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Summary record of the 193rd meeting

Topic:
Arbitral Procedure

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

ARTICLE 9 (*resumed from the 187th meeting*)

89. Mr. ALFARO submitted the following text to replace article 9.

"Unless there are prior provisions on arbitration which suffice for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify:

"(*a*) The subject matter of the dispute;

"(*b*) The method of constituting the tribunal and the number of arbitrators;

"(*c*) The place where the tribunal shall meet;

"(*d*) The manner in which the costs and expenses shall be divided.

"In addition to any other provisions deemed desirable by the parties, the *compromis* may also specify the following:

"(1) The law to be applied by the tribunal, and the power, if any, to adjudicate *ex aequo et bono*;

"(2) The power, if any, of the tribunal to make recommendations to the parties;

"(3) The procedure to be followed by the tribunal;

"(4) The number of members constituting a quorum for the conduct of the proceedings;

"(5) The majority required for an award;

"(6) The right of members of the tribunal to attach dissenting opinions to the award;

"(7) The time-limit within which the award shall be rendered;

"(8) The appointment of agents and counsel; and

"(9) The languages to be employed in the proceedings before the tribunal."

90. He recalled that he had already explained that article 9 should be so redrafted as to make a clear distinction between those requirements in the absence of which arbitration could not take place and other requirements which, though not specified in the *compromis*, were contained in the present draft.

91. Mr. SCELLE supported Mr. Alfaro's proposal, which, he considered, clarified the issue.

92. Mr. YEPES also supported it in principle, but held that proviso (d) should be listed among the *desiderata,* whereas proviso (1) should be included in the category of compulsory requirements. The manner in which the costs and expenses should be divided formed part of customary law and, indeed, Article 64 of the Statute of the International Court of Justice gave guidance on the matter. But the law which the tribunal should apply and its power to adjudicate *ex aequo et bono* must be specified in the *compromis* if that was the intention of the parties. It would be very dangerous if it were not made an obligation to lay down in the *compromis* just how far the tribunal could go in the matter of the application of certain principles of law.

93. Mr. ALFARO said that he had included the manner of division of costs and expenses in the obligatory category, because it might prove embarrassing for arbitrators to have to deal with that question themselves. He did not, however, feel strongly about the matter.

94. But he must insist that the questions of the law to be applied and adjudication *ex aequo et bono* need not be specified in the *compromis,* because they were already covered by article 12. Furthermore, cases might occur where claims had to be decided according to different legal systems, and it was preferable to give the tribunal the necessary latitude.

95. Mr. AMADO supported Mr. Alfaro.

96. Mr. SCELLE reminded Mr. Yepes that various systems of law applied if and when they were not in contradiction with international law.

97. Mr. SANDSTRÖM also opposed Mr. Yepes' suggestion.

98. Mr. LAUTERPACHT, agreeing with Mr. Scelle and Mr. Sandström, held that Article 64 of the Statute of the International Court clearly proved that no general principle of law existed in regard to the manner in which the costs and expenses should be divided.

Mr. Yepes' proposal that proviso (d) be relegated to the category of non-obligatory stipulations was rejected by 6 votes to 1, with 6 abstentions.

Mr. Yepes' proposal the desideratum (1) be promoted to the category of requirements which must be included in the compromis was rejected by 9 votes to 2, with 2 abstentions.

99. Mr. LIANG (Secretary to the Commission) felt that the introductory phrase ("Unless there are prior provisions on arbitration") was unsatisfactory, and presumed that by such provisions Mr. Alfaro really meant the instrument or instruments embodying the undertaking to arbitrate. That was the formula used in paragraph 1 of article 3, as adopted earlier at the meeting by the Commission.

100. The CHAIRMAN ruled that that point be left to the Drafting Committee.

Mr. Alfaro's proposed text for article 9 was adopted unanimously.

The meeting rose at 1.10 p.m.

193rd MEETING

Saturday, 13 June 1953, at 9.45 a.m.

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Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, 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.

