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Summary record of the 192nd meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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matter was not of very great importance, and might be dealt with by deleting either paragraph (*b*) from article 30, or the opening phrase from article 31, paragraph 2, reading: "In cases covered... of article 30."

107. Mr. LAUTERPACHT hoped that paragraph 2 of article 31 would be left as it stood. Though not particularly well drafted, it reflected the view that it would be improper to apply the same time-limit to paragraph (*b*) of article 30 as to paragraphs (*a*) and (*c*).

108. Mr. SPIROPOULOS said that article 29 and 31 should either stipulate the same time-limits, or none at all.

109. Mr. PAL was in favour of establishing a time-limit for challenging the validity of an award on the grounds that there was corruption on the part of a member of the tribunal; otherwise such a challenge might be made after a very considerable lapse of time.

110. Mr. YEPES proposed a time-limit of ten years.

111. Mr. ALFARO considered such a period unduly lengthy. A clause of that kind might reflect adversely upon the finality of the award, and the personal honour of the arbitrators.

112. Mr. SCELLE proposed a time-limit of six months for the case covered by paragraph (*b*) in article 30.

Mr. Scelle's proposal was adopted by 8 votes to none, with 3 abstentions.

Article 31, as a whole and as amended, was adopted by 10 votes to 2.

The meeting rose at 1.5 p.m.

192nd MEETING

Friday, 12 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. A. E. F. SANDSTRÖM, 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 32

1. Mr. KOZHEVNIKOV said that he could not vote for article 32; he had already explained why, in his opinion, the International Court of Justice could not be allowed to intervene in arbitral proceedings.

2. Mr. ZOUREK said that he had voted against article 31, and would vote against article 32, for the following reasons. He considered that, once the award had been rendered, arbitral proceedings came to an end, and the tribunal's competence, deriving as it did solely from the consent of the parties, was accordingly extinguished. Any dispute to which the award might give rise, whether relating to interpretation, to the discovery of new facts giving ground for revision, or to a challenge on grounds of nullity, should therefore be regarded as a new dispute to be dealt with by peaceful means according to existing agreements between the parties.

3. An obligatory application to the International Court of Justice at the request of one party would tend to transform arbitral tribunals into tribunals of first instance subject to the control of the Court. Such a system would make the Court a normal court of appeal, and would be totally at variance with the essential character of arbitral proceedings, which must end in a final award against which there was no appeal.

4. Acceptance by States of a provision such as article 31 would constitute a direct invitation to any losing party to bring the dispute before the International Court of Justice, and the intervention of that body, as provided for in articles 2, 3, 8, 28, 29, 31 and 32 of the draft arbitral procedure, conflicted with the theory of arbitration, which was based on the right of the parties to choose the arbitrators. The provisions to which he had referred would encourage acceptance of the obligatory jurisdiction of the International Court of Justice in matters submitted to arbitration, which would mean in effect the total disappearance of arbitration. His opposition was not inspired by any distrust of the International Court, which he held in great regard, but by the theoretical and practical considerations he had just stated.

Article 32 was adopted by 11 votes to 2.

5. The CHAIRMAN said that, as the Drafting Committee had been unable to reach final agreement on the texts of those articles which had been held over for

further consideration, they would have to be taken up in plenary meeting.

ARTICLE 3 (*resumed from the 186th meeting*)

6. The CHAIRMAN said that certain amendments to article 3 had been withdrawn, and the Commission now had before it only texts submitted by Mr. Lauterpacht and Mr. Sandström.

7. Mr. SCELLE (Special Rapporteur) proposed the addition of the following paragraph at the end of article 3:

"Once the tribunal has been constituted, either party may submit the dispute to it by direct citation. If the other party refuses to answer the citation and calls for the preparation of a *compromis*, the tribunal shall decide whether there is agreement between the parties on the points mentioned in article 9 (a, c, d, e, f, g, h, i, j, k). Failing such agreement, the tribunal fix a time-limit of... months for the parties to conclude the *compromis*. On the expiry of this time-limit, the procedure laid down in article 10 shall apply."

