge under Article 31 of the Statute. The point had been discussed on an earlier occasion, but had been adjourned until the time came for a general revision of the Rules.[2] In the draft Rules prepared by the Co-ordination Commission for the Court's consideration, a neutral expression had in every case been used to avoid prejudging the question.

The Court proceeded to discuss whether the question should be settled while revising the Rules or left open so as not to preclude its decision in a concrete case after hearing the parties.

M. GUERRERO, Vice-President, considered that it was

* Abridged: for full discussion see D 2, A. 3, pp. 17-23.

[1] See, *inter alia*, *Publications of the Court*, A 7, 11, 13; B 2 and 3, 4, 7; A/B 61, 63.

[2] Extracts from minute No. 74 of the 25th Session, held on July 9th, 1932:

" (c) *Appointment of Judges* ad hoc: *Articles 31 of the Statute and 71 of the Rules:*

" Sir CECIL HURST, referring to his proposal and draft article . . . said that . . . it seemed contrary to the spirit of the Statute—in particular, of Article 10, paragraph 2—that two judges of the same nationality should sit on the Bench. Moreover, the terms of Article 31, paragraph 2, of the Statute appeared to imply that the judge *ad hoc* should always be a national of the appointing State. . . .

" M. SCHÜCKING agreed that the presence of two judges of the same nationality on the Bench was contrary to the spirit of the Statute; but that the judge *ad hoc* must be chosen from among the nationals of the appointing State (" *parmi ses nationaux* ") would be going beyond the requirements of the Statute: small States could not always find a suitable national; and the Statute nowhere forbade them to choose à foreigner.

" M. FROMAGEOT explained that the system of *ad hoc* judges had been adopted, after exhaustive debates, not simply to provide an additional judge on the Bench, but in order that the Court might be informed of local circumstances, and might avoid, in its decision, expressions liable to wound national susceptibilities. These advantages would be lost if the judge were chosen from a third State. The right of a party to appoint a judge *ad hoc* was not subject to the Court's authorisation; but the Court could consider whether in a particular case the conditions to which the exercise of that right was subject were fulfilled; if they were not, the Court could deliver an order declaring the appointment inadmissible, but not without hearing arguments on the point.

" M. VAN EYSINGA was also of opinion that it was necessary to avoid having two judges of the same nationality on the Bench. However, in requiring the judge *ad hoc* always to be a national of the appointing State, the draft article seemed to run counter to the Statute. For instance, Article 31, paragraph 5, when specifying the other articles of the Statute to be observed in appointing *ad hoc* judges, included Article 2, which contained the words: " regardless of their nationality "; on the contrary, it made no mention of Article 10.

" M. URRUTIA supported the draft article, which he regarded as rightly interpreting Article 31, paragraph 2, of the Statute; thus, paragraph 2 of that article required a State to choose a deputy-judge of its own nationality, " if there be one ". It was true that, under Article 4, Arbitration Groups were not obliged to nominate their own nationals, but he thought the intention was that they should do so. As regards M. van Eysinga's remarks, he observed that Article 2 of the Statute was concerned with elections by the Assembly.

" Count ROSTWOROWSKI believed that the mention of Article 2 in Article 31 of the Statute had reference exclusively to the qualifications of judges, as set forth in Article 2, and not to the words " regardless of their nationality " in the latter article.

" The REGISTRAR, invited by the President to indicate the history of the article and the Court's practice in applying it, said that, as he had had no opportunity of reading the matter up, he must speak from memory. He had, however, before him one of the sources of information on this subject—namely, the report of M. de Lapradelle on the work of the 1920 Jurists' Committee. According to this report, there were two distinct grounds for the introduction of the system of judges *ad hoc*, besides the avoidance of injuring national susceptibilities by inopportune draftings, viz. to enable the Court to hear the arguments of a State till the last moment of the deliber-

[1] The Resolution was subsequently printed in D 1, 4th edition, 1940, p. 62.

the duty of the Court to interpret the Statute in a matter concerning the functioning of the Court and proposed the following rule: a State should be entitled to appoint a judge *ad hoc* of a nationality other than its own, provided that this did not result in there being two judges of the same nationality upon the Bench. This solution, he considered, combined respect for the interests of parties with a proper interpretation of the Statute, which laid down that all judges must be of different nationalities. In reply to the observation that, though the Statute had been revised in 1929, the question had not been decided and that it would be wiser for the Court not to go further than those responsible for the revision of the Statute, M. Guerrero remarked that the problem had become apparent only after one or two cases had shown a gap in the Rules.

MM. URRUTIA and ANZILOTTI observed that there were some articles of the Statute—relating to procedure—which the Court could interpret in its Rules, but, as regards articles concerning the actual organisation of the Court and affecting the rights of States coming before it, the situation was quite different. The point at issue was a right of Governments upon which the Court might have to pass in a specific case. Did Article 30 of the Statute empower the Court to decide that question *in abstracto* ?

Jonkheer VAN EYSINGA recalled that, on three occasions, the Court had accepted a judge *ad hoc* who was not a national of the State nominating him. A practice had to some extent been established.

M. FROMAGEOT said that it would be difficult in a concrete case to give a ruling without the decision appearing to be of a personal nature; on the other hand, doubt might be felt whether the Court had power to decide the question of the nationality of a judge *ad hoc*. There was also the consideration that some countries would have difficulty in nominating a judge of their own nationality; on the other hand again, there was the possibility of irregularities.

Jonkheer VAN EYSINGA said that there was the danger that, if the Court decided the question, a State might contend that the decision was *ultra vires* and the rule therefore of no effect.

M. FROMAGEOT thought it would be possible, when examining Articles 4 *bis* and 4 *ter* [1] and the conditions governing the nomination of judges *ad hoc*, to find some means of preventing irregularities without fettering the liberty of Governments by a too absolute rule.

M. ANZILOTTI asked whether M. Guerrero, in contending that there must not be two judges of the same nationality upon the Bench, was founding himself on Article 10, paragraph 2, of the Statute. He thought that clause had a totally different object in view.

M. GUERRERO said he had in mind the general rule that the Court was composed of a number of judges of different nationality.

The PRESIDENT said there was an intimate connection between this question and M. Fromageot's amendments

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ation; and to reassure public opinion in the States concerned as to the impartiality of the Court.

" As regards the régime provided for by Article 31, it was, according to the intentions of the authors, as follows: (1) if there was a deputy-judge of the nationality of the State concerned, that State was *obliged* to appoint this judge; (2) if there was none, it should appoint one of the candidates nominated under Article 5 and appearing on the list provided for in Article 4; (3) in order to avoid hardship in case the State concerned had none of its nationals on the list but *desired* to appoint a national, an opportunity of going outside this list was afforded by the word " preferably ", which had been inserted for this purpose.

" As to practice, the Registrar recalled the correspondence which had taken place between the President and a certain Government when the latter, though possessing a deputy-judge of its nationality, desired to appoint another person judge *ad hoc* *. He further recalled that the Court had been very liberal in allowing States to appoint other nationals than those appearing on the list; this, however, was no argument for the interpretation of Article 31.

" A decision of the Court in case of doubt was specially provided for only where several parties were in the same interest, and where therefore a conflict between the parties was possible. In other cases, the question whether a judge *ad hoc* fulfilled the required conditions (*e.g.*, as to incompatibility of functions) would no doubt have to be dealt with by the Court as an internal question, in the same way as any question concerning the application of Articles 16, 17 and 24 of the Statute.

" M. ANZILOTTI said the draft article raised two distinct questions: the limitation of a party's choice, by obliging it to appoint a national; and the question whether the appointment of a judge *ad hoc* could be challenged and made the subject of argument. Hitherto—rightly or wrongly—the Court had regarded its composition as an exclusively internal matter. Whether the draft was in keeping with the Statute therefore appeared to him an open question, and it was certainly a delicate point which should not be decided hastily.

" As to the merits, M. Anzilotti agreed with M. Urrutia that there was no relation between Article 31 and the articles governing elections to the Assembly, whether Article 2 or Article 10. He further believed the presumption in Article 31 to be that the party would choose a national; he however admitted that the two interpretations were possible.

" Jonkheer VAN EYSINGA . . . in regard to Count Rostworowski's remark, observed that Article 31, paragraph 5, spoke of the " conditions required by Article 2 . . .", not of the " qualifications ". Before deciding, it would be necessary to study the whole problem with great care, including the difficult and complex question raised

* See E 6, pp. 283, 285; C 16—III, p. 809.

in the Jurists' Committee in 1929, namely, the right of a Dominion to appoint an *ad hoc* judge, if there was already a British judge on the Bench.

. . . . . .

" The PRESIDENT said that Sir Cecil Hurst's proposal appeared to raise many points which were not ripe for a decision. It would therefore seem wiser to postpone a decision. If the problem arose in practice before October, he would, in that case, see that the Court's ultimate decision was not compromised.

. . . . . .

" M. SCHÜCKING agreed with the President as to the need of further study. A narrow interpretation of Article 31 might prove embarrassing to small or backward States, which would find themselves compelled to select as judges persons unable to collaborate usefully with the Court.

. . . . . .

" The REGISTRAR gave some further information as to the origin of Article 31 from the minutes of the Jurists' Committee of 1920. The first proposal, made by M. Adatci, was that only nationals should be eligible as judges *ad hoc*. This text was replaced by a draft which did not contain such a condition. The latter draft having been adopted as a basis for the discussion, M. Adatci had suggested a limitation of the choice to the list of candidates nominated by the Arbitration Groups; this proposal was adopted subject to the insertion, proposed by M. Hagerup, of " if possible ", which eventually became " preferably ".

. . . . . .

" M. FROMAGEOT suggested, as a provisional solution, that, if a case in point presented itself during the vacation, the President should unofficially inform the Government concerned that the Court felt a certain interest *(un certain intérêt)* in the judge *ad hoc* being a national of the appointing State.

" Sir CECIL HURST said that, in regard to M. van Eysinga's remark, he did not agree that there was any relation between this question and that of *ad hoc* judges for the Dominions. But there was clearly a division of opinion both on the merits of his proposal and also in regard to its urgency; it would therefore be better to accept M. Fromageot's suggestion, and adjourn a decision until October, or until the Court undertook the revision of the Rules.

" The PRESIDENT said he was prepared to act on M. Fromageot's suggestion, though he could not, of course, absolutely guarantee that it would prove effective. In reply to an observation by Baron Rolin-Jaequemyns, he added that any suggestion he might make to a Government would not be presented as the attitude of the Court.

" This course was agreed to."

[1] See under Article 3 of the Rules, p. 9.

numbered 4 *bis* and 4 *ter* in the Co-ordination Commission's report.[1]

At the next meeting, on 18.v.34,* the question was further considered.

M. GUERRERO explained that, in arriving at the conclusion that it was not desirable to have two judges of the same nationality on the Bench, he founded himself on the general interpretation of the Statute and on the whole idea of arbitration, which was to establish a genuine equilibrium between the parties.

M. URRUTIA believed that the intention of the revised text of Article 31 was to extend the field of application of the institution of national judges and that the abolition of deputy-judges had been only a secondary reason.

M. FROMAGEOT thought that the discussion in the Jurists' Committee had turned solely on the principle of a State's right to have a national judge and not on the right to be represented by a foreigner.

Count ROSTWOROWSKI said that the right of a State to select as judge *ad hoc* a person not of its own nationality had already been admitted by the Court. The question now was whether a State might select as judge a person of a nationality already represented in the Court. In regard to that, he proposed that the President or the Court should be empowered to call the attention of the State concerned to the difficulty arising out of such an appointment. Article 24 of the Statute made it possible for the President or the Court to intervene, but only after the appointment had been made.

M. ANZILOTTI said that the Court must either lay down a rule or simply express a wish. If they adopted the first course, there was a danger of going beyond the Court's powers.

M. SCHÜCKING said that, from the standpoint of positive law, he doubted whether the Court could altogether prevent the possibility of there being two or more judges of the same nationality in a particular case. That being so, it would be wiser to continue the practice hitherto followed—namely, to inform a State about to appoint a judge *ad hoc* that doubts were felt in the Court as to the possibility of appointing a person of a nationality already represented.

Baron ROLIN-JAEQUEMYNS thought there was nothing in the Statute to prevent the insertion in the Rules of a clause of the kind proposed by M. Guerrero. Article 31 obliged the Court to apply Article 24 of the Statute and the latter enabled the Court and the President to decide that a judge should not be admitted.

M. ANZILOTTI said that Article 24 provided for a particular case and it was better not to go beyond its strict meaning. It would be going too far to seek the basis of a general rule in Article 24.

The REGISTRAR said that Article 24 had originally been intended to take the place of the rules in regard to the disqualification of a judge, which rules it had been decided in 1920 not to include in the Statute. And, in the practice of the Court, it had been recognised in principle that the article was concerned with purely personal considerations such as were the most frequent causes of disqualification.

The PRESIDENT submitted the following question to the Court which was designed to formulate M. Guerrero's proposal:

> " Is the Court in favour of inserting in the Rules a clause making it possible to appoint a judge under Article 31 of the Statute who is not a national of the State exercising the right of appointment, providing always that the person so appointed does not belong to the same nationality as any other titular judge of the Court."

The Court, by seven votes to five, answered the question in the negative.

M. FROMAGEOT wondered if a vote might not be taken on the desirability of including in the Rules a clause enabling the attention of States concerned in a case to be drawn to the difficulties which might be occasioned to the Court—not the parties—by the nomination of a judge of the same nationality as one already on the Bench.

It was observed that this suggestion was embodied in Article 4 *bis*, paragraph 3, of the Co-ordination Commission's text.[1]

Count ROSTWOROWSKI observed that Article 24 of the Statute which was referred to in Article 31—the article cited in paragraph 3 of Article 4 *bis*—only provided for the situation which would arise after the appointment of a judge *ad hoc*, whereas his own proposal had a preventive intention.

The PRESIDENT accordingly proposed that the Court should vote on the following question:

> " Is the Court in favour of inserting a clause in the Rules making it possible for the President, before the appointment of a judge *ad hoc* has become definitive, to draw the attention of the State concerned to the difficulties which might be caused by the appointment of a person of the same nationality as a judge on the Bench ? "

The REGISTRAR said that the Court had in practice established a rule somewhat similar to that which was now contemplated—namely, the rule that a diplomat accredited to The Hague could not act as a judge *ad hoc*. This rule had on several occasions rendered it necessary to make unofficial representations, sometimes after the appointment had actually been made, sometimes when only an intention of making such an appointment had been tentatively put forward.

The PRESIDENT asked the Court to vote. The question was answered in the negative by eight votes to four.

M. FROMAGEOT thought that this negative answer must be taken to mean that it was impossible for the President, when applying Article 31 of the Statute, to rely on Article 24.

M. ANZILOTTI said that Article 24 did not appear to be in any way connected with the question of nationality.

M. GUERRERO recalled that several judges, though stating that they agreed that whenever possible the sitting of a judge *ad hoc* of the same nationality as one of the judges already on the Bench should be prevented, had said that nevertheless they would vote against the motion. They ought now to explain the reason why the proposal had been rejected.

The PRESIDENT doubted whether it was desirable that observations made or individual opinions expressed by judges in favour of a particular interpretation of Article 31

* Abridged: for full discussion see D 2, A. 3, pp. 26-31.

[1] See under Article 3 of the Rules, p. 9.

[1] See under Article 3, p. 9.

of the Statute should be set down in the Minutes relating to the revision of the Rules.

Jonkheer VAN EYSINGA wondered whether the agreement which had been shown with M. Fromageot's observations would not suffice.

