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Summary record of the 189th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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arising directly out of the subject matter of the dispute, provided they fall within its competence and are submitted not later than the final written conclusions of the parties."

67. Mr. LAUTERPACHT observed that Mr. Yepes had now amplified his original amendment by including at the end a reference to a detailed question of procedure.

68. Mr. SCELLE pointed out that such an addition was unnecessary, since the tribunal was master of its own procedure by virtue of article 13.

69. Mr. YEPES, defending his text, stressed that the Commission was dealing with a draft on procedure.

70. Mr. LAUTERPACHT said that in effect Mr. Yepes' text meant that the tribunal would be competent to settle counter-claims if it were competent to do so.

71. Mr. YEPES argued that he had not been guilty of a *petitio principii,* since the competence of the tribunal would be established either in the prior undertaking to arbitrate or in the *compromis.* Those were two entirely different situations in law.

72. Mr. SCELLE again pointed out that in the last resort it would be the tribunal itself which would have to decide whether it were competent or not to admit a claim.

73. Mr. ZOUREK considered the point at issue to be of great importance. The competence of the tribunal would be delimited in the *compromis* or the prior undertaking to arbitrate. If it transgressed those limits its findings would have to be regarded as null and void.

Mr. Kozhevnikov's proposal that article 16 be deleted was rejected by 8 votes to 2, with 1 abstention.

Mr. Lauterpacht's proposal that the words "For the purpose of securing a complete settlement of the dispute" be deleted was adopted by 7 votes to 3, with 1 abstention.

74. The CHAIRMAN then put to the vote Mr. Scelle's amendments, whereby the French text of article 16 would read:

> *"Le tribunal statue sur toutes demandes incidentes, additionnelles ou reconventionnelles qu'il estime en connexité directe avec l'objet du litige."*

The only change necessary in the English text was the insertion of the word "directly" after the word "arising".

Mr. Scelle's amendments were adopted by 9 votes to none, with 2 abstentions.

Mr. Yepes' amendment was rejected by 5 votes to 2, with 4 abstentions.

Article 16, as a whole and as amended, was adopted by 6 votes to 2, with 3 abstentions.

75. Mr. YEPES explained that he had abstained from voting on article 16 as a whole because in its amended form it was at variance with a general principle of law that counter-claims must have a direct connexion with the main issue, and because it failed to fix any time-limit for the submission of such claims.

The meeting rose at 5.5 p.m.

189th MEETING

Tuesday, 9 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Date and place of the Commission's next session and term of office of the members and the Special Rapporteurs

1. The CHAIRMAN invited the Commission to confirm the decisions taken at the private meeting held the previous day. In the light of General Assembly resolution 698 (VII), which set out the pattern of conferences for the years 1954-57 at New York and Geneva, the Commission had decided that it would hold its next session for a period of approximately eight weeks, beginning on the third week in August, 1954.

2. As to the term of office of the members, the Commission had decided that it should expire on 31 December 1953. A Special Rapporteur who had not been re-elected by the General Assembly would have to

cease working on that date; a Special Rapporteur who had been re-elected should, on the other hand, continue his work unless and until the Commission as newly constituted decided otherwise.

The decisions taken at the private meeting of the Commission held on Monday, 8 June 1953, were confirmed.

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*resumed from the 188th meeting*)

3. The CHAIRMAN proposed that a small sub-commission should be set up to study the amendments proposed to various articles of the draft on arbitral procedure, and to submit agreed texts to the Commission. He would suggest that it be composed of the authors of the various amendments, under the chairmanship of the Special Rapporteur, Mr. Scelle.

It was so agreed.

ARTICLE 17

4. Mr. KOZHEVNIKOV said that he would vote against article 17, for the reasons he had given in his general statement on the draft.[1]

5. Mr. ZOUREK supported Mr. Kozhevnikov on the grounds that article 17 conferred on the tribunal the right to prescribe provisional measures even if no request therefore were made by the parties: that constituted a departure not only from traditional arbitral procedure, but also from the domestic procedure of courts. Nor was it possible to confer on the tribunal powers which had not been assigned to it by the parties to the *compromis*.