8. He had been prompted to move his amendment by the United Kingdom Government's comment on article 9 (A/CN.4/68, No. 8 and A/2456, Annex I, No. 9). He entirely agreed with that government that it was necessary to envisage the possibility of either party submitting the dispute immediately to the tribunal once it was constituted, without first concluding a *compromis*. His proposal would both simplify and accelerate the procedure.

9. The CHAIRMAN suggested that Mr. Scelle's proposal would more properly be dealt with as a separate article.

It was so agreed.

10. Mr. LAUTERPACHT proposed an alternative text for article 3, to read:

"1. Within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision of the International Court of Justice in conformity with article 2, paragraph 1, the parties to an undertaking to arbitrate shall proceed to constitute the arbitral tribunal by appointing a sole arbitrator or arbitrators in accordance with the compromis referred to in article 9 or with any other instrument embodying the undertaking to arbitrate.

"2. If a party fails to make the necessary appointments under the preceding paragraph within three months, the appointments shall be made by the President of the International Court of Justice at the request of the other party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

"3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate. In the absence of such provisions the composition of the tribunal shall be determined after consultation with the parties by the President of the International Court of Justice or the judge acting in his place.

"3. In cases where provision is made for the appointment of a president, the tribunal shall be deemed constituted when the president is appointed. If there has been a failure to make the appointment within two months of the appointment of the other arbitrators, the president shall be appointed in accordance with paragraph 2."

11. The purpose of his text was to make clear what were the necessary appointments to the tribunal, and to provide for the case when there was failure to agree upon the appointment of its president. It had been generally agreed that paragraphs 2 and 3 of the original text were cumbersome, and could be dropped without loss.

12. Mr. SCELLE said he could accept paragraph 1 of Mr. Lauterpacht's text, which would render article 4 superfluous.

13. He was unable, however, to understand the precise meaning of paragraph 2. What would happen if neither party made the necessary appointments? With considerable subtlety, Mr. Lauterpacht appeared to have reintroduced the principle that each party would necessarily appoint a national arbitrator. Paragraph 2 would be improved if the opening words were amended to read:

"If the parties fail to constitute a tribunal within three months the appointments..."

14. Mr. PAL considered that the meaning of paragraph 2 was perfectly clear in the English text, and required no modification.

15. The CHAIRMAN observed that the President of the International Court of Justice could only make the appointments if requested to do so by one of the parties. It was conceivable that neither of them would do so.

16. Mr. PAL pointed out that in that case there would clearly be no arbitration.

17. Mr. LIANG (Secretary to the Commission) considered that the Commission must decide whether or not provision should be made to meet the possibility of neither party asking the President of the International Court of Justice to make the appointments.

18. Mr. SANDSTRÖM said that he was prepared to withdraw his amendment in favour of Mr. Lauterpacht's, though the latter suffered from certain drafting

defects.[1] Paragraph 2, for example, failed to deal with the case where arbitrators were nominated by the two parties or by the arbitrators nominated by the two parties.

19. Mr. LAUTERPACHT pointed out that paragraph 2 related solely to the arbitrators appointed by the parties.

20. Mr. SANDSTRÖM then asked whether the contingency of the arbitrators being unable to agree on the choice of president of the tribunal was covered.

21. Mr. LAUTERPACHT referred Mr. Sandström to paragraph 4 of his (Mr. Lauterpacht's) text.

22. Mr. SCELLE considered that Mr. Lauterpacht's text would unjustly place one party at a disadvantage, by enabling the President of the International Court of Justice to accept the appointments of one party and to impose his own appointments upon the other. In paragraph 2, the words "at the request of the other party" should therefore be replaced by the words "at the request of one of the parties".

23. The CHAIRMAN observed that if the President of the International Court were to appoint the whole tribunal because, although one party had made its appointments the other refused to do so, the first party would be penalized.

24. Mr. SCELLE disagreed with the Chairman. Precedent did not suggest that it was an absolute right of the parties to appoint national arbitrators. For his part, he considered such a practice as vicious, because it meant that the tribunal would always be composed of *ad hoc* judges, although in saying that he in no way wished to impugn the impartiality of such judges. Such tribunals would not constitute progress, and he hoped that so dangerous a theory would not be embodied in a rule which would go a long way towards destroying the whole purpose of his draft.

