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Summary record of the 174th meeting

Topic:
Arbitral Procedure

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80. Mr. LAUTERPACHT still considered the provision unnecessary. However, if some members of the Commission felt it desirable to retain it, it should be retained. Properly, the question of equality of the parties arose in connexion not only with procedure but also with evidence and with the application of substantive law. In order to simplify discussion, however, he would support Mr. Hudson's suggestion.

81. Mr. YEPES and Mr. ZOUREK thought that the discussion showed that the provision in question was of sufficient importance to warrant its being retained and placed in an article by itself.

82. Mr. LIANG (Secretary to the Commission) suggested that if the provision were retained, it should be differently worded, since a declaration of principle appeared somewhat out of place among detailed provisions regarding the powers of the tribunal.

83. The CHAIRMAN put to the vote the question whether the substance of the provision should be included in the final draft.

Its inclusion was decided in the affirmative by 10 votes to none with 1 abstention.

84. Mr. YEPES proposed that the provision be retained as a separate article to read as follows :

“The parties are equal in any proceedings before the tribunal.”⁷

Mr. Yepes' proposal was adopted by 6 votes to 3 with 3 abstentions.

85. Mr. SCELLE pointed out that the Commission had still to decide where the article was to be placed. He proposed that it be placed immediately after article 13, to which, as Mr. Hudson had pointed out, it was in fact complementary.

86. Mr. YEPES proposed that the article be made the first article of Chapter IV, as the principle enunciated in it governed all questions of the tribunal's procedure.

87. The CHAIRMAN said that he would first put Mr. Scelle's proposal to the vote.

Mr. Scelle's proposal was rejected by 6 votes to 4 with 1 abstention.

88. The CHAIRMAN said that he would next put Mr. Yepes' proposal to the vote.

89. Mr. SCELLE said that he merely wished to point out that, if the article were placed where Mr. Yepes proposed, it would govern article 11, dealing with interpretation of the *compromis*, and article 12, concerning the law to be applied and *non liquet* findings, all of them questions with which it was totally unconnected.

⁷ In document A/CN.4/L.35 this article which was unnumbered read as follows :

“The equality of the parties before the tribunal is an underlying principle of the law of arbitration.”

Five votes were cast in favour of Mr. Yepes' proposal, and 5 against ; the proposal was accordingly rejected.

The meeting rose at 6.25 p.m.

174th MEETING

Tuesday, 29 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Rapporteur : Mr. Jean SPIROPOULOS.

Present :

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

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

Arbitral procedure (item 2 of the agenda) (A/CN.4/L.35) (*continued*)

1. The CHAIRMAN invited the Commission to con-

* The number within brackets indicates the article number in the Special Rapporteur's Report (A/CN.4/46).

tinue consideration of the Draft on Arbitral Procedure (A/CN.4/L.35).¹

CONSIDERATION OF THE DRAFT ARTICLES SUBMITTED BY THE STANDING DRAFTING COMMITTEE (*continued*)

Article 14 [23] (*continued*)

2. Mr. YEPES said that he wished to withdraw the proposal he had made at the previous meeting that the provision formerly contained in article 23 which the Commission had decided to maintain in the form: "The parties are equal in any proceedings before the tribunal" be inserted at the beginning of chapter IV as a separate article. On reflection he felt that it should be inserted as a separate article to follow article 13.

3. Mr. LAUTERPACHT said that it was self-evident that the tribunal must administer the law impartially. He could not conceal his view that it was unnecessary to say so.

4. Mr. HUDSON also opposed the inclusion of such a provision as the revised article. In the terms in which it had been approved by the Commission, it was unsuitable for inclusion in a chapter dealing with the powers of the tribunal. He thought therefore that, if its substance was to be maintained, the article should be couched as follows:

"The tribunal shall at all times respect the principle of the equality of the parties before it."

He made it clear, however, that he himself could not vote for the article.

5. Mr. SCELLE observed that the Commission had already adopted a definite text at the previous meeting. There remained only the question where it was to be placed.

6. Mr. LIANG (Secretary to the Commission) agreed with Mr. Hudson that it might be difficult to find an appropriate place in chapter IV for the revised text of original article 23 unless the title of that chapter were made less restrictive. On the other hand there could be objections to such expressions as "at all times" and "respect" in Mr. Hudson's text. Perhaps Mr. Hudson might consider a text running somewhat as follows:

"The tribunal shall have regard for the principle of equality of the parties."