6. Mr. KOZHEVNIKOV moved that article 17 be deleted.

7. Mr. SCELLE (Special Rapporteur) urged the retention of article 17, which was substantially the same as Article 41 of the Statute of the International Court of Justice.

8. Mr. LAUTERPACHT considered that, like Article 41 of the Statute of the International Court, article 17 implied that the tribunal or its president should take provisional measures at the request of the parties. If explicit reference were made to the parties' request, would Mr. Zourek be prepared to vote for article 17?

9. Mr. ZOUREK replied that he would be unable to do so, because his objection rested in part on the circumstance that article 17 implied that the parties would be obliged to accept the provisional measures, even if they had not conferred the appropriate powers on the tribunal in the *compromis*.

10. Mr. SCELLE said that the Commission's object in adopting article 17 had been to forestall possible collusion between the parties to prevent the tribunal from rendering a workable award.

11. Article 17 formed part of the attempt to stabilize the judicial procedure.

12. Mr. LIANG (Secretary to the Commission) considered that it would be unreasonable to stipulate that provisional measures could only be prescribed at the request of both parties. Request by one party was in his opinion already implicit in article 17.

13. Mr. YEPES proposed that article 17 be amended by inserting the words: "at the request of one of the parties and" ("*sur la demande de l'une des parties et*") after the word "prescribe". That, he believed, would cover Mr. Zourek's point.

14. Mr. SCELLE was unable to support the proposed amendment, which would not circumvent the possibility of collusion between the parties. He drew attention to the United Kingdom Government's statement (A/CN. 4/68, No. 8 or A/2456, Annex I, No. 9) that it approved in particular the attitude taken up by the Commission in the articles numbered 17 to 20.

15. Mr. YEPES recalled that the provisional measures originated in article XVIII of the Convention of 1907 for the Establishment of a Central American Court of Justice. That article read in part: "the court may at the solicitation of any one of the parties... etc.".[2]

16. Mr. SCELLE said that an article so drafted would be very dangerous, since it might enable one party to confront the other with a *fait accompli*, causing the point at issue in the dispute to disappear. It was essential to preclude all possibility of fraud. Furthermore, since the article permitted the prescription of provisional measures without a request in that sense by the parties, it followed *a fortiori* that those measures could be prescribed if such request were made.

17. Mr. LAUTERPACHT did not share Mr. Scelle's apprehension, and was inclined to support Mr. Yepes' amendment. If the interests of one of the parties were in jeopardy, that party would surely ask the tribunal to take provisional measures at the outset of the proceedings. On the whole, he considered that the element of request by the parties was implied in the text and would therefore vote for it in its present form.

Mr. Yepes' amendment was adopted by 6 votes to 3, with 2 abstentions.

18. Mr. YEPES requested that article XVIII of the Convention of 1907 for the Establishment of a Central American Court of Justice be quoted verbatim in the summary record of the meeting, since it was only right that tribute should be paid to a remarkable innovation in international law. That innovation was one of the most important contributions of American international law to the progress and development of general international law.

[1] See *supra*, 185th meeting, paras. 79-86.

[2] See *American Journal of International Law, Supplement*, vol. 2 (1908), p. 238.

19. The text of the article in question read as follows:

"From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *status quo* pending a final decision."[3]

20. Faris Bey el-KHOURI asked whether both prerequisites which now figured in article 17 would have to operate before the tribunal or its president could prescribe provisional measures.

21. Mr. YEPES, with whom Mr. Scelle concurred, replied in the affirmative.

Article 17 was adopted, as amended, by 9 votes to 2.

ARTICLE 18

Article 18 was adopted unanimously.

ARTICLE 19

22. Mr. SCELLE considered that paragraph 2 of article 19, which stated that all questions should be decided by a majority of the tribunal, was in contradiction with sub-paragraph (f) of article 9, where it was stated that the number of members constituting the majority required for an award of the tribunal should be specified in the *compromis*. He would therefore suggest that sub-paragraph (f) of article 9 be deleted.

23. Mr. ZOUREK suggested that the contradiction might be removed by stipulating in paragraph 2 of article 19 that where no appropriate provision was made in the *compromis*, all questions should be decided by the majority of the tribunal. An amendment in that sense would follow the precedent set by other articles wherein action by the tribunal was made subsequent to and dependent upon agreement of the parties.

