

Document:-
A/CN.4/L.33/Add.1

**Articles Tentatively Adopted as of 13 June 1952 - incorporated in the summary records of the
140th to 142nd meetings**

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1952, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

60. Mr. el-KHOURI said that article 5 clearly did not mean that when the arbitrator or members of the tribunal had already been appointed the parties could act in whatever manner they deemed most appropriate, but that they could do so in cases where the arbitrator or tribunal were appointed by mutual agreement. All ambiguity would be removed if the words "to be" were inserted after the words "the arbitral tribunal are".

61. Mr. LIANG (Secretary to the Commission) said that there were four possibilities to be envisaged under paragraph 5: a judicial body, a sole arbitrator, an *ad hoc* tribunal, or an already existing arbitral body, such as a general claims commission.

62. Mr. SCELLE believed that a distinction must be made between arbitral awards and judicial settlements. An arbitrator or an arbitral tribunal had slightly more freedom than a court of justice. Some jurists made a distinction between the principles of *praeter legem* and *contra legem*, and considered that an arbitrator or an arbitral tribunal could act *praeter legem*, though not against the law. That was one of the reasons for maintaining the Permanent Court of Arbitration alongside the International Court of Justice. If the former did not have a greater latitude than the latter in deciding cases, there would be no point whatsoever in maintaining two international judicial organs that would otherwise have precisely the same competence. He admitted that the International Court of Justice could not go outside the law unless it was authorized to do so by the parties.

63. Mr. YEPES proposed that the text of article 5 be replaced by the following words:

"In appointing the arbitrator or members of the arbitral tribunal the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator or to a tribunal constituted as they think fit."

64. Mr. LIANG (Secretary to the Commission) pointed out that the examples quoted by Mr. Scelle all came under the heading of tribunals constituted as the parties thought fit. When the *Cour de cassation* had been asked to act as arbitrator, it had done so as an arbitral tribunal and not as a court. The International Court of Justice, however, had to proceed in accordance with its Statute, and could not go beyond the provisions of that instrument. He was therefore uncertain whether it was within its competence to decide cases otherwise than in accordance with those provisions.

65. The CHAIRMAN observed that it was desirable that article 5 should be drafted in such a way as not to exclude either the Permanent Court of Arbitration or a pre-established tribunal of the kind mentioned by the Secretary.

66. Mr. KERNO (Assistant Secretary-General) suggested that some of the difficulties mentioned in the discussion might be disposed of if the word "appointed" were substituted for the word "constituted" in the final phrase of article 5.

67. Mr. AMADO accepted Mr. Yepes' text, which respected the freedom of choice of the parties in selecting the arbitrator or arbitral tribunal.

The meeting rose at 1 p.m.

140th MEETING

Wednesday, 11 June 1952, at 9.45 a.m.

CONTENTS

	Page
Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) (<i>continued</i>)	
Article 4 (<i>resumed from the 139th meeting</i>) . . .	18
Article 5 (<i>resumed from the 139th meeting</i>) . . .	20
Article 6	20
Article 7	22

Chairman: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, 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) (*continued*)

ARTICLE 4 (*resumed from the 139th meeting*)

1. The CHAIRMAN invited the Commission to consider the amendments proposed by Mr. Yepes and Mr. Lauterpacht to the text of paragraph 1 of article 23 of the Revised General Act for the Pacific Settlement of International Disputes¹ which had been proposed for the incorporation in article 4 of the second Preliminary Draft on Arbitration Procedure annexed to the second report of the special rapporteur (A/CN.4/46). Mr. Yepes' amendment consisted in substituting the words "as provided in article 3 above" for the words "from the date on which one of the parties requested the other party to constitute an arbitral tribunal". Mr. Lauterpacht's amendment sought to insert the words "or the decision of the International Court of Justice taken in conformity with article 2, paragraph 1 above" after the words "to constitute an arbitral tribunal". It was understood that the text of article 4 would begin with an introductory clause as he (the Chairman) had suggested at the preceding meeting.

¹ See summary record of the 139th meeting, paras. 24—40. For the text of article 23, see *United Nations Treaty Series*, vol. 71, p. 115.

2. Mr. YEPES observed that the sense of his amendment was precisely the same as that of Mr. Lauterpacht's, but it was phrased more simply.

3. Mr. SCELLE said that either of the two amendments would be acceptable to him.

4. Mr. LAUTERPACHT said that in that case he would withdraw his own amendment in favour of that submitted by Mr. Yepes.

Mr. Yepes' amendment was adopted.

5. Mr. KOZHEVNIKOV reminded the Commission that at the preceding meeting he had proposed that the words "by mutual agreement" be inserted after the words "shall have the right" in the original text of article 4.

6. Replying to the CHAIRMAN, Mr. LIANG (Secretary to the Commission) said that the adoption of Mr. Yepes' text did not preclude consideration of Mr. Kozhevnikov's amendment, since the latter related to the opening words, namely: "If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the following procedure", of article 4 in the special rapporteur's text slightly amended, which was to serve as an introduction to the text of article 23 of the Revised General Act.

7. Mr. SCELLE recalled that he had explained at the preceding meeting why he was unable to support Mr. Kozhevnikov's amendment.

Mr. Kozhevnikov's amendment was rejected by 6 votes to 2.

8. Mr. ZOUREK observed that article 4 was based on the judicial theory of arbitration. There were, however, partisans of the contractual theory of arbitration, who believed that the competence of the arbitrator or arbitral tribunal derived from the agreement of the parties. He had opposed article 2 of the special rapporteur's draft procedure because it implied the transformation of arbitral tribunals into courts of justice, and would thus undermine the whole contractual principle of arbitration, which was gaining ground in commercial arbitration.

9. For those reasons it would be difficult for him to accept a provision whereby, in cases where the parties failed to agree, a third authority, chosen solely by one alone of the parties to the dispute, would be asked to make the necessary appointments. Some other method analogous to the system envisaged in article 45 of the 1907 Hague Convention for the Pacific Settlement of International Disputes should, in his view, be found, that was, one which would not conflict with the contractual theory of arbitration.

10. Mr. LAUTERPACHT said that if Mr. Zourek could formulate a concrete proposal to give effect to his contentions he should be given time to do so. The Commission must give due consideration to any suggestion which might help to make arbitration more effective.

11. Mr. SCELLE considered Mr. Zourek's attitude to

be out of date. He could not agree that the contractual theory was gaining ground in commercial arbitration. The rules of the International Chamber of Commerce on conciliation arbitration were more stringent than those for international arbitration that he had proposed in his own text.

12. Mr. LAUTERPACHT agreed that the import of Mr. Kozhevnikov's amendment, just rejected, was purely negative and inherently in contradiction with the remainder of article 4. He had felt, however, that Mr. Zourek was prepared to go a little further and had envisaged the possibility of submitting a somewhat more constructive proposal.

13. Mr. KERNO (Assistant Secretary-General) said that the difference of opinion between Mr. Zourek and Mr. Scelle might not be so great as appeared at first sight, since the principle of mutual agreement underlay the whole of the special rapporteur's draft. If the final instrument took the form of an international convention, the provisions would be binding only on the contracting parties, each of which would have agreed in advance to accept certain procedures. Thus, the contractual principle was fundamental to the draft under consideration.

14. The CHAIRMAN put to the vote the three paragraphs of article 23 of the Revised General Act for the Pacific Settlement of International Disputes for incorporation in article 4.

Paragraph 1, as amended by Mr. Yepes, was adopted by 7 votes to 2.

Paragraph 2 was adopted by 7 votes to 1, with 1 abstention.

Paragraph 3 was adopted by 7 votes to 2.

15. Mr. LAUTERPACHT asked for a ruling whether Mr. Zourek would be given an opportunity of presenting an alternative text for article 4.

16. The CHAIRMAN replied that it was open to any member of the Commission to propose the reconsideration of any article.²

² Article 4, as tentatively adopted, read as follows:

"If the parties are unable to agree on the constitution of a tribunal, each of them shall have the right to resort to the following procedure:

"1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months as provided in article 3 above, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments.

"2. If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen.

"3. If, within a period of three months, the two Powers so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a subject of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointments shall be made by the oldest member of the Court who is not a subject of either party."

ARTICLE 5 (resumed from the 139th meeting)

17. Mr. YEPES, introducing his amendment, which sought to substitute the following text for article 5 :

“In appointing the arbitrator or members of the arbitral tribunal, the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator or to a tribunal constituted as they think fit”,

said that his purpose was to simplify the original wording and to eliminate all the possible difficulties that had been mentioned at the preceding meeting. He believed that his wording “to a single arbitrator or to a tribunal constituted as they think fit” would cover all possible contingencies.

18. Mr. AMADO, Mr. LAUTERPACHT, Mr. SCELLE and Mr. ZOUREK supported Mr. Yepes' amendment.

19. Mr. KERNO (Assistant Secretary-General) said that as the draft adopted by the Commission would be circulated to governments together with comments, Mr. Yepes' broad interpretation of his text would be made clear in the comments.

20. The CHAIRMAN suggested that the words “chosen or” should be inserted before the words “constituted as they think fit” ; otherwise the provision might be interpreted as being restricted to *ad hoc* tribunals and as excluding existing bodies such as the Permanent Court of Arbitration.

21. Mr. YEPES accepted the Chairman's suggestion.

22. Mr. SCELLE said that Mr. Yepes' text would have been acceptable to him, but he agreed that it was considerably improved by the Chairman's amendment.

23. He understood the reasons for Mr. Lauterpacht's doubts, expressed at the preceding meeting, whether the International Court of Justice could act as an arbitrator, but believed that the parties were free to request it to do so and to render judgment *ex aequo et bono*. At all events, if the Court did not regard itself as competent to deal with such cases it could refuse to do so. The wide scope of Mr. Yepes' text, as amended by the Chairman, provided for every possible eventuality.

24. Mr. el-KHOURI did not believe that there was any need to substitute an alternative text for the original draft of article 5. Any possible ambiguity in the wording of the latter could be removed by inserting the words “to be” between the words “tribunal are” and the words “appointed by mutual agreement”.