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 said that the Commission would have to defer consideration of article 10 until Mr. Scelle's amendment thereto had been circulated.

2. He would therefore invite the Commission to examine Mr. Alfaro's amendment to article 11.

ARTICLE 11 (*resumed from the 188th meeting*)

3. Mr. ALFARO said that his amendment to article 11 proposed that the words "and to supplement it where necessary" be added after the word "*compromis*". The purpose was to give the tribunal the power not only to interpret the *compromis*, but to complete it if the parties had failed to include any of the required stipulations, such as that relating, for instance, to the division of expenses.

4. Mr. SCELLE (Special Rapporteur) supported Mr. Alfaro's amendment.

5. Mr. ZOUREK doubted whether it was necessary. Furthermore, it raised a question of principle in respect of the powers of the tribunal to complete a *compromis* concluded by the parties. Article 13 gave the tribunal the power to formulate its rules of procedure in the absence of agreement between the parties.

6. Mr. PAL recalled that at the preceding meeting the Commission had adopted Mr. Alfaro's proposal on article 9 wherein the matters to be settled in the *compromis* were grouped in two categories. He considered that Mr. Alfaro's amendment went too far, since it might be interpreted as meaning that the tribunal was competent to supplement the *compromis* on such important issues as the subject-matter of the dispute, or the method of constituting the tribunal and the number of arbitrators.

7. Faris Bey el-KHOURI also considered the amendment to be too far-reaching, since it would enable the tribunal to add to the *compromis* elements of which the parties had not thought.

8. Mr. YEPES concurred with the preceding speakers and held that article 11 as it stood covered the issue, since it gave the tribunal the widest powers to interpret the *compromis*.

9. Mr. KOZHEVNIKOV shared the apprehensions voiced by several members of the Commission, and was opposed to the amendment.

10. Mr. SCELLE said that there was one possibility which must at all costs be avoided, namely, that the tribunal should find itself unable to render an award because of the unsatisfactory nature of the *compromis*. He would therefore suggest that Mr. Alfaro's amendment be modified as follows:

> "to the extent required to enable it to render the award."

11. Mr. HSU favoured Mr. Alfaro's amendment, and pointed out that to add to a *compromis* was a very different thing from interpreting it. Indeed, it would be wise not to rely too much on interpretation, but to provide for supplementing the *compromis* whenever necessary, in order to ensure the smooth and successful application of arbitral procedure.

12. Furthermore, he would point out that to supplement the *compromis* did not mean to change it.

13. Mr. LAUTERPACHT said that he would abstain from voting on the amendment, because he considered that all questions were adequately covered by articles 9 and 13. Indeed, for practical purposes Mr. Alfaro's amendment constituted a reiteration of article 13.

14. Mr. LIANG (Secretary to the Commission) thought that as article 13 related to the formulation of the tribunal's rules of procedure, and article 9 dealt with a number of substantive points, the justification for the amendment would be that it could permit the tribunal to complete the *compromis* if the latter omitted some substantive points. If, however, the purpose of the amendment was to refer to questions of procedure alone, then he did not consider it necessary.

15. Mr. ALFARO drew Mr. Pal's attention to the limitative words "where necessary". It might, for instance, happen that the parties would forget to specify in the *compromis* the languages to be used by the tribunal. The latter would in that event supplement the *compromis* in that respect. But in the matter of the law to be applied by the tribunal, article 12 became applicable. Similarly, article 13 covered the issue of procedure, and article 19 the question of the majority. If the *compromis* did not give the tribunal the power to adjudicate *ex aequo et bono*, the tribunal would not be entitled to add a provision to that effect, since the silence of the *compromis* on the subject would mean that the parties did not wish the tribunal to adjudicate

in that manner. He was prepared to accept Mr. Scelle's sub-amendment.

16. Mr. PAL failed to see why the amendment was necessary if all the main points were covered by other articles in the draft.

17. Mr. YEPES supported Mr. Pal; he thought the amendment would scare governments away from arbitration.

18. Mr. SCELLE pointed out that article 10 went much farther than the proposed amendment, since it empowered the tribunal itself to draw up the *compromis* in certain circumstances.