24. Mr. SCELLE opposed Mr. Zourek's suggestion, which was based on the concept that the will of the parties must prevail. The Commission's draft, however, was based on the principle that the tribunal should have the widest possible powers, and he would recall that at the fourth session article 19 had been adopted unanimously.[4]

25. If a two-thirds majority were required from a tribunal composed of three members, or a four-fifths majority from one composed of five members, no decision would be possible. The effect of adopting Mr. Zourek's suggestion would be to give the will of the parties too much influence. He would remind the Commission of the difficulties which arose in, for instance, national parliaments when a reinforced majority was required. The majority rule was most common, and should be stipulated in the present instance.

26. Mr. KOZHEVNIKOV considered that Mr. Zourek's suggestion was reasonable, and clarified the point at issue.

27. Mr. LAUTERPACHT thought that it would be unwise for the Commission to consider the amendment of article 19 simultaneously with the deletion of sub-paragraph (f) of article 9, since the adoption of Mr. Scelle's proposal might necessitate consequential amendments to other articles.

28. As to Mr. Zourek's suggestion, he would submit that if the parties decided in the *compromis* that all the tribunal's decisions should be unanimous, such agreement would be contrary to the whole concept of arbitration, and would have the effect of transforming the tribunal into a diplomatic conference. On the other hand, to require a four-fifths majority in a tribunal composed of five members would not conflict with the fundamental concept of arbitration. To pass from theory to practice, however, he must emphasize that the Commission's object was to avert the risk of a request for a unanimous decision. He therefore supported Mr. Scelle's views.

29. After further discussion, *it was agreed* that the Sub-Commission set up at the beginning of the meeting should examine paragraph 2 of article 19 and sub-paragraph (f) of article 9, with special reference to the character of the umpire's decision in cases where his services were called upon by two national arbitrators.

30. Mr. YEPES considered that the word "majority" in paragraph 2 of article 19 should be qualified, since it must be made clear whether a simple or a prescribed majority was intended.

31. The CHAIRMAN said that the Sub-Commission would keep that point in mind.

ARTICLE 20

32. Mr. KOZHEVNIKOV was opposed to article 20, which would allow the tribunal to take a decision in the absence of one of the parties. From his point of view that would not be desirable.

Article 20 was adopted by 8 votes to 2.[5]

ARTICLE 21

Article 21 was adopted unaimously.

ARTICLE 22

33. Mr. YEPES proposed that article 22 should form paragraph 3 of article 21, since the two articles were closely related.

[3] *Ibid.*

[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 149th meeting, para. 85 (article 19 was numbered article 30 at that stage of the discussion).

[5] For further discussion of article 20, see *infra*, 193rd meeting, para. 33.

34. Mr. SCELLE pointed out that articles 21 and 22 did not deal with identical subjects even though it might be argued that they were closely related. Although, on superficial inspection, article 22 might seem to deal with the discontinuance of proceedings, in point of fact its purpose was to provide that in the event of a settlement being reached by the parties, the tribunal could embody that settlement in an award, thus, to put it in other words, giving the settlement the authority of *res judicata.*

35. Mr. PAL also considered that articles 21 and 22 differed substantively, since the withdrawal of a claim was by no means the same as the conclusion of a settlement. The two articles should therefore be kept separate.

36. Mr. LAUTERPACHT agreed with Mr. Pal.

37. Mr. ZOUREK thought that the second sentence of article 22 transcended the limits of arbitral procedure.

38. Mr. YEPES withdrew his proposal.

39. Mr. ALFARO doubted whether an arbitral tribinal would be competent to take a decision contrary to the settlement reached by the parties, or to confirm such a settlement by rendering an award. To illustrate his argument, he would refer to a hypothetical dispute about frontiers, in which one party wished agreement to be based on line A and the other wished it to be based on line B. While arbitration was in progress, the two parties arrived at a settlement on the basis of an intermediate line. It was inadmissible that the tribunal should then render the award in terms that were either contrary to the conclusions it had reached, or did not coincide with the settlement.

