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Summary record of the 191st meeting

Topic:
Arbitral Procedure

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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.

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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. 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.

12. Mr. AMADO supported Mr. Zourek and the Indian Government's suggestion, and said that he would vote in that sense if paragraph 2 failed to provide for the possibility that the tribunal might find means of resolving difficulties of interpretation. In point of fact, the words "if the parties have not agreed otherwise" allowed for the full application of arbitral procedure before the issue was brought before the Court. That was why he would vote in favour of paragraph 2.
13. Mr. KOZHEVNIKOV found it difficult to accept the Special Rapporteur's thesis that the Commission must cleave to its earlier decisions. At the fourth session, the Commission had carried out a preliminary examination of the draft arbitral procedure, and was now engaged on its final examination, in the course of which questions of principle must be tackled afresh. For what other purpose had the members come together?
14. Paragraph 2 was unacceptable to him, because it would allow an alien organ to intervene in arbitral procedure, with consequent impairment of the fundamental principle of mutual agreement.
15. Mr. LAUTERPACHT said that Mr. Kozhevnikov was perfectly consistent in his attitude. He wished one party to be in a position to frustrate arbitral proceedings at various stages, despite the original undertaking entered into by both parties to submit a dispute to arbitration.
16. As to the Indian Government's comment, he would ask Mr. Pal to explain what practical alternative that Government had in mind.
17. Mr. PAL pointed out that he was in no way responsible for the Indian Government's opinion, and could only speculate as to the reasons which had prompted the Indian Government to formulate an objection.
18. His own view of paragraph 2 was that the International Court of Justice would presumably step in if, for any reason, such as the expiry of the time-limit imposed in paragraph 1 as amended, the parties were unable to submit a request for interpretation to the tribunal which had rendered the award in the first instance. On the other hand, if a much longer period were allowed under paragraph 2—say five or ten years—it might legitimately be argued that a new dispute had arisen, that the proceedings must be initiated all over again, and that consequently the Court had no say in the matter.
19. Mr. SCELLE concurred with Mr. Pal. As a rule, interpretations were sought at once, sometimes on the very day on which the award was rendered.
20. Mr. PAL considered that the procedure envisaged in paragraph 2 should also be subject to a time-limit, and suggested that the words "within the same time-limit" be added at the end of it. If the parties failed to avail themselves of the time at their disposal, the provision would become inoperative.
21. Faris Bey el-KHOURI asked Mr. Scelle what would happen in a case in which paragraph 2 of article 28 became inoperative.
22. Mr. SCELLE said that the draft arbitral procedure contained no relevant provision; he was prepared to accept Mr. Pal's view, subject to the reservation that a time-limit of one month would be too short. It was conceivable that it would be impossible in practice to re-convene within one month the tribunal which had rendered the original award.
23. Mr. ZOUREK did not consider that the Commission should follow the Special Rapporteur in starting from the premise that it would be the wish of governments that the arbitration should fail, and that they would therefore drag matters out endlessly by renewing proceedings. After all, the whole concept of arbitration rested on the agreement of States, and there were cases enough on record when awards had been rendered and implemented.
24. He would note, with reference to the general argument, that the Commission had already made radical changes in a number of articles.
25. Mr. KOZHEVNIKOV proposed that paragraph 2 be amended by the substitution of the words "both parties" for the words "either party". The last clause would then read: "...the dispute may be referred to the International Court of Justice at the request of both parties".
26. Mr. ALFARO was prepared in principle to accept Mr. Pal's amendment, but wished to clarify the course of events as they would occur under article 28. An award would be rendered; within a period of one month (paragraph 1) one party would raise a question of interpretation; the parties then disagreed, in which event the dispute could be referred to the Court. The provision in paragraph 2 must clearly be made subject to a time-limit, and he believed that reference thereto should be made after the word "otherwise", so that the clause would read: "...and if the parties have not agreed otherwise within one month,..."
27. Mr. SCELLE asked whether the month referred to in paragraph 2 would be identical with that stipulated in paragraph 1, or a successive month.
28. Mr. ZOUREK suggested that three months would be a more suitable period, in view of the habitual slowness of diplomatic procedure.
29. Faris Bey el-KHOURI said that a difference might arise between the parties not only years after the award had been rendered, but also during the course of its application, which might in certain circumstances be prolonged and carried out in different stages. In his view, paragraph 2 should be retained as drafted.
- Mr. Zourek's proposal that a time-limit of three months be prescribed in paragraph 2 was adopted by 7 votes to 2.*
30. Mr. AMADO, explaining his vote, said that in his opinion the time-limit was still too short.

