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Summary record of the 142nd meeting

Topic:
Arbitral Procedure

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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.

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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 Arbitration 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 11 [1]

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-Khouri 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.

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-Khouri'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-Khouri'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

[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."

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 8 [5]

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.

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[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.

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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.

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

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.