40. Mr. AMADO, noting the Brazilian Government's comment (A/CN.4/68, No. 2 or A/2456, Annex I, No. 3) to the effect that article 22 appeared to ignore the will of the parties, said that that government had evidently overlooked the phrase: "At the request of the parties". He would vote for article 22.

41. Mr. SCELLE pointed out that no tribunal could be obliged to accept a settlement that was contrary to the principles of law. In the event of such a settlement being reached, the tribunal would be unable to give it the authority of *res judicata.*

42. Faris Bey el-KHOURI said that it was a question not of approval but of registration. It was usual in municipal law for courts to express a settlement in legal form.

43. Mr. AMADO agreed with Faris Beyel-Khouri, and proposed that the word "*expédient*" be deleted from the French text. That word was inspired by the comment to article 22, which, in his view, went beyond the terms of the article.

44. Mr. SCELLE said that "*expédient*" was a current French term and meant nothing but "*de commodité*".

45. He emphasized that it often happened that a settlement was contrary to law, and mentioned the case of imprisonment without trial, which constituted a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.[6] It might be that one government, after detaining the national of another State without trial for a number of years, might arrive at a settlement with the other State whereby the case would simply be dismissed. No tribunal could take the responsibility of lending its authority to such a settlement. It would be obliged to refuse to render an award. In the case of frontier disputes the parties might agree to take a line wholly different from that fixed by law, custom or the like. There again, it would be for the governments parties to the dispute, and not for the tribunal to take responsibility for a settlement which was not based on law.

46. Mr. HSU did not consider that it would be either harmful or dangerous if a tribunal refused to register a settlement. Since the parties to a dispute would be sovereign States, agreement between them would be sufficiently binding without an award.

47. Mr. YEPES agreed with Mr. Scelle, and said that he would vote for article 22 together with the amendment thereto proposed by Mr. Amado.

48. Mr. SCELLE was prepared to agree that the word "*expédient*" should be deleted.

49. Mr. KOZHEVNIKOV opposed the amendment on the grounds that the Russian text was perfectly clear as drafted. In the second sentence the emphasis was clearly on the opening words "At the request of the parties", and it would be undesirable to change that emphasis.

50. Mr. ALFARO said that he would be prepared to vote for article 22 as amended by Mr. Amado, on the understanding that it was not mandatory.

51. Mr. AMADO pointed out for Mr. Kozhevnikov's benefit that he could not agree that the word "*expédient*" should be accepted as covering such vastly important settlements involving transfers of territories as had been arrived at on the Latin-American continent. It went without saying that the Russian text must conform with the Commission's decision.

52. Mr. LAUTERPACHT asked which would be the authentic text of the draft. He was in favour of deleting the word "*expédient*". It was for the translators to find the appropriate Russian formula.

53. Mr. LIANG (Secretary to the Commission) said that the authenticity of texts was a difficult issue. Some of the conventions initiated under the auspices of the United Nations stipulated that the texts were authentic in the five official languages. In other instruments no such stipulation was made. It was not clear whether the Commission was responsible for the text in languages other than those actually used in drafting the articles on arbitral procedure. For his own part, he considered

[6] See *American Journal of International Law, Supplement,* vol. 45 (1951), pp. 26-39.

that the most the Commission could do was to draft a text in the two working languages.

54. Mr. ZOUREK did not consider that the problem could be left to translators.

55. Mr. AMADO proposed that the wording of the second sentence of article 22 be amended to read in English, "that settlement" instead of "the settlement" and in French "*cette transaction*" instead of "*la transaction*".

56. Mr. KOZHEVNIKOV reiterated that the Russian text as drafted was perfectly lucid, and perfectly acceptable to him.

57. Mr. LAUTERPACHT maintained that the point must be elucidated by the official translators. Mr. Kozhevnikov did not pretend to be an authority on the English and French languages.

Mr. Amado's amendment was adopted by 7 votes to 1, with 3 abstentions.

Article 22 was adopted, as amended, by 10 votes to none, with 1 abstention.

58. Mr. KOZHEVNIKOV explained that he had voted in favour of article 22 on the understanding that the Russian text thereof was unaffected by the amendment, and in particular that the words "*mirovaya sdelka*", appropriately inflected, were retained.

