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**A/CN.4/SR.139**

**Summary record of the 139th meeting**

Topic:  
**Arbitral Procedure**

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

65. What he was proposing was no innovation, and was consonant with article 23 of the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly on 28 April 1949.<sup>10</sup> According to that article, if agreement could not be reached on the constitution of the arbitral tribunal within a period of three months the necessary appointments were to be made by the President of the International Court of Justice. He himself had, at the 137th meeting of the Commission, referred to the arbitration procedure of the International Chamber of Commerce<sup>11</sup> precisely because that procedure laid down that even if agreement were not reached on a *compromis* arbitration must still take place.

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

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

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

*It was so agreed.*

The meeting rose at 6.5 p.m.

<sup>10</sup> *United Nations Treaty Series*, vol. 71, p. 115.

<sup>11</sup> See summary record of the 137th meeting, para. 10.

## 139th MEETING

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

### CONTENTS

|  | Page |
|--|------|
| Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) ( <i>continued</i> ) |      |
| Article 3 . . . . .  | 14   |
| Article 4 . . . . .  | 16   |
| Article 3 ( <i>resumed from above</i> ) . . . . .  | 17   |
| Article 5 . . . . .  | 17   |

Chairman : Mr. Ricardo J. ALFARO.

Present :

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

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

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

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

#### ARTICLE 3<sup>1</sup>

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

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

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

<sup>1</sup> Article 3 read as follows :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>3</sup> *United Nations Treaty Series*, vol. 71, p. 115.

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

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

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

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

*It was so agreed.*

#### ARTICLE 4<sup>4</sup>

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

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

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

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

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

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

30. Mr. HSU agreed with the Secretary.

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

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

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

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

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

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

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

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

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

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

<sup>4</sup> Article 4 read as follows:

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

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

40. The CHAIRMAN ruled that further discussion on

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

#### ARTICLE 3 (*resumed from above*)

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

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

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

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

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

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

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

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

48. Mr. AMADO could not support that text.

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

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

*Mr. Scelle's final version was accepted.*

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

#### ARTICLE 5<sup>6</sup>

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

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

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

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

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

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

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

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

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

<sup>6</sup> Article 5 read as follows :

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1 p.m.

## 140th MEETING

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

### CONTENTS

|  | Page |
|--|------|
| Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) ( <i>continued</i> ) |      |
| Article 4 ( <i>resumed from the 139th meeting</i> ) . . .  | 18   |
| Article 5 ( <i>resumed from the 139th meeting</i> ) . . .  | 20   |
| Article 6 . . . . .  | 20   |
| Article 7 . . . . .  | 22   |

Chairman: Mr. Ricardo J. ALFARO.

Present:

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

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

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

#### ARTICLE 4 (*resumed from the 139th meeting*)

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

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