

Document:-
A/CN.4/SR.190

Summary record of the 190th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1953 , vol. I

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

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

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

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

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

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

The meeting rose at 1.5 p.m.

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

190th MEETING

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

CONTENTS

	<i>Page</i>
Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (continued)	
Article 24 (continued)	34
Article 23 (resumed from the 189th meeting)	35
Article 25	36
Article 26	36
Article 27	37
Article 28	39

Chairman : Mr. J. P. A. FRANÇOIS.

Rapporteur : Mr. H. LAUTERPACHT.

Present :

Members : Mr. Ricardo J. ALFARO, Mr. Gilberto

AMADO, Mr. Shuhsi Hsu, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

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

ARTICLE 24 (continued)

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

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

2. He also intended to re-introduce the proposal he had suggested at the fourth session² to the effect that failure to include a full statement of reasons in the award should be a ground for challenging its validity (article 30).

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

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

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

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

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

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

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

8. Mr. SCELLE suggested that the texts of paragraph 2 should be left as they stood in both languages, since in their present form they accurately conveyed the meaning intended.

9. Mr. LIANG (Secretary to the Commission) expressed some apprehension about the phrase "a full statement of reasons", which might be exploited by one of the parties as a ground for challenging the validity of the award, and thereby encourage endless litigation. The decisions of the Permanent Court of Arbitration, unlike those of the International Court of Justice, were usually framed very concisely. Too much importance should therefore not be attached to the word "full".

10. The CHAIRMAN put to the vote the original text in both languages of paragraph 2 of article 24.

Paragraph 2 was adopted by 11 votes to none, with 1 abstention.

Article 24, as a whole and as amended, was adopted unanimously.³

ARTICLE 23 (resumed from the 189th meeting)

11. The CHAIRMAN invited the Commission to continue its consideration of the amendment to article 23 proposed by Mr. Lauterpacht at the previous meeting.⁴ The text proposed by Mr. Yepes, which had now been circulated, read:

"In principle, the award must be rendered within the period fixed by the *compromis*, but the tribunal shall have the right to extend this period if it considers that circumstances so require or if the parties consent to an extension."

12. He suggested that the last phrase of Mr. Yepes' amendment, reading: "or if the parties consent to an extension", was redundant.

13. Mr. YEPES contested the Chairman's arguments. The amendment stated two alternative cases in which the time-limit for rendering the award might be extended.

14. Mr. SCELLE considered that the phrase "if it considers that circumstances so require" was too vague. The only circumstance in which the tribunal would wish to extend the time-limit would be if it felt that it was not in full possession of the facts. Apart from that point, he preferred Mr. Yepes' text to that proposed by Mr. Lauterpacht, because it was more radical and would give the tribunal powers similar to those enjoyed by ordinary courts of law. If, however, given the nature of arbitration, the Commission felt that the consent of the parties was essential, and that the danger of one party preventing an extension of the time-limit had been eliminated by Mr. Lauterpacht's text, he would support the latter.

15. Mr. YEPES said that in order to meet Mr. Scelle's point he was prepared to substitute the words "if it

considers that it is not in full possession of the facts" for the words "if it considers that circumstances so require".

16. Mr. KOZHEVNIKOV said that Mr. Yepes' text would be acceptable to him if amended by the deletion of the words "In principle", which were restrictive, by the deletion of the redundant words "it considers that", and by the substitution of the word "and" for the word "or" after the word "require".

17. Mr. Lauterpacht's text was nearer the original, and would also be acceptable if the words "either or" were deleted.

18. Mr. YEPES accepted the first two amendments proposed by Mr. Kozhevnikov, but was unable to agree to the third.

19. Mr. AMADO believed that the words "if it considers that it is not in full possession of the facts" were unnecessary. He failed to see any essential difference between Mr. Yepes' proposal and the original text, except for the inclusion of that totally unnecessary phrase.

20. The CHAIRMAN pointed out to Mr. Amado that, unlike the original provision, Mr. Yepes' text would enable the tribunal itself to extend the time-limit.

21. Mr. SCELLE pointed out that Mr. Kozhevnikov's third amendment to Mr. Yepes' text, and his amendment to Mr. Lauterpacht's text, entirely destroyed their purpose by requiring the consent of both parties to any extension of the time-limit.

22. Mr. KOZHEVNIKOV expressed surprise at Mr. Scelle's remarks. He would have thought that his amendments would have given the Special Rapporteur satisfaction, inasmuch as they would render both texts closer to the original.