ARTICLE 23

59. Mr. SCELLE considered that the Indian Government had good reason for considering that paragraph 2 of article 23 was open to misunderstanding (A/CN.4/68, No. 4 or A/2456, Annex I, No. 5).

60. For his own part, he regarded the whole article as disastrous, based as it was on the assumption that the parties would be able to forecast when the tribunal would be in a position to render the award. Moreover, it now conflicted with article 9, sub-paragraph (h), from which the words "The time limit within which the award shall be rendered" had been deleted.[7] He therefore proposed that the whole of article 23 be deleted.

61. Mr. LAUTERPACHT observed that the Special Rapporteur's proposal was a very radical one. Most arbitration treaties or *compromis* contained a provision concerning a time-limit for rendering the award. The Commission ought not to ignore past practice in that respect. The only consequence of the change made in article 9, sub-paragraph (h), was that the parties were no longer bound to include in the *compromis* a provision about the time-limit.

62. It was true that paragraph 2 was not very well drafted, but as it was not of fundamental importance the text might be left as it stood.

63. Mr. SCELLE said that his views were diametrically opposed to those of Mr. Lauterpacht. In his view, it would be patently absurd to allow the parties to fix in advance the time-limit within which the tribunal was bound to render the award. The existence of such a stipulation might oblige the tribunal either to take a hasty and ill-considered decision, or to prolong it unduly. That would be contrary to every principle of justice and good order, and he must accordingly press for the deletion of the article.

64. Mr. AMADO considered that paragraph 1 should be maintained, since the parties must be entitled to lay down a time-limit in the *compromis*. On the other hand, he agreed with the Indian Government that paragraph 2 required amendment.

65. Mr. ZOUREK said that the provision made in article 23 was a necessary one. The amendment of article 9, sub-paragraph (h), did not preclude the parties from fixing a time-limit for the award in the compromis. The parties' concern that the proceedings should not be unduly protracted was a legitimate one, and should be taken into account. If for some reason the tribunal found itself unable to comply with the time-limit laid down it could always ask for an extension; in practice, such time-limits had not given rise to substantial difficulties.

66. Mr. PAL could not support Mr. Scelle's proposal that article 23 be deleted. The parties should not be placed in a position where they might have to wait indefinitely for an award. There was all the more reason for setting a time-limit, inasmuch as in international law there was no means of reaching a settlement between the parties other than by arbitral award. Nor should the matter of a time-limit be left entirely to the discretion of the arbitrators. Paragraph 1 should therefore not be abandoned and if it conflicted in any way with the amended text of article 9, sub-paragraph (h), it was the latter that should be modified.

67. He was in agreement with the Indian Government's comment and suggested that the word "shall" be substituted for the word "may" before the word "refrain" in paragraph 2.

68. Mr. LIANG (Secretary to the Commission) failed to see any contradiction between article 23 and article 9, sub-paragraph (h), as amended. The former merely laid down the essential matters that must be specified in the *compromis*, and in no way precluded provision being made for a time-limit within which the award should be rendered.

69. Perhaps it could with justice be argued that a permanent arbitral tribunal with fixed rules of procedure should not be bound by a time-limit. That argument did not, however, apply to an *ad hoc* tribunal.

70. Mr. LAUTERPACHT could not agree with Mr. Scelle that it would be absurd to allow the parties to fix a time-limit. Their concern that the tribunal should not be in a position to prolong the proceedings indefinitely was legitimate. He was glad, therefore, that there seemed to be general agreement in the Commission that paragraph 1 should be retained. He also hoped that no change would be made to paragraph 2, and could not

[7] See *supra*, 187th meeting, paras. 61-62.

support Mr. Pal's amendment which would mean that if the parties were unable to agree on an extension of the time-limit the tribunal would be obliged to refrain from rendering the award. The present wording was sufficiently elastic to permit of reasonable and fair interpretation, and should therefore be left unchanged.

71. Mr. PAL pointed out that if paragraph 2 were accepted unchanged, an extension of time-limit would be entirely within the discretion of the tribunal, which was an untenable solution.

