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Summary record of the 176th meeting

Topic:
Arbitral Procedure

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77. Mr. YEPES said that he preferred the original text of the third paragraph, which reflected more accurately the Commission's discussions. It would be remembered that it was he who had drawn attention to the disadvantages of selecting heads of State to act as arbitrators.

78. Mr. SCELLE said that he had not been absolutely certain as to what the sense of the Commission had been on that issue and had noted that Mr. Amado, Mr. François, Mr. el-Khouri and Mr. Lauterpacht had all raised objections to the argument developed by Mr. Yepes.

79. Mr. KERNO (Assistant Secretary-General) pointed out that if Mr. Scelle's amendment were adopted, the final phrase of the third paragraph, reading "but it did not wish to prohibit such appointments", would have to be omitted.

80. Mr. FRANÇOIS considered that the appointment of heads of States to act as arbitrators must not be excluded.

Fourth paragraph

81. Mr. FRANÇOIS suggested that it would be inappropriate to refer in the commentary to action by the Standing Drafting Committee. All references to it should be replaced by the word "the Commission".

82. Mr. SCELLE agreed.

83. He then declared that he would submit a new text for the comment on article 4 in the light of the observations made in the Commission.[8]

Fifth paragraph

No observations.

The meeting rose at 1.15 p.m.

[8] See summary record of the 177th meeting, paras. 1—25.

176th MEETING

Thursday, 31 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.

Rapporteur: Mr. Jean SPIROPOULOS.

Present:

Members: Mr. Roberto CÓRDOVA, 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 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*)

CONSIDERATION OF THE DRAFT COMMENTS SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the comments on the articles in the Draft on Arbitral Procedure (A/CN.4/L.35).[1]

Comment on article 5 [7]

First paragraph

2. Mr. LAUTERPACHT proposed the deletion of the first sentence which seemed to him unnecessary.[2] The paragraph would then open with the words: "This article is based etc.".

Mr. Lauterpacht's proposal was adopted.

3. Mr. SCELLE said that, if the reference to the case of the Hungarian Optants seemed either unnecessary or undesirable, he would be quite prepared to omit it.

It was agreed to delete at the end of the paragraph the words "the scandalous possibilities of which were revealed by the celebrated case of the Hungarian Optants".

4. Mr. ZOUREK proposed the deletion of the words "as opposed to diplomatic or political arbitration", which implied that hitherto all arbitration had been of a diplomatic or political character — a highly questionable thesis. Nor was the comment on article 5 the proper place for emphasizing the distinctive features of the present draft in relation to existing law and practice.

5. Mr. SCELLE said that if those words were deleted the whole sentence must be dropped. The purpose of a number of articles in the draft was to foster a development in the dircction of judicial arbitration, which had

[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] The first sentence read as follows: "This article, again, is of undoubted doctrinal and practical importance."

started in 1907 with the adoption of article 37 of the Convention for the Pacific Settlement of International Disputes.

6. He had not argued in the paragraph that the principle of the immutability of the tribunal was contrary to the character of arbitration as it had developed in the past, but had merely indicated that it was in conformity with the theory of judicial arbitration. Formerly States had been free to alter the composition of the tribunal. He was not aware of having in any way distorted the views of the Commission on that point.

7. Mr. LAUTERPACHT considered that the paragraph should be retained. He doubted, however, whether the exact meaning of the expression "'jurisdictional' arbitration" would be clear to an English reader. Presumably the special rapporteur meant arbitration conceived as a legal process.

8. Mr. SCELLE suggested that the word "*juris-dictionnel*" in the French text be translated by the word "judicial".

It was so agreed.

9. Mr. FRANÇOIS said that he had some misgivings concerning the phrase "as opposed to", which seemed to suggest that the theory of diplomatic arbitration was favourable to changes in the composition of the tribunal.

10. Mr. CÓRDOVA suggested that Mr. François' preoccupation would be removed if the words "as distinguished from" were substituted for the words "as opposed to".

Mr. Córdova's suggestion was adopted.

11. Mr. KOZHEVNIKOV reminded the Commission that it had been agreed to deal with all general questions of principle, on which opinion was often divided, in the introduction. He accordingly proposed that they should not be referred to in the individual comments. As a corollary to that proposal, he now moved the deletion of the entire paragraph.

12. Mr. SCELLE argued that some repetition in the comments of statements made in the introduction on matters of general principle was inevitable, since otherwise the comment would be virtually devoid of all content.