25. Mr. AMADO considered the Chairman's amendment to be unnecessary. Mr. Yepes' text was perfectly satisfactory as it stood.

26. Mr. SCELLE pointed out that there was no reason why the parties should not select an existing body to act as an arbitral tribunal. That possibility was not provided for in Mr. Yepes' original text, which spoke of a tribunal *constituted* as the parties thought fit.

27. Mr. LAUTERPACHT said that Mr. Yepes' text was acceptable to him either with or without the Chairman's amendment, but he wished to make it very clear that he personally did not visualize the International Court of Justice being asked to act in the capacity of an arbitral tribunal.

28. Mr. HSU said that if the majority of the Commission felt Mr. Yepes' text to be adequate, he would not oppose it ; but he wondered whether it brought out as clearly as did the special rapporteur's text for article 5 the fundamental principle of the freedom of the parties to choose the arbitrator or arbitral tribunal. He saw no objection to emphasizing that principle more forcibly.

29. The CHAIRMAN suggested that the consideration mentioned by Mr. Hsu should be referred to the Standing Drafting Committee to be set up.

It was so agreed.

30. The CHAIRMAN put to the vote Mr. Yepes' text for article 5, amended by the insertion of the words “chosen or” before the words “constituted as they think fit”.

Mr. Yepes' text, as amended, was adopted by 8 votes to none, with 2 abstentions.

ARTICLE 6³

31. Mr. FRANÇOIS said that article 6 should make clear whether nationals of the parties to a dispute could be chosen to sit on the arbitral tribunal. He was personally in favour of that being possible, and could then agree that the tribunal should consist of five judges. If that were not to be the case, however, the tribunal should be reduced to three. He would accordingly suggest that a fourth recommendation be added to article 6 specifying that the tribunal should include one arbitrator from each State party to the dispute.

32. Mr. el-KHOURI considered that article 6 was redundant, since it was unnecessary to make stipulations concerning the choice of arbitrators if the composition of the tribunal had to be decided by mutual agreement between the parties.

33. Mr. SCELLE said, in reply to Mr. François, that it was most unlikely, desirable though it would be, that parties would refrain from selecting arbitrators from among their own nationals. As Judge Loder, the First President of the Permanent Court of International

³ Article 6 read as follows :

“Nevertheless, generally speaking, and having due regard to the circumstances of the case, it is recommended in the light of experience : (a) that the persons chosen as arbitrators should possess the qualifications set forth in Article 2 of the Statute of the ICJ ; (b) that the sole arbitrator or the majority of the arbitrators should be chosen from among the nationals of States having no special interest in the case ; and (c) that the tribunal should have an odd number of judges, preferably five, and that it should be presided over by one of the neutral judges.”

Justice, had declared in another connexion, the presence of judges who were nationals of a party to a dispute was a concession to human frailty. Great progress would indeed have been made if parties could be persuaded not to insist on the appointment of their own nationals. He would therefore deplore the addition of a provision such as that suggested by Mr. François. It might, for example, prevent States from requesting the International Law Commission itself to act as arbitrator.

34. Mr. LAUTERPACHT said that the remarks of Mr. Scelle and Mr. el-Khoury encouraged him to express his doubts concerning article 6, which was clearly not intended to impose legal obligations, but merely constituted a series of recommendations. He doubted whether it was advisable to include optional recommendations, which might or might not be accepted, in international instruments intended to impose binding obligations. He was aware that precedents for doing so existed, for example, Article 6 of the Statute of the International Court of Justice, but, as was well known, that article had remained a dead letter. He feared that the insertion of such recommendations in instruments having the character of a treaty would do nothing to enhance the authority of international law or the integrity of international conventions.

35. He had no objection in principle to the recommendations contained in article 6 of the special rapporteur's draft, but believed that such matters might be left to the good will of the parties concerned. If, however, Mr. Scelle insisted on the retention of that article, it might be better to cast it in a slightly different form. For example, the words "it is recommended" might be replaced by the words "it is desirable", and the phrase "in the light of experience" might be omitted altogether, since it was inappropriate to include in an international convention reasons for its provisions. All were obviously the result of experience.

36. Mr. FRANÇOIS said that unless article 6 was made more explicit, he too would be in favour of its being deleted in its entirety.

37. Mr. SCELLE pointed out that article 22 of the Revised General Act was much more imperative, and went a great deal further than his own text, which he had been careful to phrase more liberally.

38. Mr. LIANG (Secretary to the Commission) said that the introductory sentence to article 6 was perhaps somewhat unorthodox, but pointed out that it had not yet been decided whether the Commission's text was to take the form of a draft convention.

39. If, however, it was found desirable to retain article 6, its recommendations could be included in the commentary which would accompany the draft articles adopted by the Commission.

40. As to the substance, the article might perhaps be redrafted to conform with the provisions of Article 9 of the Statute of the International Court of Justice, namely, that the main forms of civilization and the

principal legal systems of the world should be represented in the Court.

41. Mr. LAUTERPACHT said that he was anxious that he should not be misunderstood. He fully supported the intention of article 6, and warmly endorsed Mr. Scelle's desire to contribute towards the development of international law by encouraging parties to a dispute to select as arbitrators persons from other States, but was uncertain whether that purpose would in fact be served by article 6 as at present conceived. For instance, recommendations (a) and (b) were optional in the special rapporteur's draft, whereas the parallel provisions in the Statute of the International Court of Justice and in the Revised General Act respectively were legally binding. He would ask, with all respect, whether article 6 really represented an advance. Accordingly, he would only be prepared to vote for it if it were cast in the form of a definite legal obligation in conformity with the afore-mentioned instruments.

42. Mr. SCELLE thanked Mr. Lauterpacht for his very pertinent observations, which he was quite prepared to act upon.

43. He could not agree with the Secretary, however, that Article 9 of the Statute of the International Court of Justice should be taken as a model for the recasting of article 6, since Article 9 referred to the representation of the main forms of civilization and of the principal legal systems of the world, considerations which had nothing whatever to do with the constitution of arbitral tribunals. Article 2 of the Statute of the International Court would be a far more suitable model and, if it were the Commission's wish, he would be prepared to redraft article 6 in similar form.

44. Mr. HSU agreed that the provisions of article 6 should be made obligatory. Mr. Lauterpacht's argument that, where possible, optional recommendations should not be included in international instruments was perfectly sound.

45. Mr. AMADO was categorically opposed to article 6. He did not propose to elaborate his views on the development of international law, but would confine himself to saying that such recommendations as were embodied in that article would not contribute to it. Nor did he see the utility of raising such, to his mind, superfluous recommendations to the status of legal obligations. He was strongly opposed to affirmations of high-flown principles which bore very little relation to reality, a fault which was very much in evidence in the Revised General Act, the adoption of which by the General Assembly had been deferred for one year as a result of his intervention. He deplored the idealistic academic approach from which that instrument suffered.

46. Arbitration was quite distinct from judicial settlement, and the two must be kept separate; that was the only way in which progress could be made.

47. Mr. YEPES was in favour of recasting article 6 of the special rapporteur's draft, which he considered

should be maintained in the form proposed by Mr. Lauterpacht. He was particularly in favour of that being done because of the paramount importance he attached to recommendation (a), which would ensure that arbitration was lifted out of the political plane and protected from political influences. He welcomed the fact that the special rapporteur had not fallen into the error of the American Treaty on Pacific Settlement of 1948 (Pact of Bogotá) which, in article XLI, empowered the parties to select as a single arbiter a Head of State, a trend that he deplored, since it placed arbitral procedure at the mercy of political considerations.

48. The CHAIRMAN said he would first put to the vote the amendment farthest removed from the original text, namely, the proposal by Mr. el-Khouri that article 6 should be deleted in its entirety.

The proposal that article 6 be deleted in its entirety was carried by 6 votes to 4.

49. Mr. SCELLE expressed his regret at the rejection of article 6, which meant that the Commission had reversed its earlier decision on that issue. The result of the vote might perhaps have been different had all members of the Commission been present. If the Commission persisted in reversing its own decisions, it would be very difficult for rapporteurs to divine its intentions.

50. Mr. HSU pointed out that the Commission had only voted against retention of the text of article 6 as set forth in document A/CN.4/46. There was nothing in that decision to prevent it from adopting a text of an obligatory nature if it so wished.

51. Mr. KERNO (Assistant Secretary-General) said that in his view the important point in article 6 was that contained in recommendation (a). If a new proposal were made, therefore, he suggested that it be limited to the substance of that recommendation: such a proposal might replace article 6, or, alternatively, form part of the commentary on the Commission's draft.

52. Mr. ZOUREK noted that the Commission had already decided, in article 5, that when the tribunal was set up by agreement between the parties they would be free to choose or constitute it as they thought fit. It would appear to be contrary to that provision to make it binding on them to conform with the criteria proposed in article 6. The Commission should therefore respect the decision it had just taken, and pass on to consideration of article 7.

53. Mr. el-KHOURI, agreeing, pointed out that the two parties might disagree on whether a person nominated as arbitrator did in fact possess the qualifications set forth in Article 2 of the Statute of the International Court of Justice. What body was to resolve that disagreement? And what body was to enforce such a provision if it were made obligatory? In the case of the judges of the International Court of Justice, it was envisaged that the General Assembly should play that

role, but in the case of arbitral tribunals there would be no higher authority suitable for the purpose.

54. Mr. SCELLE could not agree with Mr. el-Khouri's reasoning. Nine-tenths of the rules of international law relied for their implementation only on the good faith of the parties, and were unsupported either by any separate higher authority or by the threat of sanctions.

55. The CHAIRMAN accepted the procedural point made by Mr. Hsu, and said that if any proposal were submitted incorporating part or the whole of the provisions of article 6 in obligatory form, he would accept it for submission to the Commission.