M. ANZILOTTI thought that the Minutes should show that members of the Court were in point of fact agreed that it was desirable that there should not be two judges of the same nationality in the Court; that the Court would be disposed, if necessary, to convey this to a State; but that, having regard to the terms of the Statute, it would go no further.

M. GUERRERO said the Court had been checked by a doubt with regard to the interpretation of the Statute.

10.II.36.*

Article 31, Paragraph 4, of the Revised Statute.

A discussion took place on the above clause.

M. ANZILOTTI had submitted some observations [1] concerning this paragraph which lays down that, in certain cases, the President must ask one or two members of the Court to give up their seats in a Chamber to other members of the nationality of the parties or to judges specially appointed by the parties. In order to protect the President from any possibility of criticism in the execution of this power, M. Anzilotti suggested that the principles which should govern the President's choice should be fixed. He proposed alternative ways of doing this:

> (*a*) The adoption of a definite rule according to which the President would in each case determine which judge or judges he would ask to give up their seats; for example, the drawing of lots or the order of seniority of the members of the Chamber. This would eliminate any arbitrary element and consequently any possible criticism. It would, however, also eliminate the exercise by the President of any discretion.
>
> (*b*) A flexible rule which would not deprive the President of a measure of discretion, but would determine how he should exercise it. The criterion might be the principle laid down in Article 9 of the Statute which is expressly applied to the Special Chambers of Articles 26 and 27 of the Statute: the President, in making his choice, should bear in mind the representation of the main forms of civilisation and the principal legal systems of the world.

In the discussion, the REGISTRAR remarked that the rule according to which a judge *ad hoc* took the place of a titular judge who would be invited by the President to retire already existed in Articles 26 and 27 of the 1920 Statute. It had been extended to the Chamber for Summary Procedure, and it was as a result of this that the clauses concerning the presence of judges *ad hoc* in the Chambers had been grouped together in Article 31, paragraph 4, of the Statute.

M. ANZILOTTI pointed out that the revised Statute went further than Articles 26 and 27 of the old Statute, which merely redressed the balance in case one only of the parties had a judge of its nationality in a Chamber. He said that the primary question was whether the Court considered that it should lay down some kind of rule for the President to protect him from criticism to which he might be exposed if given discretionary power. If the Court answered this question in the affirmative, it could then decide whether to adopt a rigid criterion or a flexible rule. M. Anzilotti's reason for raising the question was the concern with which he regarded the possibility of altering the composition of a Chamber for a particular case.

The PRESIDENT thought the essential object was to assure the good functioning of the Court. The fixing of a precise rule which would fetter the President's discretion would be contrary to this principle.

Other members of the Court, while recognising the importance of M. Anzilotti's observations, supported the President's opinion for a constitutional reason: the Statute gave the President discretionary powers and these could not be restricted by the Rules.

M. FROMAGEOT agreed that the selection which the President had to make called for great prudence, but there was nothing to prevent his consulting the other members of the Court—it was, in fact, his duty as President to do so.

M. ANZILOTTI having said that he did not press for a decision, the PRESIDENT thought that, in these circumstances, it would suffice to note that, having regard to the provisions of the Statute, the Court did not feel able to take the course proposed.

PROPOSAL OF A NEW ARTICLE TO FOLLOW ARTICLE 5 OF THE RULES AND DESIGNED TO APPLY ARTICLE 16 OF THE STATUTE AS IN FORCE SINCE 1.II.36

On 10.III.36,** the above proposal was made by M. Anzilotti. Though the matter was a delicate one, which in the last resort was one for a judge's conscience, M ANZILOTTI thought it desirable that the Rules should show that the Court had appreciated the new text of Article 16 of the Statute and had considered how that article should be applied. Though Article 24 of the Statute dealt with a different contingency, he took it as a guide in drafting a new rule. The provision he proposed was as follows:

> " For the application of Article 16 of the Statute, if a member of the Court feels doubt as to the compatibility of some function or occupation of his with his capacity as a member of the Court, he shall so inform the President.
>
> " If the President considers that a member of the Court is exercising a function or engaging in an occupation incompatible with his capacity as a member of the Court, he shall give him notice accordingly.
>
> " In either case, the President may, after going into the matter with the judge concerned, bring it before the Court."

As a result of suggestions made, the words " as to the compatibility of some function or occupation of his " were replaced by " as to the compatibility of certain functions or occupations ".

The interpretation of the phrase " occupation of a professional nature " in Article 16 of the Statute was discussed.

* Abridged: for full discussion see D 2, A. 3, pp. 519-521.
** For full discussion, see D 2, A. 3, pp. 710-713 and 715-723.
[1] D 2, A. 3, p. 981.

It was held that it was a remunerative occupation which provided the person concerned with a livelihood and in which he was continually engaged. Article 16 also covered political or administrative functions; its intention was to prevent the resulting dependence on a Government.

M. NEGULESCO said that the meaning of Article 16 clearly emerged from the discussions in the Committee of Jurists of 1929.[1] That article of the Statute, in conjunction with Article 18, formed a complete system; M. Anzilotti's proposal seemed superfluous.

M. ANZILOTTI said that his proposal simply laid down a rule for the application of Article 16 of the Statute and, since the latter said that "any doubt on this point is settled by the decision of the Court", indicated in what circumstances the Court would be called upon to give a decision.

[1] Several references to, and quotations from, the proceedings in this Committee concerning Article 16 of the Statute were made during the discussion; it therefore seems desirable to reproduce the relevant Minutes:

"*Article 16.*

"M. FROMAGEOT pointed out that this article dealt with the question of the disabilities of judges. He proposed the acceptance of the following principle:

"'The members of the Permanent Court shall devote themselves exclusively to this high function and may not exercise any other functions. It shall not, however, be incompatible with this provision for them to be members of the Permanent Court of Arbitration under the Convention of 1907 or to sit as arbitrators under the terms of a submission to arbitration or a convention.'

"The second sentence of the first paragraph should be deleted in consequence of the abolition of the deputy-judges.

"The CHAIRMAN thought that there was an objection to the proposal to allow a judge to serve on the Permanent Court of Arbitration, since it was possible that a case which had been submitted to that Court might later come before the Permanent Court of International Justice as the result of an appeal.

"M. POLITIS observed that it would hardly be possible for a judge who had already heard a case in the Permanent Court of Arbitration to sit as a judge in the Permanent Court of International Justice for the hearing of the same case.

"Mr. ROOT thought that M. Fromageot's proposals might give rise to a somewhat dangerous situation. The Committee had already agreed upon certain new restrictions to the conduct of those who accepted election to judgeships in the Permanent Court, the intention of those restrictions being that the judges should devote themselves entirely to the Court's work as, indeed, they might very properly be expected to do. Moreover, it had been agreed that the judges should be in a position to reach The Hague at very short notice, and that the duration of their vacations should be decided by the Court.

"Though Mr. Root had nothing against the above provisions, he had accepted them with some apprehension, which was renewed by the addition now proposed by M. Fromageot; he feared that, taken altogether, the particular limitations which it was proposed to impose on the judges of the Court would deprive the Court of many men whose services it most needed. The original provision had been quite clear, but the additional words proposing a test applicable to the conscience of those persons who were asked to serve on the Court —and the judges would naturally apply that test in the broadest possible way—might have the effect that many men, when asked to accept a judgeship, would say that they could not thus exclude themselves from all the activities of life. In Mr. Root's opinion, the Court needed men of that calibre more than they needed a position in the Court. Supposing it were desired to find an American to take Mr. Hughes' place in the Court, Mr. Root feared that the kind of man who would be willing and competent to serve would think that, in accepting these restrictions on his liberty, he was returning to a state of tutelage resembling that of a schoolboy.

"M. FROMAGEOT fully appreciated the wisdom of Mr. Root's observations. He thought that perhaps the principle, as he had formulated it, went further than the idea he had in mind. He had not meant to suggest that the judges should be entirely excluded from all other activities, but he considered it inadmissible that, when a man had accepted a judgeship, he should continue to follow in his own country another profession such, for example, as that of lawyer. These remarks also applied to education. If a professor, appointed as a judge, were at liberty to continue lecturing and to develop in this way his views and his doctrines, his decisions would be prejudiced in advance. It would be known that in such-and-such a case he would decide in such-and-such a way. His impartiality and his independence would be compromised. To be a magistrate or an educationist were two different forms of activity. Both were worthy of respect. A choice might be made between the two, but the two offices must not be held at the same time.

"The CHAIRMAN asked whether a man who had written a book on international law was to be excluded from the list of candidates.

"M. FROMAGEOT thought it was difficult to compare this case with the others, since the writing of a book did not amount to a professional occupation. When a man had been appointed a judge of the Permanent Court, his only profession should be that of judge of the Court.

"The CHAIRMAN enquired whether the judge would be allowed to deal with the business of the League of Nations.

"M. FROMAGEOT said that M. Gaus had drawn his attention to the case of conciliation commissions. It would be dangerous to allow a judge of the Court to serve on a conciliation commission if the cases submitted to those commissions had later to come before the Court. A judge's independence was the basis of his impartiality; if he were not completely and obviously independent, his impartiality might be compromised.

"M. Fromageot had already cited the case of the legal profession, which was a perfectly respectable profession, but which did not appear to him to be compatible with the holding of a judgeship in the Permanent Court. He was, however, in the Committee's hands; if the Committee thought that the remedy was worse than the evil, it must obviously reject it.

"Dr. RUNDSTEIN did not think that it could be held that it was incompatible for a judge to hold an honorary professorship at a university. If, for instance, a judge had previously been a professor, there should be no obstacle to his giving lectures on the work of the Court. Furthermore, the services of an honorary professor were not remunerated.

"Mr. ROOT said that he did not so much object to any particular wording in M. Fromageot's proposal as to the inclusion in it of anything that might seem to carry with it a feeling of suspicion or distrust that the people who were to be asked to render this service of a judge of the Court needed to be treated like children and instructed in their duties. The kind of man required for the Court might perhaps unconsciously resent the idea that he could not be trusted to conduct himself in accordance with the requirements of his office.

"M. Fromageot's proposal might therefore perhaps require redrafting in order to obviate any indication that the judges might not abide by the standards of conduct expected of them.

"M. URRUTIA thought that the changes of system which had already been adopted would suffice. It would be found, in practice, that a judge would be obliged to devote the whole of his time, except his holidays, to the work of the Court. M. Urrutia held the same views as Mr. Root. Any modification in the present system whereby residence at The Hague would be obligatory would entail more serious disadvantages than the possible advantages to be anticipated. In the view of the large volume of business which the Court might in future expect, it would be quite impossible for a judge to bind himself to the exercise of any other profession such as that of teaching.

"M. Urrutia had been greatly impressed by Mr. Root's observations and reminded the Committee that, at the time when the Statute was first drawn up, there had been a very lively discussion on this particular question both in the First Committee of the Assembly and in the Assembly itself. That showed how difficult the question was to solve. M. Urrutia would therefore prefer to leave things as they were, and he considered that the Committee should content itself with the changes it had already made.

"M. HUBER thought that the question of incompatibilities should be considered from two different aspects: first, that of the nature of the activity of the judges of the Court and, secondly, that of the actual facts. As regarded the first point, there were obviously certain posts which were, as such, incompatible with the holding of a judgeship. Thus, the Statute had laid down that no ordinary member of the Court might exercise any political or executive function.

"As regarded the second aspect, however, there were circumstances which might make the exercise of a function which, in itself, was compatible with that of a judgeship on the Permanent Court incompatible in fact. For instance, a judge who conscientiously discharged his duties to the Court might possibly not have time to carry on any other form of activity, and, that being so, M. Huber agreed with Mr. Root that the question might be left to the conscience of the

The PRESIDENT said that M. Anzilotti's proposal was intended to make clear how Article 16 would be applied, for it was difficult to apprehend the precise meaning of "occupations of a professional nature" in that article. The Court was a corporate body and it was desirable and even necessary that some degree of contact should be established among its members to ensure the adoption of homogeneous views regarding functions and occupations to be regarded as inconsistent with the Statute. It was a far cry from the uniformity of application aimed at by Article 16 in saying that any doubt was to be decided by the Court to the penal provisions of Article 18 of the Statute. M. Anzilotti's proposal would ensure this uniformity of application.

M. GUERRERO agreed that Article 16 of the Statute was difficult to interpret. It therefore seemed difficult to lay

individual judges. He understood that Mr. Root thought that the Committee should not define too precisely the things which a judge might or might not do, since the question would be found to solve itself owing to the fact that a member would be required to spend most of his time at The Hague, and hence would not be free for other work.

"As to the question of a judge serving on a Court of Arbitration, it was true that there was not necessarily any incompatibility in such service from a moral point of view, but arbitration cases usually demanded much time, and the work of the Court should come before any other functions, whether compatible or incompatible with that work.

"M. POLITIS thought that the Committee must devote its most serious attention to this question, which was of capital importance, and which involved both the credit of the Court and the prestige of international justice. As his professor of law had frequently said, justice must not only be just, it must also appear just.

"It had been said that confidence must be reposed in the judges. There were two observations to make in that connection. In those countries where justice had been organised for centuries, traditions had grown up, and the judges knew that there was a strict obligation upon them not to take part in any activity which might be incompatible with their magistracy either in fact or morally. No such traditions existed in regard to international justice. That, however, was not the only difference. In the national courts of justice, the magistrate or judge had a career before him. In international justice, however, that stage had not yet been reached. The appointments were only temporary, although they might of course be renewed. The result was that an appointment to the Permanent Court might be offered to a man who was in the full course of his social or national activity. Such a man would serve for nine years at the Court, and on the expiration of that period he might find it impossible to take up again the position he had previously occupied in his own country. The ideal position of course would be to place the international judges on a footing of equality with the national judges and to make their appointments for life. That, however, was impossible in existing circumstances. It would necessitate a radical amendment in Article 13.

"M. FROMAGEOT observed that such an amendment affected also the observations he had made regarding Article 16.

"M. POLITIS agreed. Continuing, he wished to make two proposals to meet the difficulties to which he had drawn attention. First, the period of appointment should be increased from nine to twelve years, with the hope that, in future, it would be found possible to go even further and to appoint the international judges for life. The adoption of a twelve-year period would do much to remedy the present situation, since, after serving twelve years on the Permanent Court, the great majority of the judges would have arrived at the period of life at which they would wish to retire from active work. Secondly, he would propose that judges should be given a pension which would carry with it an assurance that they would be able to keep up the honourable position they had earned when they retired to their own countries.

"If these proposals were accepted, the material position of the judges would be assured, and it would then be quite logical to introduce in Article 16 a provision to the effect that a judge should exercise no other profession or occupation than that of a judge of the Court. Meanwhile, it might be possible to make a stipulation that, in the exercise of any profession or any function, the judges of the Court should not be called upon to give opinions which might in any way be connected with the business of the Court.

"Mr. ROOT suggested an addition to M. Fromageot's proposal so that it would read:

> "'Members of the Court may not exercise any political or administrative function or other professional employment.'

"M. FROMAGEOT readily accepted Mr. Root's amendment.

"M. ITO asked for an explanation. When a national group had to recommend a candidate for a judgeship, it naturally attempted to find the man who had the best chances of being elected. Such a man would probably be one whose services would always be wanted in his home country. If, therefore, the conditions as to disability were made too severe, the national groups would have great difficulty in nominating a man who otherwise could be employed in his own country. M. Ito therefore considered M. Fromageot's first draft to be too severe, and he was glad to note that he had accepted Mr. Root's amendment.