31. Mr. SCELLE pointed out that, all told, the parties would have four months in which to seek an interpretation: one month during which they could request an interpretation from the tribunal, and three months during which they could appeal to the International Court of Justice, after which no further requests for interpretation would be admissible. Proceedings would then have to be re-initiated.

32. The CHAIRMAN said that the drafting committee would redraft the text of paragraph 2 in accordance with the Commission's decision.

33. Mr. KOZHEVNIKOV said that before his amendment was put to the vote he would like to emphasize that in his view arbitration was based on the mutual consent of the parties.

Mr. Kozhevnikov's proposal that the words "both parties" be substituted for the words "either party" in paragraph 2 was rejected by 9 votes to 3.

34. Mr. YEPES said that he had voted against the amendment because its effect would be to render the application of an award impossible.

ARTICLE 29

35. Mr. SCELLE said that the Governments of India and the United Kingdom had suggested the deletion of article 29 (A/CN.4/68, Nos. 4 and 8 or A/2456, Annex I, Nos. 5 and 9). The quarrel between the partisans of a definitive judgement and of revision dated from the conferences held at The Hague in 1899 and 1907. At the fourth session the Commission had taken a substantive decision, adopting the thesis of eminent English lawyers and of the preparatory commission entrusted with the task of drafting the Statute of the Court of International Justice.² Members would find all the relevant information in the Secretariat's commentary (A/CN.4/L.40).³ He did not need to insist on the fact that, if article 29 were dropped, the Commission would have fundamentally modified the whole concept of the draft on arbitral procedure. Everyone was familiar with the principle which had been applied in English jurisprudence for the past fifty years, and which was expressed in the formula "nothing is settled until it is settled right". Revision was not the same thing as an appeal against the sentence or the annulment thereof. It depended upon the recognition of the existence of a new fact which invalidated the original award, making it unacceptable to universal conscience. He could only mention in passing the tremendous repercussions of French public opinion at the beginning of the present century in connexion with the Dreyfus Case.

36. He would suggest that the Commission first pronounce itself on the issue of principle, and then examine the text of article 29 in detail.

37. Mr. YEPES strongly supported Mr. Scelle's views.

38. Mr. LAUTERPACHT also supported them. The arguments advanced by the United Kingdom Government on article 29 (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9) were in the nature of suggestions for a further examination of the question. They were not necessarily intended to affect a decision which the Commission had taken after long and thorough discussion. Indeed, the same held good for the United Kingdom Government's objections to articles 30 and 31.

39. Mr. PAL said that he agreed with the principle laid down in article 29, but would have some comments to offer on its various paragraphs.

40. The CHAIRMAN noted that the Commission accepted the principle laid down in article 29. It had, then, to examine the text in detail.

41. Mr. LAUTERPACHT suggested that, in the light of the Brazilian Government's comments (A/CN.4/68, No. 2 or A/2456, Annex I, No. 3), the period of six months stipulated in paragraph 2 should be extended to two years. The paragraph should consequently be amended to read as follows: "The application for revision must be made within six months of the discovery of the new fact and in any case not later than two years after the rendering of the award."