7. Mr. HSU believed that it might be wiser to have no such provision in the text. Others of a similar character which enunciated self-evident principles had not been retained. He therefore moved that the matter be reconsidered.

8. Mr. ZOUREK argued that the Commission could not reopen discussion on the principle as to whether such a provision was to be included in the draft. If it

did so he would insist that the Chairman's ruling on the amendment he had proposed to article 3 be reversed and that that text be submitted for consideration.

9. Mr. SCELLE agreed with Mr. Zourek. During the first reading of his (Mr. Scelle's) draft, the Commission had decided to retain article 23, and had confirmed that decision at the previous meeting by a vote. The Commission should refrain from perpetually going back on its decisions. He was therefore unable to accept the reasons for Mr. Hsu's motion.

10. Mr. HSU said that he had considerable sympathy with Mr. Scelle's view and had only moved reconsideration of the matter on the grounds that such a general statement of an obvious principle could be dispensed with.

Mr. Hsu's motion was defeated by 5 votes to 3 with 3 abstentions.

Mr. Yepes' proposal that the provision be included as a separate article to be placed after article 13 was adopted by 5 votes to 3 with 2 abstentions.

Article 15 [24]²

11. No observations.

Article 16 [27]³

12. Mr. HUDSON suggested that the word "arbitral" be deleted from the French text to bring it into line with the rest of the draft.

It was so agreed.

13. Mr. HUDSON referred to the special rapporteur's comment on article 16 which stated that "the fact that the English and French texts are not in complete conformity is due to the technical peculiarities of Anglo-Saxon or Latin procedure, the sense and scope of the articles are, however, identical in the two texts" He said he was unable to understand why that deficiency should not be made good. It was unthinkable that the Commission should admit to being incapable of doing so.

14. Mr. SCELLE replied that, after careful consideration, he had concluded that, for the reasons he had explained in his comment, it was impossible to evolve two absolutely concordant texts but the sense and scope of both versions were absolutely identical.

15. The CHAIRMAN said that the French text of article 16 was perfectly comprehensible to anyone familiar with continental legal procedure. All that was necessary was to find the precise English equivalents for the terms used.

¹ Mimeographed document only. It was incorporated, with drafting changes, in the "Report" of the Commission as Chapter II (see vol. II of the present publication). Drafting changes are given in the present summary records.

² Corresponds to article 14 in document A/CN.4/L.35.

³ In document A/CN.4/L.35 this article read as follows:

"For the purpose of securing a complete settlement of the dispute, the tribunal shall rule on objections to the admissibility of any claims or counter-claims presented to it."

16. Mr. LIANG (Secretary to the Commission) pointed out that the purpose of article 16 was to emphasize the power of the tribunal to rule on counter-claims. It was hardly necessary to state its power to rule on the principle claim in the dispute since that was one of its essential functions.

17. Mr. HUDSON considered that article 16 was superfluous and could be omitted.

18. Mr. LAUTERPACHT suggested that the words "counter-claims or other claims arising out of the subject-matter of the dispute" be substituted for the words "claims or counter-claims presented to it".

19. Mr. KERNO (Assistant Secretary-General) asked whether article 16 was not in fact redundant in view of article 11, under which the tribunal was the judge of its own competence and possessed the widest powers to interpret the *compromis*.

20. Mr. LIANG (Secretary to the Commission) asked whether the special rapporteur would agree that article 16 was concerned with counter-claims as distinct from the principal claim, which was the subject-matter of the dispute, and that the words "*principales ou*" and "*et notamment des demandes*" should therefore be deleted from the French text.

21. Mr. SCELLE said he could agree to the deletion suggested by the Secretary and would indeed have no objection to Mr. Lauterpacht's amendment. All he was concerned to ensure was that, in order to secure a complete settlement of the dispute, the tribunal should be empowered to rule upon the admissibility of any claim. He could not, however, agree to Mr. Hudson's view that article 16 could be omitted.

22. Mr. SPIROPOULOS observed that the only new element in article 16 was the recognition of the tribunal's power to consider counter-claims, which was a departure from customary arbitral practice. In his opinion an arbitral tribunal could only rule on claims rising out of the *compromis*. Was it the intention of the special rapporteur that the tribunal must admit any counter-claims?

