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Summary record of the 146th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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Paragraph (j)

76. The CHAIRMAN invited the Commission to consider paragraph (*j*) of Mr. Yepes' amendment, which read :

" finally, the place where the tribunal shall meet, the date of its installation and the language to be used ".

77. Mr. HUDSON proposed two alternative clauses to replace paragraph (*j*), to read :

" (*j*) the place where the tribunal shall meet and the date of its first meeting.

" (*k*) the languages to be employed in the proceedings before the tribunal."

Mr. Hudson's texts were adopted unanimously.

78. Mr. ZOUREK asked whether article 12 should not include a provision relating to costs.

79. Mr. SCELLE said that he would have no objection, since it was clearly a matter for the decision of the parties.

80. Mr. HUDSON considered that a provision on the functions of the umpire might also be included in the article relating to the *compromis*. The question was how far an umpire could participate in the proceedings, and how far he could go in establishing whether there was a difference of view between two national arbitrators.

81. The CHAIRMAN invited the preceding speakers to consult together and prepare texts on those two points for possible inclusion in article 12.

The meeting rose at 1.5 p.m.

146th MEETING

Thursday, 19 June 1952, at 9.45 a.m.

CONTENTS

Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L. 33 and Add. 1 and 2) (*continued*)

ARTICLE 12 (*continued*)

Mr. Zourek's proposal for an additional paragraph

1. The CHAIRMAN announced that, in accordance with his suggestion at the preceding meeting,[1] Mr. Zourek had submitted a proposal for an additional paragraph to article 12, to read :

" the way in which costs and expenses shall be divided ".

2. Mr. SCELLE supported Mr. Zourek's proposal.

Mr. Zourek's proposal was adopted unanimously.

Amendment to paragraph (i) of Mr. Yepes' text for article 12 (resumed from the previous meeting)

3. The CHAIRMAN invited the Commission to resume its consideration of Mr. Lauterpacht's amendment to paragraph (*i*) of Mr. Yepes' text, a decision on which had been deferred at the request of Mr. Kozhevnikov to enable a Russian translation to be prepared.[2]

4. Mr. KOZHEVNIKOV said that the words " subject to articles 38 to 41 " seemed to suggest that those articles had already been adopted, whereas in fact they had not yet been discussed. He would therefore propose that they be deleted pending the decision on the articles in question.

5. Mr. HSU said that the adoption of Mr. Lauterpacht's text as it stood would not give rise to any difficulty, since there was nothing to prevent the Commission from making a consequential amendment to it should articles 38 to 41 not be adopted.

6. Mr. SCELLE said that, as he had already explained, he was not greatly in favour of Mr. Lauterpacht's amendment, since it would require the parties to take decisions on matters which were not within their discretion. For example, a tribunal should not be compelled to observe the time-limits laid down in the *compromis*, as there might be very good reasons for its being unable to do so. He would accordingly suggest that the word " must " be replaced by the words " ought to ", after the word " award ".

7. Again, appeal and revision did not depend solely on the will of the two parties, and it would be impossible to argue that it was open to them to prohibit both of the two processes in the *compromis*. The possibility of revision was inherent in any judicial settlement.

[1] See summary record of 145th meeting, para. 78.

[2] *Ibid*, paras. 52—75. For Mr. Lauterpacht's text, see para. 63.

8. Mr. LAUTERPACHT did not consider that there was any fundamental disagreement between Mr. Scelle and himself. He too was convinced that the parties must not be given the power to make appeal or revision impossible, and he assumed that articles 38 to 41 would establish the absolute right of a party to demand revision. Nevertheless, he saw no reason why the parties should not have some latitude in laying down certain procedural details, such as the time-limit within which a new fact might be brought to light.

9. The only reason why he had inserted a provision on time-limits was that the parties might not find lengthy procedures acceptable. It was customary to make such stipulations in the *compromis*.

