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Summary record of the 188th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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188th MEETING

Monday, 8 June 1953, at 2.45 p.m.

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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.

Adoption of the provisional agenda (A/CN.4/62)

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It was agreed that the Commission should take up the following items in the order stated: arbitral procedure; Mr. Zourek's proposal relating to the incorporation in the Commission's report of dissenting opinions (A/CN.4/L.42); and régime of the high seas.

The provisional agenda (A/CN.4/62)[1] *was adopted, the order of priority for the remaining items thereof being left for subsequent decision.*

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*resumed from the 187th meeting*)

12.[2] The CHAIRMAN said that several proposals had been submitted on articles 3, 7 and 10, and he would therefore suggest that their authors might perhaps consider them and endeavour to draft joint texts, the Commission proceeding in the meantime to examine article 11.

It was so agreed.

[1] See *supra*, 184th meeting, footnote 3.

[2] Paras. 1-11 were devoted to the discussion on the order of priority for the agenda items.

ARTICLE 11

13. Mr. SCELLE (Special Rapporteur) was unable to accept the Netherlands Government's proposal concerning article 11 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6). The principle stated in article 11 was unexceptionable from the point of view of judicial theory; nor could the parties propose an interpretation of the *compromis* different from that delivered by the tribunal. The article must be maintained as drafted.

14. Mr. LAUTERPACHT and Mr. AMADO supported Mr. Scelle.

15. Mr. ZOUREK said he wished to take over the Netherlands Government's suggestion that the words "if the parties are at variance in this respect" be added at the end of article 11. He must draw attention to the fact that the parties were the judges of the content of the *compromis*, and not the tribunal, whose competence rested wholly on the will of the parties. If a tribunal went beyond the limits fixed by the *compromis*, the award it rendered would thereby be invalidated. Nor was it correct to lay down that the tribunal should possess the widest powers to interpret the *compromis*. The extent of those powers depended on the *compromis* itself, which might be interpreted restrictively. The Secretariat's commentary (A/CN.4/L.40), did not cite all the relevant examples.

16. Mr. SCELLE said that article 11 gave expression to a traditional practice in arbitral procedure.

17. Mr. LIANG (Secretary to the Commission) said that article 11 provided for cases where doubt might arise about the tribunal's competence. The will of the parties was a factor which came into play at the time when the *compromis* was being negotiated. He would call the attention of Mr. Zourek to the terms of article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907, which provided in part that the tribunal was authorized to declare its competence in interpreting the *compromis*.

18. There was, of course, no doubt that if the parties to a dispute wished to limit the competence of the tribunal, all they need do was to say so in the *compromis*.

19. Mr. KOZHEVNIKOV considered that article 11 was too wide, and transcended normal arbitral procedure. The powers of the tribunal depended solely on the will of the parties. Furthermore, he would submit that only the parties had the power to interpret a *compromis*.

20. Faris Bey el-KHOURI held that there was no reason for depriving the parties of their right to interpret a *compromis* drawn up by themselves. Why should the tribunal interpret the *compromis* against the will of the parties? He would support Mr. Zourek's amendment.

21. Mr. AMADO thought that members of the Commission would be sufficiently familiar with his general attitude towards the draft. But in the case of article 11, he was surprised that there should be any

argument at all, since the will of the parties was clearly and unmistakably admitted. Once the latter had placed their confidence in the tribunal they could not reject its interpretation of the *compromis*.

22. Mr. ALFARO proposed, as a modification of Mr. Zourek's amendment, that the words "on any point on which the parties are at variance" should be inserted after the word "*compromis*" in the text of article 11 as drafted.

Mr. LAUTERPACHT said that he would vote against that sub-amendment and Mr. Zourek's amendment on the ground that both were superfluous.

23. Mr. KOZHEVNIKOV proposed that article 11 be deleted.

24. Mr. YEPES, recalling that article 11 had been adopted in its present form after full discussion, supported Mr. Scelle.[3] He considered that the article merely codified existing law as expressed both in article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 and in paragraph 6 of Article 36 of the Statute of the International Court of Justice.

Mr. Kozhevnikov's proposal that article 11 be deleted was rejected by 8 votes to 2, with 1 abstention.