56. Mr. YEPES said that he would submit such a proposal in due course.

ARTICLE 7⁴

57. Mr. KOZHEVNIKOV proposed the deletion of the words "or by the subsidiary procedures indicated above".

58. Mr. YEPES proposed that in that event the words "by agreement between the parties" should be deleted also.

59. Mr. FRANÇOIS pointed out that article 7 should be read in conjunction with article 9, which provided that "An arbitrator may not withdraw or be withdrawn by the government which has appointed him. . . ." He could agree that the arbitrators who really were chosen by common agreement, that was to say, those chosen from among nationals of States which had no special interest in the case, should not be allowed to withdraw or to be replaced once the proceedings had started. The "national arbitrators" would, however, be in a different position. They would be appointed by their respective governments, and not by common agreement between the parties, although he had noted that in his report, Mr. Scelle had referred to all the arbitrators as being appointed by common agreement. "National arbitrators" were, however, as he had just said, in a different position from the other arbitrators, and he saw no reason why it should not be possible for them to withdraw or to be replaced.

60. Mr. SCELLE said that when the *compromis* was being concluded, one party could object to the "national arbitrator" chosen by the other, so that it was perfectly permissible to say, as he had, that all the arbitrators were chosen by common agreement, although admittedly in the case of some of them, such agreement might be tacit. It was of the very essence of his proposals that the tribunal should be an *independent* and truly

⁴ Article 7 read as follows:

"Once the arbitral tribunal has been set up by agreement between the parties or by the subsidiary procedure indicated above, it shall not be open to any of the contending Governments to alter its composition.

"If a vacancy occurs, for reasons beyond the control of those Governments, the arbitrator shall be replaced by the method laid down for appointments."

international body, jointly constituted and immutable in all its parts. The unfortunate outcome of failure to respect that principle in the past could be clearly seen, for example, in the case of the Hungarian Optants.⁵ He realized that Mr. François had behind him the weight of tradition and of confirmed habits of thought, but in his (Mr. Scelle's) view, it was essential to break with tradition in the present issue.

61. The whole question was connected with the law of treaties. He considered that each individual treaty brought into being an international system which constituted a legal entity and did not require any further sanction or support other than what was inherent in itself. He therefore attached great importance to the principle that the so-called "national arbitrators", once appointed, became members of an independent "international" tribunal, and could not be replaced or withdrawn until the task of that tribunal had been completed.

62. Mr. LAUTERPACHT said that, generally speaking, he was in full agreement with Mr. Scelle, although he thought the latter was unnecessarily complicating his case by maintaining that all arbitrators were in effect appointed by common agreement. He understood Mr. Scelle's reasoning, but such a logical refinement hardly corresponded with prevailing practice. The fact that one party could object to the national arbitrator chosen by the other was not equivalent to the tribunal's being chosen by common agreement.

63. He thought that it was essential to the very nature of arbitration, and in accordance with present practice, that a contending government should not be able to withdraw the arbitrator it had appointed, either because it did not favour the particular line he was pursuing or for some other reason, once the proceedings had begun. Otherwise, to mention only a few practical disadvantages, national arbitrators would have to remain in constant contact with the governments which had appointed them, and would enjoy no security of tenure of their offices.

64. Mr. el-KHOURI said that from his experience both of international arbitration and of arbitration within a State, he could say that one of the most frequent causes of its breaking down was that one party dismissed the arbitrator it had appointed, or caused him to withdraw, if the case appeared to be going against it. He therefore considered it essential to stipulate that, once the tribunal had been constituted, none of the arbitrators could withdraw or be withdrawn until the case had been completed. He therefore supported article 7 in its present form.

65. Mr. KOZHEVNIKOV proposed that the words "it shall not be open to any of the contending governments to alter its composition" be amended to read "it is recommended that none of the contending governments alter its composition", so as to avoid

conflict with the principle of national sovereignty as a fundamental principle of international law.

66. Mr. ZOUREK felt that the text proposed by the special rapporteur was too categorical, for in practice it was possible for the parties to a dispute before the International Court of Justice to change the judges appointed by them under Article 31, paragraphs 2 and 3, of the Court's Statute. He did not believe that that right could be denied absolutely in arbitration procedure.

67. The case of the Hungarian Optants had been mentioned, but detailed analysis of that case showed that there had been an excess of jurisdiction on the part of the Mixed Arbitral Tribunal. That Tribunal had in fact pronounced that, in virtue of article 250 of the Treaty of Trianon, it was competent in respect of agrarian reform laws, which in no wise constituted an act of seizure or liquidation falling within the Tribunal's jurisdiction as had been asserted by the Hungarian Optants. Subsequently, it had been generally recognized that there had been an excess of jurisdiction. Now, if the tribunal set up by the parties to the dispute to decide what was the law — to settle the dispute — began by violating a standard which was the sole source of its jurisdiction, or, in other words, by exceeding the limits of its jurisdiction as set forth in the *compromis* or, as in the case at present under discussion, in another legal text, the withdrawal of the arbitrator became a legitimate defensive measure by which the State victim of a manifest excess of jurisdiction attempted to repel the injustice with which it was threatened. It must not be forgotten that, by its very definition, arbitration was based on the will of the parties. Hence, the possibility of an excess of jurisdiction occurring should be provided for in the rules of arbitration procedure. Even if the Commission were to adopt the rigid text under consideration, a government which found itself confronted by a manifest excess of jurisdiction would not hesitate to have recourse to the defensive measures he had mentioned.

68. Mr. FRANÇOIS pointed out that in some cases a tribunal was set up to deal not with one particular case, but with any cases which might arise out of what might be a comprehensive treaty. Under the special rapporteur's proposal, it would be impossible to change an arbitrator, even though his competence might extend to only one of the fields covered by that treaty.

69. Mr. SCELLE agreed that the text proposed by him referred only to tribunals set up to arbitrate in one particular case, and that some amendment might be necessary to meet the point raised by Mr. François.

70. Mr. LAUTERPACHT suggested that, in order to cover that point and the contingency, arising out of Mr. Zourek's statement, that if both parties for any reason agreed that the composition of the tribunal should be altered it would be in accordance with the principles of arbitration to permit them to alter it, the text proposed by Mr. Scelle might be amended to read as follows :

⁵ See Francis Deák, *The Hungarian-Rumanian Land Dispute* (New York, Columbia University Press, 1928).

“Except by common agreement it shall not be open to the parties to alter the composition of the tribunal subsequent to the commencement of the proceedings in any particular case.”

71. The CHAIRMAN stated that as Mr. Kozhevnikov's proposal to turn the first sentence of article 7 into a recommendation was the most far-reaching, he would put it to the vote first.

Mr. Kozhevnikov's proposal to replace the words "it shall not be open to any of the contending governments to alter" by the words "it is recommended that none of the contending governments alter" was rejected by 6 votes to 2, with 1 abstention.

72. The CHAIRMAN then put to the vote Mr. Kozhevnikov's proposal that the words "or by the subsidiary procedures indicated above" be deleted.

That proposal was adopted by 5 votes to 3.

73. Mr. AMADO, explaining his vote, said that the words "or by the subsidiary procedures indicated above" were not sufficiently clear. There seemed good reason why that phrase and the one preceding it should both be deleted.

74. Mr. SCELLE pointed out that, now that Mr. Kozhevnikov's proposal had been adopted, article 7 would contradict the preceding articles unless Mr. Yepes' proposal that the words "by agreement between the parties" be deleted was also adopted.

75. Mr. el-KHOURI said that his vote in favour of Mr. Kozhevnikov's proposal to delete the words "or by the subsidiary procedures indicated above" was conditional on Mr. Yepes' proposal being adopted.

Mr. Yepes' proposal that the words "by agreement between the parties" be deleted was adopted by 8 votes to none, with 2 abstentions.

76. Mr. FRANÇOIS expressed support for the text proposed by Mr. Lauterpacht.

77. Mr. SCELLE pointed out that under Mr. Lauterpacht's proposal the parties, if in agreement, would be free to change not only the arbitrators appointed by them, but also those appointed by a third party, for example, by the International Court of Justice. In his view, they should not be able to do that.

78. Mr. LAUTERPACHT did not agree with Mr. Scelle. The only ground on which a third party could intervene in the constitution of the tribunal was that the parties had been unable to agree on its constitution. If they could subsequently reach agreement on its composition being changed, he did not see that it would be derogatory to the International Court of Justice or any other third party to permit them to do so.

79. Mr. SCELLE felt that Mr. Lauterpacht's arguments were debatable, in that they envisaged the objectivity and good faith of the parties. But both parties might regard it as more likely to be to their interest if a dispute was not judged on purely legal grounds. For that reason, they might well agree on an arbitrator

whom each thought would be more amenable to political influence than would the impartial and highly authoritative arbitrator appointed by a third party. If the arbitral tribunal were to stand above the parties as an independent authority, it must not be open to the parties to change its neutral members, even by mutual agreement.

80. He did not attach the same importance to the principle that the parties should not be able to replace their "national arbitrators", and understood the difficulties indicated by Mr. François in that respect. He would, however, regret any departure from the principle of the immutability of the tribunal as a whole.

81. Mr. AMADO stated that, as was made clear in article 37 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, what distinguished arbitration from conciliation and other means of peaceful settlement was that it was based on respect for the law. Therein lay its historical significance. In resorting to arbitration, governments agreed to submit their differences to the rule of law. It was therefore not correct to proceed from the standpoint that governments which resorted to arbitration would indulge in all kinds of trickery and bad faith.

82. Mr. SCELLE said that he was not attacking governments, but merely wished to point out that if they suspected that the strict application of the law might not be favourable to them, they would, by their very functions, be bound to attempt to interfere with it, resting as they did on the support of political parties whose policy was dictated by national interests. It was therefore impossible for governments to be really objective in a dispute to which they were a party. As had been pointed out, the whole aim of his report was to remove arbitration from the sphere of politics. Mr. Lauterpacht's proposal would work in exactly the opposite direction.

83. Mr. YEPES was regretfully compelled to disagree with Mr. Scelle on the point under discussion. As Mr. Lauterpacht had pointed out, agreement between the parties was one of the basic principles underlying arbitration procedure.