23. Mr. SCELLE said that Mr. Spiropoulos had brought the discussion back to two fundamentally different theories of arbitration: the jurisdictional theory, which emphasized the securing of a complete settlement of the dispute, and the theory of diplomatic arbitration, in which the procedure was recognized to depend strictly on the will of the parties. The latter theory, when applied in practice, allowed the parties to prohibit the tribunal from dealing with certain aspects of a case and frequently resulted in the need for a second arbitration. His draft was based on the former theory, which was reflected in article 13 of the League of Nations Covenant. Mr. Spiropoulos' view conformed more closely to existing practice, but he (Mr. Scelle) was hoping to achieve progress in his draft along the lines already laid down in certain existing international instruments.

24. In reply to Mr. Spiropoulos' question of the admissibility of counter-claims, he said that that depended upon whether they required a ruling to enable the tribunal to effect a complete settlement of the dispute.

25. Mr. CORDOVA shared Mr. Scelle's view as to the purpose of article 16. Nevertheless, the present wording did not make it entirely clear whether the tribunal could rule only on the admissibility of counter-claims and not on their substance. His difficulty would be removed if the words "objections to the admissibility of" were deleted.

26. Mr. SCELLE agreed that the tribunal could decide on the substance of counter-claims. He accepted Mr. Córdova's amendment, which would greatly improve the text.

27. Mr. KOZHEVNIKOV said that, out of respect for the Chairman's declaration at the previous meeting that discussion on the substance of the draft had been concluded, he had intended to confine his remarks to matters of drafting. As, however, the Commission appeared to have departed somewhat from the procedure laid down, he felt bound to explain his attitude on article 16. He would be prepared to support the deletion of that article which, by placing the tribunal above the parties and endowing it with very wide powers indeed, went far beyond the scope of traditional arbitral procedure. The article seemed to be in conformity with the general spirit of the draft which, as he had already indicated, was unacceptable to him.

28. Mr. el-KHOURI considered that the special rapporteur's purpose, which was to ensure that the tribunal could effect a complete settlement of the dispute could be achieved only if article 16 were accepted as it stood, it being made clear that the tribunal would admit all claims.

29. Mr. SCELLE urged Mr. el-Khouri to reconsider his view; the tribunal must be free to reject a claim.

30. Mr. LIANG (Secretary to the Commission) suggested that the objections to article 16 might be removed by the substitution of the words "decide on the incidental or additional claims or counter-claims" for the words "rule on objections to the admissibility of any claims or counter-claims presented to it".

31. Mr. LAUTERPACHT said he would like to modify his suggested amendments to article 16, so as to make it read as follows:

"For the purpose of securing a complete settlement of the dispute, the tribunal shall decide on any counter-claims or additional or incidental claims arising out of the subject-matter of the dispute."

Mr. SCELLE said he could accept either of the texts presented by the two previous speakers.

The text proposed by Mr. Lauterpacht was adopted by 8 votes to none, with 3 abstentions.

*Article 17 [26]*⁴

32. Mr. YEPES, referring to the discussion on article 2 at the previous meeting, proposed the substitution of the word "prescribe" for the word "indicate" in the English text of article 17.

Mr. Yepes' proposal was adopted.

33. Mr. YEPES said that he was not sure, on the other hand, whether the second sentence of article 17 should be deleted as had been suggested at the previous meeting.⁵ It was not altogether redundant, as some purpose might be served by stating that the parties were bound to follow the provisional measures prescribed by the tribunal.

34. Mr. LAUTERPACHT proposed that the second sentence be deleted so as to bring the article into line with article 2.

It was agreed to delete the second sentence of article 16.

*Article 18 [29]*⁶

No observations.

*Article 19 [30]*⁷*Paragraph 1*

35. Mr. CORDOVA asked whether the absence of one member of the tribunal would prevent it from proceeding with the case.

36. Mr. LAUTERPACHT replied in the negative, pointing out that the word "should" had been used and not the word "shall".

Paragraph 2

No observations.

*Article 20 [28]*⁸*Paragraph 1*

No observations.

Paragraph 2

37. Mr. HUDSON suggested the substitution of the word "case" for the word "cases".

Mr. Hudson's suggestion was adopted.

*Article 21 [16 and 17]*⁹

38. Mr. CORDOVA asked whether discontinuance of proceedings meant abandonment by one of the parties of its claim.

39. Mr. SCELLE replied in the affirmative.

40. Mr. HUDSON proposed that article 21 (in doc. A/CN.4/L.35) be transposed to form a second paragraph of article 20 (in doc. A/CN.4/L.35), and that the words "withdrawn from the tribunal" in the former article be replaced by the word "discontinued", so as to bring it into line with the wording of article 20 (in doc. A/CN.4/L.35).