13. Mr. LAUTERPACHT agreed with Mr. Scelle. Matters of principle should be touched upon in the introduction in a general way and their specific application to certain articles dealt with in the comments.

14. Mr. ZOUREK thought that, if the general purpose of the draft and how its provisions differed from existing practice were expounded in the introduction, there was no need to mention matters of principle in the comments, which should be confined to technical explanations. Otherwise repetition was bound to occur, as in the third paragraph of the comments on article 5, and the last sentence in the second paragraph of the comment on article 3.

15. Mr. SCELLE said it was the duty of the special rapporteur to point out the links between different articles, and that was the reason for the repetition criticized by Mr. Zourek.

16. Mr. YEPES opposed Mr. Kozhevnikov's proposal, the effect of which would be to render the comments useless. Repetition was not necessarily a defect.

17. Mr. LAUTERPACHT said that Mr. Kozhevnikov and Mr. Zourek, who had made a valuable contribution to the discussions on the special rapporteur's draft, had finally dissociated themselves from it by voting against the text as a whole. They might therefore wish to consider whether they wished to take up the time of the Commission by raising procedural questions.

The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that no matter of principle should be referred to in the comments on the articles, on the ground that it had already been dealt with in the introduction.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 2.

18. Mr. KOZHEVNIKOV said that, in view of the rejection of his first proposal, he would not press his subsidiary proposal for the deletion of the paragraph.

The CHAIRMAN put to the vote Mr. Zourek's proposal for the deletion of the words "as distinguished from diplomatic or political arbitration".

Mr. Zourek's proposal was rejected by 7 votes to 2, with 2 abstentions.

Second and fourth paragraphs

19. Mr. LAUTERPACHT suggested that the opening phrase of the second paragraph, reading: "The ideal is, in fact," was not very felicitous. He presumed that the special rapporteur meant that the underlying principle was that, once a dispute had been submitted to the tribunal, the composition of the tribunal should remain unchanged until the award had been rendered.

20. Mr. SCELLE said that the ideal, which was impossible of attainment at the present time, was the absolute immutability of the tribunal. However, he would be prepared to go even further than he had in the original and substitute the word "principle" for the word "ideal".

21. Mr. YEPES said that he preferred the original wording since immutability of the tribunal had not yet been recognized as a principle.

22. The CHAIRMAN suggested that the fourth paragraph be transposed to the beginning of the second, which would then open: "The principle laid down in paragraph 1 is in fact, etc.".[3]

The Chairman's suggestion was adopted.

[3] The fourth paragraph read as follows: "This principle is laid down in paragraph 1."

Third paragraph[4]

23. Mr. LAUTERPACHT asked whether it was possible to speak of an arbitral tribunal both as "a common organ of the parties" which they could, under certain conditions laid down in paragraph 2 of article 5, alter, and as a "judicial organ of the international community".

24. Mr. SCELLE said that, in his opinion, the theory propounded in the third paragraph was logically consistent; indeed the Commission had endorsed it at the previous meeting by deciding to retain the last sentence in the second paragraph of the comment on article 3. He considered that the goal should be to ensure that arbitral tribunals were as similar as possible to standing legal bodies such as domestic tribunals or the International Court of Justice.

25. Mr. CÓRDOVA said that he had interpreted the third paragraph to mean that, although the existence of an arbitral tribunal depended in some measure on the will of the parties, it was also an organ of the international community and an instrument for ensuring that justice between States was done. It was the international community which conferred certain powers on the tribunal through the parties.

26. Mr. SCELLE said that he was perfectly prepared to omit the third paragraph, which put forward a theory to which he believed the Commission had subscribed. The theory was that when two States set up an arbitral tribunal it constituted a *common* organ and not a bipartite body, as some authorities had held. For example, in the case of commercial treaties between two States, certain matters were removed from the municipal jurisdiction of either and became subject to what could only be described as a "common" law of the two. An arbitral tribunal set up in pursuance of such treaties was thus an organ of an international legal community created by the agreement of those two States.

27. Mr. KOZHEVNIKOV said that Mr. Scelle's remarks confirmed his belief that the comments represented the views of the special rapporteur rather than those of the Commission.

28. Mr. SCELLE observed that the theory mentioned in the third paragraph of his comment on article 5 was not his invention. As special rapporteur, he had had to choose between two conceptions of arbitration and had inserted the third paragraph in the belief that the Commission had associated itself with his views. If that was in doubt he was willing to delete the paragraph, since that would have no practical effect on the system envisaged in the draft.