72. Mr. SCELLE said that even if he received no support at all he would still firmly abide by his stand. There was no justification whatsoever for retaining article 23 on the ground that it was consistent with precedent. Such a step would have the fatal effect of enabling one party — in all probability the party at fault — to prevent the award from being rendered at all. Unlike Mr. Lauterpacht, he had greater faith in the tribunal than in the parties. Only the tribunal could determine when it was ready to render the award. The retention of article 23 might have the gravest repercussions on the efficacy of the whole draft either by obliging the tribunal to judge in haste, or by giving one of the parties an opportunity of frustrating the settlement. Its maintenance would make justice subject to the whim of the parties.

73. Faris Bey el-KHOURI endorsed Mr. Scelle's arguments about the dangers of article 23, but believed the provision to be a necessary evil. The parties must be free to give the tribunal a time-limit. Arbitration was an exceptional procedure for the settlement of disputes, and derived from the free will of the parties. Their rights must therefore be safeguarded.

74. He supported Mr. Pal's amendment to paragraph 2.

75. Mr. ALFARO said that a time-limit had been laid down in many former treaties and had in certain cases prevented the rendering of an award. The absence of such a provision, on the other hand, had not retarded proceedings unduly. All things considered, he believed that it would be best to leave the tribunal free to render its decision as and when it deemed itself to be in full possession of the facts. He therefore supported the Special Rapporteur's proposal.

76. Mr. YEPES said that, in the light of the extremely forceful arguments put forward by partisans of both views, he was still undecided. It was true that the practice of fixing a time-limit was widespread, and that the speedy settlement of disputes was desirable for reasons of public policy. On the other hand, it must be remembered that once public interest had declined, the circumstances were more propitious for the tribunal to reach its decision. He also recognized the force of the argument that it was impossible to foresee in advance how much time the tribunal would need before it was in a position to reach its conclusions. For example, it would be impossible to say in advance to what counter-claims a case might give rise. Even the International Court of Justice, a permanent body with fixed rules of court, could not establish in advance the time within which it would be able to render an award. How much more difficult would it be for an *ad hoc* body to do so.

77. Given all the difficulties, perhaps an acceptable compromise might be engineered by substituting for article 23 a provision stating that in principle the time-limit within which the award should be rendered should be laid down in advance in the *compromis,* but that the tribunal was free to extend that time-limit if it thought fit or necessary, according to the nature of the case.

78. Mr. SCELLE said that the compromise suggested by Mr. Yepes would be acceptable to him.

79. Mr. KOZHEVNIKOV said that the issue was of crucial importance. The discussion had again confirmed his conviction that the author of the draft had gone a great deal too far in his concept of what an arbitral tribunal should be. That theoretical concept had indeed provoked serious practical objections. Surely the tribunal should be created for the parties, and not *vice versa.* It was inadmissible that the parties should be made a kind of appendage to the tribunal and be deprived of all their elementary rights. Article 23 must be maintained as a counterweight to some of the Special Rapporteur's extreme innovations.

80. Mr. HSU agreed with the Special Rapporteur that article 23 should either be deleted or be very radically modified. Its disadvantages outweighed the advantages. Its deletion, moreover, would not prevent the parties from specifying a time-limit for rendering an award if circumstances so required and a reasonably accurate prediction could be made of the time the tribunal would need.

81. Mr. ZOUREK emphasized that the purpose of article 23 was not to settle the question of whether or not time-limits for rendering the award should be established in advance, but to indicate the obligations of the tribunal if such a time-limit existed. The deletion of the article, therefore, would in no way resolve the issue. The disastrous effects of retaining it described by the Special Rapporteur were largely imaginary. Time-limits had been laid down in numerous cases, and had very seldom prevented a tribunal from rendering its award.

82. Mr. LAUTERPACHT proposed that article 23 be replaced by a new text, to read as follows:

> "The award shall be rendered within the period fixed by the *compromis,* unless the tribunal, with the consent of either or both parties, decides to extend the period fixed in the *compromis.*"

83. That text was not very far removed from the solution suggested by Mr. Yepes, according to which it was for the tribunal alone to decide whether or not a prescribed time-limit should be extended.