23. Mr. ZOUREK considered that the original text of paragraph 1 of article 23 should be retained, and paragraph 2 deleted. He had already explained at the fourth session⁵ why, both on theoretical and on practical grounds, it was undesirable to permit the tribunal to extend the time-limit on its own initiative.

24. The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that the word "and" be substituted for the word "or" after the word "require" in Mr. Yepes' text.

The amendment was rejected by 8 votes to 3, with 1 abstention.

25. The CHAIRMAN put to the vote Mr. Yepes' text with the two amendments proposed by Mr. Kozhevnikov and accepted by the author.

Mr. Yepes' text was rejected by 6 votes to 3, with 3 abstentions.

³ See paras. 65-93 *infra*. For further discussion of article 24, see *infra*, 193rd meeting, para. 44.

⁴ See *supra*, 189th meeting, para. 82.

⁵ See *Yearbook of the International Law Commission, 1952*, vol. I, 150th meeting, para. 14.

26. The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that the words "either or" be deleted from Mr. Lauterpacht's text.

The amendment was rejected by 8 votes to 4.

27. The CHAIRMAN put to the vote Mr. Lauterpacht's substitute text for article 23.

Mr. Lauterpacht's text was adopted by 7 votes to 2, with 2 abstentions.

28. Mr. SPIROPOULOS said that, if the consent of one party was enough to secure an extension of the time-limit, the words "or both" in Mr. Lauterpacht's text were redundant.

29. Faris Bey el-KHOURI agreed.

30. Mr. SCELLE said that, although the deletion of the words "or both" would improve the style of the text, their retention would be more consistent with the principles of arbitration, and would duly reflect the Commission's preference that time-limits should be extended only with the consent of both parties. In any event, as a vote had already been taken on the amendment, no change could now be accepted.

ARTICLE 25

31. Mr. SCELLE said that no observations had been submitted on article 25, which, he suggested, should be adopted without change.

Article 25 was adopted unanimously.

ARTICLE 26

32. Mr. SCELLE said that the Chilean Government had justly criticized (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4) the unsatisfactory manner in which article 56 had been drafted. He also agreed that time must be allowed for an additional period after the expiry of the *compromis* during which the parties might apply for corrections to be made to the award. He therefore proposed that article 26 be replaced by a new text stating that once the award had been made, the tribunal would have a period of one month to correct what he would describe in French as "*erreurs matérielles*", to which the parties might draw its attention.

33. Mr. AMADO said that certain authorities on arbitration held that once the award had been rendered the tribunal ceased to exist, and its competence came to an end.

34. Mr. SCELLE said that it was perfectly true that once the award had been rendered the tribunal could not make any substantive change in it. On the other hand, acting in a purely drafting capacity, it should be empowered to rectify, for example, typographical errors or mistakes in calculations.

35. Mr. LIANG (Secretary to the Commission) pointed out that the secretariat of an *ad hoc* arbitral tribunal would not be empowered to rectify such errors. Pro-

vision must therefore be made to enable the tribunal itself to do so. He feared, however, that in Anglo-Saxon law "*erreurs matérielles*" might be interpreted as material errors—i.e., errors of substance which might render a judicial decision void. It might perhaps be wiser to use a more innocuous expression, such as "clerical or typographical errors", which had a very limited connotation.

36. Mr. SPIROPOULOS asked the Special Rapporteur whether any provision similar to article 26 existed in earlier arbitration treaties or in the Statute of the International Court of Justice. It would also be interesting to know what procedure existed in municipal law to enable a court to correct a judgement.

37. Mr. SCELLE referred Mr. Spiropoulos to the Secretariat's comment on article 26 (A/CN.4/L.40).⁶

38. Mr. LIANG (Secretary to the Commission) observed that the Registrar of the International Court of Justice was empowered to correct clerical errors, but arbitral tribunals would not have such an officer.

39. Mr. ALFARO shared the Secretary's doubts about the use of the expression "*erreurs matérielles*", which might well be confused with errors of fact having a bearing on the substance of the award. If such a phrase were to be used, it must be made clear that it referred to arithmetical or typographical errors. He would also welcome some explanation of whether the tribunal's attention would have to be drawn to such errors by one or by both of the parties.

40. Faris Bey el-KHOURI asked from what date the month suggested by Mr. Scelle for the correction of errors would run. There was sometimes an interval between the reading of the award in open court and its communication to the parties.