84. Mr. el-KHOURI said that in his view any effort to alter the composition of the tribunal set up by a third party would be very little different from an attempt to circumvent the arbitral award: in both cases the assistance of a third party would have been requested; if its decision was set aside, the procedure would have to be begun anew.

85. He pointed out, however, that article 9 provided that an arbitrator might not withdraw or be withdrawn by the government which had appointed him, *save in exceptional cases*. He suggested, therefore, that further consideration of Mr. Lauterpacht's proposal be deferred until article 9 was taken up.

It was so agreed.

The meeting rose at 1 p.m.

141st MEETING

Thursday, 12 June 1952, at 9.45 a.m.

CONTENTS

	<i>Page</i>
Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33) (<i>continued</i>)	25
Article 6 (<i>resumed from the 140th meeting</i>)	25
Article 9 and article 7 (<i>resumed from the 140th meeting</i>)	28

Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, 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) (*continued*)

1-5. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitration Procedure (Annex to document A/CN.4/46).

ARTICLE 6 (*resumed from the 140th meeting*)

6. Mr. YEPES said that, in accordance with the Chairman's ruling¹ at the preceding meeting, he wished to submit the following new text to replace article 6 of the special rapporteur's text, which the Commission had not accepted :

"Nevertheless, the following rules shall be applicable to the constitution of the Arbitral Tribunal :

"(a) The parties shall choose as arbitrators persons possessing the qualifications set forth in Article 2 of the Statute of the International Court of Justice ;

"(b) The sole arbitrator or a majority of the arbitrators shall be chosen from among nationals of States having no special interest in the case."

7. It would be noted that his proposal contained no clause corresponding to recommendation (c) of the original article 6, since that recommendation had been criticized. Otherwise, the only changes he had made to Mr. Scelle's draft were those required to make the qualification for arbitrators mandatory rather than recommendatory, although he personally would have preferred to see recommendation (b) deleted as well.

8. Mr. LAUTERPACHT pointed out that in the text proposed by Mr. Yepes, sub-paragraph (a) only covered cases where the arbitrators were chosen by the parties. In order to extend its application to cases where they were chosen by the International Court of Justice or a third Power, he suggested that it be amended to read "the arbitrators shall be chosen from among persons possessing the qualifications . . ."

9. Mr. YEPES accepted Mr. Lauterpacht's suggestion.

10. Mr. LAUTERPACHT said that, apart from the drafting point he had just made, he wished to point out that the conditions laid down in Article 2 of the Statute of the International Court of Justice were extremely stringent from the point of view of their application to the selection of arbitrators. According to that article, the judges of the Court were to be elected from among persons "who possess the qualifications required in their respective countries for appointment to the highest judicial offices . . ." Such a qualification was obviously necessary for members of the highest judicial organ of the United Nations, an organ, moreover, which had been set up to deal not with one particular dispute or set of disputes, but with any dispute which might be referred to it under its Statute. An arbitral tribunal, on the other hand, might well have to pronounce judgement on some dispute of relatively minor importance. He wondered whether, in those circumstances, the special rapporteur and other members of the Commission really thought it essential that the tribunal should be composed of persons possessing the high qualifications required of judges of the International Court of Justice.

11. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Lauterpacht's pertinent observation would have been covered by Mr. Scelle's original draft of article 6, which had included the words "generally speaking, and having due regard to the circumstances of the case, it is recommended . . ."

12. Mr. SCELLE did not think it was possible to make it obligatory that arbitrators should have all the qualifications set forth in article 2 of the Statute of the International Court of Justice. For example, it was unnecessary for them to possess the qualifications required for appointment to the highest judicial offices. Nor was it, perhaps, necessary to stipulate that they should *always* have competence in international law. He did not think it would be going too far, however, to say that they must be of high moral character and possess the qualifications required for appointment to judicial office.

13. Mr. ZOUREK said that he must again remind the Commission that in article 5 it had provided that in appointing the arbitrator or members of the arbitral tribunal the parties were free to act in whatever manner they deemed most appropriate. In view of that article he did not see how the Commission could now bind the parties by a mandatory provision in article 6. A

¹ See summary records of the 140th meeting, para. 55.

recommendation was the most that it could make. He did not, in fact, believe that, in rejecting the special rapporteur's draft of article 6, the Commission had been in agreement that that article should be replaced by one containing a mandatory provision regarding the qualifications of arbitrators.

14. Mr. KOZHEVNIKOV said that he could agree to the wording proposed by Mr. Yepes for sub-paragraph (a), provided it were made in the form of a recommendation.

15. Mr. SCELLE and Mr. YEPES said that they would have no objection to a text couched in terms of a recommendation if the Commission so desired, but recalled that the reason why the text originally proposed by the special rapporteur had been rejected was precisely that it had been couched in that form.

16. Mr. FRANÇOIS pointed out that by omitting the words "generally speaking, and having due regard to the circumstances of the case", and by making the qualification obligatory, Mr. Yepes excluded the possibility of Heads of States being chosen as arbitrators.

17. Mr. el-KHOURI agreed with Mr. Yepes that recommendation (c) of Mr. Scelle's original text was unnecessary, since it merely repeated article 22 of the Revised General Act, but said that his proposal was still far too rigid. As Mr. Lauterpacht had pointed out, the qualifications set forth in Article 2 of the Statute of the International Court of Justice might not be essential, or even the best, for arbitration in each and every case. It would be preferable not to refer to Article 2 of the Court's Statute, but merely to extract from it those qualifications which it would, generally speaking, be desirable for arbitrators to possess. As Mr. Scelle had already observed, they might not always need to have competence in international law; in commercial disputes, or disputes concerning frontiers or extradition, for example, knowledge of commercial law, of strategic matters or of domestic regulations respectively might be of more use to them. He also agreed that Heads of States might frequently make good arbitrators, even when they possessed no special competence in international law.

18. He therefore proposed that the introductory paragraph and sub-paragraph (a) of Mr. Yepes' text be amended to read as follows, sub-paragraph (b) being left unchanged:

"Nevertheless, generally speaking and having due regard to the circumstances of the case, the following rules shall be applicable to the constitution of the arbitral tribunal:

"(a) The arbitrators shall be chosen from among persons of high moral character who possess the qualifications and knowledge required for the matter;"

19. Mr. LIANG (Secretary to the Commission) suggested that, if narrowly interpreted, the phrase "the

qualifications and knowledge required for the matter" might prove too restrictive.

20. Mr. LAUTERPACHT suggested that further consideration of Mr. Yepes' proposal be deferred, seeing that the discussion had revealed difficulties which had not been apparent at the preceding meeting. It was still his view that the article under consideration should be in mandatory terms, and at the preceding meeting it had appeared that the majority of the Commission accepted that. The trend, however, was now towards the other view.

21. Although it was couched in mandatory terms, Mr. el-Khouri's amendment, by providing for unspecified exceptions, was in effect only a recommendation. The qualifications provided in his amendment appeared to say little. It was surely unlikely that persons who were not of high moral character would be appointed, and the Secretary had pointed out that it might not always be necessary for them to possess special knowledge of the matter under dispute; persons were in fact often called upon to arbitrate in matters with which they were not conversant before the case opened.

22. Further consideration also appeared to be required in the case of sub-paragraph (b). In several cases, such as the "I'm Alone" case² and the Alaska Boundary Commission dispute,³ the parties had felt that it would further settlement by arbitration to limit the arbitral tribunal to their own nationals. That might or might not be a good principle, but the Commission must recognize that the practice existed.

23. Mr. SCELLE said that if Mr. Lauterpacht had wished to cite an even better case to illustrate his point, he might have cited that of the Casablanca deserters.⁴ That case had been of great importance to the world at large, since on its settlement had hung the issue of peace or war. The arbitration had been successful, and its success had been mainly due to the fact that the two most active arbitrators had been nationals of the contending States. That case had been settled by arbitration of an essentially political nature, aimed at arriving by one means or another at an award which would not affront the national susceptibilities of the parties to the dispute. Yet it was the main purpose of his draft to remove arbitration from the sphere of politics, and it was therefore legitimate for him to ask whether the case of the Casablanca deserters had really constituted a case of arbitration. Important though it had been from one point of view, it had certainly made no contribution to the progress of arbitration law, and

² Case between Canada and the United States of America. Final report of 5 January 1935. See references in A. M. Stuyt, *Survey of international arbitrations* (The Hague, Martinus Nijhoff, 1939), p. 357.

³ Boundary question between Great Britain and the United States of America. Award of 20 October 1903. See A. M. Stuyt, *op. cit.*, p. 263.

⁴ Award dated 22 May 1909 of The Permanent Court of Arbitration. Case between France and Germany. See A. M. Stuyt, *op. cit.*, p. 301.

if the essence of international arbitration was regarded as the settlement of disputes by an international, or rather supra-national, tribunal working on the basis of respect for the law, it would be seen that the case of the Casablanca deserters was really not one of arbitration at all, but one of a purely political arrangement between the contending States, helped to a greater or lesser degree by the good offices of third Powers.

24. He had made no secret of the fact that the very essence of his reports was the principle that the supra-national arbitral tribunal should conform as closely as possible to the procedure of a domestic judicial tribunal, the competence of which, once seized of a case, would not end until it had made its award. That concept derived directly from the views of Nicholas Politis, and the first step towards its realization had been taken in 1907; he recalled in that connexion that it had at first been proposed that the Permanent Court of Arbitration should be called the *International Court of Arbitration*. The Commission at present appeared to be moving in the contrary direction, namely, that dictated by the view that the main aim of arbitration was the political one of preventing disputes deteriorating into war. A choice must be made between those two concepts.

25. Mr. AMADO pointed out that law and politics necessarily interacted on each other. What was meant by arbitration, however, was perfectly clear, and he fully supported the definition given in article 37 of the 1907 Hague Convention on the Pacific Settlement of International Disputes, from which it emerged that its essence was to bring the parties together on the basis of respect for the law. He was, however, opposed to extraneous elements being introduced into the structure of arbitration as it grew up over the years. Naturally, progress made must be taken into account, but what were, after all, the very foundations of the system must certainly not be cast aside.