Mr. Alfaro's sub-amendment to Mr. Zourek's amendment was rejected by 5 votes to 4, with 2 abstentions.

Mr. Zourek's amendment was rejected by 6 votes to 2, with 3 abstentions.

Article 11 was adopted unchanged by 7 votes to 3, with 1 abstention.[4]

Article 12

25. Mr. SCELLE said that there were no comments by governments on paragraph 1 of article 12. As to paragraph 2, the Governments of Brazil and India proposed that it be deleted (A/CN.4/68, Nos. 2 and 4 or A/2456, Annex I, Nos. 3 and 5). He would draw the Commission's attention to the fact that paragraph 2 had been adopted after long discussion, and that it imposed upon the tribunal the duty of rendering a judgement in all cases.[5]

26. Mr. YEPES wished to make the following statement relating to paragraph 1 of article 12, where reference was made to paragraph 1 of Article 38 of the Statute of the International Court of Justice. In his view, when that article laid down that the Court — the arbitral tribunal in the present instance — should apply, *inter alia*, "the general principles of law recognized by civilized nations" it created an obligation for the Court and for the arbitral tribunal to apply not only the principles of general or universal international law, but *also and mainly, in a dispute of a regional nature, the principles established by regional international law*. In other words, when, by virtue of article 12 of the present draft on arbitral procedure, an arbitral tribunal had to decide a question coming under the international law peculiar to a certain region of the world, it must apply the principles of that special international law and not, as was sometimes maintained, the principles of general international law. It was necessary to emphasize those circumstances because it was unfortunately true that international tribunals, even the highest — indeed, especially the highest — often forgot that Article 38 of the Statute of the International Court of Justice obliged them also to apply the principles of regional or special international law. When an international tribunal refused to apply to a particular case the principles applicable under Article 38 of the Statute of the International Court, it was responsible for a very regrettable denial of justice. It was by way of warning against such irregularities — not to use a stronger term — that he had wished to make the above statement to the Commission.

Paragraph 1 of article 12 was adopted unanimously.

Paragraph 2 of article 12 was adopted by 9 votes to 1, with 1 abstention.

Article 13

27. Mr. SCELLE pointed out that article 13 reiterated the provision laid down in paragraph (d) of article 9.

28. Mr. LAUTERPACHT wished to ask Mr. Scelle the following question. A case might arise where there was an agreement between the parties concerning the procedure of the tribunal but from which several points relating to the procedure had been omitted. Would the tribunal then be entitled to formulate the rules applicable to those points? His own answer to the question was in the affirmative, but he wondered whether Mr. Scelle considered that the text of article 13 covered the case.

29. Mr. SCELLE recalled that he had originally proposed that the tribunal should always lay down its rules of procedure. The Commission had, however, decided that the procedure should be laid down in the *compromis*. Should there be any lacunae it would be for the tribunal to fill them.

30. Mr. PAL considered that article 13 was sufficiently comprehensive to cover the possibility of omissions from the procedure, and therefore needed no amendment.

31. Mr. LAUTERPACHT said that he was satisfied with the interpretations given by Mr. Scelle and Mr. Pal.

Article 13 was adopted unanimously.

Article 14

32. Mr. SCELLE said that the Netherlands Government proposed the deletion of article 14, on the grounds that it was redundant (A/CN.4/68, No. 5 or A/2456,

[3] For further discussion of article 11, see *infra*, 193rd meeting, para. 3.

[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 147th meeting, paras. 9-39 (article 11 was numbered article 19 at that stage of the discussion).

[5] *Ibid.*, paras. 66-79 (article 12 was numbered article 20 at that stage of the discussion).

Annex I, No. 6). Commenting on that proposal, the Netherlands Government had referred to the principle of the absolute impartiality of the arbitrators as being of no less importance than the equality of the parties mentioned in article 14. He would submit that impartiality found its expression above all in respect for the equality of the parties in the proceedings. The adoption of article 14 would therefore signify the acceptance of both those important principles to which the Netherlands Government referred. Furthermore, he would draw attention to paragraph (c) of article 30, which provided that the validity of an award might be challenged on the ground of a serious departure from a fundamental rule of procedure. Inequality in the proceedings would constitute such serious departure. Thus, article 14 was clearly linked with article 30, and the Commission should not go back on its earlier decision to state unequivocally the principle of the equality of the parties.