25. Mr. LAUTERPACHT pointed out that the free choice of the arbitrators by the parties was the essence of arbitration. At the previous session, the Commission had not thought it necessary to depart from that principle. At the same time it was quite unacceptable that one party should be deprived of that right if the other failed to make its appointments.

26. Mr. SANDSTRÖM said that if the parties wished to appoint national arbitrators they could not be prevented from doing so.

27. He had concluded from the foregoing discussion that his amendment was simpler and more comprehensive than Mr. Lauterpacht's. He would therefore reintroduce it.

28. Mr. ZOUREK, referring to paragraph 1 of Mr. Lauterpacht's text, pointed out that the Commission had never precisely defined what was meant by an undertaking to arbitrate. In his opinion, it was a *pactum de contrahendo,* an agreement between the parties to conclude a *compromis* defining the disputes to be settled by arbitration, the choice of arbitrators and the method of their appointment.

29. Mr. SCELLE said that an undertaking to arbitrate was an undertaking to submit either a specific or a future dispute to arbitration.

30. Mr. LAUTERPACHT noted that Mr. Zourek seemed to suggest that there could be no undertaking to arbitrate unless the parties had agreed upon the *compromis*. Surely the meaning of the expression "an undertaking to arbitrate" — whether specific or general — was self-explanatory? The draft under consideration laid down the procedure for giving effect to such an undertaking.

31. Mr. YEPES said that the answer to Mr. Zourek's question was to be found in article 1, paragraph 3, which read: "The undertaking constitutes a legal obligation which must be carried out in good faith, whatever the nature of the agreement from which it results."

32. Mr. ZOUREK disagreed with Mr. Yepes. Article 1 did not specify what made an undertaking to arbitrate definitive.

33. The CHAIRMAN put to the vote paragraph 1 of Mr. Lauterpacht's text.

Paragraph 1 of Mr. Lauterpacht's text was adopted by 9 votes to 1, with 3 abstentions.

Mr. Scelle's amendments to paragraph 2 were rejected by 7 votes to 5, with 1 abstention.

Paragraph 2 of Mr. Lauterpacht's text was adopted by 6 votes to 3 with 4 abstentions.

34. Mr. YEPES opposed the second sentence in paragraph 3 of Mr. Lauterpacht's text, on the ground that it sought to give simple guidance to the President of the International Court of Justice in constituting the tribunal. Surely that was entirely inappropriate in view of his position and high authority? Moreover, full confidence in his judgement was clearly implied by the terms of paragraph 2.

35. Mr. LAUTERPACHT pointed out that paragraph 3 provided for cases in which the parties had made no stipulation in the *compromis* about the composition of the tribunal. Since, in such cases, a heavy responsibility would then be placed on the President, he would need to consult the parties.

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[1] Mr. Sandström's amendment to article 3 read as follows:

"1. If the parties have not designated arbitrators in the undertaking to arbitrate, they must constitute the arbitral tribunal by mutual agreement or in accordance with the procedure, if any, agreed for this purpose within the period they have fixed therefor or if no such period has been fixed within four months from the date of the request made for submission of the dispute to arbitration or from the date of the decision of the International Court of Justice taken in conformity with Article 2, paragraph 1.

"2. If the tribunal is not constituted within the period prescribed in the preceding paragraph, the necessary appointments shall be made...".

36. Mr. YEPES contended that that was self-evident.

37. Mr. LIANG (Secretary to the Commission) said that the deletion of paragraph 3 would remove the provision explaining what the "necessary appointments" were.

38. Mr. AMADO said that it would be undesirable to delete a reference to the necessary association between the President of the International Court of Justice and the parties in cases where the Court was called upon to determine the composition of the tribunal.

39. Mr. YEPES said that he was merely anxious to avoid a statement of the obvious in the second sentence of paragraph 3. Moreover, courtesy was due to the President of the International Court.

40. Mr. ALFARO suggested that Mr. Yepes' point would be met by the deletion of the words "after consultation with the parties". In his view, the whole matter was of minor importance, since the provision in no way derogated from the power and dignity of the President of the International Court.