26. He had objected to article 6 of Mr. Scelle's draft, which he had thought was out of place in a convention, but had agreed to its being couched in mandatory terms. Now, however, it appeared that there was no agreement on what should be made mandatory. Certainly, too rigid a formula could not be used. It appeared that Mr. Scelle wished to preclude the possibility of Heads of States being chosen as arbitrators. It was true that there was a danger, to mention only one, that Heads of States might appoint persons who lacked the necessary qualifications to deputize for them. But it was impossible to generalize. In one case which had been of very great importance to Brazil, the President of the United States of America had been chosen as arbitrator; his intervention had led to a peaceful and in every way satisfactory settlement of the dispute.⁵

27. Mr. SCELLE pointed out that what Mr. Amado had said amounted to criticism of article 22 of the

Revised General Act, which provided that three out of five arbitrators should be nationals of third Powers. The Revised General Act had recently been endorsed by the General Assembly. It was surprising to find that the International Law Commission apparently lagged behind the General Assembly in that respect.

28. Mr. HSU said that, to revert to the specific proposals before the Commission, he would suggest that the words "who possess the qualifications and knowledge required for the matter", in sub-paragraph (a) of Mr. el-Khoury's amendment, be replaced by the words "and of recognized competence in international law".

29. Mr. LAUTERPACHT said that, unlike Mr. Scelle, who appeared to think that there were two schools of thought within the Commission on the nature of arbitration, he believed that the Commission was virtually unanimous in considering that arbitration was and ought to remain a procedure based upon law, and that it should be as far removed from political influence as was possible. Members might legitimately differ on questions of detail. For example, Mr. Scelle considered that the choice of the Head of a State as arbitrator necessarily introduced a political element; he (Mr. Lauterpacht) and Mr. Amado disagreed, and he would point out that the award made by Victor Emmanuel III, the King of Italy, in the Guiana dispute had been a contribution to international law.⁶ Similarly, the fact that some members of the Commission might consider that experience had shown certain provisions of the General Act to be unsatisfactory did not mean that they did not all support Mr. Scelle's fundamental thesis. He even doubted whether it would be contrary to that thesis to delete article 6 altogether.

30. Mr. KOZHEVNIKOV said that, as the interesting discussion which had just taken place had gone to the very roots of the matter, he would take the opportunity of again stating his general views on it. There was agreement that the essence of arbitration was that it should be based on respect for the law, but such a statement by itself was too vague to be of much value; it depended on what was meant by the law. As he had already stressed, the Commission should rather proceed from the basic principles of international law, and ensure that its recommendations did not conflict with those principles. One of the underlying principles of international law was that of national sovereignty. He would therefore firmly resist any tendency to set up a supra-national organ with powers that would conflict with the principle of national sovereignty.

31. The CHAIRMAN invited the Commission to vote on Mr. el-Khoury's amendment.

32. Mr. KOZHEVNIKOV considered that the question of principle, namely, whether the provisions were to be made optional or obligatory, should be decided first.

⁵ Award of Grover Cleveland dated February 1895. Boundary question between Argentina and Brazil. See A. M. Stuyt, *op. cit.*, p. 165.

⁶ Award of 6 June 1904. Boundary question between Brazil and the United Kingdom. See A. M. Stuyt, *op. cit.*, p. 251.

33. The CHAIRMAN pointed out that that issue had already been disposed of at the preceding meeting by the rejection of the special rapporteur's text for article 6.

The introductory paragraph of Mr. el-Khourî's amendment was adopted by 4 votes to 1, with 5 abstentions.

34. Mr. AMADO said the result of the vote on an issue of cardinal importance demonstrated only too clearly the disadvantages of the voting procedure being followed by the Commission. A vital provision had been carried by virtue of abstentions rather than by the weight of majority opinion. Such a method of working could not contribute to the solution of the problems before the Commission, and he doubted whether, if the Commission were again criticized in the General Assembly, as it had been at the sixth session, it would be able to put up a convincing defence.

35. The CHAIRMAN observed that the Commission had not pronounced itself on a question of principle, but on an amendment to a proposal which was itself the direct result of a decision on principle taken at the preceding meeting, namely, that the provisions of article 6 should be made mandatory.

36. Mr. SCALLE said that the Commission's work would be rendered impossible if it persisted in reconsidering its own decisions and in taking provisional votes.

37. The CHAIRMAN put to the vote Mr. el-Khourî's amendment to sub-paragraph (a) of Mr. Yepes' text as it was the farthest removed from it.

Three votes were cast in favour of the amendment and 3 against, with 4 abstentions. The amendment was accordingly rejected.

Mr. Hsu's amendment to sub-paragraph (a) was adopted by 4 votes to 1, with 4 abstentions.

38. Mr. KOZHEVNIKOV said that he had not been present at the preceding meeting when the amendment in question had been discussed.

Mr. Yepes' text for sub-paragraph (b) was adopted by 5 votes to none, with 4 abstentions.

The text to replace the special rapporteur's draft of article 6 was adopted as a whole, as amended, by 5 votes to 2, with 3 abstentions.⁷

39. Mr. KERNO (Assistant Secretary-General) said that the Commission could not profitably examine article 8 until it had taken a final decision on article 7,

consideration of which had been deferred. He therefore suggested that article 9 be considered next.

It was so agreed.

ARTICLE 9⁸ and ARTICLE 7
(resumed from the 140th meeting)

40. Mr. SCALLE said that article 9 contained provisions which were part and parcel of the principle of the immutability of the tribunal. Clearly an arbitrator could not withdraw or be withdrawn without infringing that principle and destroying the balance of the tribunal as constituted. Withdrawal could only take place with the consent of the other members of the tribunal in very exceptional cases, such as prolonged illness.

41. Mr. ZOUREK said that some provision must be devised to protect States from becoming victims of a tribunal which exceeded its powers. He was accordingly unable to accept the words "and with the consent of the other members of the tribunal" in the first paragraph of article 9.

42. Mr. SCALLE was unable to understand clearly what Mr. Zourek had in mind. No appeal could be lodged on the grounds that a tribunal had exceeded its powers until the award had been made. It was surely unthinkable that a party to the dispute could be left free to interrupt the proceedings in such manner, since that would destroy the very essence of arbitration.

43. Mr. ZOUREK reaffirmed his conviction that States must be provided with some means of defence.

44. Mr. FRANÇOIS said that if, by the phrase "means of defence" Mr. Zourek meant the withdrawal of an arbitrator, or the suspension of proceedings, he disagreed with him. The draft contained provisions relating to revision and remedies; if they were inadequate, they must be strengthened, but unilateral withdrawal must be excluded.

45. Taking up another point, he said that he had gained the impression during the discussion of article 5 that the special rapporteur would be prepared to recognize the right of the parties to replace an arbitrator by another in cases submitted to arbitration by virtue of a general agreement. The way in which article 9 had been drafted seemed to indicate that that idea had not been taken into account.

⁸ Article 9 read as follows:

"9. An arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the other members of the tribunal.

"Should the withdrawal take place without the consent of the constituted tribunal, the latter shall be authorized to continue the proceedings and to render its award.

"If the withdrawal prevents the continuation of the proceedings, the tribunal may require that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him."

⁷ Article 6, as tentatively adopted, read as follows:

"Nevertheless, generally speaking and having due regard to the circumstances of the case, the following rules shall be applicable to the constitution of the arbitral tribunal:

"(a) The arbitrators shall be chosen from among persons of high moral character and of recognized competence in international law;

"(b) The sole arbitrator or the majority of the arbitrators shall be chosen from among nationals of States having no special interest in the case."

46. Mr. SCELLE said Mr. François was correct in his first supposition. Although a general treaty providing for obligatory arbitration might contain provisions establishing a tribunal in advance, as it were, the members of that tribunal were not necessarily nominated at that stage. If they were, the parties must be free to appoint other arbitrators if necessary, when a particular case came up for arbitration under the treaty. What he would categorically oppose was any change in the composition of a tribunal *specially* constituted to deal with a *particular* case.

47. Mr. AMADO said that the discussion had illustrated the importance of the Commission's first pronouncing itself on the principle of immutability, with which the provisions of article 9 were clearly intimately linked.

48. The CHAIRMAN reminded Mr. Amado that the Commission had decided not to take up Mr. Lauterpacht's amendment to article 7 until it had considered article 9.

49. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Amado. He felt also that the Commission must decide whether a member of a tribunal could be replaced before the proceedings started. He suggested that the words "of the other members" should be deleted from the first paragraph of article 9.

50. Mr. SCELLE accepted the amendment suggested by the Assistant Secretary-General, and pointed out that article 9 did not envisage the replacement of members of the tribunal, for which provision was made in article 7. Should an arbitrator withdraw or be withdrawn — and either contingency usually arose through the intervention of the arbitrator's government — the tribunal could either continue to function or, if it decided that it was unable to do so, the provisions of the third paragraph of article 9 would come into play. The purpose of article 9 was to prevent a recalcitrant party from frustrating the proper functioning of the tribunal.

51. Mr. el-KHOURI, referring to Mr. Lauterpacht's text for the first paragraph of article 7, said that he could not accept it since it did not stipulate the procedure to be followed once the parties had agreed to alter the composition of the tribunal.⁹ Furthermore, it did not make clear that the parties were not free, even if they reached common agreement, to alter the composition of a tribunal not constituted by themselves, for example, one designated by the International Court of Justice. A decision by an organ independent of the parties must be regarded as one which they could not modify.

52. His principal objection to the special rapporteur's draft of article 9 was the vagueness of the expression "save in exceptional cases"; he feared that unless a paragraph were added defining that expression it would be open to serious abuse.

53. Mr. SCELLE said he would not be prepared to include a definition of those words, since they concerned a matter which should be left for decision by the tribunal itself.

54. Mr. LAUTERPACHT said that what he had had in mind in framing his amendment to article 7 was that the common agreement of the parties to alter the composition of the tribunal pre-supposed that it would continue to function.

55. He was anxious to learn from the special rapporteur whether he had rightly understood him to mean that according to the provisions of article 9 an arbitrator who withdrew, or was withdrawn, would not be replaced.