33. Mr. YEPES was opposed to the Netherlands Government's proposal.

34. Mr. LAUTERPACHT considered that article 14 stated a principle so obvious that it almost impaired the dignity of the draft, for it merely stated the obvious proposition that the tribunal must be impartial. That was what Mr. Scelle had just suggested. Since, however, the article had been adopted at the previous session, he would vote for it.

35. Mr. KOZHEVNIKOV said that he had not changed his views since the fourth session, and would vote for the retention of the article.[6]

36. Mr. YEPES drew attention to the paragraph in the Secretariat's commentary (A/CN.4/L.40), where reference was made to the *Umpire* cases which had arisen before the United States-Colombian Commission.[7] It followed that in the history of arbitration there had been cases in which the equality of the parties had not been observed.

Article 14 was adopted by 8 votes to 3.

37. Faris Bey el-KHOURI, explaining his vote, said that he had abstained because he knew of no case of inequality between the parties.

Article 15

38. Mr. SCELLE considered that the Netherlands Government's comment on paragraph 2 of article 15 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) was pertinent, and therefore proposed the deletion of the words "with one another and" ("*entre elles et*").

39. Mr. LAUTERPACHT recalled that the issue had been discussed from two points of view. The first was that the parties to a dispute were inclined to conceal certain facts relevant to the issue, and could not be expected to produce evidence in support of the other party's case. That point of view implied an imputation of lack of good faith. In English procedure it was customary for the judge to order the parties to co-operate, and for the solicitors of the two parties to exchange correspondence, producing what was known as an agreed bundle of correspondence. The other view was that the parties must of necessity be inclined to subterfuge, a view that Mr. Scelle's proposed amendment expressed.

40. Mr. SCELLE replied that it was impossible to ask perfection of international law. Actually, he did not share Mr. Lauterpacht's certainty about judicial procedure in the United Kingdom, but he would submit that it was in any event going too far to ask the parties to furnish their adversary with weapons. He believed that that would make the display of good faith too onerous.

41. Mr. YEPES supported Mr. Scelle.

Mr. Scelle's proposal that the words "with one another and" ("entre elles et") be deleted from paragraph 2, was adopted by 8 votes to 2, with 1 abstention.

42. Mr. SCELLE, referring to the Netherlands Government's comment on paragraph 4, held that the request of one of the parties should suffice for the tribunal to visit the scene, provided that that party paid the costs of the visit.

43. The text should therefore be amended to read:

"The tribunal may decide, at the request of one of the parties, to visit the scene with which the case before it is connected, provided the requesting party undertakes to pay the cost of the visit."

Paragraph 4 was adopted, as amended, by 9 votes to 2.

Article 15, as amended, was adopted unanimously.

Article 16

44. Mr. SCELLE said that the Chilean Government (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4) wished the meaning of article 16 to be clarified by laying it down that additional claims must be related either directly or indirectly to the principal issue. The Indian and United States Governments had expressed similar views (A/CN.4/68, Nos. 4 and 9 or A/2456, Annex I, Nos. 5 and 10 respectively), the former referring to article 63 of the Rules of Court of the International Court of Justice, according to which a counter-claim might be presented provided it was directly connected with the subject matter of the application and that it came within the jurisdiction of the Court.

45. The precise significance of the comment of the Netherlands Government (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) was not clear to him.

46. The CHAIRMAN explained that, as the Netherlands Government considered that the tribunal should have the greatest possible latitude in dealing with counter-claims, it believed that the phrase "For the purpose of securing a complete settlement of the

[6] *Ibid.*, 148th meeting, para. 16 (article 14 was numbered article 23 at that stage of the discussion).

[7] See document A/CN.4/92, United Nations publication, Sales No.: 1955.V.1, p. 56.

dispute" was undesirable, since it might unduly restrict the powers of the tribunal.

47. Mr. SCELLE said that the opening phrase of article 16 was derived from article 13 of the Covenant of the League of Nations. If the thesis that arbitration must result in a complete settlement of the dispute were accepted, the tribunal should be empowered to decide upon counter-claims. The Chilean, Indian and United States Governments' concern that counter-claims should be closely linked with the main subject of arbitration was well founded, and he would accordingly be prepared to amend the French text by substituting the words "*qu'il estime en étroite connexité avec*" for the words "*fondées sur*".

