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Summary record of the 186th meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
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appropriate place for the reference should not be in the final clauses.

112. It might therefore be best if the proposed addition were examined after the Commission had concluded its study of the main articles of the draft.

113. Mr. SANDSTRÖM and Mr. SCELLE agreed.

It was so decided.

The meeting rose at 1.05 p.m.

186th MEETING

Thursday, 4 June 1953, at 9.45 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

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

ARTICLE 3

1. Mr. SCELLE (Special Rapporteur) noted that the United States Government considered the procedure contemplated in article 3 for the selection of arbitrators to be unnecessarily complex (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10). The three-month periods referred to in paragraphs 1, 3 and 4 were cumulative, and a period of nine months might indeed elapse before the tribunal was constituted. However, the United States proprosal that paragraphs 2 and 3 be deleted was somewhat radical, since it would bring the provisions of paragraph 4 into operation within three months if States were unable to agree on the constitution of the tribunal. None of the general instruments on arbitration examined by the Commission while preparing the draft had envisaged so short a time-limit. He would, however, be prepared to delete paragraph 2 and to modify paragraph 4 by extending the period therein mentioned to four months.

2. Mr. SANDSTRÖM considered that a radical change in the procedure was needed. In his opinion, paragraph 3 was superfluous.

3. Mr. LAUTERPACHT expressed the hope that the Special Rapporteur might yet see his way to accept the United States proposal since it would greatly simplify article 3 and eliminate the danger of the parties being unable to agree on the selection of the third State under the provisions of paragraph 3.

4. Mr. SCELLE said that, in the light of the observations made by Mr. Sandström and Mr. Lauterpacht, he would be prepared to accept the United States proposal that paragraphs 2 and 3 be eliminated, provided that his own amendment to paragraph 4 (the substitution of the word "four" for the word "three" after the words "preceding paragraph within") were accepted. Paragraph 4 would also require the consequential amendment of the deletion of the words "or if the governments of the two States designated fail to reach an agreement within three months".

5. Mr. SANDSTRÖM, Mr. ALFARO and Mr. YEPES all expressed agreement with the amendments to article 3 proposed by the Special Rapporteur.

6. Mr. KOZHEVNIKOV could not agree with the principle underlying article 3 for reasons he had already given during the discussion on article 2 at the previous meeting. Furthermore, article 3 provided for direct intervention by the International Court of Justice without stipulating the agreement of the parties. He would therefore vote against it.

7. Mr. ZOUREK said that article 3 was incompatible with the traditional notion of arbitration, inasmuch as it might result in the tribunal being constituted by a third party. The argument that a parallel provision existed in the Revised General Act for the Pacific Settlement of International Disputes of 1949 carried very little weight, since that convention had been ratified by very few States. Nor was the system laid down in the Hague Convention of 1907 a happy solution. With those considerations in mind he had at the previous session proposed[1] an alternative system for the constitution of the tribunal in the event of the parties failing to reach agreement. As his proposal had been rejected, he would be obliged to vote against article 3.

8. The CHAIRMAN put to the vote the Special Rapporteur's proposal that paragraphs 2 and 3 of article 3 be deleted, and the consequential amendments to paragraph 4 of that article.

The amendments were adopted by 7 votes to 1, with 4 abstentions.

9. Mr. SCELLE, drawing attention to the comment of the Netherlands Government on article 3 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6), said that its substance had already been discussed at the previous meeting in connexion with retrospective effect. He would

[1] See *Yearbook of the International Law Commission, 1952*, vol. I, 173rd meeting, para. 28.

suggest that further consideration of the matter be deferred until his draft of the new article on retrospective effect had been circulated.

10. Mr. SANDSTRÖM was uncertain whether retrospective effect and the issue raised by the Netherlands Government were one and the same. In his view, the new convention could only have retrospective effect on general instruments on arbitration; it could not abrogate the provisions of any specific arbitral agreement containing provisions governing the setting-up of the tribunal.

11. Mr. LAUTERPACHT said that the Netherlands' comment was not entirely germane to the question of retrospective effect but was virtually identical with the United States Government's observation that article 3 contained no provision for the contingency wherein States were already under the obligation to pursue, or had previously invoked, other procedures. That question should be discussed forthwith.