29. Mr. el-KHOURI said he had no objection to the third paragraph. An arbitral tribunal which was authorized to settle disputes between States was an organ of the international community.

30. Mr. FRANÇOIS proposed the deletion of the third paragraph.

Mr. François' proposal was rejected by 7 votes to 3 with 2 abstentions.

Fifth paragraph[5]

31. Mr. ZOUREK asked whether the statement in the last sentence of the paragraph really represented the view of the Commission.

32. Mr. SCELLE replied that the point had been discussed at great length and it had been agreed almost unanimously that an arbitrator appointed by an international authority could in no circumstances be replaced either by one party or by agreement between them. Without such a provision the International Court of Justice would be reduced to the status of a mere consultative organ.

Sixth and seventh paragraphs[6]

No observations.

Comment on article 6 [8]

33. At Mr. HUDSON's suggestion, *it was agreed to delete the last sentence reading: "The same does not apply to article 7 concerning the withdrawal of an arbitrator".*

Comment on articles 7 and 8 [9 and 11]

No observations.

Comment on article 9 [12][7]

First paragraph

No observations.

[4] The third paragraph became the last sentence of para. (2) in the "Report".

[5] Para. (3) in the "Report".

[6] Paras. (4) and (5) in the "Report".

[7] The comment on article 9 read as follows: [Beginning same as in the "Report"]

"...

"Its conclusion is now *assured,* since if the parties fail to agree on the provisions to be included, the *compromis* may be drawn up by the tribunal itself, which has been set up to that end. Thus the revised procedure and the possibility of a preliminary partial *compromis* concerning only the constitution of the tribunal are not calculated to minimise the importance of the general *compromis* but, on the contrary, to strengthen it.

"Another article proposed by the rapporteur (Article 13 of his preliminary draft) was deleted by the Commission because it gave the tribunal wide powers of discretion as regards compliance with the clauses of the *compromis.* The Commission considered that, in principle, these clauses should be the responsibility of the parties, and hence that the tribunal was bound by them subject, however, to arrangements which may be provided for by subsequent articles. In any case, the parties retain wide powers to direct the conduct of the proceedings, in accordance with the individualistic spirit with which many of the modern codes of procedure are still imbued.

"A preamble adopted by the Commission referred to two possible forms of the undertaking to arbitrate; an undertaking deriving from the *compromis* itself and a prior undertaking. The Drafting Committee considered this preamble unnecessary and decided to delete it.

"The eleven paragraphs of..."

Second and third paragraphs

34. Mr. SCELLE proposed the deletion of the third paragraph which referred only to the action taken by the Commission and therefore had no place in the commentary.

35. Mr. HUDSON proposed the deletion of the second paragraph for the same reason.

36. Mr. SCELLE said he was prepared to accept Mr. Hudson's proposal. He had only inserted the second paragraph in order to demonstrate that, in deciding that the tribunal must comply strictly with the clauses of the *compromis,* the Commission had been less liberal than its special rapporteur, and had rejected article 13 in the preliminary draft, which gave it wide powers of discretion in that respect.

It was agreed to delete the second and third paragraphs.

Fourth paragraph

37. Mr. YEPES suggested that, in the fourth paragraph, and also in the fifth to tenth paragraphs inclusive, the word "*lettre*" in the French text should be replaced by the word "*paragraphe*".

It was so agreed.

Fifth paragraph[8]

38. Mr. LAUTERPACHT felt that the fifth paragraph was not relevant to paragraph (*a*) of article 9 itself. Moreover, the way in which it was worded was somewhat controversial. He, for one, had never associated article 13 of the League of Nations Covenant with the question of the scope of the original undertaking to arbitrate. He proposed, therefore, that the whole paragraph be deleted.

39. Mr. SCELLE recalled that he had proposed following the wording used in article 13 of the League of Nations Covenant, but that the Commission had rejected his proposal. He would not object to deletion of the reference to that article, but hoped that the subject-matter of the last sentence of the fifth paragraph would be retained, since it had been thoroughly discussed by the Commission. He felt, moreover, that even if it did not refer specifically to the League of Nations Covenant, the Commission should indicate the important change it had made, compared to the provisions of the Covenant, in that respect.

40. Mr. YEPES agreed that the last sentence should be retained in order to reveal the Commission's intention, which had been to avoid any disagreement in interpreting the scope of the original undertaking to arbitrate.