41. Mr. YEPES accepted Mr. Alfaro's suggestion.

42. Mr. AMADO urged that some consideration be given to the parties. To treat them as outcasts would be to deny the very essence of arbitration. The President of the International Court would in no way lose face by consulting them.

43. Mr. LAUTERPACHT observed that even if Mr. Alfaro's amendment were accepted, there would be nothing to preclude the President of the International Court from consulting the parties.

44. Mr. SPIROPOULOS considered that no harm would be done by retaining the phrase "after consultation with the parties". The cases in which the President would not wish to consult them would be very rare indeed.

45. Mr. SCELLE said that he would be unable to vote for paragraph 3, which seemed to him too great an innovation.

46. Mr. LAUTERPACHT expressed surprise that the special rapporteur, who had formerly agreed that a provision of the kind contained in paragraph 3 was necessary, should now oppose it.

Mr. Alfaro's amendment was rejected by 7 votes to 1, with 4 abstentions.

Paragraph 3 of Mr. Lauterpacht's text was adopted by 7 votes to 3, with 3 abstentions.

47. Mr. SCELLE was unable to understand the precise significance of the words "the tribunal shall be deemed constituted when the president is appointed" in paragraph 4. What would be the situation if the president was appointed before the other members of the tribunal? He was also opposed to the new time-limit contained in the second sentence, which would unnecessarily prolong the whole process of appointing the tribunal.

48. Mr. LAUTERPACHT explained that the purpose of paragraph 4 was to provide aginst the contingency of the arbitrators failing to reach agreement on the choice of president.

49. Mr. LIANG (Secretary to the Commission) was doubtful whether the first sentence in paragraph 4 was necessary. It was true that the president was sometimes chosen by the other members of a tribunal, but that was not invariably so, in which case the provision failed to cover all contingencies.

50. Mr. ALFARO considered Mr. Scelle's objection to the first sentence to be well founded. Perhaps it could be disposed of by transposing the phrase "the tribunal shall be deemed... is appointed" to the end of paragraph 4. In his opinion, it was certainly necessary to provide for the possibility of the arbitrators failing to agree upon the choice of the president; a matter which was much more likely to give rise to difficulties than the appointment of the national arbitrators themselves.

51. Mr. PAL, in order to meet the objections raised, proposed the insertion of the words "by the arbitrators" after the words "the appointment of a president", and the insertion of the word "only" after the word "constituted".

52. Mr. LAUTERPACHT accepted Mr. Pal's amendments, but could not agree to Mr. Alfaro's amendment, since the two were incompatible.

53. Mr. ALFARO supported Mr. Pal's amendments.

54. Mr. LIANG (Secretary to the Commission) pointed out that as the president was one of the members of the tribunal, though he might be selected by the other members, he derived his authority from the parties. He therefore suggested that Mr. Pal's intention might be better rendered by the substitution of the words "for the choice of a president by the other arbitrators" for the words "appointment of a president".

55. Mr. PAL accepted Mr. Liang's wording for his first amendment.

56. Mr. LAUTERPACHT said that as no objections had been put forward to Mr. Pal's amendment as amended by the Secretary, the final wording might be left to the Drafting Committee.

It was so agreed.

Paragraph 4, as amended by Mr. Pal and the Secretary, was adopted by 7 votes to none, with 5 abstentions.

Article 3, as a whole and as amended, was adopted by 7 votes to 4, with 2 abstentions.

57. Mr. SCELLE explained that he had been unable to accept Mr. Lauterpacht's text for article 3, which differed radically from the original version and did not conform very closely to the observations made by governments.

ARTICLE 6 (*resumed from the 187th meeting*)

58. Mr. SANDSTRÖM said that, since his absence had prevented him from following the course of the Commission's work uninterruptedly, he would withdraw the various amendments he had submitted and reserve his position on the draft as a whole.

59. Mr. LAUTERPACHT submitted the following text to replace the original article 6:

"Should a vacancy occur on account of death or incapacity of an arbitrator or, prior to the commencement of proceedings, the resignation of an arbitrator, the vacancy shall be filled by the method laid down for the original appointment."