12. The CHAIRMAN had understood the Commission to have reached general agreement at the previous meeting that a new convention would supersede existing instruments on arbitration, it being understood that signatory States would be free to enter reservations regarding its application to existing treaties.

13. Mr. SCELLE said that, as a convinced partisan of the theory of automatic abrogation in the absence of reservations, he could not subscribe to Mr. Sandström's thesis. Any new convention must replace existing ones, particularly in matters of procedure, unless the parties made express reservations about the maintenance of certain prior treaty obligations. That was why he had prepared a text for an article dealing with retrospective effect in general.

14. As he had indicated at the previous meeting, however, there was one exception to his general view, namely: that provisions of a new convention could not apply to a case already *sub judice*.

15. Mr. SANDSTRÖM observed that the French text of paragraph 1 of article 3 was unsatisfactory, because it suggested that there was a difference between an arbitral tribunal and a single arbitrator; it should be amended to indicate that an arbitral tribunal could consist of one or several members.

16. Mr. LAUTERPACHT recalled that it was stated in paragraph (2) of the comment on article 4, that the expression "tribunal" when used in the draft meant either a single arbitrator or a body of several arbitrators.

17. Mr. SANDSTRÖM said that Mr. Lauterpacht's remarks strengthened his contention that the French text of paragraph 1 required revision.

18. Mr. ALFARO felt that, as the general public did not seem to have any very clear idea of what was meant by a tribunal, some clarification in the body of the text was perhaps called for. Mr. Sandström's fear of misunderstanding would thereby be allayed.

19. Mr. PAL considered that paragraph 1 of article 4 defined with sufficient precision and clarity what was meant by an arbitral tribunal. Nothing more was required.

20. Mr. LIANG (Secretary to the Commission) said that no change was necessary in the English text of article 3, which was perfectly consistent with article 4, paragraph 1. Mr. Sandström's point would be met by the deletion from the French text of the words "*ou instituer un arbitre unique*".

The Secretary's suggestion was adopted.

21. Mr. LAUTERPACHT observed that it was necessary to clarify what the "necessary appointments" would be which were to be made by the President of the International Court of Justice under the terms of paragraph 4, if no stipulation had been made in the *compromis* about the size of the tribunal.

22. Mr. SCELLE said that Mr. Lauterpacht had raised an important point. If the parties failed to reach agreement on the constitution of the tribunal, and were bound by no prior undertaking regulating the number of arbitrators, the President of the International Court would be placed in an extremely awkward position. The problem was closely linked with that raised by the United Kingdom Government in its comment on article 9 (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9), where it was pointed out that cases were frequently submitted to arbitration without the conclusion of any *compromis*.

23. Perhaps it would be well to add a new paragraph to article 3, stating that without any *compromis* being necessary, a case could be submitted to an arbitral tribunal according to a procedure similar to that laid down in Article 36, paragraph 2, of the Statute of the International Court of Justice.

24. He had been particularly struck by the United Kingdom comment, which conformed closely with the approach he had followed in his first draft on arbitral procedure. He had always favoured the immediate constitution of a tribunal, precisely in order to avoid the kind of difficulties likely to arise during the conclusion of a *compromis*.

25. Mr. LAUTERPACHT said that as he had raised a new question, the special rapporteur might be invited, in consultation with other members of the Commission, to prepare a text.

26. Mr. PAL said that, in the absence of any general provision in article 9, it might be wise to stipulate that if the parties failed to indicate the size of the tribunal, each should appoint one arbitrator, who would then together nominate a third.

27. Mr. LIANG (Secretary to the Commission) said that in its commentary on the draft (A/CN.4/L.40), the Secretariat had enumerated the precedents which had inspired article 3, including article 45 of the Pact of Bogotá of 1948. The procedure laid down in that article might perhaps provide a solution to the problem raised by Mr. Lauterpacht.

28. Mr. ALFARO said that Mr. Lauterpacht's point was an important one, and deserved immediate attention. The President of the Court would be greatly embarrassed if called upon to fix the size of the tribunal. A tribunal of five would perhaps prove cumbersome, whereas the appointment of a single arbitrator might provoke serious objection. The Commission, therefore, should consider inserting a provision to the effect that if the *compromis* contained no stipulation about the size of the tribunal, the latter should consist of three members, one from each party's national group in the Permanent Court of Arbitration, and one umpire of any other nationality.