"There was another case, however, to be considered: suppose a candidate was a member of an extra-parliamentary or extra-governmental commission; such a function could not be described as political or administrative in the strict sense of the term. Would the exercise of such functions exclude a candidate from the possibility of election? The national groups at any rate might possibly feel some doubts as to the utility of putting forward his name. M. Ito therefore thought it inadvisable to make any hard-and-fast rule, but that it would be better to leave the matter to the conscience of the individual judge.

"Jonkheer VAN EYSINGA thought it necessary to bear in mind the observation which had been made by Mr. Root and which had led to the amendment which M. Fromageot had accepted. The difficulty had been greatly lessened by the fact that the Committee had already accepted an amendment to Article 23 by which the judges would be obliged to devote the whole of their time, except their vacations, to their work at The Hague. If the Committee accepted Mr. Root's amendment to M. Fromageot's text, doubtful cases, one of which had been mentioned by M. Ito, might nevertheless arise. In this connection, M. van Eysinga would point out that, in the second paragraph of Article 16 as at present drafted, there was a provision stating that doubtful cases were to be settled by a decision of the Court.

"M. van Eysinga wondered whether certain decisions had already been taken in such cases by the Court. Without wishing to go into details, he would ask the President of the Court whether he could give any general information on the point. Did the President of the Court think that, in the various cases that had occurred, the Court had reached an entirely satisfactory result from the point of view of the provision that members should not carry on other occupations which might hamper their work as judges? If the President's answer were in the affirmative, the Committee would have greater liberty of action, since it would be seen that, in those cases of doubt which had arisen, the Court had succeeded in settling them satisfactorily.

"M. ANZILOTTI was unable to say that the application of the existing system had, so far as he knew, given rise to any difficulties or disadvantages. The case had never yet occurred where a judge had refused to discharge his duties on the ground of other professional occupations.

"M. RAESTAD reverted to the point made by M. Politis with regard to the assimilation of national and international judges. There would always be a great difference in the status of the two categories of judges, as long as the individual States continued to exist. In the present state of the world, it was very rightly laid down that the judges must represent the different forms of civilisation. Hence it was desirable for judges to preserve, to a certain extent, their connections with their country of origin; by working in one way or another, a man was best able, as a rule, to maintain his connection with his country. It was probably in order to be able to maintain a Court composed of judges who retained some connection with their home country that the limited term of appointment had been originally adopted.

"M. Raestad considered that there was every reason for thinking that in practice the question would settle itself, and that therefore there was no need to make any change in the article (except to suppress the reference to the deputy-judges), especially in view of the new system which the Committee had already adopted as regards the composition and working of the Court.

"M. FROMAGEOT then submitted the following proposal for the redrafting of Article 16:

> "*Article 16, paragraph 1:*
>
> "1. Add the following words at the end of the first sentence:
>
> *'nor engage in any other occupation of a professional nature'.*
>
> "2. Delete the second sentence.

"*The above proposals were adopted.*"

down a rule for its application. The proposal before the Court would, however, more or less result in conferring on the President power to construe that article. The obligations accepted by members of the Court did not compel them to break all ties with their own country or renounce any right to personal freedom. There were certain activities in which a judge was entitled to engage which, without placing him in a position of dependence on any Government, would serve the cause of peace. If a judge considered that he could engage in such an occupation without interfering with the working of the Court, M. Guerrero did not think it possible to compel him by the Rules to consult the President as to whether such an occupation was consistent with his functions as a judge.

Later, at the same meeting, the discussion was continued. As the result of an observation by Baron ROLIN-JAEQUEMYNS, who wished it to be made clear that only hesitations felt by a member of the Court on his *own* account were in question, the first paragraph was amended to read ". . . with *his* capacity (avec *sa* qualité) as a member of the Court".

M. URRUTIA regarded paragraph 1 as confirming that Article 16 of the Statute concerned an obligation, the appreciation of which was, in the first place, a matter for the conscience of a judge. It was for the individual member to appreciate whether to submit any uncertainty felt by him to the President. No sort of control was provided and the provision would therefore be purely theoretical.

The PRESIDENT took a vote on paragraph 1 of the proposal.

The result showed five votes for and five against.

In these circumstances, M. ANZILOTTI withdrew his proposal.

The second paragraph would, he said, meet with even more objection than the first and the first would be of no use without the second.

Jonkheer VAN EYSINGA then recalled a memorandum [1] and proposal in the same connection which he had circulated. His proposal was for the insertion in the Rules of the following provision:

> "For the application of Article 16 of the Statute, each member of the Court shall inform the Court of all his occupations other than that of member of the Court."

Since the coming into force of the revised Statute, in addition to political or administrative functions, any other occupations of a professional nature had become incompatible with membership of the Court, and any doubt on the point was to be settled by the Court. The conscience of members would be an excellent guide, but the Statute envisaged doubtful cases. Besides doubt felt by a judge himself, who could submit the matter to the Court, doubt might be felt by another judge or by some authority outside the Court, such as the Assembly of the League of Nations. The matter would then become delicate. A preventive control would avert the raising of such doubts and that was the object of his proposal. The list of occupations received from each judge would be considered by the Court and any doubtful cases discussed. The general and automatic character of the control would eliminate the element of delicacy.

M. NEGULESCO considered that the proposal went further than Article 16 of the Statute, as it spoke of "occupations" without the words "of a professional nature". There had been no intention of precluding a judge from engaging in intellectual activities. Again, whereas the system in the revised Statute was complete, since steps could be taken under Article 18 against a judge who accepted a function incompatible with his position, Jonkheer van Eysinga's proposal made no provision for constraint.

Jonkheer VAN EYSINGA said he had omitted the words "of a professional nature" in order to allow the Court to separate doubtful cases from the rest. As regards the enforcement of Article 16, he pointed out that, under that article, "any doubt . . . is settled by . . . the Court". Article 18 of the Statute was the last resort.

M. GUERRERO considered the supervision and control proposed invidious and unworthy of the Court.

The PRESIDENT said he would have preferred M. Anzilotti's proposal, but, that having been withdrawn, he would vote for that of Jonkheer van Eysinga. His view was that, in view of all the discussion which had taken place and would be reproduced, it would be better to have some provision concerning incompatibilities.

He put the question whether the Court adopted the draft proposed by Jonkheer van Eysinga.

The Court answered in the negative by seven votes to three and the proposed article was thus rejected.

[1] D 2, A. 3, p. 983.

COMPARATIVE TABLE OF THE RULES OF COURT

1922-1936

1922

RULES OF COURT
adopted by the Court on March 24th, 1922.

1926

REVISED RULES OF COURT
adopted by the Court on July 31st, 1926, to come into force as from the Same Date.

PREAMBLE

The Court,
By virtue of Article 30 of its Statute,
Adopts the present Rules:

PREAMBLE

[Not modified.]

CHAPTER I — THE COURT

Heading 1. — Constitution of the Court.

SECTION A — JUDGES AND ASSESSORS

Article 1.

Subject to the provisions of Article 14 of the Statute, the term of office of judges and deputy-judges shall commence on January 1st of the year following their election.

CHAPTER I — THE COURT

Heading 1. — Constitution of the Court.

SECTION A — JUDGES AND ASSESSORS

Article 1.

[Not modified.]

Article 2.

Judges and deputy-judges elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over judges and deputy-judges elected at a subsequent session. Judges and deputy-judges elected during the same session shall take precedence according to age. Judges shall take precedence over deputy-judges.

Article 2.

[No modification in paragraphs 1 to 4.]

1931

RULES OF COURT

adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on September 7th, 1927, and February 21st, 1931.

PREAMBLE

[Not motified.]

CHAPTER I — THE COURT

Heading I. — Constitution of the Court.

SECTION A — JUDGES AND ASSESSORS

Article 1.

[Not modified.]

Article 2.

[No modification in paragraphs 1 to 3.]

1936

RULES OF COURT

adopted on March 11th, 1936.

TABLE

PREAMBLE

The Court,

Having regard to the Statute annexed to the Protocol of December 16th, 1920, and the amendments to this Statute annexed to the Protocol of September 14th, 1929, in force as from February 1st, 1936;

Having regard to Article 30 of this Statute;

Adopts the present Rules:

Heading I. — Constitution and Working of the Court.

SECTION I — CONSTITUTION OF THE COURT
JUDGES AND TECHNICAL ASSESSORS

Article 1.[1] 1.

The term of office of members of the Court shall begin to run on January 1st of the year following their election, except in the case of an election under Article 14 of the Statute, in which case the term of office shall begin on the date of election.

Article 2.

1. Members of the Court elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence over members elected at a subsequent session. Members elected during the same session shall take precedence according to age. Judges nominated under Article 31 of the Statute of the Court from outside the Court shall take precedence after the other judges in order of age. 2, paras. 1 and 2.

[1] The numbers given in the margin are those of the corresponding articles of the 1931 Rules.

1922	1926
National judges chosen from outside the Court, under the terms of Article 31 of the Statute, shall take precedence after deputy-judges in order of age. The list of deputy-judges shall be prepared in accordance with these principles. The Vice-President shall take his seat on the right of the President. The other members of the Court shall take their seats to the right and left of the President in the order laid down above.	Nevertheless the retiring President, whatever may be his seniority according to the preceding provisions, shall take his seat on the right of the President, the Vice-President taking in such case his seat on the left. This rule, however, shall not affect the other privileges or the powers conferred by the Statute or Rules of Court upon the Vice-President or the eldest judge.
Article 3.	*Article 3.*
Deputy-judges whose presence is necessary shall be summoned in the order laid down in the list referred to in the preceding article, that is to say, each of them will be summoned in rotation throughout the list. Should a deputy-judge be so far from the seat of the Court that, in the opinion of the President, a summons would not reach him in sufficient time, the deputy-judge next on the list shall be summoned; nevertheless, the judge to whom the summons should have been addressed shall be called upon, if possible, on the next occasion that the presence of a deputy-judge is required. A deputy-judge who has begun a case shall be summoned again, if necessary out of his turn, in order to continue to sit in the case until it is finished. Should a deputy-judge be summoned to take his seat in a particular case as a national judge, under the terms of Article 31 of the Statute, such summons shall not be regarded as coming within the terms of the present article.	[Paragraph 3 deleted.]
Article 4.	*Article 4.*
In cases in which one or more parties are entitled to choose a judge *ad hoc* of their nationality, the full Court may sit with a number of judges exceeding eleven. When the Court has satisfied itself, in accordance with Article 31 of the Statute, that there are several parties in the same interest and that none of them has a judge of its nationality upon the bench, the Court shall invite them, within a period to be fixed by the Court, to select by common agreement a deputy-judge of the nationality of one of the parties, should there be one; or, should there not be one, a judge chosen in accordance with the principles of the above-mentioned article. Should the parties have failed to notify the Court of their selection or choice when the time-limit expires, they shall be regarded as having renounced the right conferred upon them by Article 31.	In cases in which one or more parties are entitled to choose a judge *ad hoc* of their nationality, the full Court may sit with a number of judges exceeding the number of regular judges fixed by the Statute. [Paragraphs 2 and 3 not modified.]
Article 5.	*Article 5.*
Before entering upon his duties, each member of the Court or judge summoned to complete the Court, under the terms of Article 31 of the Statute, shall make the following solemn declaration in accordance with Article 20 of the Statute: " I solemnly declare that I will exercise all my powers and duties as a judge honourably and faithfully, impartially and conscientiously." A special public sitting of the Court may, if necessary, be convened for this purpose.	[Not modified.]

1931	1936	
The Vice-President shall take his seat on the right of the President. The other members of the Court shall take their seats on the left and right of the President in the order laid down above.	2. The Vice-President shall take his seat on the right of the President. The other judges shall take their seats on the left and right of the President in the order laid down above.	2, para. 4.
[Last paragraph omitted.]		
Article 3.	*Article 3.*	
[Paragraphs 1 and 2 not modified.]	1. Any State which considers that it possesses and which intends to exercise the right to nominate a judge under Article 31 of the Statute of the Court shall so notify the Court by the date fixed for the filing of the Memorial. The name of the person chosen to sit as judge shall be indicated, either with the notification above mentioned, or within a period to be fixed by the President. These notifications shall be communicated to the other parties and they may submit their views to the Court within a period to be fixed by the President. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties.	—
Should a deputy-judge be summoned to take his seat in a particular case as a national judge, under the terms of Article 31 of the Statute or of Article 71 of the Rules, such summons shall not be regarded as coming within the terms of the present article.	2. If, on receipt of one or more notifications under the terms of the preceding paragraph, the Court finds that there are several parties in the same interest and that none of them has a judge of its nationality upon the Bench, it shall fix a period within which these parties, acting in concert, may nominate a judge under Article 31 of the Statute. If, at the expiration of this time-limit, no notification of a nomination by them has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute.	4, paras. 2 and 3.
Article 4.	*Article 4.*	
[Not modified.]	Where one or more parties are entitled to nominate a judge under Article 31 of the Statute, the full Court may sit with a number of judges exceeding the number of members of the Court fixed by the Statute.	4, para. 1.
Article 5.	*Article 5.*	
[Not modified.]	1. The declaration to be made by every judge in accordance with Article 20 of the Statute of the Court shall be worded as follows: "I solemnly declare that I will exercise all my powers and duties as a judge honourably and faithfully, impartially and conscientiously." 2. This declaration shall be made at the first public sitting of the Court at which the judge is present after his election or nomination. A special public sitting of the Court may be held for this purpose.	5.

1922	1926
At the public inaugural sitting held after a new election of the whole Court, the required declaration shall be made first by the President, secondly by the Vice-President, and then by the remaining judges in the order laid down in Article 2.	
Article 6.	*Article 6.*
For the purpose of applying Article 18 of the Statute, the President, or if necessary the Vice-President, shall convene the judges and deputy-judges. The member affected shall be allowed to furnish explanations. When he has done so, the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimously agreed, the Registrar shall issue the notification prescribed in the above-mentioned article.	[Not modified.]
Article 7.	*Article 7.*
The President shall take steps to obtain all information which might be helpful to the Court in selecting technical assessors in each case. With regard to the questions referred to in Article 26 of the Statute, he shall, in particular, consult the Governing Body of the International Labour Office.	[Not modified.]
The assessors shall be appointed by an absolute majority of votes, either by the Court or by the special Chamber which has to deal with the case in question.	
Article 8.	*Article 8.*
Assessors shall make the following solemn declaration at the first sitting of the Court at which they are present:	
"I solemnly declare that I will exercise my duties and powers as an assessor honourably and faithfully, impartially and conscientiously, and that I will scrupulously observe all the provisions of the Statute and of the Rules of Court."	[Not modified.]
SECTION B — THE PRESIDENCY	SECTION B — THE PRESIDENCY
Article 9.	*Article 9.*
The election of the President and Vice-President shall take place at the end of the ordinary session immediately before the normal termination of the period of office of the retiring President and Vice-President.	
After a new election of the whole Court, the election of the President and Vice-President shall take place at the commencement of the following session. The President and Vice-President elected in these circumstances shall take up their duties on the day of their election. They shall remain in office until the end of the second year after the year of their election.	[Not modified.]
Should the President or the Vice-President cease to belong to the Court before the expiration of their normal term of office, an election shall be held for the purpose of appointing a substitute for the unexpired portion of their term of office. If necessary, an extraordinary session of the Court may be convened for this purpose.	
The elections referred to in the present article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected.	