42. At the suggestion of Mr. SCELLE and Mr. AMADO, he agreed that the period should be fixed at ten years.

43. Mr. YEPES, having drawn attention to paragraph 5 of Article 61 of the Statute of the International Court of Justice,

44. Mr. SCELLE agreed that the amendment might read: "... after the lapse of ten years from the date of judgement."

45. Mr. LAUTERPACHT was prepared to accept that formula.

Mr. Lauterpacht's amendment to paragraph 2 of article 29, as itself amended, was adopted by 9 votes to none, with 2 abstentions.

46. Mr. SCELLE held that the Netherlands Government's comments (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) on paragraph 3 were pertinent, and suggested that the text of that paragraph be redrafted to read:

"The proceedings for revision shall consist of two stages. At the first stage the tribunal which rendered the award shall record the existence of the new fact and rule upon the admissibility of the application. At the second stage the tribunal gives its opinion on the revision proper."

47. The CHAIRMAN noted that the Commission agreed with the proposed text, and *ruled* that it be transmitted to the drafting committee for final review.

48. Mr. PAL considered that paragraph 4 contained an innovation. In accordance with the decision just taken, it would be possible for an application for revision to be

² See *Yearbook of the International Law Commission, 1952*, vol. I, 151st meeting, paras. 34-53.

³ See document A/CN.4/92, pp. 99-104.

made at any time during a period of ten years. Surely an application for revision made towards the end of that period would constitute a renewal of the dispute. According to the procedure suggested in paragraph 4, however, the application for revision could be addressed not to the arbitral tribunal but to the International Court of Justice on the initiative of one party. He held that to be contrary to the principles of arbitration and revision. The original tribunal must undertake the task of revision.

49. Mr. SCELLE drew Mr. Pal's attention to the escape clauses in paragraph 4, namely: "If, for any reason, it is not possible...", and "unless the parties agree otherwise,". Would Mr. Pal's point be met if the following words were included in paragraph 4: "and the parties have been unable to agree to the setting up of a new tribunal".

50. Mr. PAL said that the parties could not be obliged to apply to the International Court of Justice.

51. Mr. SCELLE pointed out that if the parties failed to agree, the provisions of article 3 would come into play.

52. Mr. LAUTERPACHT felt that it would be desirable to make the second sentence somewhat more precise. One of the reasons which might militate against application to the original tribunal was the death of all or most of its members. But what other reasons could there be? It would seem to him that the logical outcome of Mr. Pal's argument would be that the party which desired revision would be denied the right to claim it, since the other party would withhold its consent.

53. Mr. PAL said that if the original tribunal were no longer available, means should be devised to enable a new tribunal to be set up, the parties thus starting the proceedings all over again. He considered that method to be preferable and closer to national practice in jurisprudence than application to the International Court of Justice. The latter should be able to take action only if the constitution of a new tribunal were wholly impossible.

54. Mr. LAUTERPACHT presumed that Mr. Pal wished to amend the last two lines of paragraph 4 in the sense that the application for revision should be made to a tribunal constituted in accordance with paragraph 2 of article 3.

55. Mr. ALFARO thought that Mr. Pal's attitude was conditioned by apprehension lest the original tribunal should no longer exist. Mr. Pal's proposal that a tribunal should be reconstituted in accordance with article 3 might be interpreted as conveying that a certain prejudice against the International Court of Justice existed in the International Law Commission. He (Mr. Alfaro) would submit that that fear was unfounded. The ideal of the international community was the maintenance of peace and security, the peaceful settlement of all conflicts between States and the obligatory jurisdiction of the International Court of Justice. But until that ideal was realized there was no reason why the parties should

not apply to the International Court in cases such as those provided for in article 29, paragraph 4. The solution—adopted consistently by the Commission—that in the last resort the Court should take action was ideally the correct solution. He failed to see why the Commission should provide for the constitution of another, new tribunal.

56. Faris Bey el-KHOURI also considered that paragraph 4 was an innovation in international law. The jurisdiction of the International Court of Justice was not universally applicable and obligatory. But it should certainly be made so, and Mr. Alfaro had taken a progressive attitude which he, for his part, was prepared to support. If the International Court should act under paragraph 4 of article 29, it would in practice be acting as an arbitral tribunal, and it was desirable that an attempt should be made to extend the Court's authority step by step.