48. The word "*additionnelles*" should also be transposed to follow the word "*incidentes*", since in French legal procedure incidental claims comprised the other two categories, namely, "*additionnelles*" and "*reconventionnelles*".

49. Mr. LAUTERPACHT suggested that Mr. Scelle's amendment could be rendered in the English text by inserting the word "directly" after the word "arising".

49a. Mr. SCELLE agreed.

50. Mr. LAUTERPACHT considered that the opening phrase of article 16 ("For the purpose of securing a complete settlement of the dispute") was unnecessary, and, being in the nature of an explanation, had no place in a legal text. Furthermore, it was dangerously imprecise. What in fact was a complete settlement of any dispute? A legal decision might not produce a complete settlement from the political point of view. However, as the text had been accepted at the previous session, he would not vote against it if it commanded general support.

51. Mr. SCELLE said that he would prefer to retain the opening phrase of article 16. Its inclusion would constitute progress in the theory and practice of arbitration.

52. Mr. YEPES said that at the fourth session, as a supporter of the principle it embodied, he had voted in favour of article 16.[8] However, he now found the text both vague and dangerous. It failed to stipulate any time-limit for the submission of counter-claims, and would thus enable the parties to prolong the proceedings indefinitely. Furthermore, as he was opposed to the tribunal's being given unlimited power to decide on counter-claims, he considered that the text of article 16 as amended by Mr. Scelle should be improved by the addition of a phrase modelled on that part of article 63 of the Rules of Court of the International Court of Justice referred to by the Indian Government. He also suggested that the Special Rapporteur should follow the wording of that article by using, in the French text, the expression "*en connexité directe*" rather than "*en étroite connexité*".

53. Mr. LIANG (Secretary to the Commission) did not consider that there would be any harm in retaining the opening phrase of article 16, which nearly implied that counter-claims must be closely connected with the subject matter of the dispute.

54. In preparing the commentary on article 16, the Secretariat had carefully analysed the varying definitions of counter-claims, additional or incidental claims prevailing under different systems of law. For Anglo-Saxon lawyers, the expression "counter-claims" was a general one, and could mean direct or indirect counter-claims. The insertion in the English text of the word "directly", as proposed by Mr. Lauterpacht, would therefore render the meaning clear.

55. Mr. PAL supported the amendment suggested by Mr. Lauterpacht to the English text, an amendment which would, moreover, render the words "or additional or incidental claims" unnecessary.

56. In his opinion, the opening phrase of article 16 served some purpose, and should be retained.

57. Mr. KOZHEVNIKOV contended that article 16 was obscure, and would be liable to be interpreted too broadly. To his mind it deviated from the very concept of arbitration. He therefore proposed its deletion.

58. Mr. SCELLE was unable to support Mr. Kozhevnikov's proposal.

59. Though he would not insist upon the retention of the words "additional or incidental", their omission would make the text somewhat less precise.

60. He accepted Mr. Yepes' suggestion that the word "*directe*" be used in place of the word "*étroite*".

61. Mr. AMADO said that in Brazilian law "*demandes reconventionnelles*" were different from "*demandes incidentes*".

62. Mr. ALFARO said that in order to conform with Spanish legal practice, in which the three types of claim were quite distinct, it would be necessary to refer to all three.

63. Mr. ZOUREK had grave doubts about the retention of the opening phrase of article 16, which might jeopardize the freedom of the parties. The proviso went extremely far.

64. Unless he received an assurance that the tribunal would only be empowered to decide upon claims coming within its competence, he would have to vote against the article.

65. Mr. SCELLE pointed out that it was for the tribunal itself to decide whether or not it was competent to deal with a claim.

66. Mr. YEPES then submitted an alternative text for article 16 reading:

> "The tribunal shall decide on any counter-claims or additional or incidental claims that it counters as

[8] See *Yearbook of the International Law Commission, 1952*, vol. I, 149th meeting, para. 37 (article 16 was numbered article 27 at that stage of the discussion).

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.

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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