1931	1936	
	3. At the public inaugural sitting held after a new election of the whole Court, the required declaration shall be made first by the President, next by the Vice-President, and then by the remaining judges in the order laid down in Article 2 of the present Rules.	
Article 6.	*Article 6.*	6.
[Not modified.]	For the purpose of applying Article 18 of the Statute of the Court, the President, or if necessary the Vice-President, shall convene the members of the Court. The member affected shall be allowed to furnish explanations. When he has done so, the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimous, the Registrar shall issue the notification prescribed in the above-mentioned article.	
Article 7.	*Article 7.*	
[Not modified.]	1. The President shall take steps to obtain all relevant information with a view to the selection of the technical assessors to be appointed in a case. For cases falling under Article 26 of the Statute of the Court, he shall consult the Governing Body of the International Labour Office.	7, para. 1.
	2. Assessors shall be appointed by an absolute majority of votes by the full Court or by the Chamber which has to deal with the case in question, as the case may be.	7, para. 2.
	3. A request for assessors to be attached to the Court under Article 27, paragraph 2, of the Statute must at latest be submitted with the first document of the written proceedings. Such a request shall be complied with if the parties are in agreement. If the parties are not in agreement, the decision rests with the full Court or with the Chamber, as the case may be.	35, 3, para. 2.
Article 8.	*Article 8.*	8.
[Not modified.]	Before taking up their duties, assessors shall make the following solemn declaration at a public sitting:	
	" I solemnly declare that I will exercise my duties and powers as an assessor honourably and faithfully, impartially and conscientiously, and that I will scrupulously observe all the provisions of the Statute and of the Rules of Court."	
SECTION B — THE PRESIDENCY	THE PRESIDENCY	9.
Article 9.	*Article 9.*	
The election of the President and the Vice-President shall take place in the last quarter of the last year of office of the retiring President and Vice-President.	1. The President and the Vice-President shall be elected in the last quarter of the last year of office of the retiring President and Vice-President. They shall take up their duties on the following January 1st.	
[Paragraph 2 not modified.]	2. After a new election of the whole Court, the election of the President and of the Vice-President shall take place at the commencement of the following year. The President and Vice-President elected in these circumstances shall take up their duties on the date of their election. They shall remain in office until the end of the second year after the year of their election.	
Should the President or the Vice-President cease to belong to the Court before the expiration of their normal term of office, an election shall be held for the purpose of appointing a substitute for the unexpired portion of their term of office.	3. Should the President or the Vice-President cease to belong to the Court before the expiration of his normal term of office, an election shall be held for the purpose of appointing a successor for the unexpired portion of his term of office.	
[Paragraph 4 not modified.]	4. The elections referred to in the present article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected.	

1922	1926
Article 10.	*Article 10.*
The President shall direct the work and administration of the Court; he shall preside at the meetings of the full Court.	[Not modified.]
Article 11.	*Article 11.*
The Vice-President shall take the place of the President, should the latter be unable to be present, or, should he cease to hold office, until the new President has been appointed by the Court.	[Not modified.]
Article 12.	*Article 12.*
The President shall reside within a radius of ten kilometres from the Peace Palace at The Hague. The main annual vacation of the President shall not exceed three months.	[Not modified.]
Article 13.	*Article 13.*
After a new election of the whole Court and until such time as the President and Vice-President have been elected, the judge who takes precedence according to the order laid down in Article 2 shall perform the duties of President. The same principle shall be applied should both the President and the Vice-President be unable to be present, or should both appointments be vacant at the same time.	[Paragraph 1 not modified.] The same principle shall be applied should both the President and the Vice-President be unable to be present, or should both appointments be vacant at the same time. Whenever, according to the rules in force, the functions of President should be exercised by a national of one of the parties to the suit, they shall pass, for the purposes of the case in question, in the order of seniority established by the Rules of Court, to the first judge not similarly situated.
SECTION C — THE CHAMBERS	SECTION C — THE CHAMBERS
Article 14.	*Article 14.*
The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute shall be appointed at a meeting of the full Court by an absolute majority of votes, regard being had for the purposes of this selection to any preference expressed by the judges, so far as the provisions of Article 9 of the Statute permit.	[Not modified.]

1931	1936	
Article 10.	*Article 10.*	10.
[Not modified.]	[Not modified.]	
Article 11.	*Article 11.*	11.
The Vice-President shall take the place of the President, should the latter be unable to fulfil his duties, or, should he cease to hold office, until the new President has been appointed by the Court.	The Vice-President shall take the place of the President, if the latter is unable to fulfil his duties. In the event of the President ceasing to hold office, the same rule shall apply until his successor has been appointed by the Court.	
Article 12.	*Article 12.*	12.
The discharge of the duties of the President shall always be assured at the seat of the Court, either by the President himself or by the Vice-President. If at the same time both the President and the Vice-President are unable to fulfil their duties, or if both appointments are vacant at the same time, the duties of President are discharged by the oldest among the judges who have been longest on the bench. After a new election of the whole Court, and until the election of the President and the Vice-President, the duties of President are discharged by the oldest judge.	1. The discharge of the duties of the President shall always be assured at the seat of the Court, either by the President himself or by the Vice-President. 2. If at the same time both the President and the Vice-President are unable to fulfil their duties, or if both appointments are vacant at the same time, the duties of President shall be discharged by the oldest among the members of the Court who have been longest on the Bench. 3. After a new election of the whole Court, and until the election of the President and the Vice-President, the duties of President shall be discharged by the oldest member of the Court.	
Article 13.	*Article 13.*	
If the President is a national of one of the parties to the case, the functions of President pass in respect of that case to the Vice-President, or if he is similarly prevented from presiding, to the oldest among the judges who have been longest on the bench and who is not for the same reason prevented from presiding.	1. If the President is a national of one of the parties to a case brought before the Court, he will hand over his functions as President in respect of that case. The same rule applies to the Vice-President or to any member of the Court who might be called on to act as President.	13.
	2. If, after a new election of the whole Court, the newly elected President sits, under Article 13 of the Statute of the Court, in order to finish a case which he had begun during his preceding term of office as judge, the duties of President, in respect of such case, shall be discharged by the member of the Court who presided when the case was last under examination, unless the latter is unable to sit, in which case the former Vice-President or the oldest among the members of the Court who have been longest on the Bench shall discharge the duties of President.	—
	3. If, owing to the expiry of a President's period of office, a new President is elected, and if the Court sits after the end of the said period in order to finish a case which it had begun to examine during that period, the former President shall retain the functions of President in respect of that case. Should he be unable to fulfil his duties, his place shall be taken by the newly elected President.	—

SECTION C — THE CHAMBERS

Article 14.

[Paragraphs 1 and 2 not modified.]

1922	1926
The substitutes mentioned in Articles 26 and 27 of the Statute shall be appointed in the same manner. Two judges shall also be chosen to replace any member of the Chamber for Summary Procedure who may be unable to sit. The election shall take place at the end of the ordinary session of the Court, and the period of appointment of the members elected shall commence on January 1st of the following year. Nevertheless, after a new election of the whole Court, the election shall take place at the beginning of the following session. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election. The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member, provided that the President is not also a member.	
Article 15.	*Article 15.*
The special Chambers for Labour cases and for Communications and Transit cases may not sit with a greater number than five judges. Except as provided in the second paragraph of the preceding article, the composition of the Chamber for Summary Procedure may not be altered.	[Not modified.]
Article 16.	*Article 16.*
Deputy-judges shall not be summoned to complete the special Chambers or the Chamber for Summary Procedure, unless sufficient judges are not available to complete the number required.	[Not modified.]
SECTION D — THE REGISTRY	SECTION D — THE REGISTRY
Article 17.	*Article 17.*
The Court shall select its Registrar from amongst candidates proposed by members of the Court. The election shall be by secret ballot and by a majority of votes. In the event of an equality of votes, the President shall have a casting vote. The Registrar shall be elected for a term of seven years commencing on January 1st of the year following that in which the election takes place. He may be re-elected. Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor.	[Paragraphs 1 to 3 not modified.] Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Each election shall be for a full term of seven years. The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence, and, in the event of his ceasing to hold the office, to perform its duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed in the same way as the Registrar.

1931

The election shall take place in the last quarter of the year, and the period of appointment of the members elected shall commence on January 1st of the following year.

[Paragraphs 4 and 5 not modified.]

Article 15.

[Not modified.]

Article 16.

[Not modified.]

SECTION D — THE REGISTRY

Article 17.

The Court shall select its Registrar from amongst candidates proposed by members of the Court. The latter shall receive adequate notice of the date on which the list of candidates will be closed so as to enable nominations and information concerning the nationals of distant countries to be received in sufficient time.

Nominations must give the necessary particulars regarding age, nationality, university degrees and linguistic attainments of candidates, as also regarding their judicial and diplomatic qualifications, their experience in connection with the work of the League of Nations and their present profession.

The election shall be by secret ballot and by an absolute majority of votes.

[Paragraph 3 not modified.]

Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Such election shall be for a full term of seven years.

The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence, and, in the event of his ceasing to hold the office, to perform its duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed under the same conditions and in the same way as the Registrar.

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THE REGISTRY

Article 14.

17.

1. The Court shall select its Registrar from amongst candidates proposed by members of the Court. The latter shall receive adequate notice of the date on which the list of candidates will be closed so as to enable nominations and information concerning the nationals of distant countries to be received in sufficient time.

2. Nominations must give the necessary particulars regarding age, nationality, university degrees and linguistic attainments of candidates, as also regarding their judicial and diplomatic qualifications, their experience in connection with the work of the League of Nations and their present profession.

3. The election shall be by secret ballot and by an absolute majority of votes.

4. The Registrar shall be elected for a term of seven years reckoned from January 1st of the year following that in which the election takes place. He may be re-elected.

5. Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Such election shall be for a term of seven years.

6. The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence and, in the event of his ceasing to hold the office, to perform the duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed under the same conditions and in the same way as the Registrar.

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Article 18.	*Article 18.*
Before taking up his duties, the Registrar shall make the following declaration at a meeting of the full Court: "I solemnly declare that I will perform the duties conferred upon me as Registrar of the Permanent Court of International Justice in all loyalty, discretion and good conscience." The other members of the Registry shall make a similar declaration before the President, the Registrar being present.	[Paragraph 1 and declaration not modified.] The Deputy-Registrar shall make a similar declaration in the same conditions.
Article 19.	*Article 19.*
The Registrar shall reside within a radius of ten kilometres from the Peace Palace at The Hague. The main annual vacation of the Registrar shall not exceed two months.	The Registrar and the Deputy-Registrar shall reside within a radius of ten kilometres from the Peace Palace at The Hague. [Paragraph 2 not modified.]
Article 20.	*Article 20.*
The staff of the Registry shall be appointed by the Court on proposals submitted by the Registrar.	The officials of the Registry, other than the Deputy-Registrar, shall be appointed by the Court on proposals submitted by the Registrar. On taking up their duties, such officials shall make the following declaration before the President, the Registrar being present: "I solemnly declare that I will perform the duties conferred upon me as official of the Permanent Court of International Justice in all loyalty, discretion and good conscience."
Article 21.	*Article 21.*
The Regulations for the Staff of the Registry shall be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the Court.	[Not modified.]
Article 22.	*Article 22.*
The Court shall determine or modify the organisation of the Registry upon proposals submitted by the Registrar. On the proposal of the Registrar, the President shall appoint the member of the Registry who is to act for the Registrar in his absence or, in the event of his ceasing to hold his office, until a successor has been appointed.	The Court shall determine or modify the organisation of the Registry upon proposals submitted by the Registrar. On the proposal of the Registrar or Deputy-Registrar, as the case may be, the Court, or, if it is not in session, the President, shall appoint the official of the Registry who is to act as substitute for the Registrar, should both the Registrar and Deputy-Registrar be unable to be present, or, should both appointments be vacant at the same time, until a successor to the Registrar has been appointed.
Article 23.	*Article 23.*
The registers kept in the archives shall be so arranged as to give particulars with regard to the following points amongst others: (1) For each case or question, all documents pertaining to it and all action taken with regard to it in chronological order; all such documents shall bear the same file number and shall be numbered consecutively within the file; (2) All decisions of the Court in chronological order, with references to the respective files;	[Not modified.]

1931	1936	
Article 18.	*Article 15.*	18.
[Not modified.]	1. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the full Court: "I solemnly declare that I will perform the duties conferred upon me as Registrar of the Permanent Court of International Justice in all loyalty, discretion and good conscience." 2. The Deputy-Registrar shall make a similar declaration in the same conditions.	
Article 19.	*Article 16.*	19.
The Registrar is entitled to two months' holiday in each year.	The Registrar is entitled to two months' holiday in each year.	
Article 20.	*Article 17.*	20.
[Not modified.]	1. The officials of the Registry, other than the Deputy-Registrar, shall be appointed by the Court on proposals submitted by the Registrar. 2. On taking up their duties, such officials shall make the following declaration before the President, the Registrar being present: "I solemnly declare that I will perform the duties conferred upon me as an official of the Permanent Court of International Justice in all loyalty, discretion and good conscience."	
Article 21.	*Article 18.*	21.
The Court shall determine or modify the organisation of the Registry upon proposals submitted by the Registrar. The Regulations for the staff of the Registry shall be drawn up having regard to the organisation decided upon by the Court and to the provisions of the Regulations for the staff of the Secretariat of the League of Nations, to which they shall, as far as possible, conform. They shall be adopted by the President, on the proposal of the Registrar, subject to subsequent approval by the Court.	1. The Court shall determine or modify the organisation of the Registry upon proposals submitted by the Registrar. 2. The Regulations for the staff of the Registry shall be drawn up having regard to the organisation decided upon by the Court and to the provisions of the Regulations for the staff of the Secretariat of the League of Nations, to which they shall, as far as possible, conform. They shall be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the Court.	
Article 22.	*Article 19.*	22.
On the proposal of the Registrar or Deputy-Registrar, as the case may be, the Court, or, if it is not sitting, the President, shall appoint the official of the Registry who is to act as substitute for the Registrar, should both the Registrar and Deputy-Registrar be unable to be present, or, should both appointments be vacant at the same time, until a successor to the Registrar has been appointed.	In case both the Registrar and the Deputy-Registrar are unable to be present, or in case both appointments are vacant at the same time, the President, on the proposal of the Registrar or the Deputy-Registrar, as the case may be, shall appoint the official of the Registry who is to act as substitute for the Registrar until a successor to the Registrar has been appointed.	
Article 23.	*Article 20.*	
[Not modified.]	1. The General List of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases shall be entered in the list and numbered successively according to the date of the receipt of the document bringing the case before the Court.	28, para. 1.
	2. The General List shall contain the following headings:	—
	I. Number in list. II. Short title. III. Date of registration. IV. Registration number. V. File number in the archives. VI. Nature of case. VII. Parties. VIII. Interventions. IX. Method of submission. X. Date of document instituting proceedings. XI. Time-limits for filing documents in the written proceedings. XII. Prolongation, if any, of time-limits. XIII. Date of termination of the written proceedings. XIV. Postponements.	

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(3) All advisory opinions given by the Court in chronological order, with references to the respective files;
(4) All notifications and similar communications sent out by the Court, with references to the respective files.

Indexes kept in the archives shall comprise:

(1) A card index of names with necessary references;
(2) A card index of subject-matter with like references.

Article 24.

During hours to be fixed by the President, the Registrar shall receive any documents and reply to any enquiries, subject to the provisions of Article 38 of the present Rules and to the observance of professional secrecy.

Article 25.

The Registrar shall be the channel for all communications to and from the Court.

The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the official representatives or to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender, if a request to that effect be made.

Article 26.

The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. He shall himself be present at all meetings of the full Court and either he, or a person appointed to represent him with the approval of the Court, shall be present at all sittings of the various Chambers; he shall be responsible for drawing up the minutes of the meetings.

He shall further undertake all duties which may be laid upon him by the present Rules.