41. Mr. CÓRDOVA also agreed that the last sentence should be retained.

42. Mr. HUDSON pointed out that article 13 of the League of Nations Covenant did not state that the whole subject-matter of a dispute *in respect of which there was an undertaking to arbitrate* must be submitted to arbitration. Article 13 read as follows:

> "The members of the League agree that, whenever any dispute shall arise between them *which they recognize to be suitable for submission to arbitration*..., they will submit the whole subject-matter to arbitration..."

The second sentence of the fifth paragraph of the comment could not therefore be retained in its present form.

43. Mr. YEPES suggested that the fifth paragraph be replaced by the following:

> "Paragraph (*a*) meets the need for defining the subject-matter of the dispute clearly in the *compromis* itself so as to avoid any disagreement on the scope of the undertaking to arbitrate."

He thought that that wording expressed the exact significance of paragraph (*a*), which, he recalled, he himself had proposed.

44. Mr. LIANG (Secretary to the Commission) said that in his view the last sentence of the fifth paragraph could only mean that in drafting the *compromis* the parties were free to limit, by mutual consent, the aspects of the dispute to be submitted to arbitration. It would seem that, properly speaking, that would not constitute a limitation of the scope of the original undertaking to arbitrate.

45. Mr. el-KHOURI recalled that the comments which the Commission was at present discussing were only intended to be provisional; the final commentary would be approved at the next session. He suggested therefore that it would be prudent for the Commission to avoid committing itself to comments which might be open to question. There was no objection to leaving aside such controversial points until the fifth session, when they could be discussed fully. He therefore supported the proposal to delete the whole of the fifth paragraph.

Mr. Lauterpacht's proposal that the fifth paragraph be deleted was adopted by 7 votes to 3 with 2 abstentions.

46. The CHAIRMAN stated that that vote did not prevent the Commission from voting on Mr. Yepes' suggestion, which consisted in a substitution for the text that had been rejected.

47. Mr. HUDSON said that he strongly opposed Mr. Yepes' suggestion.

[8] The fifth paragraph read as follows:

"Paragraph (*a*) is more in the nature of a recommendation than an actual obligation imposed on the parties, for the text makes no provision for penalties. The Commission did not see fit to insert, at this point, the provision of Article 13 of the League of Nations Covenant under which the *whole* of the subject-matter of a dispute between the parties, in respect of which there is an undertaking to arbitrate, must be submitted to the tribunal. It follows that in drafting the *compromis*, the parties are free to limit by mutual consent the scope of the original undertaking to arbitrate."

Mr. Yepes' suggestion was rejected by 4 votes to 3 with 5 abstentions.

Sixth paragraph [9]

48. The CHAIRMAN pointed out that, in view of the decision to delete the fifth paragraph, the sixth would have to be reworded as follows:

"Paragraphs (*a*), (*b*) and (*c*) require no explanation" instead of "Paragraphs (*b*) and (*c*) require no explanation".

Seventh paragraph [10]

No observations.

Eighth paragraph [11]

49. Mr. LIANG (Secretary to the Commission) noted that the word "immutability" had been used in previous drafts, but nowhere in the present one. Article 7, paragraph 3, referred only to the remaining members of the tribunal having power, in the event of withdrawal of one of the members, to continue the proceedings. The words "concerning the principle of immutability" did not therefore appear to be entirely appropriate. He suggested the use of the word "continuity".

50. Mr. HSU thought the word "immutability" expressed precisely what the special rapporteur had in mind.

51. Mr. LIANG (Secretary to the Commission) said that if members of the Commission were satisfied with the present wording, he would not press the point.

Ninth paragraph [12]

52. Mr. KERNO (Assistant Secretary-General) suggested the deletion at the end of the paragraph of the words in parentheses: "We shall come back to this important matter."

It was so agreed.

Tenth paragraph [13]

53. Mr. KERNO (Assistant Secretary-General) suggested the deletion of the word "important" before the word "power".

It was so agreed.

Eleventh paragraph [14]

54. Mr. YEPES proposed the deletion of the second sentence and the substitution for the words "It appears to have taken", at the beginning of the third sentence, of the words "The Commission takes." [15]

55. Mr. SCELLE accepted Mr. Yepes' amendments, the first of which he had intended to move himself.

Mr. Yepes' amendments were adopted.

Twelfth paragraph [16]

56. Mr. LAUTERPACHT proposed the deletion of the twelfth paragraph, since the tribunal's power to make recommendations could be compared to many other things besides the power to issue regulations.