60. He explained that his proposal was intended to define the reasons for vacancies which were "beyond the control of the parties". Such reasons were the death or incapacity of an arbitrator. He had also included in the text a previous proposal relating to the filling of a vacancy caused by the resignation of an arbitrator prior to the commencement of proceedings.

Mr. Lauterpacht's text for article 6 was adopted by 10 votes to 1, with 1 abstention.

ARTICLE 7 (*resumed from the 187th meeting*)

61. Mr. LAUTERPACHT, in apologising for the large number of amendments he was putting forward, explained that he had submitted a series of proposals in his capacity as the Commission's General Rapporteur. His proposed text for article 7 read:

"1. Once the proceedings before the tribunal have begun, an arbitrator may not withdraw without the consent of the tribunal. The resulting vacancy shall be filled by the method laid down for the original appointment.

"2. Should the withdrawal take place without the consent of the tribunal, the resulting vacancy shall be filled in accordance with paragraph 2 of article 3."

62. Answering Mr. Yepes, he agreed that no reference was made in his proposal to the possibility of the withdrawal of an arbitrator by a government. Juridically, such a situation could not occur. Once a tribunal had been constituted, the parties to the dispute had nothing further to do with it.

63. It was true that an arbitrator might be obliged to withdraw through pressure exercised by his government, but that possibility was covered by paragraph 1 of his text.

64. Mr. SCELLE considered that the point should be clearly stated, in order that there should not be the slightest uncertainty about the immutability of a tribunal. If no such statement were included, the matter would be left in doubt, since the Commission had accepted the principle of national arbitrators. He would suggest that the best way of solving the difficulty would be to add the following words at the end of paragraph 1 of article 5:

"and governments shall then not have the right to withdraw arbitrators whom they have appointed."

65. Mr. LIANG (Secretary to the Commission) suggested that reference be made in paragraph 2 of Mr. Lauterpacht's proposal to a request or an application for the filling of the vacancy. It could not be assumed that the President of the International Court of Justice would know that a withdrawal had taken place without being officially apprised of it.

66. As to the premise that the withdrawal of an arbitrator by a party was a juridical impossibility, if that were so, the second sentence of paragraph 2 of article 5 should be deleted. However, he was inclined to agree with Mr. Scelle that the possibility did exist.

67. Mr. LAUTERPACHT reiterated that a government could not in law withdraw an arbitrator from a tribunal over which it had no control. In practice, a government could certainly instruct an arbitrator to withdraw.

68. The Secretary's point concerning paragraph 2 was well taken. He would therefore suggest that the paragraph be amended by the addition of the words "at the request of the tribunal" after the words "in accordance with paragraph 2 of article 3".

69. Mr. ZOUREK said that he would oppose any modification or article 5, which was both sensible and in keeping with normal practice.

70. Mr. SCELLE said that he would not insist on his proposed amendment to paragraph 1 of article 5. The simplest way of solving the difficulty would be to make a slight change in the first sentence of paragraph 2: "A party may, however, only replace an arbitrator appointed by it, if the tribunal etc." Article 7 could then stand.

71. Mr. PAL pointed out that paragraph 2 of article 5 did not affect the principle enunciated by Mr. Lauterpacht, for the simple reason that it dealt with the replacement of an arbitrator before the beginning of proceedings. Once proceedings had begun, the provisos of article 7 came into force. There was, therefore, no need to refer to the possibility of withdrawal of an arbitrator by the parties, and he would urge the deletion of the words "without the consent of the tribunal" from paragraph 2 of Mr. Lauterpacht's proposal.

72. Mr. YEPES said that it was essential that the Commission should define precisely what was meant by the beginning of proceedings. He would consequently suggest that the second sentence of paragraph 2 of article 5 be clarified by the addition, after the word "*commencée*", of the following phrase:

"*c'est-à-dire au moment où le premier mémoire écrit est soumis au greffe du tribunal.*"

73. In any case he thought that clarification should be made somewhere in the draft because it was absolutely indispensable to fix the time from which certain periods began to run. In arbitration procedure, precise deter-

mination of the time when proceedings must be considered as having begun was essential.