57. Mr. PAL accepted Mr. Lauterpacht's interpretation of his views.

58. Mr. HSU agreed with Mr. Alfaro's general view of arbitration as forming part of the judicial life of the world community. He did not therefore believe that application to the International Court in the last instance would conflict with the principle enunciated by Mr. Pal.

59. Mr. KOZHEVNIKOV disagreed with Mr. Alfaro about the ideal of obligatory international jurisdiction; that thesis presupposed the existence of a supranational authority. The very foundations of existing international law, as an expression of the will of sovereign States, would thus be called into question. Though States might voluntarily abandon some particle of their sovereignty, the whole theory and practice of arbitration were based upon the agreement of the parties. At present there was no problem in dispute or unsettled which could not be settled by peaceful means through the mutual agreement of the countries concerned. To his mind, it would be totally contrary to the principles of arbitration to oblige the parties to act against their will. He therefore agreed with Mr. Pal and Faris Bey el-Khoury that the last part of paragraph 4 went too far, and violated the rights of the parties.

60. Mr. SCELLE considered that there was general agreement that the International Court of Justice would only intervene if the parties were unable to reach agreement on the constitution of a new tribunal; that would be perfectly consistent with the provisions of article 28, paragraph 2.

61. The CHAIRMAN pointed out to the Special Rapporteur that there was a fundamental cleavage of opinion in the Commission, inasmuch as Mr. Pal and his supporters considered that the tribunal could only be reconstituted by agreement between the parties.

62. Mr. ZOUREK considered the provisions of articles 2, 3, 28 and 29 relating to the International Court of Justice to be out of place, because they would transform the arbitral tribunal into a court of first instance, which was totally at variance with the principle

of arbitration. If the competence of the International Court were thus extended, arbitration as such would disappear.

63. Mr. YEPES considered that paragraph 4, which, he believed, might be made generally acceptable by the insertion of the words: "at the request of one of the parties" after the words "that tribunal", should be retained.

64. Mr. SCELLE agreed that Mr. Yepes's amendment was consistent with the purpose of paragraph 4.

65. Mr. ZOUREK opposed Mr. Yepes's amendment, which would result in the parties being bound to apply to the Court if they failed to reach agreement. He saw no purpose whatsoever in preparing a draft on arbitral procedure that would make obligatory the jurisdiction of the International Court, and therefore proposed that the second sentence of paragraph 4 be deleted.

66. Mr. KOZHEVNIKOV suggested that Mr. Pal's amendment failed to achieve the intended object by referring to article 3, paragraph 2, which conflicted with the principle that the parties should not be forced to accept a certain procedure against their will.

67. Mr. SCELLE pointed out that acceptance of Mr. Pal's amendment would not alter the fact that in the last resort the International Court would intervene.

68. Mr. PAL said that as the procedure of revision was recognized in Indian law, he had no objection to the principle underlying paragraph 4. However, he saw no reason why, if one party were prepared to designate members of the new tribunal, it should be precluded from doing so by the recalcitrance of the other. The intervention of the International Court should in that event be limited to the appointment of the remaining members. He was anxious to safeguard the right of the parties to choose their own arbitrators.

Mr. Zourek's proposal that the second sentence of paragraph 4 be deleted was rejected by 7 votes to 2, with 3 abstentions.

69. Mr. YEPES said that if Mr. Pal's amendment entailed the deletion of the words: "unless the parties agree otherwise", he would be obliged to vote against it, since it would then be unduly restrictive.

70. Mr. SPIROPOULOS pointed out that the possibility of the parties finding another solution would not be precluded by the deletion of that phrase.

71. The CHAIRMAN then put Mr. Pal's amendment to the vote.

Five members voted in favour of the amendment and 5 against, 2 members abstaining. The amendment was accordingly rejected.