41. Mr. AMADO endorsed the Secretary's remarks. It was essential that it be made clear that article 26 referred solely to mistakes of form or errors in calculation.

42. He agreed with the Chilean Government that the parties must be allowed time to apply for rectification after the expiration of the time-limit for rendering the award.

43. Mr. PAL said that, generally speaking, there were two kinds of errors, substantive and clerical. The first could only be rectified by invoking the process of review. If the intention was that article 26 should deal only with the latter, he proposed that it read:

"Within one month after the award is rendered and communicated to the parties, the tribunal, either of its own motion or at the request of either party, shall be entitled to rectify any clerical, typographical or arithmetical errors apparent on the face of the award."

⁶ See document A/CN.4/92, comment to article 27 (corresponding to comment to article 26 in document A/CN.4/L.40), pp. 93-95.

44. Mr. LAUTERPACHT pointed out that precedent justified a provision of the kind contained in article 26.

45. He agreed with the Chilean Government that the opening clause concerning the time-limit should be amended, but doubted whether the Special Rapporteur's alternative proposal, which spoke of "*erreurs matérielles*", was satisfactory. Apart from typographical and arithmetical errors, errors of description, such as had occurred in boundary disputes, must also be taken into account.

46. With those considerations in mind, he proposed an alternative wording for article 26, reading:

"Within two months of rendering the award, the tribunal may, on the application of either party, rectify typographical errors or mistakes in calculation or description."

47. Mr. SCELLE agreed with the views expressed by Mr. Alfaro, Mr. Lauterpacht and Mr. Pal. It had never been his intention that article 26 should apply to errors of fact affecting the substance of the award. He could accept either Mr. Lauterpacht's or Mr. Pal's text, the meaning of which appeared to him to be almost identical. He would, however, draw attention to the disadvantages of attempting to enumerate the possible types of error that might require rectification. He fully recognized the difficulty of rendering in English the expression "*erreurs matérielles*".

48. Faris Bey el-KHOURI considered that some provision should be made to enable the tribunal itself to correct any errors of which it became aware before the parties drew its attention to them.

49. Mr. KOZHEVNIKOV said that article 26 was clearly of limited application, and dealt solely with typographical mistakes and errors of description as distinct from substantive errors. The use in the French text of the expression "*erreurs matérielles*" might give rise to difficulties in the Russian text, since the equivalent term in Russian would also cover errors of substance. The Special Rapporteur's proposal should be regarded as an entirely new one, and not as an amendment to article 26.

50. Mr. YEPES, opposing both the original text of article 26 and the alternative suggested by the Special Rapporteur, proposed that the article simply be deleted. The stipulation in article 27 that the award must be carried out in good faith implied that any errors of form would be corrected. If there was any doubt as to the interpretation of the award the provisions of article 28 would come into play.

51. Mr. SPIROPOULOS suggested that in the light of Mr. Scelle's comments article 26 might be amended by the addition of the words "or errors of the same nature" ("*des erreurs de même nature*"). He drew Mr. Yepes' attention to the fact that article 28 dealt with interpretation, and not with the rectification of errors.

52. Mr. PAL accepted the amendment suggested by Mr. Spiropoulos.

53. Mr. YEPES formally moved that article 26 be deleted.

54. Mr. SCELLE supported the motion.

55. Mr. ALFARO considered that article 26 should be retained, and was inclined to favour Mr. Lauterpacht's proposal, although the suggested time-limit of two months was, in his opinion, too long. Typographical and arithmetical errors should be noticed and corrected immediately.

56. As to the way in which those errors should be referred to, he believed that the word "description" would be dangerous, especially in the case of frontier disputes.

57. He also considered that Mr. Pal's suggestion, that the word "clerical" be used, deserved attention, since it was clear and definite in meaning.

58. Mr. LAUTERPACHT agreed that the word "clerical" should be added, and that the time-limit should be fixed at one month instead of two months.

59. The CHAIRMAN said that the text of article 26 with the various amendments proposed thereto would be circulated to members, who would then be able to vote upon it.

60. He would now request them to vote only on Mr. Yepes' motion that the article be deleted.

61. Mr. AMADO said that he would vote in favour of article 26 as set out in the draft, since he considered that the term "description" was highly dangerous, and might lead to serious difficulties in the case of disputes involving areas where frontiers were not clearly marked.