19. Mr. ZOUREK said that the discussion had convinced him that the amendment was in part inadmissible and in part useless. The freely-given consent of the parties was the sole source of a tribunal's competence, and he failed to see how the tribunal could enlarge or complete a compromis which expressed the parties' agreement. No government would be able to accept a provision of that nature.

20. As to Mr. Scelle's point that a tribunal might find itself in the position of being unable to render an award because the *compromis* was defective, he woud submit that that would be a relatively minor difficulty. All the tribunal need do in such an event was to ask the parties to complete the *compromis*.

21. Mr. SANDSTRÖM said that there was no single case to which the amendment would apply. The question of languages would be dealt with under article 13, and the draft made appropriate provision for all other contingencies.

22. He would vote against the amendment.

23. Mr. YEPES emphasized that the consequences would be very serious if the tribunal, having started proceedings on the basis of a *compromis* which did not empower it to adjudicate *ex aequo et bono,* subsequently introduced that element into the *compromis*. His proposal that a *compromis* should be required to specify whether the tribunal was empowered to adjudicate *ex aequo et bono* had been rejected by the Commission at the previous meeting.[1] He was strongly opposed to the amendment.

24. Mr. SCELLE pointed out that an arbitral tribunal always tended to judge *ex aequo et bono*; indeed, therein lay its difference from the International Court of Justice.

25. Mr. ALFARO said that Mr. Yepes' hypothesis was untenable, because article 12 provided that, in the absence of agreement between the parties concerning the law to be applied, the tribunal should be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice. That article did not allow for adjudication *ex aequo et bono.*

26. In the light of the strong opposition expressed to his amendment, he would withdraw it.

27. Faris Bey el-KHOURI moved the deletion of the word " widest " from article 11.

28. Mr. SCELLE was strongly opposed both to Faris Bey el-Khouri's amendment in particular, and to the submission of amendments to articles which had already been adopted by the Commission in general.

29. Mr. ZOUREK supported Faris Bey el-Khouri's amendment. The expression " widest " was contrary to the intentions of the draft. The only powers which the tribunal possessed were the powers given it in the *compromis*, and the *compromis* must be interpreted in accordance with the generally accepted rules of international law.

30. Mr. KOZHEVNIKOV said that the special rapporteur seemed only to object to the submission of amendments which were contrary to his ideas. He had supported Mr. Alfaro's amendment, despite the fact that it had been submitted to an article which had already been adopted.

31. He shared Faris Bey el-Khouri's views, and supported his amendment.

32. The CHAIRMAN moved the closure of the debate, and invited the Commission to vote on the motion.

The motion for the closure of the debate was carried by 7 votes to 3.

Faris Bey el-Khouri's amendment was rejected by 6 votes to 5.

ARTICLE 20 (*resumed from the 189th meeting*)

33. At the suggestion of the CHAIRMAN, Mr. SANDSTRÖM agreed that his amendment to article 20, which consisted in the fusion of the two paragraphs thereof, should be considered by the Drafting Committee.

ARTICLE 19 (*resumed from the 189th meeting*)

34. The CHAIRMAN pointed out that, since the Sub-Commission[2] had not completed its task, the Commission must examine paragraph 2 of article 19 in relation to paragraph 5 of article 9 (formerly paragraph (f) of article 9), and decide whether the two tallied.

35. Mr. YEPES recalled that at the 189th meeting he had suggested that the word " majority " should be qualified.[3] He thought that should be done by adding the word " absolute ".

36. Mr. SCELLE asked Mr. Yepes exactly what he had in mind. An absolute majority would imply that a tribunal would have to have a considerable number of members.

[1] See *supra,* 192nd meeting, para. 98.

[2] See *supra,* 189th meeting, para. 3.

[3] *Ibid.,* para. 30.

37. Mr. YEPES explained that in a tribunal of five members, an absolute majority would be three and a prescribed or "qualified" majority four.