72. The CHAIRMAN then put to the vote Mr. Yepes' proposal that the words: "at the request of one of the parties" be inserted after the words: "that tribunal".

Mr. Yepes's amendment was adopted by 6 votes to 3, with 3 abstentions.

73. Mr. ALFARO said that he had understood the Special Rapporteur to have suggested a compromise consisting in the insertion of the words "and if the parties cannot agree on the constitution of another arbitral tribunal" before the words: "the application may". He would have been in favour of such an amendment.

74. Mr. SCELLE observed that the amendment in question was a drafting one, and should be referred to the Drafting Committee.

Paragraph 4 was adopted as amended by 6 votes to 3, with 2 abstentions.

75. Mr. LAUTERPACHT explained that he had voted in favour of paragraph 4, which contained an essential provision. However, the text would have been improved by the adoption of Mr. Pal's amendment.

76. Mr. SCELLE explained that he had abstained from voting on paragraph 4, as amended, because it was not substantially different from the original text.

Article 29, as a whole and as amended, was adopted by 9 votes to 2, with 1 abstention.

ARTICLE 30

77. Mr. SCELLE said that he could accept the Brazilian Government's suggestion (A/CN.4/68, No. 2 or A/2456, Annex I, No. 3) that failure to include a full statement of reasons, as required by article 24, might be made a ground for annulment of the award.

78. It would be remembered that at the fourth session the Commission had decided that no appeal should be allowed from an arbitral award.⁴ It therefore remained to confirm the decision that the validity of the award might be challenged on certain grounds.

79. Mr. LAUTERPACHT said that the lengthy discussions on article 30 at the fourth session had clearly shown that certain members regarded it as one of the most important articles in the draft.⁵ The existence of two conflicting principles, namely, that the tribunal had power to decide the scope of its jurisdiction, and that an award rendered by a tribunal which had exceeded its powers was nugatory, had been pointed out, and it had been shown that unless provision were made for proper and judicial determination as to whether there had been excess of jurisdiction, one of the fundamental safeguards in arbitral procedure would have been removed. Therefore, and in view of the importance of article 30, he advocated its maintenance, and expressed the hope that it would not be weakened by the addition of any other grounds of nullity.

80. Mr. Yepes, too, was in favour of the retention of article 30, but considered that it should be amplified by the addition of two extra paragraphs, to read:

⁴ See *Yearbook of the International Law Commission, 1952*, vol. I, 153rd meeting, paras. 64-84, and 154th meeting, paras. 1-18.

⁵ *Ibid.*, 152nd meeting.

“(d) that the award is not supported by valid reasons ;

“(e) that the *compromis* is void.”

81. Mr. ALFARO felt grave misgivings about Mr. Yepes's amendments. It had already been stipulated in article 24 that the award should include a full statement of reasons. It would be extremely dangerous if failure to comply with that requirement were made a ground for challenging the validity of an award, since it would then be open to either party to claim that the statement of reasons was insufficient. It must be remembered that the party against which the award had gone would inevitably be tempted to seek any pretext for challenging it.

82. He would be unable to express any opinion about paragraph (e) in Mr. Yepes's amendment until he had been told how a *compromis* could be void.

83. Mr. LAUTERPACHT endorsed Mr. Alfaro's views, and expressed the hope that Mr. Yepes would see his way to withdrawing his amendments. The judgement whether or not an award had been supported by valid or sufficiently detailed reasons must necessarily be very subjective. Moreover, it was not clear who was to make it.

84. Mr. Yepes' second amendment might have far-reaching consequences. Whether or not a treaty concluded in excess of constitutional limitations was null was one of the most controversial questions. If Mr. Yepes' second amendment were accepted, the tribunal might be called upon to decide whether a government had observed the provisions of its own constitution. If it had disregarded them in concluding the *compromis*, that should surely be an additional reason for not allowing it to challenge the award on those grounds.