56. Mr. SCELLE said that the provisions of article 9 prohibited a party from replacing its arbitrator by unilateral action.

57. He had cited examples in his first report (A/CN.4/18) of tribunals continuing their work despite the withdrawal of one of their members.

58. Mr. LAUTERPACHT, referring to the third paragraph of article 9, asked whether in cases of a State withdrawing its arbitrator, that arbitrator would be considered as "absent".

59. Mr. SCELLE replied in the negative, and said that such an arbitrator would be considered as not discharging his functions.

60. Mr. KERNO (Assistant Secretary-General) observed that Mr. Lauterpacht's question probably arose from a defective English translation of the word "défaillant".

61. Mr. LAUTERPACHT asked whether an arbitrator might continue to serve on a tribunal, despite his government's wish that he should withdraw.

62. Mr. SCELLE answered in the affirmative. Once a person had been designated to serve on an arbitral tribunal he no longer came under the orders of his government. Surely no government of any civilized country had ever prohibited a judge from sitting in a case. If a government declared its intention of withdrawing an arbitrator, he had every right, and in fact it would be his *duty*, to continue in his functions regardless.

63. Mr. HSU said that he could not accept the final words of Mr. Lauterpacht's amendment, reading "subsequent to the commencement of the proceedings in any particular case", which, he believed, would be open to abuse by parties who wished to prevent the proceedings from being opened.

64. Mr. SCELLE said that he could not accept the words "subsequent to the commencement of the proceedings" in Mr. Lauterpacht's amendment, but suggested that they might be replaced by the words "subsequent to the constitution of the tribunal."

65. A distinction should be drawn in article 7 between arbitrators appointed by the parties and those appointed

⁹ See summary record of the 140th meeting, para. 70.

by a third Power or by the International Court of Justice, as in the two latter cases arbitrators could not be replaced even by mutual consent of the parties.

66. The CHAIRMAN put to the vote Mr. Lauterpacht's amendment to the first paragraph of article 7.

The amendment was rejected by 5 votes to 3, with 2 abstentions.

67. The CHAIRMAN reminded the Commission that at the preceding meeting it had agreed to the deletion of the words "by agreement between the parties or by the subsidiary procedures indicated above" from the special rapporteur's text of article 7, first paragraph.¹⁰ He would accordingly put the text as amended to the vote.

Five votes were cast in favour of the special rapporteur's text for article 7, and 5 against with no abstentions. The text was accordingly rejected.

The meeting rose at 1.10 p.m.

¹⁰ See summary record of the 140th meeting, paras. 72 and 75.

142nd MEETING

Friday, 13 June 1952, at 9.45 a.m.

CONTENTS

	Page
Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33) (<i>continued</i>)	30
Article 11	30
Article 7 (<i>resumed from the 141st meeting</i>)	33
Article 8	34
Article 9 (<i>resumed from the 141st meeting</i>)	34

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. A. E. F. SANDSTRÖM, 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) (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the Second Preliminary Draft on Arbitration¹ Procedure contained in the special rapporteur's second report (annex to document A/CN.

4/46). He understood that Mr. Scelle, in consultation with those members of the Commission who had made proposals at the previous meeting with regard to article 7, had prepared a new text, not only for that article but also for articles 8, 9 and 10. Pending distribution of that text, he suggested that the Commission consider article 11, dealing with disqualification of an arbitrator.

It was so agreed.

ARTICLE 11¹

2. The CHAIRMAN invited comments on the first paragraph of article 11.

3. Mr. HUDSON asked how a party could be aware, at the time of constitution of the tribunal, of a fact which did not arise until after constitution of the tribunal. In his view, the words "unless it can reasonably be supposed to have been unaware of the fact" did not make sense.

4. Mr. SCELLE said that his intention could be clearly seen from paragraph 41 of his first report (A/CN.4/18), where it was pointed out that "the governments parties to the dispute may be presumed to have known what they were about when they invested the judges". It seemed reasonable, therefore, to provide that they should not be able to propose disqualification of any of the arbitrators except on account of a fact arising subsequent to the constitution of the tribunal, or on account of a fact arising before constitution of the tribunal but which it was reasonable to suppose they might have been unaware of, or which had been concealed from them by fraud.

5. Mr. KERNO (Assistant Secretary-General) said that if that was the intention, neither the English nor the French text expressed it clearly. He suggested that a semi-colon be placed after the words "subsequent to the constitution of the tribunal" and that the remainder of the sentence be amended to read as follows :

"it may not so propose on account of a fact arising prior to the constitution of the tribunal unless it can reasonably be supposed to have been unaware of that fact or has been the victim of a fraud".

6. Mr. HUDSON asked whether there was not some international practice with regard to disqualification of arbitrators to which the Commission might refer.

7. Mr. SCELLE said that the Commission's task was to seek the best solution, not to conform to existing practice where that was defective.

¹ Article 11 read as follows :

"A party may not propose the disqualification of one of the arbitrators except on account of a fact arising subsequent to the constitution of the tribunal, unless it can reasonably be supposed to have been unaware of the fact or has been the victim of fraud. The matter shall be decided by the tribunal.

"In the case of a single arbitrator, the decision shall rest with the International Court of Justice through summary procedure."

The amendment suggested by the Assistant Secretary-General was adopted.

8. Mr. KOZHEVNIKOV proposed that the words "with the consent of that party" be added at the end of the sentence reading "The matter shall be decided by the tribunal".

9. Mr. el-KHOURI said that if he understood Mr. Kozhevnikov's proposal correctly, it would have the result of making it impossible for the tribunal to reject a proposal for disqualification unless the party which had made the proposal agreed. If that was the case, he could not support it.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 2.

10. The CHAIRMAN pointed out that in the sentence to which Mr. Kozhevnikov had referred, the words "la Cour" in the French text should be replaced by the words "le Tribunal".

11. Mr. KERNO (Assistant Secretary-General) pointed out that there was another discrepancy between the English and French texts of that sentence. The French text could be interpreted as meaning that it was only the question of whether the party which proposed disqualification could reasonably be supposed to have been unaware of a fact arising prior to the constitution of the tribunal or to have been the victim of a fraud which was to be decided by the tribunal; from the English text, it was clearer that the tribunal should decide any question covered by the foregoing sentence.

12. Mr. SCELLE confirmed that it was his intention that the tribunal should decide all questions relating to disqualification of the arbitrators.

13. Mr. AMADO suggested that the French text be amended to read: "*Le Tribunal décidera*".

Mr. Amado's suggestion was adopted in respect of both the French and the English texts.

The first paragraph of article 11 was adopted as amended by 8 votes to none, with 3 abstentions.

14. The CHAIRMAN invited comments on the second paragraph of article 11.

15. Mr. FRANÇOIS recalled that the Commission had already decided to delete mention of the Chamber of Summary Procedure of the International Court of Justice from article 2.² The question therefore arose whether the words "through summary procedure" should be deleted from the paragraph under discussion, though he would agree to their being retained, as the question of disqualification was not so important as the question dealt with in article 2.

16. After some discussion, Mr. HUDSON pointed out that Article 29 of the Statute of the International Court of Justice provided that the Court should form annually a Chamber composed of five judges which, at the

request of the parties, might hear and determine cases by summary procedure. The words "through summary procedure" were therefore unnecessary, since even if they were deleted it would still be open to the parties to request the Court to decide the question by that expeditious procedure; but what was more, those words might also be considered improper, since the procedure in question could not be resorted to unless the parties so requested. He therefore proposed that the words in question be deleted.

17. Mr. YEPES and Mr. SCELLE supported Mr. Hudson's proposal.

Mr. Hudson's proposal that the words "through summary procedure" be deleted was adopted by 7 votes to none, with 3 abstentions.

18. Mr. el-KHOURI pointed out that article 11 did not specify whether the arbitrator had a right of appeal against the Court's decision, or what would happen if continuation of the proceedings were threatened by withdrawal of an arbitrator. In those and many other ways it needed to be clarified.

19. Mr. SCELLE suggested that the second question raised by Mr. el-Khoury would be dealt with under article 9.

20. Mr. ZOUREK recalled that the Commission had decided, in accordance with the essential nature of arbitration, that the tribunal should be constituted by the parties if that was possible, and that only if they failed should an alternative procedure be used. It therefore seemed illogical for the Commission to provide, as was done in the second paragraph of article 11, that the matter of disqualification should be referred to the International Court of Justice direct, without the parties being given a chance to attempt to resolve it themselves. It might well happen that both parties would agree that, since his appointment, the arbitrator had acquired a special interest in the case which made him unsuitable for his arbitral duties.

21. Mr. SCELLE could not envisage a case where the disqualification of an arbitrator, as distinct from his replacement, could be the subject of valid agreement between the parties.

22. Mr. KOZHEVNIKOV proposed that the words "subject to the consent of the parties" be inserted before the words "the decision shall rest".

23. Mr. SCELLE said that such a proposal ran counter to the whole purpose of his draft, which was to make the parties continue along the path of arbitration, even if they did not wish to, once they had entered on it.

24. Mr. HUDSON understood that Mr. Scelle's intention was that if the draft convention were accepted by a State, that State would thereby automatically agree in advance to the jurisdiction of the Court in the cases provided for in the convention. The object of Mr. Kozhevnikov's amendment appeared to be to make the specific agreement of the contending States necessary, in each case where disqualification of a

² See summary record of the 138th meeting, para. 41.

single arbitrator was proposed, before the matter could be submitted to the International Court of Justice.

25. Mr. ZOUREK said that he would content himself with pointing out that the addition of the words proposed would make the draft convention acceptable to many more States.

Mr. Kozhevnikov's proposal was rejected by 8 votes to 2, with 1 abstention.

26. Mr. HUDSON said that, despite the decision which had just been taken, the Commission would doubtless agree that cases might arise where the parties would be in agreement on the disqualification of a single arbitrator. In such cases it would surely be unnecessary to refer the matter to the International Court of Justice.