29. Mr. SCELLE observed that a distinction must be made between the parties failing to agree upon the persons to be appointed, and their failing to agree upon their number. In the latter case, the President of the Court would find himself in great difficulty, because the nature of the case would of necessity largely determine the size of the tribunal. If the decision were to be left to the President of the Court, he would be indirectly influencing the proceedings. He (Mr. Scelle) had originally recommended that arbitral tribunals in the strict sense of the term (as distinct from conciliation commissions) should be composed of five members because in a tribunal of three the umpire's role tended to predominate — the more so inasmuch as States tended to select as arbitrators lawyers rather than judges. If, in the absence of prior agreement between the parties, the President of the Court were asked to decide whether the tribunal were to consist of five members or a sole arbitrator, he would be endowed with considerable latitude. The whole matter, on which a provision was undoubtedly necessary, therefore required further reflection.

30. The CHAIRMAN suggested that further consideration of the point raised by Mr. Lauterpacht be deferred until the Special Rapporteur had submitted a text. The final vote on paragraphs 1 and 4 of article 3 should also be deferred.

It was so agreed.

31. Mr. SCELLE, reverting to the United Kingdom Government's observations on article 9, said that he had been struck by the analogy drawn therein between arbitral procedure and the procedure in disputes brought before the International Court of Justice under Article 36, paragraph 2, of its Statute. He had particular sympathy for the whole trend of that comment, because of his conviction that the *compromis* was frequently a major obstacle to arbitration. For that reason he had drafted a new paragraph for inclusion in article 3, providing that where an arbitral tribunal already existed, either party to a dispute could submit the case to it by application.

32. Mr. KOZHEVNIKOV said that such a text would obviously require very careful examination. His immediate impression was that it would be unacceptable, since it implied total rejection of the traditional principles of arbitration, and would, indeed, constitute their death warrant.

33. Mr. ZOUREK pointed out that if the *compromis* contained no provision about the size of the tribunal, its validity and the competence of the tribunal would be impaired. Before he could express a final opinion he must have an explanation of what Mr. Scelle meant when he stated that if a tribunal existed either party would be able to bring a case before it direct. Surely an arbitral tribunal could only exist by virtue of a multilateral or bilateral treaty. A new convention, according to Mr. Scelle's argument, would abrogate all earlier treaties. It was therefore a contradiction to refer to existing arbitral tribunals.

34. Mr. SCELLE said that his thesis had perhaps been slightly distorted by Mr. Zourek. The point he had wished to bring out was that, by refusing to submit to adjudication by a tribunal without the preliminary conclusion of a *compromis,* one party could engineer a deadlock, and thus prevent the tribunal even from deciding whether it was competent to deal with the dispute.

35. Mr. LAUTERPACHT urged the Commission not to proceed with the discussion until it had Mr. Scelle's text before it. Perhaps the Special Rapporteur had attributed too much importance to the United Kingdom Government's observation on article 9. That observation was based on the assumption that article 9 demanded the conclusion of a *compromis* in every case. They did not perhaps take sufficiently into account the opening words of article 9, namely: "Unless there are prior provisions on arbitration which suffice for the purpose...". The Special Rapporteur might therefore reconsider the text of his proposed new paragraph, which in any event would find its proper place, not in Chapter II, which dealt with the constitution of the tribunal, but in Chapter IV, which dealt with the powers of a tribunal.

36. Mr. LIANG (Secretary to the Commission) said that the opening words of article 9 might obviate any need for a special provision of the kind envisaged by the Special Rapporteur. However, if any doubt subsisted they might be replaced by the following: "Unless there are previous agreements on arbitration between the parties which are sufficient for the purpose..."

37. If a previous undertaking to resort to arbitration accompanied by certain procedural provisions existed, there would be no need for a separate *compromis.*

38. Mr. SCELLE said that the first phrase of article 9 had not escaped his notice, and he interpreted it in the same way as the Secretary. He wondered, however, whether, on that interpretation, a tribunal would be able to take up a case in face of opposition by one of the parties on the ground that a *compromis* was necessary. In his view, the provisions of article 9 were inadequate to dispose of the contingency of one party's preventing the other from making a direct application to the tribunal despite the existence of a prior undertaking to arbitrate. He would, however, support Mr. Lauterpacht's suggestion that further discussion be deferred until his new text had been circulated.