Mr. Lauterpacht's proposal was adopted.

Thirteenth paragraph [17]

57. Mr. LIANG (Secretary to the Commission) pointed out that the special provisions referred to in the thirteenth paragraph were those provided for in paragraph (*h*) of article 9. Paragraph (*h*), like all the other paragraphs of article 9, was governed by the introductory paragraph, which now read:

"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, in particular;"

There did not therefore appear to be any difference between the obligatory effect of article 9 (*h*) and that of articles 29 to 32.

58. Mr. LAUTERPACHT said that the purpose of article 9 (*h*) was to state that, if the parties wished to conclude any special provisions concerning the procedure for revision or other legal remedies, if, for example, they wished to provide that applications for revision must be made within twelve months of the discovery of a new fact, instead of six months as provided for in article 29, paragraph 2, or that the validity of the award could be challenged on grounds other than those listed in article 30, or that an application for annulment should not stay execution notwithstanding article 31, paragraph 3, then such provisions must be inserted in the *compromis* and those provisions would be binding on the arbitral tribunal, in so far as they were not contrary to the general provisions of articles 29 to 32.

59. Mr. KERNO (Assistant Secretary-General) pointed out that if that was the meaning of article 9 (*h*), then

[9] Para. (3) in the "Report".
[10] Para. (4) in the "Report".
[11] Para. (5) in the "Report".
[12] Para. (6) in the "Report".
[13] Para. (7) in the "Report".
[14] Para. (8) in the "Report".

[15] The second sentence read as follows: "But what is to be understood by judgment *ex aequo et bono* was not clearly defined by the Commission".

[16] This paragraph read as follows:

"The power which may be given to the tribunal to make recommendations is similar to the power to issue regulations, as in the Bering Straits case."

[17] Para. (9) in the "Report". It read as follows:

"As regards the special provisions concerning revision of the award and other legal remedies, account must here be taken of articles 29 to 32, which are considered to be obligatory and thus reduce the effect of the *compromis* to that of mere procedural recommendations."

it was not clearly explained in the comment. In his view the special provisions referred to in article 9 (*h*) could not be *contra legem* as it was laid down in articles 29 to 32, but could be *praeter legem*.

60. Mr. SCELLE said that in his view it would be impossible for the parties to extend the time-limit of six months laid down in article 29, paragraph 2.

61. Mr. CÓRDOVA said that on one point there was no doubt: the parties could not state in the *compromis* that there should be no possibility of revision and the other legal remedies provided for in articles 29 to 32. To that extent those articles should be regarded as obligatory, but if the parties were to be allowed no freedom in settling the detail of the procedure for revision and the other legal remedies, article 9 (*h*) had no meaning.

62. Mr. LIANG (Secretary to the Commission) asked whether Mr. Scelle could accept the following text:

> "As regards the special provisions concerning the procedure for revision of the award and other legal remedies, account must be taken of articles 29 to 32, which state the general principles and procedures of revision and other legal remedies. The parties may agree in the *compromis* on any special procedures for revision and other legal remedies, in so far as these procedures are not in conflict with articles 29 to 32".

63. Mr. LAUTERPACHT said that he had been about to propose the following wording:

> "As regards the special provisions concerning the procedure for revision and annulment, the parties are bound by the general provisions of articles 29 to 32. Their freedom of action, provided for in article 9 (*h*), refers only to the procedure of revision and annulment."

64. Mr. LIANG (Secretary to the Commission) withdrew his text in favour of that proposed by Mr. Lauterpacht.

65. Mr. SCELLE said that he could accept the text proposed by Mr. Lauterpacht.

Mr. Lauterpacht's proposal was adopted.

Comment on article 10 [14]

66. Mr. HUDSON pointed out that article 47 of the Pact of Bogotá bore no relation to the subject-matter of article 10.

67. Mr. SCELLE agreed that the reference should be to article 43.

68. Mr. YEPES suggested that, for the sake of clarity, the words "of 1948" be inserted after the words "Pact of Bogotá".

It was so agreed.

69. Mr. LIANG (Secretary to the Commission) suggested that, as reference was made to a specific article in the Pact of Bogotá, the same should be done in the case of the 1907 Convention on the Pacific Settlement of Disputes.

It was so agreed.

The meeting rose at 1.5 p.m.

177th MEETING

Friday, 1 August 1952, at 9.45 a.m.

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Chairman: Mr. Ricardo J. ALFARO.

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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).

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

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