Mr. Hudson's proposal was adopted.

Article 22 [18]

No observations.

Article 23 [31]

41. Mr. SPIROPOULOS said that he merely wished to point out that it was sometimes impossible for the tribunal to render the award within the period fixed by the *compromis*.

42. Mr. SCELLE said that he personally considered that the tribunal should not be prevented from rendering its award merely because the parties had inadvertently fixed too short a period in the *compromis* to allow it to complete its proceedings. The Commission, however, had not accepted that view.

43. Mr. LAUTERPACHT said that the whole of article 23 constituted a compromise which had been reached only after lengthy discussion. In those circumstances he felt it would be prudent to refrain from reopening discussion on any part of it.

44. Mr. SCELLE pointed out that article 23, as at present drafted, might result in the continuance of the dispute. Its tendency therefore was contrary to that of other provisions in the draft, for example, that prohibiting a finding of *non liquet*. He agreed, however, that unless the Commission decided otherwise, it could not reopen discussion on the question of substance involved.

*Article 24 [32]**Paragraph 1*¹⁰

45. Mr. HUDSON pointed out that the words "*présent ou*" in the French text, had no equivalent in the English text and should be deleted.

46. Mr. LAUTERPACHT said that the words "being present or duly summoned to appear" had been agreed on after a lengthy discussion. The English text should therefore be brought into line with the French text, not *vice versa*.

It was so agreed by 6 votes to none with 4 abstentions.

¹⁰ Paragraph 1 in document A/CN.4/L.35 read as follows: "1. The award shall be drawn up in writing and communicated to the parties. It shall be read in open court, the agents and counsel of the parties being duly summoned to appear."

⁴ Corresponds to article 16 in document A/CN.4/L.35.

⁵ The second sentence read as follows: "Each party is under a duty to take the measures indicated to it."

⁶ Corresponds to article 17 in document A/CN.4/L.35.

⁷ Corresponds to article 18 in document A/CN.4/L.35.

⁸ Corresponds to article 19 in document A/CN.4/L.35.

⁹ Corresponds to articles 20 and 21 in document A/CN.4/L.35.

47. Mr. CORDOVA proposed that the words "and counsel" be deleted.

48. Mr. HUDSON and Mr. SPIROPOULOS supported Mr. Córdova's proposal.

49. Mr. YEPES pointed out that counsel were mentioned as well as agents in a corresponding article of the Statute of the International Court of Justice.

Mr. Córdova's proposal was adopted by 6 votes to 1 with 2 abstentions.

Paragraphs 2 and 3

No observations.

Article 25 [34]

No observations.

*Article 26*¹¹

50. Mr. LAUTERPACHT pointed out that the words "in the award" had no equivalent in the French text, which should be brought into line with the English in that respect.

51. Mr. SCELLE agreed that the words "*contenues dans la sentence*" should be added to the French text.

It was so agreed.

Article 27 [35]

52. Mr. KERNO (Assistant Secretary-General) pointed out that the words "from the date it is rendered" did not precisely convey the Commission's intention, which was that the award should be binding from the very moment it was rendered. The expression was, however, commonly used in some legal instruments, and there might be no practical objection to retaining them.

53. Mr. SPIROPOULOS suggested that those words could simply be omitted. The award could not be binding before it had been rendered, and if nothing was said to the contrary it would be understood that it was binding as soon as it was rendered.

54. Mr. el-KHOURI supported Mr. Spiropoulos' suggestion.

55. Mr. ZOUREK and Mr. SCELLE pointed out that the question could not be left in the air as Mr. Spiropoulos had suggested, since it could be argued equally well that the award was binding upon the parties only from the time they learned of it.

56. Mr. CORDOVA proposed that the words "from the date it is rendered"¹² be replaced by the words "as soon as it is rendered".

It was so agreed.

¹¹ This article is based on an additional provision submitted by Mr. Zourek (see summary record of the 154th meeting, para. 33).

¹² These words were added by the Standing Drafting Committee on the basis of an addition proposed by Mr. Zourek (see summary record of the 154th meeting, para. 33).

Article 28 [37]

57. Mr. HUDSON suggested that, in both paragraphs, the words "at the request of any party" be replaced by the words "at the request of either party".

It was so agreed.

Article 29 [38, 39 and 40]

Paragraph 1

58. Mr. HUDSON suggested that the words "the party claiming revision", which occurred twice, be replaced by the words "the party requesting revision".