10. Mr. SCELLE said that, in the light of Mr. Lauterpacht's explanations, he would accept the text, provided his amendment were adopted, and on condition that the words " procedure for " were inserted after the words " in the matter of ".

11. Mr. LAUTERPACHT accepted Mr. Scelle's amendments.

12. The CHAIRMAN said that the word " appeal " which had been translated into French by the word " *recours* ", might give rise to difficulties, since the latter expression and its Spanish equivalent " *recurso* " denoted a whole range of legal remedies, and was not so restrictive as the term " appeal ".

13. Mr. KERNO (Assistant Secretary-General) suggested that the difficulty be referred to the Standing Drafting Committee.

14. In answer to a question by Mr. YEPES, Mr. LAUTERPACHT said that he was using the word " revision " in its widest sense.

15. Mr. YEPES said that there was a variety of remedies which the parties might seek to obtain. For example, they might wish to stipulate in the *compromis* that a challenge of the validity of the award might be submitted to the International Court of Justice.

16. The CHAIRMAN suggested that Mr. Yepes' doubts might be allayed by the addition of the words " and other legal remedies " at the end of Mr. Lauterpacht's text.

17. Mr. KOZHEVNIKOV said that appeal and revision raised fundamental problems of principle. How, for example, was an appeal to be lodged and before what instance ? Would it require the additional consent of the other parties ? He did not think that a provision on such matters could be voted upon without mature consideration.

18. Mr. YEPES maintained that some provision must be inserted in article 12 that would enable one party to refer its challenge of an arbitral award to the International Court of Justice.

19. Mr. LAUTERPACHT pointed out that such an eventuality would be covered by the Chairman's proposed wording " and other legal remedies ". The present moment did not seem to him the appropriate time for detailed consideration of the distinction to be made between appeal and revision, a question which probably belonged properly to articles 38 to 41 of the special rapporteur's draft.

20. The CHAIRMAN said that he would put to the vote Mr. Lauterpacht's text with the amendments accepted by the author, the words " subject to articles 38 to 41 " being deleted pending the Commission's decision on those articles. The text would accordingly read :

" the time limits within which the award ought to be rendered, the form of the award and any power given to the Tribunal to make recommendations, and any special provisions in the matter of procedure for revision and other legal remedies ;"

That wording was adopted by 7 votes to 1, with 1 abstention.

Mr. Lauterpacht's proposal for an additional paragraph

21. The CHAIRMAN invited the Commission to consider Mr. Lauterpacht's proposal for the addition of a new paragraph to article 12, to read :

" the time limits and the order of the pleadings and of the communication of documents and other evidence ; provisions, in such detail as the parties may determine, of the nature and the manner of evidence submitted to the tribunal ; the allocation of costs and fees ; and the appointment of agents and counsel ;"

22. Mr. LAUTERPACHT deleted the words " the allocation of costs and fees " from his amendment, in view of the adoption of Mr. Zourek's proposal for an additional paragraph to article 12.[3]

23. Mr. YEPES proposed the deletion of the words " the time limits . . . and other evidence ".

24. Mr. LAUTERPACHT accepted Mr. Yepes' proposal.

Mr. Lauterpacht's text, as amended, was adopted by 8 votes to 2, with 1 abstention.

Mr. Lauterpacht's amendment to the introductory paragraph to article 12

25. The CHAIRMAN drew the attention of the Commission to Mr. Lauterpacht's amendment to the introductory paragraph to article 12, which amendment read :

" The treaty of arbitration or a special *compromis* to be concluded in pursuance thereof shall specify :"

26. Mr. LAUTERPACHT apologized for re-opening the discussion on the introductory paragraph to article 12, which had already been adopted.[4] He did so because it seemed to him that the Commission had

[3] See above, paras. 1 and 2.