62. Mr. ZOUREK was opposed to the deletion of article 26, which met a practical need. Errors might be made which the tribunal alone would be able to rectify. The principle of correction was widely accepted, and had been included in the draft on arbitral procedure prepared by the *Institut de Droit international*.

*Mr. Yepes' motion that article 26 be deleted was rejected by 10 votes to 1, with 1 abstention.*⁷

ARTICLE 27

63. The CHAIRMAN considered that the French text of article 27, which read in part: "*La sentence est obligatoire... dès qu'elle est rendue...*" was clearer than the English, which used the word "when". He also noted the Chilean Government's comment on the article (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4).

64. Mr. SCELLE agreed that the French text was preferable to the English. As to the Chilean Government's objection, he held that suspension did not affect the obligatory character of the award. In point of fact, the Chilean Government's argument really related to article 28. Although a reference to the cognizance of

⁷ For further discussion of article 26, see *infra*, 193rd meeting, para. 73.

the parties might be added to article 27, in his view that article should be retained as drafted.

65. Mr. LIANG (Secretary to the Commission) recalled that at the fourth session the Commission had rejected the alternative solution that the award should become binding when it had been communicated to the parties.⁸ Article 24 stipulated that the parties must be summoned to appear. If they did not comply with the summons, they could not complain that the award had not been communicated to them.

66. Mr. YEPES proposed that article 27 be amended by the addition of the following words after the word "rendered":

"namely, from the day that it has been read in open court before the parties" ("*c'est-à-dire du jour ou elle a été lue en séance publique devant les parties*").

67. Mr. ALFARO said that, since articles 26 and 28 were obviously closely connected, whereas article 27 was more general, he would suggest that they be renumbered, article 27 following article 25, and article 26 being consequently renumbered 27.

68. Mr. SCELLE accepted Mr. Alfaro's suggestion.

69. The CHAIRMAN said that the Sub-Commission would deal with that point in due course.⁹

70. Mr. LAUTERPACHT was not sure that Mr. Yepes' amendment would add anything to the text, since it was already laid down in article 24 that the award should be read in open court.

71. Faris Bey el-KHOURI said that article 24 did not make it clear when the award was to be considered as having been rendered. According to paragraph 3 of article 24, its validity would run from the date on which the president of the tribunal signed it. The point should be made clear in article 27.

72. Mr. LIANG (Secretary to the Commission) drew attention to the Secretariat's commentary (A/CN.4/L.40)¹⁰ where that very point had been dealt with.

73. Mr. LAUTERPACHT considered that the Commission should either clarify the text of article 24 or adopt Mr. Yepes' amendment to article 27. One of the considerations that made it difficult to modify article 24 was that in practice there might be a time-lag between the communication of the award to the parties and the reading of it in open court.

74. Mr. ALFARO considered that the second sentence of paragraph 1 of article 24 should be amended to read: "It shall be rendered by reading in open court."

75. Mr. SCELLE maintained that the Commission was creating artificial difficulties, and that article 24 was perfectly clear and satisfactory.

76. Mr. LIANG (Secretary to the Commission) suggested that article 24 should be rearranged, paragraph 1 being made to refer only to the drawing up of the award in writing and the signing thereof by the president. Paragraph 2 should refer to the rendering of the award, and paragraph 3 to the communication thereof to the parties. Normally, a judgement was first read in open court and then communicated to the parties. Such, for instance, was the practice of the International Court of Justice.

77. Mr. PAL pointed out that if the rendering of the award were held to be equivalent to the fulfilment of article 24 in the several stages prescribed, article 27 would need no amendment.

78. Mr. KOZHEVNIKOV considered that article 24 failed to make clear at what moment the award was to be considered as having been rendered.

79. Faris Bey el-KHOURI thought that the parties might regard that moment as the one at which the written communication come into their possession. He would suggest that that be made clear in paragraph 1 of article 24.

80. Mr. YEPES wished to modify his amendment by adding the words: "the parties having been duly summoned to appear in accordance with article 24." Article 27 would then read:

"The award is binding upon the parties when it is rendered—namely, when it has been read in open court, the parties being present or having been duly summoned to appear in accordance with article 24."

81. Mr. SCELLE pointed out that once the award had been dated and signed it became binding and final. The agents who were present at the reading would represent the parties, namely, the governments parties to the dispute. There was no possible doubt about the matter, and he failed to see why the Commission should wish to reiterate in article 27 what it had clearly enunciated in article 24. He conceded that the possibility would always exist that the parties might refuse to take cognizance of an award, but they would do so on their own responsibility.