The duties of the Registry shall be set forth in detail in a List of Instructions to be submitted by the Registrar to the President for his approval.

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Article 24.

The Registrar shall be the channel for all communications to and from the Court.

The Registrar shall reply to any enquiries concerning its activities, including enquiries from the Press, subject, however, to the provisions of Article 42 of the present Rules and to the observance of professional secrecy.

Article 25.

The Registry shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the official representatives or to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender, if a request to that effect be made.

Article 26.

The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. He, or the Deputy-Registrar, shall be present at all meetings of the full Court and either he, or the Deputy-Registrar, or an official appointed by the Registrar, with the approval of the Court, to represent him, shall be present at all sittings of the various Chambers; the Registrar shall be responsible for drawing up the minutes of the meetings.

He shall further undertake all duties which may be laid upon him by the present Rules.

The duties of the Registry shall be set forth in detail in a list of instructions to be submitted by the Registrar to the President for his approval.

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	XV. Date of the beginning of the hearing (date of the first public sitting). XVI. Observations. XVII. References to earlier or subsequent cases. XVIII. Result (nature and date). XIX. Removal from the list (nature and date). XX. References to publications of the Court relating to the case.
Article 24.	3. The General List shall also contain a space for notes, if any, and spaces for the inscription, above the initials of the President and of the Registrar, of the dates of the entry of the case, of its result, or of its removal from the list, as the case may be.
	Article 21.
[Not modified.]	1. The Registrar shall be the channel for all communications to and from the Court. — 24, para. 1.
	2. The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender. — 25.
Article 25.	
[Not modified.]	3. The Registrar shall, subject to the obligations of secrecy attaching to his official duties, reply to all enquiries concerning the work of the Court, including enquiries from the Press. — 24, para. 2.
	4. The Registrar shall publish in the Press all necessary information as to the date and hour fixed for public sittings. — 43.
	Article 22. — 65.
	A collection of the judgments and advisory opinions of the Court, as also of such orders as the Court may decide to include therein, shall be printed and published under the responsibility of the Registrar.
Article 26.	*Article 23.* — 26.
[Not modified.]	1. The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. The Registrar or the Deputy-Registrar shall be present at all sittings of the full Court and at sittings of the Special Chambers and of the Chamber for Summary Procedure. The Registrar shall be responsible for drawing up the minutes of the meetings.
	2. He shall undertake, in addition, all duties which may be laid upon him by the present Rules.
	3. The duties of the Registry shall be set forth in detail in a list of instructions submitted by the Registrar to the President and approved by him.
	THE SPECIAL CHAMBERS AND THE CHAMBER FOR SUMMARY PROCEDURE
	Article 24.
	1. The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute of the Court and also the substitute members shall be appointed at a meeting of the full Court by secret ballot and by an absolute majority of votes. — 14, paras. 1 and 2.
	2. The election shall take place in the last quarter of the year and the period of appointment of the persons elected shall commence on January 1st of the following year. — 14, para. 3.
	3. Nevertheless, after a new election of the whole Court, the election shall take place at the beginning of the following year. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election. — 14, para. 4.

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Heading 2. — Working of the Court.	**Heading 2. — Working of the Court.**
Article 27.	*Article 27.*
In the year following a new election of the whole Court, the ordinary annual session shall commence on the fifteenth of January. If the day fixed for the opening of a session is regarded as a holiday at the place where the Court is sitting, the session shall be opened on the working-day following.	[Not modified.]
Article 28.	*Article 28.*
The list of cases shall be prepared and kept up to date by the Registrar under the responsibility of the President. The list for each session shall contain all questions submitted to the Court for an advisory opinion and all cases in regard to which the written proceedings are concluded, in the order in which the documents submitting each question or case have been received by the Registrar. If, in the course of a session, a question is submitted to the Court or the written proceedings in regard to any case are concluded, the Court shall decide whether such question or case shall be added to the list for that session. The Registrar shall prepare and keep up to date extracts from the above list showing the cases to be dealt with by the respective Chambers. The Registrar shall also prepare and keep a list of cases for revision.	[Not modified.]

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Heading 2. — Working of the Court.

Article 27.

1. The ordinary session of the Court opens on February 1st in each year.

2. The session continues until the session list referred to in Article 28 is finished. The President declares the session closed when the agenda is exhausted.

3. The President may summon an extraordinary session of the Court whenever he thinks it desirable, as, for instance, when a case submitted to the Court is ready for hearing or to deal with urgent administrative matters.

4. Judges are bound to be present at the ordinary session of the Court and at all sessions to which they are summoned by the President, unless they are on leave or are prevented by illness or other serious reasons duly explained to the President and communicated by him to the Court.

Deputy-judges are bound to be present at all sessions to which they are summoned by the President unless they are prevented by some reason duly explained to the President and communicated by him to the Court.

5. Judges whose homes are situated at more than five days' normal journey from The Hague and who by reason of the fulfilment of their duties in the Court are obliged to live away from their own country are entitled in the course of each period of three years of duty to leave for six months in addition to the time spent on travelling.

The order in which these leaves are to be taken shall be laid down in a list drawn up by the Court according to the seniority in age of the persons entitled. This order can only be departed from for serious reasons duly admitted by the Court.

The number of judges on leave at any one time must not exceed two.

The President and the Vice-President must not take their leave at the same time.

6. [Old paragraph 2 not modified.]

Article 28.

The general list of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases shall be entered in the list and numbered successively according to the date of the receipt of the document submitting the case to the Court.

For each session of the Court a session list shall be prepared in the same way, indicating the contentious cases and the cases for advisory opinion which are ready for hearing, whether submitted to the full Court or to the Special Chambers or the Chamber for

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4. The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall preside *ex officio* over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall preside *ex officio* over any Chamber of which he may be elected a member and of which the President of the Court is not a member. — 14, para. 5.

5. The Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court may not sit with a greater number than five judges. — 15, para. 1.

SECTION 2 — WORKING OF THE COURT

Article 25.

1. The judicial year shall begin on January 1st in each year. — *cf.* 27, 1.

2. In the absence of a special resolution by the Court, the dates and duration of the judicial vacations are fixed as follows: (*a*) from December 18th to January 7th; (*b*) from the Sunday before Easter to the second Sunday after Easter; (*c*) from July 15th to September 15th. —

3. In case of urgency, the President can always convene the members of the Court during the periods mentioned in the preceding paragraph. — *cf.* 27, 3.

4. The public holidays which are customary at the place where the Court is sitting will be observed by the Court. — 27, 6.

Article 26.

1. The order in which the leaves provided for in Article 23, paragraph 2, of the Statute of the Court are to be taken shall be laid down in a list drawn up by the Court for each period of three years. This order can only be departed from for serious reasons duly admitted by the Court. — 27, 5, para. 2.

2. The number of members of the Court on leave at any one time must not exceed two. The President and the Vice-President must not take their leave at the same time. — 27, 5, paras. 3 and 4.

Article 27.

Members of the Court who are prevented by illness or other serious reasons from attending a sitting of the Court to which they have been summoned by the President shall notify the President, who will inform the Court. — 27, 4, para. 1.

Article 28.

1. The date and hour of sittings of the full Court shall be fixed by the President of the Court. — 29.

2. The date and hour of sittings of the Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court shall be fixed by the Presidents of the Chambers respectively. The first sitting, however, of a Chamber in any particular case is fixed by the President of the Court. —

Article 29.

If a sitting of the full Court has been convened and it is found that there is no quorum, the President shall adjourn the sitting until a quorum has been obtained. Judges nominated under Article 31 of the Statute shall not be taken into account for the calculation of the quorum. — 30.

Article 30.

1. The Court shall sit in private to deliberate upon disputes which are submitted to it and upon advisory opinions which it is asked to give. — 31, para. 1.

2. During the deliberations referred to in the preceding paragraph, only persons authorised to take part therein and the Registrar or his substitute shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court. — 31, para. 2.

3. Every judge who is present at the deliberations shall state his opinion together with the reasons on which it is based. — 31, para. 3.

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Article 29.	*Article 29.*
During the sessions, the dates and hours of sittings shall be fixed by the President.	[Not modified.]
Article 30.	*Article 30.*
If at any sitting of the full Court it is impossible to obtain the prescribed quorum, the Court shall adjourn until the quorum is obtained.	If at any sitting of the full Court it is impossible to obtain the prescribed quorum, the Court shall adjourn until the quorum is obtained. Judges *ad hoc* shall not be taken into account for the calculation of the quorum.
Article 31.	*Article 31.*
The Court shall sit in private to deliberate upon the decision of any case or on the reply to any question submitted to it.	The Court shall sit in private to deliberate upon the decision of any case or upon any advisory opinion; also, when dealing with any administrative matter.
During the deliberation referred to in the preceding paragraph, only persons authorised to take part in the deliberation and the Registrar shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, having regard to exceptional circumstances.	During the deliberation referred to in the preceding paragraph, only persons authorised to take part in the deliberation and the Registrar or, in his absence, the Deputy-Registrar, shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, having regard to exceptional circumstances.
Every member of the Court who is present at the deliberation shall state his opinion together with the reasons on which it is based.	[Paragraph 3 not modified.]
The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the members.	The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the members voting in an order inverse to the order of precedence established by Article 2.
Any member of the Court may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. A request to this effect shall be complied with.	[Paragraph 5 not modified.]
	No detailed minutes shall be prepared of the Court's private meetings for deliberation upon judgments or advisory opinions; such minutes, which are to be considered as confidential, shall record only the subject of the debates, votes taken, with the names of those voting for and against a motion, and statements expressly made for insertion in the minutes.
	Subject to a contrary decision by the Court, the same procedure shall apply to private meetings for deliberation upon administrative matters.
	After the final vote taken on a judgment or advisory opinion, any judge who desires to set forth his individual opinion must do so in accordance with Article 57 of the Statute.

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Summary Procedure. Cases shall be entered in the order which they occupy in the general list, but subject to the priority resulting from Article 57 or accorded by the Court to a particular case in exceptional circumstances.		
When the list includes no cases other than those submitted to the Special Chambers or the Chamber for Summary Procedure, the session shall only continue as a session of the Special Chamber or of the Chamber for Summary Procedure, as the case may be.		
If in the course of the session a case submitted to the Court, either for decision or for an advisory opinion, becomes ready for hearing, it shall be entered in the session list, unless the Court decides to the contrary.		
Adjournments which are applied for in cases which are submitted to the Court for decision or for advisory opinion and are ready for hearing may be granted by the Court in case of need. If the Court is not sitting, adjournments may in such cases be granted by the President.		
Article 29.		
[Not modified.]		
Article 30.		
[Not modified.]		
Article 31.		
[Not modified.]		
	4. Any judge may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. Effect shall be given to any such request.	31, para. 5.
	5. The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the judges voting in an order inverse to the order laid down by Article 2 of the present Rules.	31, para. 4.
	6. No detailed minutes shall be prepared of the private meetings of the Court for deliberation upon judgments or advisory opinions; the minutes of these meetings are to be considered as confidential and shall record only the subject of the debates, the votes taken, the names of those voting for and against a motion and statements expressly made for insertion in the minutes.	31, para. 6.
	7. After the final vote taken on a judgment or advisory opinion, any judge who desires to set forth his individual opinion must do so in accordance with Article 57 of the Statute.	31, para. 8.
	8. Unless otherwise decided by the Court, paragraphs 2, 4 and 5 of this article shall apply to deliberations by the Court in private upon any administrative matter.	31, para. 7.

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CHAPTER II — PROCEDURE

Heading 1. — Contentious Procedure.

SECTION A — GENERAL PROVISIONS

Article 32.

The rules contained under this heading shall in no way preclude the adoption by the Court of such other rules as may be jointly proposed by the parties concerned, due regard being paid to the particular circumstances of each case.

Article 33.

The Court shall fix time-limits in each case by assigning a definite date for the completion of the various acts of procedure, having regard as far as possible to any agreement between the parties.

The Court may extend time-limits which it has fixed. It may likewise decide in certain circumstances that any proceeding taken after the expiration of a time-limit shall be considered as valid.

If the Court is not sitting, the powers conferred upon it by this article shall be exercised by the President, subject to any subsequent decision of the Court.

Article 34.

All documents of the written proceedings submitted to the Court shall be accompanied by not less than thirty printed copies certified correct. The President may order additional copies to be supplied.

SECTION B — PROCEDURE BEFORE THE COURT AND BEFORE THE SPECIAL CHAMBERS (ARTICLES 26 AND 27 OF THE STATUTE)

I — INSTITUTION OF PROCEEDINGS

Article 35.

When a case is brought before the Court by means of a special agreement, the latter, or the document notifying the Court of the agreement, shall mention the addresses selected at the seat of the Court to which notices and communications intended for the respective parties are to be sent.

In all other cases in which the Court has jurisdiction, the application shall include, in addition to an indication of the subject of the dispute and the names of the parties concerned, a succinct statement of facts, an indication of the claim and the address selected at the seat of the Court to which notices and communications are to be sent.

Should proceedings be instituted by means of an application, the first document sent in reply thereto shall mention the address selected at the seat of the Court to which subsequent notices and communications in regard to the case are to be sent.

Should the notice of a special agreement, or the application, contain a request that the case be referred to one of the special Chambers mentioned in Articles 26 or 27 of the Statute, such request shall be complied with, provided that the parties are in agreement.

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CHAPTER II — PROCEDURE

Heading 1. — Contentious Procedure.

SECTION A — GENERAL PROVISIONS

Article 32.

[Not modified.]

Article 33.

[Not modified.]

Article 34.

The originals of all documents of the written proceedings submitted to the Court shall be signed by the agent or agents duly appointed; they shall be dated.

The original shall be accompanied by ten copies certified as correct. Subject to any contrary arrangement between the Registrar and the agent or agents, it shall likewise be accompanied by a further forty printed copies.

The President may order additional printed copies to be supplied.

SECTION B — PROCEDURE BEFORE THE COURT AND BEFORE THE SPECIAL CHAMBERS (ARTICLES 26 AND 27 OF THE STATUTE)

I — INSTITUTION OF PROCEEDINGS

Article 35.

1. When a case is brought before the Court by means of a special agreement, the latter, or the document notifying the Court of the agreement, shall mention:

(*a*) the names of the agents appointed by the respective parties for the purposes of the case;
(*b*) the permanent addresses at the seat of the Court to which notices and communications intended for the respective parties are to be sent.

In all other cases in which the Court has jurisdiction, the application, in addition to the specification of the subject of the dispute and the names of the parties concerned, a succinct statement of facts, and an indication of the claim, shall include:

(*a*) The name or names of the agent or agents appointed for the purposes of the case;
(*b*) The permanent addresses at the seat of the

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CHAPTER II — PROCEDURE

Heading 1. — Contentious Procedure.

SECTION A — GENERAL PROVISIONS

Article 32.

[Not modified.]

Article 33.

[Not modified.]

Article 34.

[Not modified.]

SECTION B — PROCEDURE BEFORE THE COURT AND BEFORE THE SPECIAL CHAMBERS (ARTICLES 26 AND 27 OF THE STATUTE)

1 — INSTITUTION OF PROCEEDINGS

Article 35.

[Not modified.]

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Heading II. — Contentious Procedure.

Article 31.

The rules contained in Sections 1, 2 and 4 of this Heading shall not preclude the adoption by the Court of particular modifications or additions proposed jointly by the parties and considered by the Court to be appropriate to the case and in the circumstances. 32.

SECTION 1 — PROCEDURE BEFORE THE FULL COURT

1 — GENERAL RULES

Institution of Proceedings.

Article 32.