[4] See summary record of the 144th meeting, paras. 1—33.

become entangled in a terminological confusion, which might render the whole draft incomprehensible, by speaking of the conclusion of a special *compromis* as if that were the only means of acceptance by the parties of the provisions enumerated in article 12. He wished to point out that, in the majority of cases, such provisions were included in the treaty of arbitration itself. To require the parties to sign an additional *compromis* in such cases would be wholly unnecessary and confusing. In his amendment, he had also tried to meet Mr. Scelle's view that, if there were no prior *compromis,* there was an obligation on the parties to conclude one.

27. Mr. HUDSON failed to see the purpose of Mr. Lauterpacht's amendment. How could a general treaty of arbitration specify the subject of a future dispute ?

28. Mr. LAUTERPACHT pointed out that treaties of arbitration fell into two categories, those concerning possible future disputes, which were therefore indeterminate, and those concluded for the settlement of a particular dispute.

29. Mr. AMADO said that, in the case of the first type, a special *compromis* was essential in order to safeguard what, in his view, was crucial to arbitration, namely, the freedom of the parties to choose their judges. Unless Mr. Lauterpacht could give a more convincing explanation of the necessity for his amendment, he would be compelled to abstain when it was put to the vote.

30. Mr. el-KHOURI also saw no necessity for Mr. Lauterpacht's amendment. Both kinds of treat to which he (Mr. Lauterpacht) had referred were covered in the introductory paragraph to article 12 already adopted by the Commission.

31. Mr. YEPES regretted that he could not support Mr. Lauterpacht's amendment, but he was unable to see what purpose it would serve. The text already adopted was clear, and faithfully reflected the intention of the Commission.

32. Mr. KOZHEVNIKOV remained unconvinced of the necessity for re-affirming a prior obligation, as was stipulated in the introductory paragraph already adopted.

33. Mr. HSU supported Mr. Lauterpacht's amendment, which had the advantage of eliminating certain unsatisfactory elements which occurred in the text already adopted, such as the words " shall sign a *compromis* ", and the weakening proviso concerning the re-affirmation of a prior obligation.

34. Mr. SCELLE suggested that the Commission was wasting its time unnecessarily. As it had reached fundamental agreement on the introductory paragraph to article 12, it might refer the two texts before it to the Standing Drafting Committee.

35. Mr. FRANÇOIS supported Mr. Scelle.

36. The CHAIRMAN, speaking in his personal capacity, said that he fully understood the reason why Mr. Lauterpacht was anxious to draw attention to the fact that, where a special treaty had been concluded for the submission of a dispute to arbitration, no special *compromis* would be necessary. He agreed that the text already adopted might give rise to doubts by giving the *impression* that a special *compromis* would always be necessary.

37. Mr. HUDSON proposed the following alternative wording for the text already adopted :

" Unless there is a treaty of arbitration which suffices for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify :".

38. Mr. LAUTERPACHT said that that wording would fully meet his point. He hoped that Mr. Hudson would now admit that his (Mr. Lauterpacht's) objections had not been purely of a drafting order, and that he had had valid grounds for attempting to eliminate the inherent contradiction in the wording of the preamble to article 12 as already adopted by the Commission.

39. Mr. SCELLE asked whether Mr. Hudson could agree to the substitution of the words " an obligation to arbitrate " for the words " a treaty of arbitration " since that obligation could result from an instrument other than a treaty of arbitration.

40. The CHAIRMAN suggested that Mr. Hudson's amendment be referred to the Standing Drafting Committee for consideration in the light of Mr. Scelle's remarks.

The Chairman's proposal was adopted by 8 votes to none.

Article 12, as a whole, and as amended, was adopted by 7 votes to none, with 4 abstentions.[5]

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[5] Article 12, as tentatively adopted, read as follows :

" The parties having recourse to arbitration shall sign a *compromis* in which, after having reaffirmed their obligation previously undertaken, or affirmed their common desire to submit the dispute between them to arbitration, they shall specify in particular :

(*a*) the subject of the dispute, defined precisely and as clearly as possible ;

(*b*) the choice of arbitrators, if the tribunal has not already been constituted ;

(*c*) the procedure to be followed or the authority conferred on the tribunal to establish its own procedure ;