Mr. Lauterpacht's suggestion was adopted.

39. Mr. KOZHEVNIKOV thought that, in the interests of clarity and precision, the expression "arbitral tribunal" should be used throughout the draft. He noticed that in some articles the word "tribunal" alone was used, and that article 1 referred to "arbitration". Admittedly, the comments did indicate what was meant, but they had no legal force and could not be binding on States.

40. He also wished to take the present opportunity of stating that his agreement with any article or portion of an article was not to be taken as implying agreement with the comment thereon.

41. Mr. SCELLE agreed that the expression "arbitral tribunal" should be used throughout the draft.[2]

42. Mr. LAUTERPACHT doubted whether it was either essential or justifiable to introduce such rigorous uniformity. On stylistic grounds it was, for instance, unnecessary in article 3 to qualify the word "tribunal" in every case. There was no possibility of misunderstanding as to what was meant. With regard to article 1, the word "arbitration" must be retained, since it referred to arbitration generally.

43. Mr. KOZHEVNIKOV insisted that his remarks be taken into account, the more so as their force had been recognized by the special rapporteur.

44. Mr. ZOUREK supported Mr. Kozhevnikov's view.

45. Mr. ALFARO said that it would be quite legitimate in certain instances to use the word "tribunal" alone. Indeed, the expression "arbitral tribunal" would sometimes be tautological. In a convention relative to arbitral procedure it should surely be abundantly clear that the tribunal in question was an arbitral tribunal and no other.

46. The CHAIRMAN asked the Special Rapporteur to consider whether any revision of the text was necessary in the light of Mr. Kozhevnikov's remarks.[3]

ARTICLE 4

47. Mr. SCELLE said that, in the opinion of the United States Government (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10), the first clause of paragraph 1 of article 4 was not clear. The point at issue was whether the clause applied to all procedures for the constitution of the tribunal, or only to the composition of the tribunal. He accepted the latter interpretation, but was prepared to concede that there might be some ambiguity.

48. Mr. SANDSTRÖM said that if the clause referred to all procedures for the constitution of the tribunal, he would be prepared to accept it.

49. Mr. YEPES suggested that paragraph 1 might be amended to read:

> "The parties having recourse to arbitration may constitute a tribunal of one or more arbitrators as they think fit."

50. Mr. LAUTERPACHT also considered that the first clause should be deleted, since it was redundant and open to controversial interpretation.

51. Mr. ALFARO supported the amendment proposed by Mr. Yepes. It was obvious that article 4 could only refer to the composition of the tribunal, inasmuch as the powers of the tribunal were defined in articles 11 and 13.

52. Mr. SANDSTRÖM was prepared to accept the proposed amendment.

53. Mr. ZOUREK considered that the amendment narrowed the meaning of the text, since the phrase "may act in whatever manner they deem most appropriate" declared the principle of the freedom of the parties.

54. Mr. SCELLE agreed with Mr. Yepes, Mr. Lauterpacht and Mr. Alfaro, but appreciated the pertinence of Mr. Zourek's observation. Actually, the Commission had adopted the words "may act in whatever manner they deem most appropriate" because the composition of the tribunal could differ according to the nature of the dispute. He would therefore suggest that the words "to the nature of the dispute" be added at the end of the first clause, the words "as they think fit" being deleted from the second clause. That would clearly convey confidence in the ability of the parties to compose the tribunal in the way best suited to the needs of the case in question.

55. Mr. KOZHEVNIKOV was perfectly satisfied with paragraph 1 as drafted. He objected to the proposed amendments.

56. Mr. AMADO thought that the difficulty lay in the word "act" (*agir*), which gave too much latitude. He would therefore suggest that the term "compose" or "constitute" (*composer, constituer*) be substituted for it, particularly in view of the fact that Chapter II of the draft was entitled: "Constitution of the Tribunal". The text would therefore read:

> "The parties having recourse to arbitration may constitute the tribunal in whatever manner they deem most appropriate." (*selon qu'elles le jugeront bon*)

The only objection he had to those last words was that they were very clumsy in French.