74. The CHAIRMAN asked Mr. Yepes to submit his proposal in writing.

75. Mr. HSU asked Mr. Lauterpacht what the position would be if the withdrawal of national arbitrators by one or other of the parties were continued *ad infinitum*.

76. Mr. SCELLE said that that very situation had been foreseen in paragraph 2 of Mr. Lauterpacht's former proposal relating to article 7, which read as follows:

> "Should the withdrawal take place in disregard of paragraph 1, the remaining members shall have the power, upon the request of one of the parties, to continue the proceedings and render the award."

77. He preferred that version of the proposal, and would draw member's attention to the Secretariat's valuable comments on the subject.[2]

78. The CHAIRMAN pointed out that the Commission had felt that such a provision, which had also been included in the original article 7, was somewhat too drastic, since it would in practice be difficult to distinguish between a voluntary and an enforced withdrawal. To apply sanctions to a party if the arbitrator it had nominated withdrew of his own free will would not, perhaps, be entirely fair.

79. Mr. SCELLE replied that it would be for the tribunal to judge each case on its merits. He could not insist too strongly on the fact that the parties were in no way masters of the tribunal.

80. Mr. LAUTERPACHT recalled that the whole issue had already been discussed at great length, and added that, although truncated tribunals had been known since the end of the eigtheenth century, the reason why they had functioned as such was because no provision for the replacement of an arbitrator had existed. The purpose of the present draft was to make provisions for replacement, and to ensure that a tribunal should always function with a quorum.

81. As to Mr. Hsu's question, the obvious answer was that, if a party persisted in obliging an arbitrator, who was its national, to withdraw, the President of the International Court of Justice would, if the same situation arose once more, take the simple precaution of appointing an arbitrator who was not a national of that party.

82. Mr. SANDSTRÖM stated that he would be able to accept Mr. Lauterpacht's proposal now that it was couched in less drastic terms.

The proposal that the words "at the request of the tribunal" be added after the words "in accordance with paragraph 2 of article 3" in paragraph 2 of Mr. Lauterpacht's proposed text for article 7 was adopted by 11 votes to 2.

Paragraph 1 of Mr. Lauterpacht's text was adopted by 8 votes to 2, with 3 abstentions.

83. Mr. YEPES explained that he had abstained from voting on paragraph 1 because the procedure of filling a vacancy by the method laid down for the original appointment would take far too long.

Paragraph 2 of Mr. Lauterpacht's text, as amended, was adopted by 10 votes to 2, with 1 abstention.

Mr. Lauterpacht's proposed text for article 7 was adopted, as a whole and as amended, by 10 votes to 2 with 1 abstention.

ARTICLE 8 (*resumed from the 187th meeting*)

84. Mr. LAUTERPACHT proposed that article 8 be amended by adding the words "The resulting vacancy shall be filled by the method laid down for the original appointment." at the end of paragraph 1, and by replacing paragraph 2 by the following text:

> "In the case of a sole arbitrator, the question of disqualification shall be decided by the International Court of Justice on the application of either party."

85. Mr. SANDSTRÖM wished to amend Mr. Lauterpacht's amendment to paragraph 1 of article 8 by replacing the clause following the word "filled" by the words "in accordance with paragraph 2 of article 3 at the request of the tribunal". The sentence would then read:

> "The resulting vacancy shall be filled in accordance with paragraph 2 of article 3 at the request of the tribunal."

86. Mr. LAUTERPACHT accepted Mr. Sandström's sub-amendment, which *was adopted by 10 votes to 2, with 1 abstention.*

Mr. Lauterpacht's proposed text for paragraph 1 of article 8 was adopted, as amended, by 10 votes to 3.

87. Mr. LIANG (Secretary to the Commission) suggested that the method of filling vacancies prescribed in paragraph 1 of article 8 should also apply to the case of a sole arbitrator. He would therefore suggest that the sentence be amended to read:

> "The resulting *vacancies* shall be filled in accordance with paragraph 2 of article 3 at the request of the tribunal."

and then transposed to the end of article 8 as paragraph 3.