1. When a case is brought before the Court by means of a special agreement, Article 40, paragraph 1, of the Statute of the Court shall apply. —

2. When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the subject of the dispute. It must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise nature of the claim and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed in the Memorial, to which the evidence will be annexed. 35, 1, para. 2.

3. The original of an application shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party at The Hague, or by a duly authorised person. If the document bears the signature of a person other than the diplomatic representative of that party at The Hague, the signature must be —

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Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for Summary Procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not refer to any of the questions indicated in Articles 26 and 27 of the Statute.

Article 36.

The Registrar shall forthwith communicate to all members of the Court special agreements or applications which have been notified to him.

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Court to which subsequent notices and communications in regard to the case are to be sent.

Should proceedings be instituted by means of an application, the first document sent in reply thereto shall likewise mention the name or names of the agent or agents and the addresses at the seat of the Court.

Whenever possible, the agents should remain at the seat of the Court pending the trial and determination of the case.

2. The declaration provided for in the Resolution of the Council of the League of Nations of May 17th, 1922 (Annex [1]), shall, when it is required under Article 35 of the Statute, be filed with the Registry not later than the time fixed for the deposit of the first document of the written procedure.

3. Should the notice of a special agreement, or the application, contain a request that the case be referred to one of the special Chambers mentioned in Articles 26 and 27 of the Statute, such request shall be complied with, provided that the parties are in agreement.

Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for Summary Procedure, shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not relate to the matters dealt with in Articles 26 and 27 of the Statute.

Article 36.

[Paragraph 1 not modified.]

He shall also transmit them through the channels provided for in the Statute or by special arrangement, as the case may be, to all Members of the League of Nations and to all States not members of the League entitled to appear before the Court.

[1] See opposite page.

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legalised by this diplomatic representative or by the competent authority of the Government concerned.

Article 33. —

1. When a case is brought before the Court by means of an application, the Registrar shall transmit forthwith to the party against whom the claim is brought a copy of the application certified by him to be correct.

2. When a case is brought before the Court by means of a special agreement filed by one only of the parties, the Registrar shall notify forthwith the other party that it has been so filed.

Article 34. 36.

1. The Registrar shall transmit forthwith to all the members of the Court copies of special agreements or applications submitting a case to the Court.

2. He shall also transmit through the channels indicated in the Statute of the Court or in a special arrangement, as the case may be, copies to Members of the League of Nations and to States entitled to appear before the Court.

Article 35.

1. When a case is brought before the Court by means of a special agreement, the appointment of the agent or agents of the party or parties lodging the special agreement shall be notified at the same time as the special agreement is filed. If the special agreement is filed by one only of the parties, the other party shall, when acknowledging receipt of the communication announcing the filing of the special agreement, or failing this, as soon as possible, inform the Court of the name of its agent. 35, 1, para. 1.

Article 36.

2. When a case is brought before the Court by means of an application, the application, or the covering letter, shall state the name of the agent of the applicant Government. 35, 1, para. 2.

[Not modified.]

3. The party against whom the application is directed and to whom it is communicated shall, when acknowledging receipt of the communication, or failing this, as soon as possible, inform the Court of the name of its agent. 35, 1, para. 3.

4. Applications to intervene under Article 64 of the present Rules, interventions under Article 66 and requests under Article 78 for the revision, or under Article 79 for the interpretation, of a judgment, shall similarly be accompanied by the appointment of an agent. —

5. The appointment of an agent must be accompanied by a mention of his permanent address at the seat of the Court to which all communications as to the case are to be sent. 35, 1, paras. 1, 2, 3.

Article 36. 35, 2.

The declaration provided for in the Resolution of the Council of the League of Nations dated May 17th, 1922[1], shall be filed with the Registry at the same time as the notification of the appointment of the agent.

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[1] *Annex to Article 36.*

RESOLUTION ADOPTED BY THE COUNCIL ON MAY 17th, 1922

The Council of the League of Nations, in virtue of the powers conferred upon it by Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice, and subject to the provisions of that article,

RESOLVES:

1. The Permanent Court of International Justice shall be open to a State which is not a Member of the League of Nations or mentioned in the Annex to the Covenant of the League, upon the following condition, namely: that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Covenant of the League of Nations, and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to carry out

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II — Written Proceedings

Article 37.

Should the parties agree that the proceedings shall be conducted in French or in English, the documents constituting the written procedure shall be submitted only in the language adopted by the parties.

In the absence of an agreement with regard to the language to be employed, documents shall be submitted in French or in English.

Should the use of a language other than French or English be authorised, a translation into French or into English shall be attached to the original of each document submitted.

The Registrar shall not be bound to make translations of documents submitted in accordance with the above rules.

In the case of voluminous documents, the Court, or the President if the Court is not sitting, may, at the request of the party concerned, sanction the submission of translations of portions of documents only.

Article 38.

The Court, or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the Case and Counter-Cases of each suit at the disposal of the Government of any State which is entitled to appear before the Court.

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II — Written Proceedings

Article 37.

[Not modified.]

Article 38.

When proceedings are begun by means of an application, any preliminary objection shall be filed after the filing of the Case by the applicant and within the time fixed for the filing of the Counter-Case.

The document submitting the objection shall contain a statement of facts and of law on which the plea is based, a statement of conclusions and a list of the documents in support; these documents shall be attached; it shall mention the evidence which the party may desire to produce.

Upon receipt by the Registrar of the document submitting the objection, the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the plea is directed may submit a written statement of its observations and conclusions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

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Preliminary Measures.

Article 37.

1. In every case submitted to the Court, the President ascertains the views of the parties with regard to questions connected with the procedure; for this purpose he may summon the agents to a meeting as soon as they have been appointed. —

2. In the light of the information obtained by the President, the Court will make the necessary orders to determine, *inter alia*, the number and order of the documents of the written proceedings and the time-limits within which they must be presented. —

3. In the making of an order under the foregoing paragraph, any agreement between the parties is to be taken into account so far as possible. —

4. The Court may extend time-limits which have been fixed. It may also, in special circumstances and after giving the agent of the opposing party an opportunity of submitting his views, decide that a proceeding taken after the expiration of a time-limit shall be considered as valid. 33, para. 2.

5. If the Court is not sitting and without prejudice to any subsequent decision of the Court, its powers under this article shall be exercised by the President. 33, para. 3.

Article 38.

Time-limits shall be fixed by assigning a definite date for the completion of the various acts of procedure. 33, para. 1.

II — Written Proceedings

Written Proceedings.

Article 37.

Article 39. 37.

[Not modified.]

1. Should the parties agree that the proceedings shall be conducted wholly in French, or wholly in English, the documents of the written proceedings shall be submitted only in the language adopted by the parties.

2. In the absence of an agreement with regard to the language to be employed, the documents shall be submitted in French or in English.

Article 38.

[Not modified.]

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in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

2. Such declaration may be either particular or general.

A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

A general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future.

A State in making such a general declaration may accept the jurisdiction of the Court as compulsory, *ipso facto*, and without special convention, in conformity with Article 36 of the Statute of the Court; but such acceptance may not, without special convention, be relied upon vis-à-vis Members of the League or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the " optional clause " provided for by the Additional Protocol of December 16th, 1920.

3. The original declarations made under the terms of this Resolution shall be kept in the custody of the Registrar of the Court, in accordance with the practice of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all Members of the League of Nations, and States mentioned in the Annex to the Covenant, and to such other States as the Court may determine, and to the Secretary-General of the League of Nations.

4. The Council of the League of Nations reserves the right to rescind or amend this Resolution by a Resolution which shall be communicated to the Court; and on the receipt of such communication and to the extent determined by the new Resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

5. All questions as to the validity or the effect of a declaration made under the terms of this Resolution shall be decided by the Court.

[In D 1, 3rd edition 1936, this Resolution is not printed below the relevant article, as in previous editions of that publication, but following the Rules. A footnote to Article 36 indicates the page where it is to be found.]

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	Unless otherwise decided by the Court, the further proceedings shall be oral. The provisions of paragraphs 4 and 5 of Article 69 of the Rules shall apply.
Article 39.	*Article 39.*
In cases in which proceedings have been instituted by means of a special agreement, the following documents may be presented in the order stated below, provided that no agreement to the contrary has been concluded between the parties: A Case, submitted by each party within the same limit of time; A Counter-Case, submitted by each party within the same limit of time; A Reply, submitted by each party within the same limit of time. When proceedings are instituted by means of an application, failing any agreement to the contrary between the parties, the documents shall be presented in the order stated below: The Case by the applicant; The Counter-Case by the respondent; The Reply by the applicant; The Rejoinder by the respondent.	[Not modified.]
Article 40.	*Article 40.*
Cases shall contain: (1) A statement of the facts on which the claim is based; (2) A statement of law; (3) A statement of conclusions; (4) A list of the documents in support; these documents shall be attached to the Case.	
Counter-Cases shall contain: (1) The affirmation or contestation of the facts stated in the Case; (2) A statement of additional facts, if any; (3) A statement of law; (4) Conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court; (5) A list of the documents in support; these documents shall be attached to the Counter-Case.	[Not modified.]
Article 41.	*Article 41.*
Upon the termination of the written proceedings, the President shall fix a date for the commencement of the oral proceedings.	[Not modified.]
Article 42.	*Article 42.*
The Registrar shall forward to each of the members of the Court, a copy of all documents in the case as he receives them.	The Registrar shall forward to each of the members of the Court, and to the parties, a copy or copies of all documents in the case as he receives them. The Court, or the President if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the Cases and Counter-Cases of each suit at the disposal of the Government of any State which is entitled to appear before the Court.

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	3. Should the use of a language other than French or English be authorised, a translation into French or into English shall be attached to the original of each document submitted.	
Article 39.	4. The Registrar shall not be bound to make translations of the documents of the written proceedings.	
	Article 40.	
	1. The original of every document of the written proceedings shall be signed by the agent and filed with the Court accompanied by fifty printed copies bearing the signature of the agent in print.	34, paras. 1 and 2.
[Not modified.]	2. When a copy of a document of the written proceedings is communicated to the other party under Article 43, paragraph 4, of the Statute of the Court, the Registrar shall certify that it is a correct copy of the original filed with the Court.	—
	3. All documents of the written proceedings shall be dated. When a document has to be filed by a certain date, it is the date of the receipt of the document by the Registry which will be regarded by the Court as the material date.	—
	4. If the Registrar at the request of the agent of a party arranges for the printing, at the cost of the Government which this agent represents, of a document which it is intended to file with the Court, the text must be transmitted to the Registry in sufficient time to enable the printed document to be filed before the expiry of any time-limit which may apply to it.	—
Article 40.	5. When, under this article, a document has to be filed in a number of copies fixed in advance, the President may require additional copies to be supplied.	34, para. 3.
	6. The correction of a slip or error in a document which has been filed is permissible at any time with the consent of the other party, or by leave of the President.	—
[Not modified.]	*Article 41.*	39.
	1. If proceedings are instituted by means of a special agreement, the following documents may, subject to Article 37, paragraphs 2 and 3, of the present Rules, be presented in the order stated below: A Memorial, by each party within the same time-limit; A Counter-Memorial, by each party within the same time-limit; A Reply, by each party within the same time-limit.	
Article 41. Upon the termination of the written proceedings, the Court, or the President, if the Court is not sitting, shall fix a date for the commencement of the oral proceedings.	2. If proceedings are instituted by means of an application, the documents shall, subject to Article 37, paragraphs 2 and 3, of the present Rules, be presented in the order stated below: The Memorial by the applicant; The Counter-Memorial by the respondent; The Reply by the applicant; The Rejoinder by the respondent.	
Article 42. †	*Article 42.*	40.
[Paragraphs 1 and 2 not modified.]	1. A Memorial shall contain: a statement of the facts on which the claim is based, a statement of law, and the submissions.	
	2. A Counter-Memorial shall contain: the admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial, a statement of law in answer thereto, and the submissions.	
	Article 43.	
In the same way, the Court or the President may, with the consent of the parties, authorise the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case.	1. A copy of every document in support of the arguments set forth therein must be attached to the Memorial or Counter-Memorial; a list of such documents shall be given after the submissions. If, on account of the length of a document, extracts only are attached, the document itself or a complete copy of it must, if possible, and unless the document has been published and is of a public character, be	40, para. 1, No. 4, and para. 2, No. 5.

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III. Oral Proceedings

Article 43.

In the case of a public sitting, the Registrar shall publish in the Press all necessary information as to the date and hour fixed.

Article 44.

The Registrar shall arrange for the interpretation from French into English and from English into French of all statements, questions and answers which the Court may direct to be so interpreted.

Whenever a language other than French or English is employed, either under the terms of the third paragraph of Article 39 of the Statute or in a particular instance, the necessary arrangements for translation into one of the two official languages shall be made by the party concerned. In the case of witnesses or experts who appear at the instance of the Court, these arrangements shall be made by the Registrar.

Article 45.

The Court shall determine in each case whether the representatives of the parties shall address the Court before or after the production of

III — Oral Proceedings

Article 43.

[*Not modified.*]

Article 44.

[Not modified.]

Article 45.

[Not modified.]

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communicated to the Registrar for the use of the Court and of the other party.

2. Any document filed as an annex which is in a language other than French or English, must be accompanied by a translation into one of the official languages of the Court. Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, subject, however, to any subsequent decision by the Court, or, if it is not sitting, by the President. 37, para. 5.

3. Paragraphs 1 and 2 of the present article shall apply also to the other documents of the written proceedings. —

Article 44.

1. The Registrar shall forward to the judges and to the parties copies of all the documents in the case, as and when he receives them. 42.

2. The Court, or the President if the Court is not sitting, may, after obtaining the views of the parties, decide that the Registrar shall hold the documents of the written proceedings in a particular case at the disposal of the Government of any Member of the League of Nations or State which is entitled to appear before the Court.

3. The Court, or the President, if the Court is not sitting, may, with the consent of the parties, authorise the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case.

Article 45.

Upon the termination of the written proceedings, the case is ready for hearing. —

Article 46.

1. Subject to the priority resulting from Article 61 of the present Rules, cases submitted to the Court will be taken in the order in which they become ready for hearing. When several cases are ready for hearing, the order in which they will be taken is determined by the position which they occupy in the General List. 28, para. 2.

2. Nevertheless, the Court may, in special circumstances, decide to take a case in priority to other cases which are ready for hearing and which precede it in the General List. 28, para. 2.

3. If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing and which follow it in the General List, the President may grant such an adjournment: if the parties are not in agreement, the President decides whether or not to submit the question to the Court. 28, para. 5.

III — Oral Proceedings

Article 43.

[Not modified.]

Article 44.

[Not modified.]

Article 45.

[Not modified.]

Oral Proceedings.

Article 47.

1. When a case is ready for hearing, the date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting. 41.

2. If occasion should arise, the Court or the President, if the Court is not sitting, may decide that the commencement or continuance of the hearings shall be postponed. —

Article 48.