27. Mr. SCELLE said that Mr. Hudson's view derived from the contractual concept of arbitration. The concept from which his own draft was derived in its entirety was a different one, namely, that the arbitral tribunal, once constituted, had supra-national powers. As he had already stated, he could not conceive of the parties being in agreement on a proposal to disqualify an arbitrator, whether he was the sole arbitrator or not, unless both were acting in bad faith.

28. Mr. HUDSON said that acceptance of Mr. Scelle's theory in the present instance would have serious practical disadvantages. Proceedings before the International Court of Justice necessarily lasted months, and if a proposal to disqualify a single arbitrator had necessarily to go before the Court even if the parties were agreed upon it, the course of the arbitration would be greatly retarded. Mr. Scelle had said that he could not envisage a case of a *bona fide* agreement between the parties on such a matter. But to take only one instance, one party might be unaware, before constitution of the tribunal, that the proposed arbitrator was related by marriage to the President of the other party, but might become aware of that fact subsequently, and propose disqualification on those grounds; the latter party might well agree to the proposal if it had believed that that fact had been known to the first party but had been deemed immaterial. He saw no reason why the decision in such a case should necessarily rest with the International Court of Justice.

29. Mr. KERNO (Assistant Secretary-General) thought that the whole discussion was somewhat academic. In the unlikely event of the parties agreeing on the disqualification of the arbitrator chosen they could have recourse to the procedure proposed for replacement.

30. Mr. SCELLE pointed out that articles 15-18 of his draft procedure provided for discontinuance of the case in accordance with a procedure which would ensure the good faith and validity of the settlement arrived at. It was not, therefore, true to suggest that he wished the whole lengthy process of arbitration to be carried through regardless of whether the parties reached agreement. But what he wished to avoid in the present case was that the parties should be free to change the

composition of the tribunal once it had been set up, merely because it did not suit either of them, and thus to cast unjust reflections on the honour or impartiality of a judge whom they themselves or a third Power had chosen. Leaving such cases of collusion aside, however, a party proposed disqualification of an arbitrator because it suspected that he would not judge the case objectively; and it was surely impossible for such a matter to be decided by the parties themselves.

31. Mr. LAUTERPACHT thought that Mr. Scelle was possibly going too far in the conclusions he drew from his concept of a supra-national tribunal, but said that he would be prepared to follow him as special rapporteur, as he (Mr. Lauterpacht) thought the Commission should always do in any matter on which there was doubt. He did not believe that the delay caused by referring such cases to the International Court of Justice would be so great as Mr. Hudson feared, since the Court's procedure would certainly be expedited if the parties happened to be in agreement.

32. Mr. ZOUREK felt that it might well happen that one party would put forward a valid case for disqualification of the arbitrator after his appointment, and that the other party would accept it, since a sole arbitrator would usually be the national of a third country, and all the particulars concerning him might not emerge beforehand. The Commission should respect the principle that the parties should have the right to settle such questions between themselves if they were able to do so.

33. Mr. el-KHOURI said that he could agree that it was unnecessary for the matter to be referred to the International Court of Justice if the parties were in agreement, provided, first, that the disqualified arbitrator did not object, and secondly, that the parties at the same time agreed on his replacement, a question on which the intervention of the International Court of Justice would otherwise be necessary in any event.

34. Mr. SCELLE urged the Commission to keep disqualification and replacement completely separate. It had already been conceded that the parties should be free to change the composition of the tribunal before the proceedings began. On the other hand, an arbitrator could only be disqualified after the proceedings had opened.

35. He recalled that the Commission had already rejected the proposal that an arbitrator could be disqualified by agreement of the parties in cases where there was more than one arbitrator. It would therefore surely be illogical to give them the power to disqualify a sole arbitrator by mutual arrangement.

36. The CHAIRMAN put to the vote the second paragraph of article 11, as amended by the deletion of the words "through summary procedure".

The paragraph was adopted by 6 votes to 4.

37. Mr. el-KHOURI said that he had voted against that paragraph since it was incomplete. In the same way, he would be unable to vote for article 11 as a

whole until he saw whether all the points he had referred to previously were covered by article 9.

*Article 11, as amended, was adopted by 6 votes to 2, with 2 abstentions, subject to any further amendments made by the Standing Drafting Committee to be set up.*³

ARTICLE 7 (resumed from the 141st meeting)

38. The CHAIRMAN invited the Commission to take up the new text of articles 7, 8 and 9 prepared by Mr. Scelle in consultation with some other members of the Commission, which was now available in both languages.

39. The text for article 7 read as follows :

“Once the arbitral tribunal has been set up its composition shall remain unchanged until after the decision has been rendered.

“The parties may, however, replace one or other of the arbitrators appointed by them, provided that the tribunal has not yet sat or begun its proceedings. An arbitrator may not be replaced during the hearing except by agreement between the parties.”

40. Mr. HUDSON proposed the deletion of the first paragraph, which was entirely vitiated by the second.

41. Mr. SCELLE said that the first paragraph of article 7 was of paramount importance, as it enunciated the principle of the immutability of the tribunal. He agreed that the second paragraph provided for an important exception, but the principle laid down in the first paragraph stood.

42. The second paragraph had been included to meet the point raised by Mr. François at the preceding meeting, namely, that when a case came up as the result of a general arbitration agreement under which a tribunal had already been nominated, the parties must be free to change the composition of the tribunal if for some particular reason it was unsuited to the specific case at issue.

43. Mr. LAUTERPACHT agreed that the first paragraph stated a principle and the second an exception to it. It was only to that extent that the two were mutually contradictory.

44. Mr. YEPES supported both paragraphs, since exceptions must obviously derogate from the general rule. He hoped, however, that both the English and the French texts would be referred to the drafting committee, as neither seemed to him quite satisfactory as they stood.

³ Article 11, as tentatively adopted, read as follows :

“1. A party may not propose the disqualification of one of the arbitrators except on account of a fact arising subsequent to the constitution of the tribunal ; it may not so propose on account of a fact arising prior to the constitution of the tribunal, unless it can reasonably be supposed to have been unaware of that fact or has been the victim of a fraud. The tribunal shall decide.

“2. In the case of a single arbitrator the decision shall rest with the International Court of Justice.”

45. Mr. KERNO (Assistant Secretary-General) was uncertain whether the word “hearing” was an exact translation of the words “*lorsque l'instance est en cours*”.

46. Mr. LIANG (Secretary to the Commission) suggested that a possible contradiction between the first and second sentences in the second paragraph would be removed by the substitution of the words “Each party” for the words “The parties”, and by the substitution of the word “it” for the word “them” after the words “appointed by”.

47. Mr. HSU supported the Secretary's suggestion.

48. Mr. KOZHEVNIKOV proposed the insertion of the words “by agreement between the parties, it is recommended that” after the words “has been set up” in the first paragraph.

49. Mr. YEPES asked Mr. Kozhevnikov whether, in his view, article 7 would still be applicable if a tribunal had not been set up by agreement between the parties.

50. Mr. KOZHEVNIKOV believed that a tribunal could only be set up by agreement between the parties.

51. Mr. el-KHOURI said he could vote in favour of the first paragraph, provided the word “shall” was replaced by the word “should”. He believed that such a provision was essential in order to strengthen arbitral procedures. On the other hand, he believed the second paragraph to be unnecessary, since its provisions were repeated in articles 8, 9 and 11. He accordingly proposed that it be deleted.

52. Mr. LAUTERPACHT did not quite understand the purpose of Mr. el-Khoury's amendment to the first paragraph. Surely the use of the word “should” would weaken it.

53. Mr. el-KHOURI said that in that case he would withdraw his amendment to the first paragraph.

Mr. Hudson's proposal that the first paragraph of article 7 be deleted was rejected by 8 votes to 1, with 2 abstentions.

Mr. Kozhevnikov's amendment to the first paragraph was rejected by 8 votes to 2, with 1 abstention.

Mr. el-Khoury's proposal that the second paragraph be deleted was rejected by 7 votes to 2, with 2 abstentions.

The Secretary's suggestion concerning the second paragraph was adopted by 8 votes to none, with 3 abstentions.

54. Mr. HUDSON asked what was meant by the phrase “provided that the tribunal has not yet sat or begun its proceedings”. He failed to understand the purpose of such a distinction, and he would also ask the special rapporteur to define the precise moment at which a tribunal might be regarded as constituted.

55. Mr. SCELLE replied that a tribunal could not be considered as constituted until its members had met and taken some procedural action, such as deciding on

the date of the first public meeting or discussing the rules of procedure.

56. Mr. AMADO said that surely the problem was not so complicated as it seemed. A tribunal was constituted as soon as its members came together to deliberate.

57. Mr. KERNO (Assistant Secretary-General) said that the precise significance of the phrases "*n'ait pas encore siégé ni entamé la procédure*" and "*lorsque l'instance est en cours*" escaped him. Surely a tribunal could sit without having begun its proceedings; the possible invocation of pre-established tribunals must also be taken into account. He presumed that the intention was not to allow replacement of arbitrators once the proceedings had actually begun.

58. Mr. SCELLE pointed out that consideration of its rules of procedure by a tribunal was already part of its proceedings.

59. The CHAIRMAN suggested that the text of article 7, as amended, be referred to the standing drafting committee to be set up, for consideration in the light of the foregoing discussion.⁴

It was so agreed.

ARTICLE 8⁵

60. The CHAIRMAN drew the attention of the Commission to the new text of article 8, which read as follows:

"Should one or more vacancies occur, for reasons beyond the control of the parties, the absent arbitrator or arbitrators shall be replaced by the method laid down for appointments."

61. Mr. LAUTERPACHT proposed that, in the interests of clarity, the words "the original" be inserted before the word "appointments".

It was so agreed.

62. Mr. HUDSON said that the English text was somewhat faulty. If a vacancy occurred, it would be inappropriate to speak of an absent arbitrator.

63. Mr. LAUTERPACHT suggested that Mr. Hudson's point would be met by the substitution of the words

"the vacancies shall be filled" for the words "the absent arbitrator or arbitrators shall be replaced".

It was so agreed.