38. Mr. SANDSTRÖM said that the question of majority was very complex, and drew attention to Article 55 of the Statute of the International Court of Justice.

39. Mr. ALFARO considered that Mr. Yepes' amendment was unnecessary. Surely the word "majority" as used in paragraph 2 of article 19 meant a simple majority, namely, half the members plus one.

40. Mr. YEPES withdrew his amendment.

41. After some discussion on the relation between paragraph 5 of article 9 and paragraph 2 of article 19,

42. Mr. LAUTERPACHT moved that the Commission decide that there was no inconsistency between the two paragraphs, and that the discussion thereon be closed.

The Commission decided that there was no inconsistency between paragraph 5 of article 9 and paragraph 2 of article 19.

43. Mr. LIANG (Secretary to the Commission) said that the scope of paragraph 2 of article 19 was doubtful. Its present position seemed to suggest that it applied to the deliberations of the tribunal, but since there were other matters which it might well cover, its rightful place would, perhaps, be in article 13. The point could, however, be referred to the Drafting Committee.

It was so agreed.

ARTICLE 24 (*resumed from the 190th meeting*)

44. The CHAIRMAN drew the attention of the Commission to Mr. Alfaro's proposed text for article 24, which read:

"1. The award shall be drawn up in writing. It shall contain the names of the arbitrators and shall be signed by the President and the members of the tribunal who have voted for it.

"2. The award shall contain a full statement of reasons.

"3. The award is rendered by being read in open court, the agents of the parties being present or duly summoned to appear.

"4. The award shall be communicated to the parties."

45. The French text of paragraph 3 should be corrected by the substitution of the word "*convoqués*" for the word "*appelés*".

46. Mr. ALFARO said that the purpose of his amendment was to clarify the procedure for rendering the award and to determine the precise moment at which it should be regarded as rendered. The text contained no new elements.

47. Mr. YEPES supported Mr. Alfaro's amendment, which would also cover a point he had himself intended to deal with in an amendment to article 27. That amendment would thereby become unnecessary.

48. Mr. SCELLE, accepting Mr. Alfaro's text, proposed that the word "immediately" be added to paragraph 4.

49. Mr. ZOUREK asked whether the provisions of article 24 were obligatory, or whether the parties could make in the *compromis* other stipulations relating to the rendering of the award. For instance, the parties might with good reason decide that the award should not be read in public. In that connexion he referred to the *Chevreau* case.[4]

50. Mr. KOZHEVNIKOV asked at what precise moment the award became binding upon the parties.

51. The CHAIRMAN said that the answer to Mr. Kozhevnikov's question was to be found in article 27, read in conjunction with Mr. Alfaro's text for article 24, paragraph 3.

52. Mr. ALFARO, in reply to Mr. Zourek, said that the parties could insert in the *compromis,* among the other optional clauses, one concerning the rendering of the award.

53. He accepted Mr. Scelle's amendment to paragraph 4 of his text.

54. Mr. SANDSTRÖM agreed that an award might not necessarily be read in open court. It would be enough to say that it was rendered once read in the presence of the parties.

55. Mr. Scelle's amendment to paragraph 4 could have practical disadvantages if printed copies of the award were not immediately available for communication to the parties.

56. Mr. SCELLE considered that Mr. Sandström's objection to his amendment was one of detail; surely the award would not be read until sufficient copies were available.

57. Mr. YEPES suggested an alternative amendment to that proposed by Mr. Scelle, namely, the addition at the end of paragraph 4 of the words "as soon as possible".

58. Mr. SCELLE said that such an amendment would be unacceptable, since it would render indeterminate the time at which an award became binding upon the parties.

59. Mr. YEPES withdrew his suggestion.

60. Mr. ZOUREK said that it was essential to stipulate when the award would become binding. Some provision must therefore be made for the possibility of the parties agreeing to its not being read in public.

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[4] See Manley O. Hudson, "The Chevreau Claim between France and Great Britain", *American Journal of International Law*, vol. 26 (1932), p. 807.