(*d*) without prejudice to the provisions of Article 9, paragraph 3, if the tribunal has several members, the number of members constituting a quorum for the conduct of the proceedings ;

(*e*) without prejudice to the provisions of article 9, paragraph 3, the number of members constituting the majority required for a judgment of the tribunal ;

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

(*g*) the time limits within which the award ought to be rendered, the form of the award and any power given to the Tribunal to make recommendations, and any special provisions in the matter of procedure for revision and other legal remedies ;

(*h*) the place where the tribunal shall meet and the date of its first meeting ;

ARTICLE 15 [6]

41. The CHAIRMAN invited the Commission to consider article 15 in the special rapporteur's draft (Annex to document A/CN.4/46).

42. Mr. SCELLE said that the purpose of the article was self-evident.

43. Mr. FRANÇOIS proposed the deletion of article 15, which seemed to him entirely superfluous.

44. Mr. AMADO and Mr. LAUTERPACHT supported Mr. François' proposal.

45. Mr. SCELLE said that he would have no objection to the deletion of article 15.

Mr. François' proposal that article 15 be deleted was adopted by 7 votes to none, with 1 abstention.

ARTICLE 16 [7]

46. Mr. HUDSON pointed out that the terms " claimant " and " respondent " had not been used before in the draft, and would need clarification. He also had doubts about the substance of article 16. The rule in the International Court of Justice was that discontinuance of proceedings by one party could be accepted by the tribunal without the other party's consent, provided the latter had up to that time taken no step in the proceedings ; once it had taken some step, its — at least tacit — consent was required. In his view, that distinction should be preserved.

47. Mr. el-KHOURY felt that the parallel with the International Court of Justice was not valid. In the case of arbitration both parties had agreed to have recourse to a certain procedure, and it was logical that the consent of both should be required before that procedure could be discontinued. On the other hand, he agreed with Mr. Hudson that the use of the terms " claimant " and " respondent " was inappropriate in referring to arbitration.

48. Mr. AMADO fully agreed with the substance of article 16.

49. The CHAIRMAN suggested that it be left to the Standing Drafting Committee to find appropriate substitutes for the terms " claimant " and " respondent ".

On that understanding, article 16 was adopted by 8 votes to 2, with one abstention.

ARTICLE 17 [8]

50. Mr. LAUTERPACHT proposed the deletion of the second sentence from article 17.

51. Mr. SCELLE said that he could accept that proposal, since the sentence in question did not essentially affect the arbitration procedure he was trying to crystallize.

52. Mr. KERNO (Assistant Secretary-General) pointed out that Article 103 of the Charter already provided that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail.

Mr. Lauterpacht's proposal was unanimously adopted.

Article 17 was adopted, as amended, by 9 votes to none.

ARTICLE 18 [9]

53. Mr. LAUTERPACHT proposed that the words " after verifying its good faith and validity " be deleted, and that a new sentence be added reading :

" At the request of the parties it shall embody the settlement in an agreed award."

54. There was no need for him to comment on the deletion he proposed, but the sentence which he proposed be added was in accordance with normal practice in several countries, where the agreement reached by the parties was given added authority by being embodied by the tribunal in what was known as an " agreed award ".

55. Mr. SCELLE said that he could agree to the sentence which Mr. Lauterpacht proposed be added to article 18, but that the tribunal could not be asked to confer its authority on a settlement which it had not been given an opportunity of scrutinizing, at least to the extent of ensuring that it did constitute a real settlement of the dispute and did not conflict with the rights of third parties affected by it.

56. It must be borne in mind that the settlement referred to in article 18 was of a special kind ; it was

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(*i*) the languages to be employed in the proceedings before the tribunal ;

(*j*) the way in which the costs and expenses shall be derived ;

(*k*) provisions, in such detail as the parties may determine, of the nature and the manner of evidence submitted to the tribunal, and the appointment of agents and counsel."

Alternative text of preamble referred to Standing Drafting Committee :

" Unless there is a treaty of arbitration which suffices for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify : ".