82. Mr. AMADO agreed with Mr. Scelle, and suggested that article 27 should be put to the vote in its original form, which expressed Mr. Scelle's views.

83. Mr. ALFARO agreed with Mr. Scelle that article 24 covered all the issues, but considered that the order of its constituent paragraphs should be changed, since confusion might follow from the circumstance that paragraph 1 referred first to the drawing up of the award in writing and its communication to the parties, and then to its being read in open court. He therefore agreed with the Secretary's suggestion, the adoption of which would ensure that the article ran logically.

⁸ See *Yearbook of the International Law Commission, 1952*, vol. I, 174th meeting, paras. 55-56.

⁹ See *infra*, 194th meeting, para. 77.

¹⁰ See document A/CN.4/92, p. 93.

84. Mr. ZOUREK supported Mr. Kozhevnikov's view that the award must be considered as having been rendered at the moment when it was communicated to the parties, regardless of the presence of the agents in court or their absence.

85. Mr. KOZHEVNIKOV proposed that paragraph 1 of article 24 be amended by the addition of the words "and shall become binding on the receipt thereof by the parties" at the end of the first sentence.

86. Mr. SCELLE was unable to accept Mr. Kozhevnikov's amendment, and reiterated that it would be enough if the award was dated and signed. Furthermore, he would draw Mr. Kozhevnikov's attention to the words "or duly summoned to appear" at the end of paragraph 1.

87. Mr. SPIROPOULOS pointed out that if the Commission wished to re-open the discussion on article 24, it would have to take a formal decision to that effect.

88. Turning to the point at issue, he agreed that the precise moment at which the award should be considered as having been rendered was difficult to define. It was usual for an award to become binding once it had been read in open court, the text thereof being there and then transmitted to the parties. In the event of an arbitrator's failing to read the award in open court, his signature would constitute proof of the rendering. In point of fact, that possibility was not envisaged in the draft, which specifically provided for the reading. He too preferred the rearrangement of the paragraphs of article 24 suggested by the Secretary and sponsored by Mr. Alfaro.

89. Mr. LAUTERPACHT said that there were three ways out of the difficulty. The first would be for the Commission to defer to the views of the Special Rapporteur, even though he had introduced an element of confusion by suggesting that an award should be considered as having been rendered once it had been signed by the president. The second way would be to adopt Mr. Alfaro's suggestion concerning the rearrangement of the paragraphs in article 24; and the third way would be to adopt Mr. Yepes' amendment to article 27, which would have the effect of clarifying article 24 and of disposing of the whole issue.

90. He would be disinclined to support any suggestion that the discussion on article 24 be re-opened.

91. Mr. KOZHEVNIKOV emphasized that in his view article 24 was badly drafted. The following three stages should be carefully dealt with therein: reading of the award in open court; communication to the parties; receipt of the communication by the parties.

92. Mr. SPIROPOULOS agreed with Mr. Scelle that the Commission was creating artificial difficulties. The general practice of arbitral tribunals was perfectly familiar to everyone: an award was rendered once it had been read, it being understood that the text thereof existed and had been handed to the parties at the time of reading. He could not agree with Mr. Kozhevnikov

that the operative moment was that of receipt of the communication by the parties.

93. Faris Bey el-KHOURI proposed that Mr. Alfaro be requested to put his suggestion concerning the rearrangement of article 24 in writing, further discussion on the article being deferred.

It was agreed that the Sub-Commission should revise the order of articles 24 and 27 in the light of the foregoing discussion.

ARTICLE 28

94. Mr. SCELLE, after drawing attention to the Chilean Government's comments (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4), proposed that article 28 be amended as follows: the first clause "Unless the parties agree otherwise," to be deleted; the second clause to read "Any dispute between the parties as to the meaning and scope of the award may, at the request of either party and within the period of one month, be submitted . . ." ("*Tout différend qui pourrait surgir entre les parties, concernant l'interprétation et la portée de la sentence, sera, à la requête de l'une d'elles, et dans le délai d'un mois, soumis . . .*"); and the following sentence to be added at the end of paragraph 1: "On a request for interpretation the execution of the award shall be deferred pending decision." ("*Le recours en interprétation suspend l'exécution de la sentence jusqu'à ce qu'il ait été jugé.*")

95. Mr. YEPES supported Mr. Scelle's amendments.

96. Mr. SCELLE, replying to Mr. ZOUREK, said that the first clause of paragraph 1, the deletion of which he had proposed, added nothing to the text. If the parties wished to seek an interpretation, the latter would obviously have to be provided by the tribunal which had rendered the award. If, on the other hand, the parties submitted the issue to another tribunal, the proceedings would merely start all over again, and article 28 would be inapplicable.