61. Mr. YEPES believed there was danger in retaining the words "by being read in open court". In certain cases an award was read *in camera* prior to publication, so as to enable public opinion to be prepared for it.

62. Mr. ALFARO considered that, except in very exceptional cases, it was unlikely under modern conditions that governments would wish to withhold publication of an award.

63. The CHAIRMAN pointed out that if paragraph 3 were adopted as it stood, it would be impossible to regard as rendered an award not read in open court.

64. Mr. LAUTERPACHT disagreed with the Chairman; as Mr. Alfaro had pointed out, the parties were free to decide otherwise in the *compromis*.

65. Mr. SCELLE regretted that the Commission should be giving so much attention to a possibility which he could only regard as retrograde. It was a general principle of law that any decision by a judicial body must be read in public.

66. Mr. LAUTERPACHT suggested that the parties were unquestionably free to insert in the *compromis* provisions other than those contained in article 24. The only objection would be if article 24 were interpreted to mean that the award *must* be read in open court.

67. The CHAIRMAN said that the parties might not foresee the need to insert different provisions in the *compromis,* but it might arise during the proceedings. Would the parties then have to comply with paragraph 3 of article 24?

68. Mr. LIANG (Secretary to the Commission) said that the whole draft required examination in order to establish which provisions were obligatory. At the moment, a hierarchy of three different types of provision appeared to have been established, namely: provisions which were not subject to modification by the parties in the compromis; optional provisions such as article 25; and finally, provisions such as that the award should include a full statement of reasons which, if not adhered to, might invalidate the award.

69. It was difficult to see to which category article 24 belonged. If Mr. Lauterpacht's argument was sound, the words "Subject to any contrary provision in the *compromis*" should preface paragraphs 1 and 2, but not paragraph 4.

70. Mr. YEPES proposed the substitution of the words "before the parties" for the words "in open court". Special circumstances might often require that an award should not be made known to the general public immediately. Accordingly, it would not be prudent to insist on immediate publicity as laid down in the article.

71. Mr. SCELLE said that he would be unable to accept such an amendment.

Mr. Yepes' amendment was rejected by 4 votes to 3, with 4 abstentions.

Mr. Scelle's proposal that the word "immediately" be added at the end of paragraph 4 was adopted by 8 votes to 2 with 1 abstention.

Mr. Alfaro's text for article 24, as a whole and as amended, was adopted by 10 votes to none, with 1 abstention.

72. Mr. YEPES explained that he had voted in favour of the text because, generally speaking, it was acceptable to him. It was regrettable, however, that no provision had been made allowing the parties to defer publication of the award.

ARTICLE 26 (*resumed from the 190th meeting*)

73. The CHAIRMAN drew attention to the amended version of Mr. Pal's proposal, moved at the 190th meeting. The new text read:

> "Within a 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 or errors of the same nature apparent on the face of the award."

He understood that the French translators had found difficulty in rendering the expression "apparent on the face of the award".

74. Mr. PAL said that what he had in mind were manifest errors immediately obvious on perusal of the text.

75. Mr. SCELLE considered that the words "errors of the same nature apparent on the face of the award" could be rendered in French by the words "*toute erreur manifeste du même ordre contenue dans la sentence*".

76. Mr. ALFARO considered that the word "contenue" did not quite accurately express Mr. Pal's intention. The point should be referred to the Drafting Committee.

Article 26 was adopted unanimously subject to final review by the Drafting Committee.

ARTICLE 10 (*resumed from the 187th meeting*)

77. Mr. SCELLE introduced an alternative text for article 10, reading:

> "Once the tribunal has been constituted, either party may submit the dispute to it by direct citation. If one of the parties refuses to answer the citation and calls for the preparation of a *compromis,* the tribunal shall decide whether there is already sufficient agreement between the parties on the points mentioned in article 9 to enable it to examine the case forthwith. Failing such agreement, the tribunal shall fix a time-limit of four months for the parties to conclude a *compromis,* either directly between themselves or through the good offices of a third State. On the expiry of this time-limit, the tribunal may draw up the *compromis* within a reasonable time which it shall itself decide."