It was so agreed.

59. Mr. LAUTERPACHT pointed out that the English text contained no equivalent to the words "*sur la solution du litige*" which appeared in the French text. He suggested that what was really meant was "of such a nature as to have a decisive influence on the award", and that that wording should be used instead of "of such a nature as to be of a decisive character".

It was so agreed.

60. Mr. HUDSON felt that the word "new" should be deleted before the word "fact". It was not the fact that was new, but its discovery.

61. Mr. SCELLE said that in French, at any rate, the term "*fait nouveau*" was a commonly used term, with a precise meaning.

62. Mr. CORDOVA and Mr. FRANÇOIS pointed out that the meaning was defined in the remainder of the paragraph and that the word "new" was therefore out of place in paragraph 1, but should be retained in the other paragraphs.

It was agreed that the word "new" be deleted from paragraph 1, but retained in the other paragraphs.

Paragraphs 2, 3 and 4

No observations.

Article 30 [42]

No observations.

Article 31 [43]

Paragraph 1

No observations.

Paragraph 2

63. Mr. CORDOVA pointed out that a limit of sixty days was much too short for lodging an application for annulment of the award on the ground of corruption. In his view an award should be declared null where there was corruption on the part of a member of the tribunal, irrespective of the time elapsed after the award had been rendered.

64. Mr. SCALLE pointed out that corruption on the part of a member of the tribunal need not necessarily affect the award. He agreed, however, with Mr. Córdova that the time-limit set for applications for annulment on the ground of corruption was far too short, as it was also far too short for applications for revision. He thought, nevertheless, that the Commission could not reconsider those two questions at the present session, but should consider them carefully when it took up the draft again.

65. Mr. LAUTERPACHT suggested that the perfectly valid point made by Mr. Córdova could be met with no great difficulty, by amending the paragraph to read as follows:

“In cases covered by paragraphs (a) and (c) of article 30, the application must be made within sixty days of the rendering of the award.”

66. The CHAIRMAN pointed out that, if no limit were fixed for submitting applications for annulment of the award on the ground of corruption, there was a danger that, in virtue of paragraph 3, one of the parties might stay execution of the award by intimating that it was investigating the possibility of corruption on the part of one of the members of the tribunal.

67. Mr. LAUTERPACHT pointed out that under paragraph 3 it was only the formal application which would result in execution being stayed.

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

68. Mr. CORDOVA said that, in view of the point made by Mr. Scelle, the Commission should consider adding to article 30(b) the words “and that such corruption influenced the award”.

69. Mr. SCALLE pointed out that article 30 merely provided that the validity of the award could be challenged by either party on one of three grounds. It would be for the tribunal to decide the question, and in doing so it would, in the case of corruption, naturally take into account the question whether that corruption had influenced the award.

Paragraph 3

70. Mr. KERNO (Assistant Secretary-General) said that he felt it his duty to state his view that paragraph 3, already objectionable in that possibly unavoidable delay on the part of the tribunal might delay execution of a just judgment, had been rendered doubly objectionable by the amendment to paragraph 2. He hoped that when the Commission took up the draft again it would consider very carefully the desirability of amending paragraph 3 to read:

“The application shall *not* stay execution unless otherwise decided by the Court.”

71. Mr. el-KHOURI said that he did not agree with the Assistant Secretary-General. The practical objections to paragraph 3 were not so great as the objections to an award being executed notwithstanding the filing of an application for annulment.

Article 32 [44]

No observations.

72. The CHAIRMAN pointed out that the Commission had completed its consideration of the Draft on Arbitral Procedure submitted by the Standing Drafting Committee (A/CN.4/L.35). He would now put these articles, as amended and as a whole, to the vote. The Commission would take up the comments to the articles at the next meeting.

The Draft on Arbitral Procedure, contained in document A/CN.4/L.35, was adopted, as amended and as a whole, by 9 votes to 3.

73. Mr. HUDSON, in explanation of his vote against the adoption of the Draft as a whole, stated that he was unable to support many of its provisions, particularly those envisaging limitations on the freedom of the parties resorting to arbitration.

The meeting rose at 1 p.m.

175th MEETING

Wednesday, 30 July 1952, at 9.45 a.m.

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* The number within brackets indicates the article number in the Special Rapporteur's Report (A/CN.4/46).

Chairman : Mr. Ricardo J. ALFARO.

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Present :

Members : Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shushi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCALLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

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