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Summary record of the 436th meeting

Topic:
Arbitral Procedure

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demonstrated that many countries which began by expressing strong criticism of a draft eventually came round to supporting it, because they realized that taken as a whole it would work to their interest ; their initial strictures were largely inspired by the desire to strike as good a bargain as possible in the later stages. For that reason he did not believe that the Commission should make extreme concessions in the endeavour to meet every objection that had been raised. In particular, he believed it would be ill advised to make any concessions at all on article 3, which, as the Special Rapporteur had rightly pointed out, was vital to the draft as a whole. If the parties were to be given the chance of escaping from their obligations by failure to agree on whether to refer a preliminary question of arbitrability to the Permanent Court of Arbitration or the International Court of Justice, the Commission might as well go back to The Hague Convention for the Pacific Settlement of International Disputes of 1907. He accordingly urged the Special Rapporteur to withdraw the fatal and, in his view, unnecessary concession he had made in article 3.

17. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. García Amador that there was no need to make a concession in paragraph 1 of article 3 which was likely to defeat the whole purpose of the draft on arbitral procedure. The procedure outlined in the article, being subject to the proviso in paragraph 4 of article 1, became binding upon the parties only if they had expressly agreed to adopt it. He suggested that the reference to the Permanent Court of Arbitration in the article might well be dispensed with.

18. Mr. SCELLE, Special Rapporteur, said that he was in the curious position of having to defend himself against himself, for the Commission was in effect returning to its original position with which he was in entire agreement. He would gladly delete a reference to the Permanent Court of Arbitration which had been included only as a concession to those Governments which had criticized the idea of the compulsory jurisdiction of the International Court of Justice. Indeed, now that the text was merely a model code of procedure, initial acceptance of which was entirely optional, a whole series of objections by Governments no longer applied. He would point out, however, that in remodelling the draft he had not abandoned everything. If the parties accepted article 3 they must, in the event of disagreement, bring the preliminary question before one court or the other and, if it came before the Permanent Court of Arbitration and either party refused to accept its decision, that party would be committing an act of blatant bad faith.

19. He was, on the other hand, more reluctant to delete the reference to seeking an advisory opinion. It was possible for a State, by a process of substitution similar to that described by Mr. Bartos at the 434th meeting, to seek an advisory opinion through the medium of the competent international organization of which the State was a member. And advisory opinions, even though States were not bound to accept them, carried, in his view, the same force as court judgements. Such a procedure was, in fact, an elegant way out of a dilemma, enabling a State to obtain a ruling on a point of law without losing its case in open court.

20. He had taken note of the pertinent observations made by Sir Gerald Fitzmaurice.

21. Mr. BARTOS fully agreed with the Special Rapporteur that, in the circumstances he had just mentioned, advisory opinions could play a part in disputes between States. The International Civil Aviation Organization, for instance, which was given the role under its constitution [2] of permanent arbitrator, so to speak, and preserver of good relations between its members in matters of civil aviation, might well seek an advisory opinion of the International Court of Justice on behalf of one or more member States. But such advisory opinions could be sought by a State only indirectly through a different legal entity, and paragraph 1 of article 3 did not make that point clear.

22. On the proposal of the CHAIRMAN, Mr. SCELLE, Special Rapporteur, agreed to submit a revised draft of article 3, in the light of the discussion.

The meeting rose at 11.15 a.m.

[2] See article 44 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944, in United Nations, *Treaty Series*, vol. 15, 1948, No. 102.

436th MEETING

Monday, 5 May 1958, at 3 p.m.

Chairman : Mr. Radhabinod PAL.

Appointment of a Drafting Committee

1. The CHAIRMAN proposed that the Commission's Drafting Committee should be constituted as follows : Mr. Amado as Chairman, Sir Gerald Fitzmaurice, Mr. François, Mr. García, Mr. Sandström, Mr. Scelle, Mr. Tunkin and Mr. Zourek.

It was so agreed.

Arbitral procedure : General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 3 *(continued)*

2. Mr. EL-ERIAN said that both he and Mr. Zourek, who was unable to attend that meeting, were of the opinion that the Permanent Court of Arbitration could play a useful part, and that the reference to it in paragraph 1 of article 3 should therefore be retained.