84. Mr. SCELLE said that if Mr. Lauterpacht's text commanded the support of the majority he would accept it, since it removed the major defect of article 23, which was that the losing party might be enabled to prevent the tribunal from rendering the award.

85. Mr. YEPES criticized Mr. Lauterpacht's text on the grounds that it would be imprudent to require the agreement of one or both parties to any extension of a time-limit. The tribunal would be the best judge of whether it was in a position to render the award. As it would be composed of persons of high standing, it should command every confidence.

86. Mr. KOZHEVNIKOV said that he would have voted in favour of the original text of article 23. He now had some hesitation, in view of the new proposals before the Commission. He therefore asked that further discussion be deferred until they had been circulated in writing.[8]

It was so agreed.

ARTICLE 24

87. Mr. SCELLE said that no government had commented on article 24.

88. Mr. YEPES suggested that in the interests of courtesy the word "*convoqués*" be substituted for the word "*appelés*" in paragraph 1 of the French text.

89. Mr. SCELLE accepted Mr. Yepes' suggestion.

Mr. Yepes' amendment to the French text was adopted by 5 votes to none, with 6 abstentions.

Paragraph 1, as amended, was adopted unanimously.

90. Mr. KOZHEVNIKOV then proposed a similar drafting change in the Russian text. The word "summoned" had been translated by a somewhat brusque term.

91. Faris Bey el-KHOURI, referring to paragraph 3, proposed that the word "them" be substituted for the words "the president and the registrar or secretary of the tribunal".

92. Mr. LAUTERPACHT could not support Faris Bel el-Khouri's amendment. The question had been fully discussed at the fourth session, and the reason why it had been decided not to require signature by all members of the tribunal was that in the past national arbitrators had often refused to sign the award.[9] If signature were to be made mandatory upon all members, there would be a danger of the proceedings being frustrated in the concluding stages.

93. Faris Bey el-KHOURI pointed out that by virtue of article 19, which stated that the deliberations of the tribunal should be attended by all of its members, it would be only normal for all of them to sign the award.

94. Mr. KOZHEVNIKOV supported Faris Bey el-Khouri's amendment, which would enhance the authority of the award rendered by the tribunal.

95. Mr. LAUTERPACHT was not surprised by Mr. Kozhevnikov's approval of the amendment, which would go a long way towards giving him satisfaction with regard to the whole procedure laid down in the draft. The serious consequences of requiring all members of the tribunal to sign the award were obvious.

96. Mr. SCELLE considered the difficulty mentioned by Mr. Lauterpacht to be a real one. It might, however, be removed by the inclusion of a proviso stating that refusal by one of the arbitrators to sign the award could not constitute grounds for challenging its validity. He would not like to suggest, however, that any arbitrator would be guilty of such bad faith as to fall back on a purely formal provision in order to invalidate the decision of the tribunal.

97. Mr. ALFARO said that, in order to meet Mr. Lauterpacht's point, he would propose that Faris Bey el-Khouri's amendment be amended by the addition at the end of the paragraph of the words "without prejudice to the provision of article 25 regarding dissenting opinions".

98. Mr. LIANG (Secretary to the Commission) pointed out that Faris Bey el-Khouri's amendment was inspired by The Hague Convention of 1899. The significance of the signatures to an award was different both in The Hague Convention of 1907 and in the Statute of the Permanent Court of International Justice, according to which they became merely a means of authentication. If that interpretation were to be maintained, it would be pointless to discuss the possibility of the absence of one signature affecting the validity of the award. On the other hand, adoption of Faris Bey el-Khouri's amendment might give rise to doubt on that question.

99. Mr. PAL said that he was in favour of paragraph 3 as it stood. Mr. Alfaro's sub-amendment would not avert the danger to which attention had been drawn by Mr. Lauterpacht.

100. Mr. SCELLE agreed with Mr. Pal.

101. Mr. ZOUREK considered Faris Bey el-Khouri's amendment to be acceptable. Matters submitted by States to arbitration were always important, and it was therefore appropriate that the award should be signed by all members of the tribunal.