78. Mr. ALFARO also submitted a text for article 10, reading:

> "When the parties are bound by an undertaking to arbitrate and the tribunal has been constituted, if the parties fail to agree on the *compromis* within three months after the date on which one of the parties had notified the other of its readiness to conclude the *compromis,* the tribunal shall draw up the *compromis* within the ensuing three months."

79. His purpose had been to simplify the cumbersome procedure laid down in the original text, with the succession of time limits it implied. He had also eliminated the intervention of a third State, which had not found favour with the Commission. Provided the latter change were accepted, however, he woud be prepared to withdraw his text in favour of that proposed by Mr. Scelle.

80. Mr. LAUTERPACHT said that he had intended submitting a text for article 10, but would not do so because Mr. Alfaro's proposal gave him satisfaction. He hoped, therefore, that it would not be withdrawn by its author.

81. He would be unable to support Mr. Scelle's text because he believed that the *compromis* was essential to arbitration when no permanent tribunal existed. The special rapporteur's new text, which had clearly been inspired by the observations of the United Kingdom Government on article 9 (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9), would, moreover, conflict with the provisions of article 9. The United Kingdom Government had, perhaps, failed to take fully into account the opening words of article 9, namely: "Unless there are prior provisions on arbitration which suffice for the purpose".

82. Mr. SCELLE said that he had retained the provision enabling the parties to seek the good offices of a third State out of respect for precedent and the will of the parties. The suppression of such a provision would, however, certainly not prevent the parties from applying to a third State if they so wished. If the Commission wished to reverse its previous decision, he would be prepared to delete that provision.

83. Replying to Mr. Lauterpacht's point, he observed that the United Kingdom Government had presumably not prepared its comment without careful reflection. It had sought to emphasize that in many cases a matter was submitted to the tribunal by complaint on the part of one of the parties. He agreed that once the tribunal was constituted there was nothing to prevent the parties from applying to it direct without first concluding a *compromis,* which, in his opinion, was often the stumbling-block in arbitration. There would be enormous advantage in the parties being able to dispense with the *compromis,* to which certain members of the Commission seemed unduly attached. If one of the parties, however, insisted upon a *compromis* it would be left to the tribunal to decide whether there was sufficient agreement between them on the essential points mentioned in article 9 to enable it to examine the case forthwith. Adoption of his text would greatly accelerate the procedure, and enable a settlement to be reached more quickly. It would be pure formalism to insist that a *compromis* was always essential.

84. Mr. YEPES said that he would be unable to accept Mr. Scelle's text as, generally speaking, he regarded the *compromis* as the corner-stone of arbitration, though he admitted there were exceptional cases where it would not be necessary. He was usually prepared to support the Special Rapporteur, but in the present instance could not subscribe to a text which ran counter to the whole purpose of the draft.

85. He therefore proposed the deletion from Mr. Scelle's text of the words "decide whether there is already sufficient agreement between the parties on the points mentioned in article 9 to enable it to examine the case forthwith. Failing such agreement, the tribunal shall", and the substitution of the words "reasonable time-limit according to the circumstances of the case" for the words "time-limit of four months".

86. Mr. KOZHEVNIKOV also considered the *compromis* to be extremely important. It would be totally contrary to the nature of arbitration to compel the parties to act against their will. Mr. Scelle's text was totally unacceptable because it refused to recognize that arbitration was based upon the free consent of the parties and because it would enable the tribunal to impose a time-limit on them for the conclusion of the *compromis,* or failing that, to impose the *compromis* itself.

87. Mr. SCELLE said that he was prepared to accept Mr. Yepes' second amendment, since the words "a reasonable time-limit according to the circumstances of the case" would further extend the powers of the tribunal.

88. Contrary to what Mr. Kozhevnikov thought, his proposal was based on respect for the will of the parties, since it would enable them to dispense entirely with the *compromis* if they so wished. Moreover, he was anxious to prevent one of the parties from unilaterally repudiating its prior undertaking. The tribunal would be able to decide if that undertaking were sufficiently specific to enable it to examine the case. The article was consistent with the spirit and the letter of the draft arbitral procedure.