85. He must again reaffirm that any additions to article 30 would seriously weaken it.

86. Mr. YEPES said that he had based his second amendment on the draft prepared by the *Institut de Droit international*. In his view, it was patently absurd that an award should be binding upon the parties when based upon a *compromis* that was null and void. The theory and practice of establishing whether a *compromis* was null was part of the law of treaties. He would refer the Commission to the passage in the Secretariat's comment (A/CN.4/L.40)⁶ reading :

“The converse of the foregoing is that an award rendered in violation of such fundamental principles is not binding upon the parties. Theory and practice abundantly demonstrate that when one or more of the fundamental conditions for the validity of an award are lacking, the State concerned is not bound to carry it into effect. Among the earliest of authorities who have affirmed this principle is Pufendorf, who said :

“‘But the statement that one has to abide by the

decision of the arbitrator, whether it be just or not, must be taken with a grain of salt. For just as we cannot refuse to stand by the decision which has been made against us, even though we had entertained higher hopes for our case, so his decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted further to pose as an arbitrator.’ (S. Pufendorf, *De Jure Naturae et Gentium*, Oldfather Translation, 1688 Edition (Oxford, 1934), Vol. II, Book V, Chapter XIII, Sec. 4, p. 827 at p. 829).

“Some two centuries later the *Projet*, 1875, stated in article 27 :

“‘The arbitral award is void when the *compromis* is void, or when the Tribunal has exceeded its jurisdiction, or in case of proved corruption of one of the arbitrators, or in case of essential error.’

“Bluntschli set forth the applicable principles as follows :

“‘The decision of the arbitral tribunal can be considered void :

“‘(a) To the extent that the arbitral tribunal has exceeded its jurisdiction ;

“‘(b) In case of lack of devotion to duty and denial of justice on the part of the arbitrators ;

“‘(c) If the arbitrators have refused to hear the parties or have violated any other fundamental principle of procedure ;

“‘(d) If the arbitral award is contrary to international law.

“‘But the decision of the arbitrators cannot be attacked on the ground that it is wrong or unjust. Errors in calculation are excepted from this statement.’ (Bluntschli, *Le Droit International Codifié* (Paris, 1886) Section 495, p. 289).”

87. There should be no need for an explanation of his (Mr. Yepes's) first amendment. Surely there must be general agreement that flagrant cases of excess of jurisdiction must be prevented. The expression “*dûment motivé*” had a perfectly precise meaning in French, and any doubts as to its interpretation would be settled by the tribunal, and not by the parties. He therefore failed to see what danger such a provision could entail. On the other hand, its inclusion was essential.

88. The CHAIRMAN, speaking in his personal capacity, said that he shared the doubts expressed by Mr. Alfaro and Mr. Lauterpacht about Mr. Yepes's first amendment, which would require the International Court of Justice to decide as a Court of Appeal whether the statement of reasons given by the tribunal was adequate or not, and would thereby greatly extend its competence.

89. Mr. PAL said that, unless failure to give valid reasons for an award was merely a minor defect which

⁶ See document A/CN.4/92, pp. 105-106.

had no bearing upon its validity, some provision would have to be made in article 30 as to what authority was to decide whether the reasons given were satisfactory.

90. Mr. SCELLE referred Mr. Pal to article 31.

91. Mr. LIANG (Secretary to the Commission) said that, as he had already indicated during the discussion on article 24, paragraph 2 of that article was equivocal in both languages.⁷ The Commission might do well to note the wording of article 56 of the Statute of the International Court of Justice, which ran:

“The judgement shall state the reasons on which it is based.”

Failure to give reasons would be a serious departure from a fundamental rule of procedure.

92. Mr. PAL pointed out that if sanctions were to be imposed for failure to observe every rule of procedure, the validity of an award might be challenged on the grounds that it had not been communicated to one of the parties. It was for the tribunal itself to decide whether disregard of a rule of procedure was or was not grave.