[6] Article 15 read as follows :

" Once the tribunal has received the submissions of the parties, it must continue the proceedings until an award is made."

[7] Article 16 read as follows :

" Discontinuance of proceedings by the claimant may not be accepted by the tribunal without the respondent's consent."

[8] Article 17 read as follows :

" If the case is withdrawn from the tribunal by agreement between the two parties, the tribunal shall take note of the fact. Such withdrawal shall be without prejudice to the provisions of Chapter VI of the United Nations Charter, and in particular of Articles 33 and 36."

[9] Article 18 read as follows :

" The tribunal shall take note of the conclusion of a settlement between the parties, after verifying its good faith and validity."

a final settlement, binding on the parties. The tribunal was not merely the servant of the parties; it also represented the common interest of the international community.

57. Mr. AMADO felt that Mr. Scelle was attempting to be too perfectionist. He would ask the English-speaking members of the Commission, however, whether the phrase " settlement between the parties " was an accurate translation of " *transaction d'expédient* ".

58. Mr. SCELLE felt that Mr. Amado's question was extremely pertinent. He wondered, in fact, whether Anglo-Saxon law provided for a " *transaction d'expédient* ", meaning an agreement between the parties which was given the force of law by the tribunal's approving it.

59. Mr. LAUTERPACHT said that " settlement between the parties " was a term which had a clear and definite meaning. Whether that meaning was exactly the same as what was meant in French by " *transaction d'expédient* ", he could not say.

60. Mr. KOZHEVNIKOV said that article 18 again raised the general question of the nature of the arbitral award, and that he therefore felt obliged to restate his general views on the subject.

61. Article 18 clearly reflected the general trend of Mr. Scelle's draft, which appeared to be based on the curious assumption that one, at least, of the parties would be acting in bad faith. If that assumption were accepted, it followed that a certain procedure would have to be imposed on the parties, but to do so would be contrary to their sovereign rights and would make the tribunal a supra-national body whose powers might well extend to interference in the domestic affairs of sovereign States. Such a trend ran counter to the basic principles of international law.

62. It was surely a fundamental axiom of arbitration that the tribunal was made for the parties, and not the parties for the tribunal.

63. Article 18 clearly reflected the excessively dogmatic nature of Mr. Scelle's draft as a whole. The bad faith of the parties could not be taken as a basis for drawing up arbitration procedure. He therefore supported Mr. Lauterpacht's proposal that the words " after verifying its good faith and validity " be deleted.

64. Mr. AMADO pointed out that the English words " its good faith " were a mistranslation of the French words " *le caractère certain* ".

65. Mr. FRANÇOIS pointed out that the English text of article 18 contained another error in translation, in that the words " *le cas échéant* " had not been translated; they might be rendered in English by replacing " shall " by " may ". Those words surely made the last clause of article 18 superfluous.

66. Mr. SCELLE feared that there was a basic difference of opinion on the substance of article 18. He had agreed to the deletion of article 15 because he had thought it went without saying. If the idea was that, in the event of the parties concluding a settlement, the tribunal need have nothing further to do, he must resolutely oppose that idea, which was quite contrary to the basic purpose of his draft.

Further discussion of article 18 was deferred.

The meeting rose at 11.45 a.m.

147th MEETING

Friday, 20 June 1952, at 9.45 a.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33, A/CN.4/L.33/Add.1) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46) contained in the special rapporteur's Second Report.

ARTICLE 18 (*continued*)

2. Mr. ZOUREK supported the first part of the amendment[1] proposed by Mr. Lauterpacht and seconded by Mr. Kozhevnikov at the previous meeting, which envisaged the deletion of the words " after verifying its good faith and validity ". It appeared that that phrase was somewhat in contradiction with the substance of article 17. If a case could be withdrawn from the tribunal by agreement between the parties, why should a different procedure be provided for in the case of the

[1] See summary record of the 146th meeting, para. 53.