102. Mr. AMADO, drawing attention to the seventh paragraph of the Secretariat's comment on article 24 (A/CN.4/L.40),[10] said that if signature by the president of the tribunal constituted authentication of the award there was no need to complicate the process further by requiring all members to sign. The difficulty would be eliminated if the words "and the registrar or secretary of the tribunal" were replaced by a proviso stating that the award should be signed by the president and each member who had expressed himself in agreement with the award. He accordingly proposed an amendment to that effect.

[8] See *infra*, 190th meeting, para. 11.

[9] See *Yearbook of the International Law Commission, 1952*, vol. I, 150th meeting, paras. 42, 53-63 (article 24 was numbered article 32 at that stage of the discussion).

[10] See document A/CN.4/92, p. 87.

103. Faris Bey el-KHOURI said that the authentication of decisions by the International Court of Justice, which was a permanent body, could not be compared with authentication of awards rendered by *ad hoc* arbitral tribunals. He therefore pressed his amendment, while accepting the sub-amendment suggested by Mr. Alfaro. He could also support Mr. Amado's amendment.

Mr. Amado's amendment was adopted by 8 votes to none, with 3 abstentions.

Paragraph 3, as amended, was adopted by 9 votes to none, with 2 abstentions.

104. Mr. YEPES considered that the English and French texts of paragraph 2 were inconsistent. He preferred the former, believing that a statement of reasons was essential. He therefore intended to submit a new wording for the French text, and to propose the addition in Chapter VII, "Annulment of the Award", of a clause providing that any award not containing a full statement of reasons should be null and void. No terms could ever be too strong for the conduct of arbitrators like President Cleveland in the *Cerruti* case, between Colombia and Italy, who not only omitted to state any reason for his decision, but also exceeded his powers by giving a decision *ultra petita.*[11]

105. Mr. AMADO saw no reason for changing the existing text of paragraph 2 in either language.

106. Mr. ALFARO observed that the Spanish text of paragraph 2 concorded perfectly with the English version.

The meeting rose at 1.5 p.m.

[11] Award of 2 March 1897. See Stuyt, *Survey of International Arbitrations 1794-1938* (The Hague, Martinus Nijhoff, 1939), p. 188.

190th MEETING

Wednesday, 10 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

ARTICLE 24 (*continued*)

1. Mr. YEPES said that he was anxious to ensure that the award should include a full statement of reasons. As he had mentioned at the previous meeting in the *Cerruti* case between Colombia and Italy the arbitrator, President Cleveland of the United States of America, had exceeded his competence and given no reasons whatsoever for what could only be described as an absolutely arbitrary decision.[1] He feared that the French text of paragraph 2 was not sufficiently explicit. It might therefore be modified to read:

"*La sentence doit contenir un exposé complet des motifs sur lesquels elle est basée.*"

2. He also intended to re-introduce the proposal he had suggested at the fourth session[2] to the effect that failure to include a full statement of reasons in the award should be a ground for challenging its validity (article 30).

3. Mr. SCELLE (Special Rapporteur) considered Mr. Yepes' amendment to the French text of paragraph 2 unnecessary. He was prepared, however, to support his proposal concerning article 30.

4. Mr. YEPES said that he would not press his amendment to the French text of paragraph 2 provided there was no doubt as to the meaning of that provision.

5. Mr. LAUTERPACHT observed that Mr. Yepes' text had the merit of being a literal translation of the English version. The requirement in the original French text of paragraph 2 hardly seemed to go so far as requiring a full statement of reasons.

6. Mr. ALFARO considered that the phrase "*dûment motivée*" in paragraph 2 precisely conveyed Mr. Yepes' intention. Moreover, it had an exact equivalent in Spanish. On the other hand the words "*un exposé complet des motifs*" had another connotation both in French and in Spanish.

7. Mr. KOZHEVNIKOV said that the Russian text was sufficiently clear as it stood, but might be rendered yet more precise by Mr. Yepes' amendment, which therefore would be acceptable to him.

[1] Award of 2 March 1897. See Stuyt, *Survey of International Arbitrations 1794-1938* (The Hague, Martinus Nijhoff, 1939), p. 188.

[2] See *Yearbook of the International Law Commission, 1952*, vol. I, 150th meeting, para. 37 (article 24 was numbered article 32 at that stage of the discussion).