97. Mr. SPIROPOULOS supported Mr. Scelle's proposal that the first clause in paragraph 1 be deleted, on the ground that such a formula could be inserted at the beginning of every article in the draft. Obviously, if the parties agreed otherwise, the rest of the text would become superfluous in each case.

It was agreed by 9 votes to 2 that the first clause of paragraph 1 of article 28 should be deleted.

The proposal that the words "and within the period of one month" should be inserted in the second clause was adopted by 9 votes to none, with 2 abstentions.

Mr. Scelle's proposal that a second sentence be added at the end of paragraph 1 was adopted by 11 votes to 1, with 1 abstention.

Paragraph 1 of article 28 was adopted, as amended, by 10 votes to 2.

The meeting rose at 1 p.m.

191st MEETING

Thursday, 11 June 1953, at 9.30 a.m.

CONTENTS

	Page
Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (continued)	
Article 28 (continued)	40
Article 29	42
Article 30	44
Article 31	46

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

1. The CHAIRMAN announced that the Sub-Commission had unfortunately failed to achieve any great success the previous day, and he must therefore, albeit regretfully, rule that it would be best for it to cease its endeavours. The discussions had turned on questions of principle, which it was in any case incumbent upon the Commission itself to solve.

2. The appropriate solution might be to set up a drafting committee, and he would make certain relevant proposals the next day.

3. Answering Mr. Kozhevnikov, he explained that the Sub-Commission's difficulties had begun with the interpretation of paragraph 1 of article 3, which laid down that within three months from the date of the request made for the submission of a 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 should constitute an arbitral tribunal by mutual agreement (*d'un commun accord*).

4. The Special Rapporteur considered that the words "by mutual agreement" were to be interpreted as meaning that such agreement was required even in the

case of the appointment of a national arbitrator. Other members felt that those words did not preclude the possibility of national arbitrators being nominated by each party without the consent of the other. Other questions were closely related to, and affected by, that major divergence of views.

ARTICLE 28 (continued)

5. The CHAIRMAN recalled that at its preceding meeting, the Commission had concluded its examination of paragraph 1 of article 28.

6. At the suggestion of Mr. LIANG (Secretary to the Commission) *it was agreed* that the word "interpretation" should be substituted for the word "meaning" in the second line of the English text of paragraph 1 of article 28.

7. The CHAIRMAN invited the Commission to consider paragraph 2 of article 28.

8. Mr. SCELLE (Special Rapporteur) was unable to accept the views expressed by the Indian Government (A/CN.4/68, No. 4 or A/2456, Annex I, No. 5). A change of tribunal did not transform an old dispute into a new one. It would be inadmissible to allow all the antecedent procedure to be wasted simply as a result of a request for interpretation. Indeed, the interpretation of an award in no way invalidated the original decision.

9. Mr. ZOUREK appreciated the importance of the point, and believed that the difficulty was due to an excessive tendency to introduce into the draft provisions from the Statute of the International Court of Justice, despite the fact that that instrument differed essentially from any code of arbitral procedure.

10. He had some doubts about the wisdom of accepting one month's delay for a request for interpretation, as had been agreed at the previous meeting.¹ Was that long enough? The history of arbitration knew cases when twenty-five years had elapsed between the original rendering of the award and the final interpretation. He held that in the event of disagreement about the interpretation, such disagreement constituted a new dispute, and must be treated as such. The Indian Government had made a valid point.

11. Mr. SCELLE said that in the event, for proceedings to be started all over again it would suffice if one party were displeased with the award, then a request for interpretation would become a new dispute, and so on and so on. He really found the greatest difficulty in attributing any validity at all to Mr. Zourek's argument, but he must point out yet again that he was the servant of the Commission, that he did not support texts simply because they had been adopted, but because it was his duty to remind the Commission of what its earlier attitude had been, in order that it might not fall into the snare of calling white what at the previous session it had called black.

¹ See *supra*, 190th meeting, para. 97.