89. Faris Bey el-KHOURI opposed Mr. Scelle's proposal, because he considered that arbitration was based upon the free will of the parties, which could only be given concrete expression in the *compromis.* It was therefore quite inadmissible to allow the tribunal to force a *compromis* upon the parties. If they could not agree upon a *compromis,* there would be no arbitration. He was prepared to concede, however, that the tribunal could assist them in the preparation of the *compromis.*

90. Mr. SCELLE insisted that when there was already sufficient agreement between the parties on the essential elements mentioned in article 9, *pacta sunt servanda.*

Unless his text were accepted, the parties would be able to repudiate earlier agreements.

91. Mr. PAL said that the criticism levelled against Mr. Scelle's proposal was unjustifiably severe. Such a provision would assist the parties in the peaceful settlement of the dispute and should therefore be supported by those who regarded that as the purpose of arbitration. If Mr. Scelle were prepared to abandon the clause relating to the intervention of a third State, the text would be preferable to Mr. Alfaro's.

92. Mr. ALFARO, endorsing Mr. Pal's remarks, said that the reason why he had withdrawn his text was that the Special Rapporteur had taken into account the proviso contained in the opening words of article 9, namely, "Unless there are prior provisions on arbitration which suffice for the purpose".

93. In drafting his own text, his main concern had been to eliminate the delays allowed in the original text of article 10. In the new version proposed by Mr. Scelle that danger had been removed, and any delay which would now occur would be the outcome of the mutual consent of the parties.

94. Mr. SANDSTRÖM proposed the addition at the end of Mr. Scelle's text of the words "taking due account of agreements between the parties".

95. Mr. SCELLE accepted Mr. Sandström's amendment, and moved the closure of the debate on article 10.

96. Mr. LAUTERPACHT said that the discussion had not been exhausted. If a vote were taken immediately on Mr. Scelle's version of article 10 he would have to vote against it, though for reasons other than those expounded by Mr. Kozhevnikov and Faris Bey el-Khouri. He would be placed in an embarrassing position if Mr. Scelle's motion were put to the vote without a further opportunity for discussion.

97. Mr. KOZHEVNIKOV expressed surprise at the Special Rapporteur's motion, which was highly inappropriate in a discussion between scholars. He failed to see the reason for haste on so important a question.

98. Mr. SCELLE observed that the matters being dealt with by the Commission had been discussed at great length and inconclusively by many authorities in the past. In truth, Mr. Kozhevnikov was opposed to allowing the tribunal to draw up the *compromis* itself, as decided by the Commission three years ago.[5]

99. Mr. KOZHEVNIKOV said that it was not the Commission's task merely to confirm the Special Rapporteur's own views.

100. Mr. SCELLE reiterated that he had referred to a decision taken by the Commission.

101. Mr. ZOUREK moved that further discussion on article 10 be deferred until the next meeting.

Mr. Zourek's motion was carried by 7 votes to 2.

The meeting rose at 1.15 p.m.

[5] See *Yearbook of the International Law Commission, 1950*, vol. I, 73rd meeting, paras 1-51, and 80th meeting, paras. 5-16.

194th MEETING

Monday, 15 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. A. E. F. SANDSTRÖM, 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.

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

ARTICLE 10 (*concluded*)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 10, said that it still had before it Mr. Yepes' amendment, whereby the Special Rapporteur's text would read:

"Once the Tribunal has been constituted, either Party may submit the dispute to it by direct citation. If one of the Parties refuses to answer the citation and calls for the preparation of a *compromis*, the Tribunal shall fix a reasonable time-limit, in accordance with the circumstances of the dispute, for the Parties to conclude a *compromis*, either by direct agreement between themselves or through the good offices of a third State. On the expiry of this time-limit, the Tribunal may draw up the *compromis* within a reasonable time which it shall itself determine."