88. Mr. LAUTERPACHT accepted the Secretary's suggestion, which *was adopted by 10 votes to 2, with 1 abstention.*

Mr. Lauterpacht's proposed text for paragraph 2 of article 8 was adopted, as amended, by 11 votes to 2.

Article 8 was adopted, as a whole and as amended, by 9 votes to 3.

[2] See document A/CN.4/92, pp. 28-30.

ARTICLE 9 (*resumed from the 187th meeting*)

89. Mr. ALFARO submitted the following text to replace article 9.

"Unless there are prior provisions on arbitration which suffice for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify:

"(*a*) The subject matter of the dispute;

"(*b*) The method of constituting the tribunal and the number of arbitrators;

"(*c*) The place where the tribunal shall meet;

"(*d*) The manner in which the costs and expenses shall be divided.

"In addition to any other provisions deemed desirable by the parties, the *compromis* may also specify the following:

"(1) The law to be applied by the tribunal, and the power, if any, to adjudicate *ex aequo et bono*;

"(2) The power, if any, of the tribunal to make recommendations to the parties;

"(3) The procedure to be followed by the tribunal;

"(4) The number of members constituting a quorum for the conduct of the proceedings;

"(5) The majority required for an award;

"(6) The right of members of the tribunal to attach dissenting opinions to the award;

"(7) The time-limit within which the award shall be rendered;

"(8) The appointment of agents and counsel; and

"(9) The languages to be employed in the proceedings before the tribunal."

90. He recalled that he had already explained that article 9 should be so redrafted as to make a clear distinction between those requirements in the absence of which arbitration could not take place and other requirements which, though not specified in the *compromis*, were contained in the present draft.

91. Mr. SCELLE supported Mr. Alfaro's proposal, which, he considered, clarified the issue.

92. Mr. YEPES also supported it in principle, but held that proviso (d) should be listed among the *desiderata,* whereas proviso (1) should be included in the category of compulsory requirements. The manner in which the costs and expenses should be divided formed part of customary law and, indeed, Article 64 of the Statute of the International Court of Justice gave guidance on the matter. But the law which the tribunal should apply and its power to adjudicate *ex aequo et bono* must be specified in the *compromis* if that was the intention of the parties. It would be very dangerous if it were not made an obligation to lay down in the *compromis* just how far the tribunal could go in the matter of the application of certain principles of law.

93. Mr. ALFARO said that he had included the manner of division of costs and expenses in the obligatory category, because it might prove embarrassing for arbitrators to have to deal with that question themselves. He did not, however, feel strongly about the matter.

94. But he must insist that the questions of the law to be applied and adjudication *ex aequo et bono* need not be specified in the *compromis,* because they were already covered by article 12. Furthermore, cases might occur where claims had to be decided according to different legal systems, and it was preferable to give the tribunal the necessary latitude.

95. Mr. AMADO supported Mr. Alfaro.

96. Mr. SCELLE reminded Mr. Yepes that various systems of law applied if and when they were not in contradiction with international law.

97. Mr. SANDSTRÖM also opposed Mr. Yepes' suggestion.

98. Mr. LAUTERPACHT, agreeing with Mr. Scelle and Mr. Sandström, held that Article 64 of the Statute of the International Court clearly proved that no general principle of law existed in regard to the manner in which the costs and expenses should be divided.

Mr. Yepes' proposal that proviso (d) be relegated to the category of non-obligatory stipulations was rejected by 6 votes to 1, with 6 abstentions.

Mr. Yepes' proposal the desideratum (1) be promoted to the category of requirements which must be included in the compromis was rejected by 9 votes to 2, with 2 abstentions.

99. Mr. LIANG (Secretary to the Commission) felt that the introductory phrase ("Unless there are prior provisions on arbitration") was unsatisfactory, and presumed that by such provisions Mr. Alfaro really meant the instrument or instruments embodying the undertaking to arbitrate. That was the formula used in paragraph 1 of article 3, as adopted earlier at the meeting by the Commission.

100. The CHAIRMAN ruled that that point be left to the Drafting Committee.

Mr. Alfaro's proposed text for article 9 was adopted unanimously.

The meeting rose at 1.10 p.m.

193rd MEETING

Saturday, 13 June 1953, at 9.45 a.m.

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