57. Mr. SANDSTRÖM asked whether the word "constitute" (*constituer*) would not be interpreted as meaning that the parties to a dispute would be free to choose the procedure for constituting the tribunal. That would mean, in fact, that the word would bear the same interpretation as in article 3, where reference was made to the constitution of an arbitral tribunal by mutual agreement.

58. Mr. AMADO thought that the point was covered by the title of the chapter.

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[2] See, however, *infra*, 232nd meeting, paras. 29-34.

[3] For further discussion of article 3, see *infra*, 192nd meeting, para. 6.

59. Mr. ZOUREK maintained that the word "act" (*agir*) was the best.

60. Mr. KOZHEVNIKOV formally moved that paragraph 1 be put to the vote as it stood.

61. Mr. SCELLE asked what procedures Mr. Sandström envisaged for the constitution of a tribunal. What possible procedure could there be except negotiation — the choice of the time and place for the negotiation, and the choice of negotiators?

62. Mr. SANDSTRÖM replied that the purpose of his question was to elucidate whether the procedure laid down in article 3 would be mandatory, or whether, in view or article 4, it could be replaced by a procedure of the parties' choice.

63. Mr. SCELLE considered that the latter interpretation would in essence be tantamount to the deletion of article 3.

64. Mr. SANDSTRÖM pointed out that article 3 could be made non-mandatory.

65. Mr. SCELLE contended that the Commission was preparing a model draft, which would not be imposed upon States. The latter would be free to adopt or to discard it. To give advice was not the sole purpose of the model, and he would remind members of the precedent set by the Hague Convention for the Pacific Settlement of International Disputes of 1907.

66. It was impossible to redraft article 4 in such a manner as to invalidate article 3.

67. Replying to the CHAIRMAN, he stated that, as Special Rapporteur, he preferred Mr. Yepes' amendment to that suggested by Mr. Amado.

68. Faris Bey el-KHOURI said he had listened to the discussion with great attention, but failed to see where paragraph 1 was at fault. There was really no difference whatsoever between the amendments and the original text, which simply declared that States were free to compose a tribunal as they thought fit.

69. Mr. AMADO drew Faris Bey el-Khouri's attention to the fact that the United States Government had rightly pointed out that the wording of paragraph 1 of article 4 was vague. He was, however, prepared to withdraw his amendment in favour of Mr. Yepes'.

Mr. Yepes' amendment to paragraph 1 of article 4 was adopted by 8 votes to 2, with 1 abstention.

70. Mr. KOZHEVNIKOV wished to submit paragraph 1 of article 4 in its original form for the Commission's consideration and decision as a drafting proposal.

71. Mr. SCELLE could not agree to such a course. The Commission had just adopted an amendment whereby the word "act" (*agir*) had been deleted.

72. Mr. ZOUREK wished to raise a general question. Was it intended that the draft should abrogate all antecedent agreements and treaties, or would it be considered as being merely supplementary thereto? He would draw attention to article 9, in the introductory clause to which reference was made to prior provisions on arbitration. Surely the same principle might apply also in the case of article 4?

73. Mr. LAUTERPACHT was in full agreement with Mr. Scelle that the Commission would be wrong to consider Mr. Kozhevnikov's proposal.

74. The CHAIRMAN asked the Commission to vote on whether it was prepared to consider Mr. Kozhevnikov's proposal as a drafting proposal.

The Commission decided against consideration of Mr. Kozhevnikov's proposal, by 8 votes to 2.

75. Mr. SCELLE, turning to paragraph 2 of article 4, said that the United States Government proposed (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10) that the word "however" be deleted. He himself considered that the term *devraient* did not correspond to the English term "should", the latter being stronger.

76. Mr. LAUTERPACHT pointed out that the difficulty was not serious, since the clause was governed by the opening words: "With due regard to the circumstances of the case,".

77. Faris Bey el-KHOURI said that paragraph 1 of article 4 gave States full freedom in the voice of arbitrators, and that paragraph 2 limited that freedom, particularly by its reference to the choice of persons of "recognized competence in international law". Who would be judge of that competence? He would remind the Commission that when the General Assembly had elected the members thereto it had not applied the relevant provisions of the Statute concerning the competence of the persons elected, but had based its selection on political considerations. He would suggest that paragraph 2 be deleted.