93. Faris Bey el-KHOURI said that the question was not a purely procedural one. It was essential that the tribunal should give valid—and he must insist upon that word—reasons for its award. If one of the parties considered that the reasons were not satisfactory, it should be entitled to appeal to the International Court of Justice.

94. Mr. YEPES said that he would be prepared to accept any modification to his first amendment, provided the principle itself were sustained. To meet the views of certain members of the Commission, he would withdraw the word “valid”.

95. He would ask Mr. Lauterpacht whether the arbitrators were entitled to refrain from giving valid reasons for their award.

96. Mr. LAUTERPACHT observed that by the provisions of article 24, paragraph 2, the tribunal was obliged to make a full statement of reasons. Disregard of other rules of procedure had not been made a ground of nullity. Surely some confidence should be placed in the good faith of the tribunal and in its judicial integrity.

97. Faris Bey el-Khourri's interpretation of Mr. Yepes's amendment as admitting appeal would be regarded by most members of the Commission as profoundly damaging to the whole draft, inasmuch as it would call in question the final character of the award.

98. Mr. SCELLE agreed with Mr. Yepes that safeguards against flagrant cases of injustice were essential. He considered failure to give valid reasons to be a fundamental deviation from the rules of procedure, and suggested that, instead of Mr. Yepes's first amendment, paragraph (c) in the original text should be modified by the addition of the words “*et notamment absence de*

motivation de la sentence.” (“and particularly omission to furnish a statement of reason for the award”).

99. Mr. YEPES accepted Mr. Scelle's proposal, and withdrew his second amendment.

Mr. Scelle's proposal was adopted by 11 votes to 1.

100. Mr. AMADO explained that he had voted against Mr. Scelle's proposal in the belief that the substance of Mr. Yepes's first amendment was already contained in paragraph (c) of the original text of article 30, which, moreover, had the merit of being restrictive. He was not convinced by the overwhelming support accorded to the proposal that that particular departure from a fundamental rule of procedure should receive special emphasis.

101. Mr. ZOUREK said that he had not quite understood why Mr. Yepes should have withdrawn his second amendment which was fully justified on theoretical grounds. The arguments adduced against the amendment applied equally to the other paragraphs in article 30. He would therefore himself take up Mr. Yepes's amendment, consisting in the addition at the end of article 30 of the words “that the *compromis* is void”.

102. He would also draw the attention of the Drafting Committee to the fact that the introductory phrase to article 30 was unsatisfactory, since both in practice and in jurisprudence an award in the cases covered by article 30 was considered as null and void and not merely voidable. It appeared to confuse a principle with procedure, which was dealt with in article 31.

Mr. Zourek's proposal was rejected by 6 votes to 4, with 2 abstentions.

103. Mr. SCELLE regretted that the problem of a *compromis* being void should not have been previously discussed in connexion with Mr. Lauterpacht's report on the law of treaties. The whole problem hinged on the important issue of nullity in municipal and in international law. He had therefore abstained from voting on Mr. Zourek's proposal, which, moreover, was not precise enough.

Article 30, as amended, was adopted unanimously.

104. Mr. ZOUREK proposed that the final vote on his amendment to article 30 should be deferred until item 4 of the agenda had been disposed of.

105. Mr. SCELLE observed that, as Mr. Lauterpacht's report on the law of treaties was extremely lengthy, it would be a very long time before Mr. Zourek's amendment could be reconsidered. He would therefore be opposed to such a proposal.

Mr. Zourek's proposal was rejected by 9 votes to 2, with 1 abstention.

ARTICLE 31

106. Mr. SCELLE said that it had been asked why the time-limit laid down in paragraph 2 of article 31 should not apply equally to paragraph (b) of article 30. The

⁷ See *supra*, 190th meeting, para. 9.

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

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

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

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

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

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

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

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

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

The meeting rose at 1.5 p.m.

192nd MEETING

Friday, 12 June 1953, at 9.30 a.m.

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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. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

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

ARTICLE 32

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

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

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

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

Article 32 was adopted by 11 votes to 2.

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