1. Except as provided in the following paragraph, no new document may be submitted to the Court after the termination of the written proceedings save with the consent of the other party. The party desiring to produce the new document shall file the original or a certified copy thereof with the Registry, which will be responsible for communicating it to the other party and will inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document. —

2. If this consent is not given, the Court, after hearing the parties.

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the evidence; the parties shall, however, retain the right to comment on the evidence given.	
Article 46.	*Article 46.*
The order in which the agents, advocates or counsel, shall be called upon to speak shall be determined by the Court, failing an agreement between the parties on the subject.	[Not modified.]
Article 47.	*Article 47.*
In sufficient time before the opening of the oral proceedings, each party shall inform the Court and the other parties of all evidence which it intends to produce, together with the names, christian names, description and residence of witnesses whom it desires to be heard. It shall further give a general indication of the point or points to which the evidence is to refer.	[Not modified.]
Article 48.	*Article 48.*
The Court may, subject to the provisions of Article 44 of the Statute, invite the parties to call witnesses, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement.	[Not modified.]
Article 49.	*Article 49.*
The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses out of Court.	[Not modified.]
Article 50.	*Article 50.*
Each witness shall make the following solemn declaration before giving his evidence in Court: " I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."	[Not modified.]
Article 51.	*Article 51.*
Witnesses shall be examined by the representatives of the parties under the control of the President. Questions may be put to them by the President and afterwards by the judges.	[Not modified.]
Article 52.	*Article 52.*
The indemnities of witnesses who appear at the instance of the Court shall be paid out of the funds of the Court.	[Not modified.]
Article 53.	*Article 53.*
Any report or record of an enquiry carried out at the request of the Court, under the terms of Article 50 of the Statute, and reports furnished to the Court by experts, in accordance with the same article, shall be forthwith communicated to the parties.	[Not modified.]
Article 54.	*Article 54.*
A record shall be made of the evidence taken. The portion containing the evidence of each witness shall be read over to him and approved by him. As regards the remainder of the oral proceedings, the Court shall decide in each case whether verbatim records of all or certain portions of them shall be prepared for its own use.	A verbatim record shall be made of the oral proceedings, including the evidence taken, under the supervision of the Registrar. The report of the evidence of each witness shall be read to him in order that, subject to the direction of the Court, any mistakes may be corrected. The report of statements made by agents, advocates or counsel, shall be communicated to them for their correction or revision, subject to the direction of the Court.
Article 55.	*Article 55.*
The minutes mentioned in Article 47 of the Statute shall in particular include: (1) The names of the judges;	[Paragraph 1 not modified.]

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Article 46.	may either refuse to allow the production or may sanction the production of the new document. If the Court sanctions the production of the new document, an opportunity shall be given to the other party of commencing upon it.	
[Not modified.]	*Article 49.*	
Article 47.	1. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and, through the Registry, the other parties, of the names, christian names, description and residence of witnesses and experts whom it desires to be heard. It shall further give a general indication of the point or points to which the evidence is to refer.	47, paras. 1 and 2.
[Not modified.]	2. Similarly, and subject to Article 48 of these Rules and to the preceding paragraph of this article, each party shall indicate all other evidence which it intends to produce or which it intends to request the Court to take, including any request for the holding of an expert enquiry.	—
Article 48.	*Article 50.*	45.
[Not modified.]	The Court shall determine whether the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.	
Article 49.	*Article 51.*	46.
[Not modified.]	The order in which the agents, counsel or advocates shall be called upon to speak shall be determined by the Court, unless there is an agreement between the parties on the subject.	
Article 50.	*Article 52.*	—
[Not modified.]	1. During the hearing, which is under the control of the President, the latter, either in the name of the Court or on his own behalf, may put questions to the parties or may ask them for explanations.	
Article 51.	2. Similarly, each of the judges may put questions to the parties or ask for explanations; nevertheless, he shall first apprise the President.	
[Not modified.]	3. The parties shall be free to answer at once or at a later date.	
Article 52.	*Article 53.*	
[Not modified.]	1. Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges.	51.
Article 53.	2. Each witness shall make the following solemn declaration before giving his evidence in Court:	50.
[Not modified.]	"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."	
Article 54.	3. Each expert shall make the following solemn declaration before making his statement in Court:	—
[Not modified.]	"I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."	
	Article 54.	48.
	The Court may invite the parties to call witnesses or experts, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement If need. be, the Court shall apply the provisions of Article 44 of the Statute of the Court.	
Article 55.	*Article 55.*	52.
[Not modified.]	The indemnities of witnesses or experts who appear at the instance of the Court shall be paid out of the funds of the Court.	
	Article 56.	49.
	The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take	

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(2) The names of the agents, advocates and counsel;
(3) The names, christian names, description and residence of witnesses heard;
(4) A specification of other evidence produced;
(5) Any declarations made by the parties;
(6) All decisions taken by the Court during the hearing.

Article 56.

Before the oral proceedings are concluded, each party may present his bill of costs.

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The minutes of public sittings shall be printed and published.

Article 56.

The party in whose favour an order for the payment of costs has been made may present his bill of costs after judgment has been delivered.

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Article 56.

[Not modified.]

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the necessary steps for the examination of witnesses or experts otherwise than before the Court itself.

Article 57.

1. If the Court considers it necessary to arrange for an enquiry — or an expert report, it shall issue an order to this effect, after duly hearing the parties, stating the subject of the enquiry or expert report, and setting out the number and appointment of the persons to hold the enquiry or of the experts and the formalities to be observed.

2. Any report or record of an enquiry and any expert report shall 53. be communicated to the parties.

Article 58.

1. In the absence of any decision to the contrary by the Court, 44, para. 1. or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same rule shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.

2. Whenever a language other than French or English is employed 44, para. 2. with the authorisation of the Court, the necessary arrangements for a translation into one of the two official languages shall be made by the party concerned; the evidence of witnesses and the statements of experts shall, however, be translated under the supervision of the Court. In the case of witnesses or experts who appear at the instance of the Court, arrangements for translation shall be made by the Registry.

3. The persons making the translations referred to in the preceding — paragraph shall make the following solemn declaration in Court:

> " I solemnly declare upon my honour and conscience that my translation will be a complete and faithful rendering of what I am called upon to translate."

Article 59. 55.

1. The minutes mentioned in Article 47 of the Statute of the Court shall include:

> The names of the judges present;
> The names of the agents, counsel or advocates present;
> The names, christian names, description and residence of witnesses and experts heard;
> A statement of the evidence produced at the hearing;
> Declarations made on behalf of the parties;
> A brief mention of questions put to the parties by the President or by the judges;
> Any decisions delivered or announced by the Court during the hearing.

2. The minutes of public sittings shall be printed and published.

Article 60. 54.

1. In respect of each hearing held by the Court, a shorthand note shall be made under the supervision of the Registrar of the oral proceedings, including the evidence taken, and shall be appended to the minutes referred to in Article 59 of the present Rules. This note, unless otherwise decided by the Court, shall contain any interpretations from one official language to the other made in Court by the interpreters.

2. The report of the evidence of each witness or expert shall be read to him in order that, under the supervision of the Court, any mistakes may be corrected.

3. Reports of speeches or declarations made by agents, counsel or advocates shall be communicated to them for correction or revision, under the supervision of the Court.

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IV — Interim Protection.	IV — Interim Protection
Article 57.	*Article 57.*
When the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President. Any refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed on record.	[Not modified.]

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IV — Interim Protection

Article 57.

An application made to the Court by one or both of the parties, for the indication of interim measures of protection, shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency, and if the Court is not sitting it shall be convened without delay by the President for the purpose.

If no application is made, and if the Court is not sitting, the President may convene the Court to submit to it the question whether such measures are expedient.

In all cases, the Court shall only indicate measures of protection after giving the parties an opportunity of presenting their observations on the subject.

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II — Occasional Rules

Interim Protection.

Article 61.

1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures of which the indication is proposed. —

2. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency. 57, para. 1.

3. If the Court is not sitting, the members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision. para. 1 and new.

4. The Court may indicate interim measures of protection other than those proposed in the request. —

5. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts. —

6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene the members in order to submit to the Court the question whether it is expedient to indicate such measures. 57, para. 2.

7. The Court may at any time by reason of a change in the situation revoke or modify its decision indicating interim measures of protection. —

8. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies a decision indicating such measures. 57, para. 3.

9. When the President has occasion to convene the members of the Court, judges who have been appointed under Article 31 of the Statute of the Court shall be convened if their presence can be assured at the date fixed by the President for hearing the parties. —

Preliminary Objections.

Article 62.

1. A preliminary objection must be filed at the latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party. 38, para. 1.

2. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; these documents shall be attached; it shall mention any evidence which the party may desire to produce. 38, para. 2.

3. Upon receipt by the Registrar of the objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the objection is directed may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned. 38, para. 3.

4. Unless otherwise decided by the Court, the further proceedings shall be oral. 38, para. 4.

5. After hearing the parties, the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings. —

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V. Intervention

Article 58.

An application for permission to intervene, under the terms of Article 62 of the Statute, must be communicated to the Registrar at latest before the commencement of the oral proceedings.

Nevertheless the Court may, in exceptional circumstances, consider an an application submitted at a later stage.

Article 59.

The application referred to in the preceding article shall contain:

(1) A specification of the case in which the applicant desires to intervene;
(2) A statement of law and of fact justifying intervention;
(3) A list of the documents in support of the application; these documents shall be attached.

Such application shall be immediately communicated to the parties, who shall send to the Registrar any observations which they may desire to make within a period to be fixed by the Court, or by the President, should the Court not be sitting.

Article 60.

Any State desiring to intervene, under the terms of Article 63 of the Statute, shall inform the Registrar in writing at latest before the commencement of the oral proceedings.

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V — Intervention

Article 58.

[Not modified.]

Article 59.

[Paragraphs 1 and 2 not modified.]

Such observations shall be communicated to the State desiring to intervene and to all parties. The intervener and the original parties may comment thereon in Court; for this purpose the matter shall be placed on the agenda for a hearing the date and hour of which shall be notified to all concerned. The Court will give its decision on the application in the form of a judgment.

If the application is not contested, the President, if the Court is not sitting, may, subject to any subsequent decision of the Court as regards the admissibility of the application, fix, at the request of the State by which the application is made, time-limits within which such State is authorised to file a Case on the merits and within which the other parties may file their Counter-Cases. These time-limits, however, may not extend beyond the beginning of the session in the course of which the case shall be heard.

Article 60.

The notification provided for in Article 63 of the Statute shall be sent to every State or Member of the League of Nations which is a party to the convention relied upon in the special agreement or in the application as governing the case submitted to the Court.

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Counter-claims.

Article 63.

When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings.

cf. 40, para. 2, No. 4.

V — INTERVENTION

Intervention.

Article 58.

Article 64.

[Not modified.]

1. An application for permission to intervene under the terms of Article 62 of the Statute of the Court shall be filed with the Registry at latest before the commencement of the oral proceedings.

58, para. 1.

2. The application shall contain:

59, para. 1.

A specification of the case;
A statement of law and of fact justifying intervention;
A list of the documents in support of the application; these documents shall be attached.

Article 59.

3. The application shall be communicated to the parties, who shall send to the Registry their observations in writing within a period to be fixed by the Court, or by the President, if the Court is not sitting.

59, para. 2.

4. The application to intervene shall be placed on the agenda for a hearing, the date and hour of which shall be notified to all concerned. Nevertheless, if the parties have not, in their written observations, opposed the application to intervene, the Court may decide that there shall be no oral argument.

59, para. 3.

[Not modified.]

5. The Court will give its decision on the application in the form of a judgment.

59, para. 3 *(in fine)*.

Article 65.

1. If the Court admits the intervention and if the party intervening expresses a desire to file a Memorial on the merits, the Court shall fix the time-limits within which the Memorial shall be filed and within which the other parties may reply by Counter-Memorials; the same course shall be followed in regard to the Reply and the Rejoinder. If the Court is not sitting, the time-limits shall be fixed by the President.

—

2. If the Court has not yet given its decision upon the intervention and the application to intervene is not opposed, the President, if the Court is not sitting, may, without prejudice to the decision of the Court on the question whether the application should be granted, fix the time-limits within which the intervening party may file a Memorial on the merits and the other parties may reply by Counter-Memorials.

59, para. 4.

3. In the cases referred to in the two preceding paragraphs, the time-limits shall, so far as possible, coincide with those already fixed in the case.

—

Article 66.

Article 60.

1. The notification provided for in Article 63 of the Statute of the Court shall be sent to every Member of the League of Nations or State which is a party to a convention invoked in the special agreement or in the application as governing the case referred to the Court. A Member or State desiring to avail itself of the right conferred by the above-mentioned article shall file a declaration to that effect with the Registry.

60, para. 1.

[Not modified.]

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The Court, or the President if the Court is not sitting, shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court.	The Court, or the President if the Court is not sitting, shall fix the times within which States desiring to intervene are to file any Cases. The Registrar shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court. Such observations shall be communicated to the parties, who may comment thereon in Court. The Court may authorise the intervening State to reply.
VI. Agreement	VI — Agreement
Article 61.	*Article 61.*
If the parties conclude an agreement regarding the settlement of the dispute and give written notice of such agreement to the Court before the close of the proceedings, the Court shall officially record the conclusion of the agreement. Should the parties by mutual agreement notify the Court in writing that they intend to break off proceedings, the Court shall officially record the fact and proceedings shall be terminated.	[Not modified.]
VII. Judgment	VII — Judgment
Article 62.	*Article 62.*
The judgment shall contain: (1) The date on which it is pronounced; (2) The names of the judges participating; (3) The names and style of the parties; (4) The names of the agents of the parties; (5) The conclusions of the parties; (6) The matters of fact; (7) The reasons in point of law;	[Nos. 1 to 9 not modified.]

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2. Any Member of the League of Nations or State, which is a party to the convention in question and to which the notification referred to has not been sent, may in the same way file with the Registry a declaration of intention to intervene under Article 63 of the Statute. —

3. Such declarations shall be communicated to the parties. If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court. —

4. The Registrar shall take the necessary steps to enable the intervening party to inspect the documents in the case in so far as they relate to the interpretation of the convention in question, and to submit its written observations thereon to the Court within a time-limit to be fixed by the Court or by the President if the Court is not sitting. 60, paras. 2 and 3.

5. These observations shall be communicated to the other parties and may be discussed by them in the course of the oral proceedings; in these proceedings the intervening party shall take part. 60, para. 3.

Appeals to the Court.

Article 67. —

1. When an appeal is made to the Court against a decision given by some other tribunal, the proceedings before the Court shall be governed by the provisions of the Statute of the Court and of the present Rules.

2. If the document instituting the appeal must be filed within a certain limit of time, the date of the receipt of this document in the Registry will be taken by the Court as the material date.

3. The document instituting the appeal shall contain a precise statement of the grounds of the objections to the decision complained of, and these constitute the subject of the dispute referred to the Court.

4. An authenticated copy of the decision complained of shall be attached to the document instituting the appeal.

5. It lies upon the parties to produce before the Court any useful and relevant material upon which the decision complained of was rendered.

Settlement and Discontinuance.

VI — AGREEMENT

Article 68. 61.

Article 61.

If, at any time before judgment has been delivered, the parties conclude an agreement as to the settlement of the dispute and so inform the Court in writing, or by mutual agreement inform the Court in writing that they are not going on with the proceedings, the Court will make an order officially recording the conclusion of the settlement or the discontinuance of the proceedings; in either case the order will prescribe the removal of the case from the list.

[Not modified.]

Article 69. —

VI — JUDGMENT

1. If in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

Article 62.

[Not modified.]

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court, or the President if the Court is not sitting, shall fix a time-limit within which the respondent must state whether it opposes the

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(8) The operative provisions of the judgment;
(9) The decision, if any, referred to in Article 64 of the Statute.

The opinions of judges who dissent from the judgment shall be attached thereto should they express a desire to that effect.

Article 63.

After having been read in open Court, the text of the judgment shall forthwith be communicated to all parties concerned and to the Secretary-General of the League of Nations.

Article 64.

The judgment shall be regarded as taking effect on the day on which it is read in open Court, in accordance with Article 58 of the Statute.

Article 65.

A collection of the judgments of the Court shall be printed and published under the responsibility of the Registrar.