64. Mr. HUDSON asked what kind of contingency was envisaged in article 8. Was it, for example, the death or illness of an arbitrator? He was bound to express his surprise at the first paragraph of article 7, which stipulated that there should be no change in the composition of a tribunal, being immediately followed by a series of exceptions to that principle.

65. Mr. KOZHEVNIKOV proposed the substitution of the words "by agreement between the parties" for the words "by the method laid down for appointments".

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

66. The CHAIRMAN put to the vote article 8, as amended by the two proposals made by Mr. Lauterpacht and already adopted.

Article 8, as amended, was adopted by 8 votes to none, with 3 abstentions.⁶

ARTICLE 9 (resumed from the 141st meeting)

67. The CHAIRMAN read out the new text of article 9, as follows:

"Once the hearing has begun, an arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the tribunal.

"If, for any reason such as previous cognizance of the case, a member of the tribunal considers that he cannot take part in the hearing, or if any doubt arises in this connexion within the tribunal, it may decide to require his replacement.

"Should the withdrawal take place without the consent of the constituted tribunal, the latter shall be authorized to continue the proceedings and render the award.

"If the withdrawal should make it impossible to continue the proceedings, the tribunal may require that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him."

First paragraph

68. Mr. HUDSON, referring to the first paragraph, asked whether the consent of a sole arbitrator would have to be obtained for his own withdrawal.

69. Mr. SCELLE failed to understand the purport of the question, which seemed to him somewhat frivolous.

⁴ Article 7, as tentatively adopted, read as follows:

"1. Once the arbitral tribunal has been set up, its composition shall remain unchanged until the decision has been rendered.

"2. Each party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet sat or begun its proceedings. An arbitrator may not be replaced during the hearing except by agreement between the parties."

⁵ Article 8 read as follows:

"If it is necessary to replace a single arbitrator, the appointment of the new arbitrator shall, in the absence of agreement between the parties, be entrusted to the third Power which would have been competent to appoint the first arbitrator, or to the President of the International Court of Justice."

⁶ Article 8, as tentatively adopted, read as follows:

"Should one or more vacancies occur, for reasons beyond the control of the parties, the vacancies shall be filled by the method laid down for the original appointments."

70. Mr. YEPES wondered whether it might not be advisable to cite a few examples of the kind of exceptional cases in which an arbitrator might be withdrawn. He had in mind, for example, continued illness or inadequate means.

71. Mr. SCELLE could not agree to the inclusion of such examples. It would be for the tribunal itself to decide whether or not the circumstances attending any given case were exceptional.

72. Mr. KERNO (Assistant Secretary-General) said that he had understood the clause relating to exceptional cases to be in the nature of a directive to the tribunal, as it was impossible to legislate in advance for such contingencies. What was exceptional in one case might not be so in another.

The first paragraph of article 9 was adopted without change by 7 votes to none, with 4 abstentions.

73. Mr. HUDSON asked whether a tribunal composed of three persons could ever act unless all were present. If it could, then that should be clearly stated. He knew of very few instances in which that had occurred, although some did exist, such as the Lena Goldfields case.⁷ The decisions of the French-Mexican Claims Commission in 1927 had been taken in the absence of the Mexican member, and it would be recalled that the decisions had been impugned by the Mexican Government. Later, the Governments of France and Mexico had reached a compromise without, however, solving the question of principle.⁸ The International Court of Justice in its second advisory opinion on the interpretation of the peace treaties with Bulgaria, Hungary and Romania had laid stress on the importance of the presence of both the national members in a three-member tribunal.⁹

74. Mr. SCELLE said that Mr. Hudson had raised a very delicate issue which he personally hoped he had provided for in his original text. Surely it was for the tribunal itself to decide whether or not it could continue its work in the absence of one of its members.

75. Mr. HUDSON said that it was essential to devise a provision which would hold water. In his view, two members of a tribunal of three could not comply with the provisions even of the first and second paragraphs of article 9. Were they, in fact, competent to decide such issues?

76. Mr. SCELLE said that it would be helpful if Mr. Hudson gave expression to his very definite opinions in a formal amendment.

77. Mr. ZOUREK said that one of the essential conditions of arbitration was that the tribunal should be legally constituted, and that would not be the case

if one or more members were absent. Should a vacancy occur, the tribunal must request the parties to fill it.

78. Mr. SCELLE considered that what Mr. Zourek was proposing was tantamount to leaving the proceedings to the caprice of the parties. Once a tribunal had been constituted, it became transmuted into an international and supra-national organ which could not be changed. Arbitrators, once appointed, became the servants of the international community, and ceased to owe national allegiance. He was utterly opposed to the parties being given the possibility of preventing the proceedings from taking their course and the award being made. If they were to be free to do so, the tribunal would cease to be an arbitral organ, since, as soon as the case took a turn which seemed unfavourable to one of the parties, that party would clearly make every effort to bring about the suspension of the proceedings.

79. Mr. el-KHOURI observed that article 9 did not stipulate what a quorum of the tribunal should be. It was not a matter that could be left to chance, particularly in the case of a tribunal of three persons, of whom two might be nationals of the parties to the dispute. He considered that only the full tribunal could be considered as constituting a quorum.

80. Mr. KERNO (Assistant Secretary-General) asked whether a solution might not be found by leaving it to the tribunal to decide what would constitute a quorum.

81. Mr. SCELLE felt that the Assistant Secretary-General's ideas were very similar to his own. What he was anxious to prevent was the tribunal being left to the mercy of the will of the parties. It was surely for the tribunal itself to decide whether it was in a position to continue the proceedings in the absence of one or more of its members. He realized that particular difficulties might arise for tribunals composed of three persons, and it was for that reason that it was laid down in the "Revised General Act for the Pacific Settlement of International Disputes" that the arbitral tribunal should consist of five members. He was not personally in favour of stipulating that there would be a quorum only if all members were present. He saw no reason, for example, why two members of a tribunal of three might not be able to reach unanimous agreement and make an award in the absence of their colleague.

82. In his opinion, the function of the judge was not so much to protect the interests of the individual, as to settle disputes. If the whole process of arbitration, once instituted, were to be made contingent on the will of the parties it would cease to be arbitration, the purpose of which was to settle disputes in accordance with the rules of law. It was accordingly essential that the tribunal be independent. Such, in general terms, was his concept of arbitration, although, of course, he realized that the Commission might wish to adopt another.

83. Mr. AMADO said that, despite a strenuous effort to understand Mr. Scelle's point of view, he remained

⁷ See A. M. Stuyt, *Survey of International Arbitrations* (The Hague, Martinus Nijhoff, 1939) p. 392.

⁸ See United Nations, *Reports of International Awards*, Vol. V, p. 309.

⁹ Interpretation of Peace Treaties (second phase), Advisory Opinion, *I.C.J. Reports 1950*, p. 221.

unconvinced, since he doubted whether an outside body was capable of judging the interests of two States.

84. Mr. SCELLE asked whether the purpose of arbitration was to defend the interests of the parties or to determine on the basis of the rules of law whether or not a case was well founded. Once a State had given its consent to resort to arbitration that decision should be irrevocable. He confessed that he was unable to understand very clearly Mr. Amado's conception of arbitration, which seemed to him to come perilously close to mediation.

The meeting rose at 1.10 p.m.

143rd MEETING

Monday, 16 June 1952, at 2.45 p.m.

CONTENTS

	Page
Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57) (continued)	36
Article 9 (continued)	36
Article 12	38
Article 14	39
Appointment of Standing Drafting Committee	41
Date and place of the fifth session (item 7 of the agenda)	41

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) (continued)

1. The CHAIRMAN invited members to continue their consideration of the Second Preliminary Draft on Arbitration Procedure submitted by the special rapporteur (Annex to document A/CN.4/46).

2. He recalled that at the end of the preceding meeting the Commission had been considering the new text proposed by the special rapporteur for article 9.¹ The Commission had adopted the first paragraph of that text. He called for comments on the second.

ARTICLE 9 (continued)

Second paragraph

3. Mr. HUDSON said that the second paragraph seemed to envisage the very improbable contingency of an arbitrator accepting appointment and then finding that he was unable to participate in the work of the tribunal because he had previous cognizance of the case. He wondered whether such a provision, which was appropriate for a standing organ with a fixed membership, such as the *International Court of Justice*, was really necessary for an *ad hoc* tribunal constituted to deal with a specific case.

4. Furthermore, certain other points needed elucidation. For example, would the member in question take part in the decision whether he must be replaced? He also suggested that the word "hearing" should be replaced by the word "case".

5. Mr. LAUTERPACHT pointed out that an arbitral tribunal might be appointed in advance to deal with a series of cases. When the appointments were made it would not be known what cases it would have to deal with.

6. Mr. KOZHEVNIKOV said that the latter part of the second paragraph seemed to him obscure. What, for example, was the doubt likely to arise, and what was the procedure to be followed if a tribunal decided that a certain member had to be replaced? He thought that the last phrase, "it may decide to require his replacement", might be improved by making it read "it may decide on his replacement".

7. Mr. KERNO (Assistant Secretary-General) suggested that most of the comments so far made were more or less of a drafting character and might well be referred to the Standing Drafting Committee when it was set up. The Commission had only to decide in principle whether or not a provision should be included in the draft, dealing with cases where a member of a tribunal ceased to fulfil the required conditions.

8. Mr. SCELLE agreed with the Assistant Secretary-General.

9. Mr. YEPES proposed that the words "on the unanimous vote of the other members" be inserted after the words "it may decide", so as to make it perfectly clear how the decision on replacement was to be reached.

10. Mr. FRANÇOIS asked whether it was necessary to stipulate unanimity.

11. Mr. YEPES replied that disqualification of an arbitrator on the grounds that he had previous cognizance of the case was a very serious matter on which a decision could not be reached by a simple majority. His amendment was modelled on paragraph 1 of Article 18 of the Statute of the *International Court of Justice*.

Mr. Yepes' amendment was adopted by 5 votes to none, with 4 abstentions.

¹ See summary record of the 142nd meeting, para. 67.