78. Mr. SCELLE said that in the last resort States had to bow to public opinion, which, he would remind Faris Bey el-Khouri, had found expression even in the days of absolute monarchy in France. Neither governments nor the General Assembly could make such appointments as would provoke unfavourable public reaction. Paragraph 2, which uttered a salutary warning to States, should be retained.

79. Faris Bey el-KHOURI recalled that on a number of occasions Heads of States had acted as arbitrators, and had solved disputes satisfactorily. True, they had had the counsel of competent advisers.

80. Mr. PAL, supporting Faris Bey el-Khouri, said that confidence was the essential element in arbitration. It mattered more that States should have confidence in the arbitrators than that the latter should be highly competent and qualified jurists.

81. Mr. AMADO recalled that at the previous session he had voted against paragraph 2, which Mr. Scelle and Mr. Yepes were anxious to retain because they were suspicious of Heads of States and political personages. Their point of view was that of lawyers, who wished to make arbitration a judicial institution.

82. He preferred to place his confidence in the good sense of the parties, and would again vote against paragraph 2.

83. Mr. KOZHEVNIKOV said that he would be prepared to accept paragraph 2 in the light of the fact that the provision relating to the choice of the arbitrators was circumscribed by the opening clause. The expression "due regard" was clear and far-reaching.

84. The CHAIRMAN agreed with Mr. Kozhevnikov, and considered that paragraph (3) of the Comment should be slightly modified, since the reference therein to the technical nature of the issues involved was somewhat restrictive, and would, by implication, exclude the choice of sovereigns as arbitrators.

Faris Bey el-Khouri's proposal that paragraph 2 be deleted was rejected by 6 votes to 2, with 4 abstentions.

85. Mr. YEPES proposed that the word "*des*" should be substituted for the word "*les*" in the second line of the French text; the second clause would accordingly read: "*... les arbitres devraient être choisis parmi des personnes ...*"

86. Mr. ALFARO considered that the word "should" must be rendered in French by the word "*doivent*". He also supported the United States suggestion that the word "however" (*toutefois*) be deleted.

Mr. Alfaro's proposal that the word "doivent" *be substituted for the word* "devraient" *was adopted by 4 votes to 3, with 5 abstentions.*

87. The CHAIRMAN *noted* that the Commission agreed to adopt the United States suggestion that the word "however" (*toutefois*) be deleted.

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

Article 4 was adopted as amended by 6 votes to 1, with 5 abstentions.

88. After some discussion on the comments appended to the text and the Commentary prepared by the Secretariat (A/CN.4/L.40),

It was agreed that further consideration of the question be deferred.

The meeting rose at 1.05 p.m.

187th MEETING

Friday, 5 June 1953, at 9.45 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

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

1. The CHAIRMAN said that, before asking the Commission to proceed with item 1 of the provisional agenda, he would suggest that it hold another private meeting after the plenary meeting on the afternoon of Monday, 8 June, in order to conclude its consideration of certain administrative matters.

It was so agreed.

2. The CHAIRMAN, continuing, informed the Commission that he would shortly submit a tentative time-table for the work of the fifth session, and would propose that, after considering that time-table the Commission adopt its provisional agenda (A/CN.4/62).[1]

3. So far the Commission had made but slow progress, and he would urge members not to re-open issues which had already been discussed two, if not three, times. It might be possible to conclude consideration of the draft on arbitral procedure in three or four meetings.

4. He invited members to take up article 5 of the draft on arbitral procedure.

ARTICLE 5

5. Mr. SCELLE (Special Rapporteur) said that in his view the United States Government's comment (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10) was not acceptable, since it was contrary to the Commission's conception of the "immutability" of a tribunal once set up. According to the United States Government, an arbitrator might be replaced during the interval between the setting up of the tribunal and the beginning of the judicial proceedings. He would submit that once an arbitrator had been nominated, he represented the authority of the tribunal — he was, in other words, a *juge commun* — and must function as such from the time of his nomination until the rendering of the award.

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[1] See *supra*, 184th meeting, footnote 3.