VIII. Revision

Article 66.

Application for revision shall be made in the same form as the application mentioned in Article 40 of the Statute.

It shall contain:

(1) The reference to the judgment impeached;
(2) The fact on which the application is based;
(3) A list of the documents in support; these documents shall be attached.

It shall be the duty of the Registrar to give immediate notice of an application for revision to the other parties concerned. The latter may submit observations within a time limit to be fixed by the Court, or by the President should the Court not be sitting.

If the judgment impeached was pronounced by the full Court, the application for revision shall also be dealt with by the full Court. If the judgment impeached was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute, the application for revision shall be dealt with by the same Chamber. The provisions of Article 13 of the Statute shall apply in all cases.

If the Court, under the third paragraph of Article 61 of the Statute, makes a special order rendering the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar, and proceedings in revision shall be stayed pending receipt by the Registrar of proof of previous compliance with the original judgment and until such proof shall have been accepted by the Court.

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(10) The number of the judges constituting the majority contemplated in Article 55 of the Statute.

Dissenting judges may, if they so desire, attach to the judgment either an exposition of their individual opinion or the statement of their dissent.

Article 63.

When the judgment has been read in public, duly signed and sealed copies thereof shall be forwarded to the parties.

This text shall forthwith be communicated by the Registrar, through the channels agreed upon, to Members of the League of Nations and to States entitled to appear before the Court.

Article 64.

[Not modified.]

Article 65.

[Not modified.]

VIII — Revision and Interpretation

Article 66.

[Paragraph 1 not modified.]

It shall contain:

(*a*) A specification of the judgment impeached;
(*b*) The facts upon which the application is based;
(*c*) A list of the supporting documents; these documents shall be attached to the application.

[Paragraph 3 not modified.]

If the Court, under the third paragraph of Article 61 of the Statute, by a special judgment makes the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar, and proceedings in revision shall be stayed pending receipt by the Registrar of proof of previous compliance with the original judgment and until such proof shall have been accepted by the Court.

2. A request to the Court to construe a judgment which it has given may be made either by the notification of a special agreement between all the parties or by an application by one or more of the parties.

The agreement or application shall contain:

(*a*) A specification of the judgment the interpretation of which is requested;
(*b*) An indication of the precise point or points in dispute.

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discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue.

Article 63.

[Not modified.]

Article 64.

[Not modified.]

Article 65.

A collection of the judgments, orders and advisory opinions of the Court shall be printed and published under the responsibility of the Registrar.

VIII — Revision and Interpretation

Article 66.

[Not modified.]

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If the request for interpretation is made by means of an application, it shall be the duty of the Registrar to give immediate notice of such application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court or by the President, as the case may be.

The Court may, whether the request be made by agreement or by application, invite the parties to furnish further written or oral explanations.

3. If the judgment impeached or to be construed was pronounced by the full Court, the application for revision or the request for interpretation shall also be dealt with by the full Court. If the judgment was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute, the application for revision or the request for interpretation shall be dealt with by the same Chamber. The provisions of Article 13 of the Statute shall apply in all cases.

4. Objections to the Court's jurisdiction to revise or to construe a judgment, or other similar preliminary objections, shall be dealt with according to the procedure laid down in Article 38 of the present Rules.

5. The Court's decision on requests for revision or interpretation shall be given in the form of a judgment.

SECTION C — SUMMARY PROCEDURE

SECTION C — SUMMARY PROCEDURE

Article 67.

Except as provided under the present section, the rules for procedure before the full Court shall apply to summary procedure.

Article 67.

[Not modified.]

Article 68.

Upon receipt by the Registrar of the document instituting proceedings in a case which, by virtue of an agreement between the parties, is to be dealt with by summary procedure, the President shall convene as soon as possible the Chamber referred to in Article 29 of the Statute.

Article 68.

Upon receipt by the Registrar of the document instituting proceedings in a case which, by virtue of an agreement between the parties, is to be dealt with by summary procedure, the President of the Court shall, as soon as possible, notify the members of the Chamber referred to in Article 29 of the Statute. The Chamber or, if it is not in session, its President, shall fix the time within which the first document of the written procedure, provided for in the following article, shall be filed.

The President shall convene the Chamber at the earliest date that may be required by the circumstances of the case.

Article 69.

The proceedings are opened by the presentation of a Case by each party. These Cases shall be communicated by the Registrar to the members of the Chamber and to the opposing party.

Article 69.

Summary proceedings are opened by the presentation of Cases according to the provisions of Article 39, paragraph 1, of the present Rules. If a Case is presented by one party only, the other party or parties shall present a Counter-Case. In the event of the simultaneous presentation of Cases by the parties, the Chamber may invite the presentation, under the same conditions, of Counter-Cases.

The Cases and Counter-Cases, which shall be communicated by the Registrar to the members of the Chamber and to opposing parties, shall mention all evidence which the parties may desire to produce.

Should the Chamber consider that the documents do not furnish adequate information, it may, in the

The Cases shall contain reference to all evidence which the parties may desire to produce.

Should the Chamber consider that the Cases do not furnish adequate information, it may, in the absence of an agreement to the contrary between the parties, institute oral proceedings. It shall fix a date for the commencement of the oral proceedings.

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SECTION C — SUMMARY PROCEDURE	SECTION 2 — PROCEDURE BEFORE THE SPECIAL CHAMBERS AND THE CHAMBER FOR SUMMARY PROCEDURE	
Article 67.	*Article 70.*	67.
[Not modified.]	Procedure before the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court shall, subject to the provisions of the Statute and of these Rules relating to the Chambers, be governed by the provisions as to procedure before the full Court.	
Article 68.	*Article 71.*	
[Not modified.]	1. A request that a case should be referred to one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court, must be made in the document instituting proceedings or must accompany that document. Effect will be given to the request if the parties are in agreement.	35, 3, para. 1.
	2. Upon receipt by the Registry of the document instituting proceedings in a case brought before one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute, the President of the Court shall communicate the document to the members of the Chamber concerned. He shall also take such steps as may be necessary to assure the application of Article 31, paragraph 4, of the Statute.	68, para. 1.
Article 69.	3. The President of the Court shall convene the Chamber at the earliest date compatible with the requirements of the procedure.	68, para. 2.
	4. As soon as the Chamber has met in order to go into the case submitted to it, the powers of the President of the Court in respect of the case shall be exercised by the President of the Chamber.	—
	Article 72.	
[Not modified.]	1. The procedure before the Chamber for Summary Procedure shall consist of two parts: written and oral.	—
	2. The written proceedings shall consist of the presentation of a single written statement by each party in the order indicated in Article 41 of the present Rules; to it must be attached the documents in support. The Chamber may however, if the parties so request or in view of the circumstances and after hearing the parties, call for the	69, para. 1.

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At the hearing, the Chamber shall call upon the parties to supply oral explanations. It may sanction the production of any evidence mentioned in the Cases. If it is desired that witnesses or experts whose names are mentioned in the Case should be heard, such witnesses or experts must be available to appear before the Chamber when required.	absence of an agreement to the contrary between the parties, institute oral proceedings. It shall fix a date for the commencement of the oral proceedings. At the hearing, the Chamber shall call upon the parties to supply oral explanations. It may sanction the production of any evidence mentioned in the documents. If it is desired that witnesses or experts whose names are mentioned in the documents should be heard, such witnesses or experts must be available to appear before the Chamber when required.
Article 70.	*Article 70.*
The judgment is the judgment of the Court rendered in the Chamber for Summary Procedure. It shall be read at a public sitting of the Chamber.	[Not modified.]

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presentation of such other written statement as may appear fitting.

3. The written statements shall be communicated by the Registrar to the members of the Chamber and to opposing parties. They shall mention all evidence, other than the documents referred to in the preceding paragraph, which the parties desire to produce. 69, para. 2.

4. When the case is ready for hearing, the President of the Chamber shall fix a date for the opening of the oral proceedings, unless the parties agree to dispense with them; even if there are no oral proceedings, the Chamber always retains the right to call upon the parties to supply verbal explanations. 69, paras. 3 and 4.

5. Witnesses or experts whose names are mentioned in the written proceedings must be available so as to appear before the Chamber when their presence is required. 69, para. 5.

Article 70.

[Not modified.]

Article 73. 70.

Judgments given by the Special Chambers or by the Chamber for Summary Procedure are judgments rendered by the Court. They will be read, however, at a public sitting of the Chamber.

Section 3 — Judgments

Article 74. 62.

1. The judgment shall contain:

The date on which it is pronounced;
The names of the judges participating;
A statement of who are the parties;
The names of the agents of the parties;
A summary of the proceedings;
The submissions of the parties;
A statement of the facts;
The reasons in point of law;
The operative provisions of the judgment;
The decision, if any, in regard to costs;
The number of the judges constituting the majority.

2. Dissenting judges may, if they so desire, attach to the judgment either an exposition of their individual opinion or a statement of their dissent.

Article 75. 63.

1. When the judgment has been read in public, one original copy, duly signed and sealed, shall be placed in the Archives of the Court and another shall be forwarded to each of the parties.

2. A copy of the judgment shall be sent by the Registrar to Members of the League of Nations and to States entitled to appear before the Court.

Article 76. 64.

The judgment shall be regarded as taking effect on the day on which it is read in open Court.

Article 77. 56.

The party in whose favour an order for the payment of the costs has been made may present his bill of costs after judgment has been delivered.

Section 4 — Requests for the Revision or Interpretation of a Judgment

Article 78.

1. A request for the revision of a judgment shall be made by an application. 66, 1.

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Heading 2. — Advisory Procedure.	**Heading 2. — Advisory Procedure.**
Article 71.	*Article 71.*[1]
Advisory opinions shall be given after deliberation by the full Court.	Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of the judges constituting the majority. *On a question relating to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute shall apply. In case of doubt the Court shall decide.*
The opinions of dissenting judges may, at their request, be attached to the opinion of the Court.	Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent.

[1] The paragraph in italics was added as the result of an amendment adopted by the Court on September 7th, 1927.

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The application shall contain:

A specification of the judgment of which the revision is desired;

The particulars necessary to show that the conditions laid down by Article 61 of the Statute of the Court are fulfilled;

A list of the documents in support; these documents shall be attached to the application.

2. The request for revision shall be communicated by the Registrar to the other parties. The latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

3. If the Court makes the admission of the application conditional upon previous compliance with the judgment to be revised, this condition shall be communicated forthwith to the applicant by the Registrar and proceedings in revision shall be stayed pending receipt by the Court of proof of compliance with the judgment.

Article 79. 66, 2.

1. A request to the Court to interpret a judgment which it has given may be made either by the notification of a special agreement between the parties or by an application by one or more of the parties.

2. The special agreement or application shall contain:

A specification of the judgment of which the interpretation is requested;

Mention of the precise point or points in dispute.

3. If the request for interpretation is made by means of an application, the Registrar shall communicate the application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

4. Whether the request be made by special agreement or by application, the Court may invite the parties to furnish further written or oral explanations.

Article 80. 66, 3.

If the judgment to be revised or to be interpreted was rendered by the full Court, the request for its revision or for its interpretation shall be dealt with by the full Court. If the judgment was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute of the Court, the request for revision or for interpretation shall be dealt with by the same Chamber.

Article 81. 66, 5.

The decision of the Court on requests for revision or interpretation shall be given in the form of a judgment.

Heading 2. — Advisory Procedure.

Heading III. — Advisory Opinions.

Article 71.

[Not modified.]

Article 82. —

In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Chapter IV of the Statute of the Court, apply the provisions of the articles hereinafter set out. It shall also be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognises them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a " dispute " or to a " question ".

Article 83. 71, para. 2.

If the question upon which an advisory opinion is requested relates to an existing dispute between two or more Members of the League

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Article 72.	*Article 72.*
Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council. The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.	[Not modified.]
Article 73.	*Article 73.*
The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, and to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant. Notice of such request shall also be given to any international organisations which are likely to be able to furnish information on the question.	1. The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court. The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organisation considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question. Should any State or Member referred to in the first paragraph have failed to receive the communication specified above, such State or Member may express a desire to submit a written statement, or to be heard; and the Court will decide. 2. States, Members and organisations having presented written or oral statements or both shall be admitted to comment on the statements made by other States, Members or organisations, in the form, to the extent and within the time limits which the Court or, should it not be sitting, the President shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to States, Members and organisations having submitted similar statements.
Article 74.	*Article 74.*
Any advisory opinion which may be given by the Court and the request in response to which it was given, shall be printed and published in a special collection for which the Registrar shall be responsible.	Advisory opinions shall be read in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of States, of Members of the League and of international organisations immediately concerned. The Registrar shall take the necessary steps in order to ensure that the text of the advisory opinion is in the hands of the Secretary-General at the seat of the League at the date and hour fixed for the meeting hedl for the reading of the opinion. Signed and sealed original copies of advisory opinions shall be placed in the archives of the Court and of the Secretariat of the League. Certified copies thereof shall be transmitted by the Registrar to States, to Members of the League, and to international organisations immediately concerned. Any advisory opinion which may be given by the Court and the request in response to which it is given, shall be printed and published in a special collection for which the Registrar shall be responsible.

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Article 72.	of Nations or States, Article 31 of the Statute of the Court shall apply, as also the provisions of the present Rules concerning the application of that article.	
	Article 84.	
[Not modified.]	1. Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of judges constituting the majority.	71, para. 1.
	2. Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent.	71, para. 3.
Article 73.	*Article 85.*	
	1. The Registrar shall take the necessary steps in order to ensure that the text of the advisory opinion is in the hands of the Secretary-General at the seat of the League of Nations at the date and hour fixed for the sitting to be held for the reading of the opinion.	74, para. 1.
	2. One original copy, duly signed and sealed, of every advisory opinion shall be placed in the archives of the Court and another in those of the Secretariat of the League of Nations. Certified copies thereof shall be transmitted by the Registrar to Members of the League of Nations, to States and to international organisations directly concerned.	74, para. 2.
[Not modified.]		
Article 74.		
[Paragraphs 1 and 2 not modified.]		
[Paragraph 3 deleted.]		

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Heading 3. — Errors.	**Heading 3. — Errors.**
Article 75.	*Article 75.*
The Court, or the President if the Court is not sitting, shall be entitled to correct an error in any order, judgment or opinion, arising from a slip or accidental omission.	[Not modified.]
Done at The Hague, the twenty-fourth day of March, one thousand nine hundred and twenty-two.	Done at The Hague, the thirty-first day of July, one thousand nine hundred and twenty-six.

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Heading 3. — Errors.

Article 75.

[Not modified.]

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FINAL PROVISION

Article 86.

The present Rules of Court which are adopted this eleventh day of March, 1936, repeal, as from this date, the Rules adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on September 7th, 1927, and February 21st, 1931.

Done at The Hague, this eleventh day of March nineteen hundred and thirty-six.

SUBJECT INDEX TO THE RULES OF COURT ADOPTED ON MARCH 11th, 1936

A.

C.

D.

S.

T.

V.

INDEX TO THE MINUTES CONCERNING THE PREPARATION AND THE REVISION OF THE RULES (1922-1931). [1]

EXPLANATORY NOTE

in regard to the dates given in the third column:

1922 refers to Volume Series D, No. 2.
1926 ,, ,, ,, ,, ,, Addendum to No. 2.
1927 ,, ,, ,, Series E, No. 4.
1931 ,, ,, ,, Series D, Second Addendum to No. 2.

[1] The figures between brackets in the *second* column indicate paragraphs. The figures in italics of the *last* column indicate discussions.
* Discussed without a number.

* Discussed without a number.

** References without a number.