3. He, too, doubted whether the procedure of applying to the International Court of Justice for an advisory opinion could be resorted to in a disagreement as to the existence of a dispute or as to its arbitrability. Apart from the fact, already pointed out by previous speakers, that such advisory opinions could be requested only by the General Assembly or Security Council of the United Nations or by certain other authorized international organizations, there was a further consideration. Under Article 65 of its Statute, the Court was competent to give an advisory opinion on any " legal question ", by which he understood legal points of a general nature connected with the interpretation and application of the Charter of the United Nations. The list of past advisory opinions tended to substantiate that view, for they had related mainly to such matters as the admission of new Members to the United Nations, to the question whether decisions of the United Nations Administrative Tribunal were subject to review by the General Assembly, and other similar legal questions.

4. Mr. VERDROSS, referring to the argument that States could obtain advisory opinions through the international organizations of which they were members, said that he failed to see how a disagreement regarding the existence or arbitrability of a dispute could be brought before one of the specialized agencies, which could ask for advisory opinions solely on legal questions arising within the scope of their activities. Only the General Assembly or the Security Council could request an advisory opinion on the interpretation of an arbitration agreement. But those authorities were not obliged to agree to such a request.

5. Mr. SCELLE, Special Rapporteur, read out the following revised text of paragraphs 1 and 2 of article 3, paragraph 3 remaining unchanged :

> " 1. If, before the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to arbitrate, such preliminary question shall, failing agreement between the parties upon the adoption of another procedure, be brought by both or either of the parties within three months before the International Court of Justice for summary procedure or shall be the subject of a request for an advisory opinion in conformity with Chapter IV of the Statute of the Court.
>
> " 2. In its decision on the question, the Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties. The decision shall be final."

6. He had, somewhat reluctantly, deleted all reference to the Permanent Court of Arbitration, in deference to the view of several members of the Commission that the provision of alternative courts introduced an unnecessary complication. He could not agree with the two previous speakers, however, on the matter of advisory opinions. A question concerning the interpretation of an undertaking to arbitrate was a " legal question " within the meaning of Article 65 of the Statute of the Court and, as Mr. Bartos had made quite clear, a specialized agency could request an advisory opinion on behalf of a Member State, provided that the subject of the dispute was within its competence. An advisory opinion was a ruling on a point of law, and the International Court of Justice followed much the same procedure in its advisory as in its judicial capacity.

7. Mr. HSU said that, though he had no objection to them as such, advisory opinions should probably not be referred to in article 3. In order for a State to obtain an advisory opinion of the International Court of Justice, a political body might have to intervene and, in existing circumstances, the attitude of that body on the question might not be entirely objective.

8. Sir Gerald FITZMAURICE asked the Special Rapporteur how a disagreement as to the existence or arbitrability of a dispute could form the subject of a request for an advisory opinion of the International Court from the General Assembly, the Security Council or any international body authorized to make such a request. Though it might be theoretically possible for those bodies to make the request, the likelihood of such an eventuality was extremely remote. Even allowing for so unlikely a contingency, it seemed quite sufficient in the context simply to say that the disagreement should be brought before the International Court of Justice.

9. Mr. FRANÇOIS said that strange as it might seem for him, as Secretary of the Permanent Court of Arbitration, not to advocate the extension of that Court's competence to the utmost, he must declare in favour of deleting the reference to it. As already pointed out by Mr. Verdross (435th meeting, para. 5), the Permanent Court of Arbitration was not a standing body like the International Court of Justice, but had to be constituted on each occasion. Was it likely, therefore, that parties which could not agree as to the existence or arbitrability of a dispute would collaborate in selecting arbitrators from a list of judges in order to settle their disagreement? A further difficulty was that the number of States signatories to The Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 did not include all Members of the United Nations. The problem was not, however, as great as it seemed. The words " failing agreement between the parties upon the adoption of another procedure " in article 3 obviously implied that the parties were free to have recourse to the Permanent Court of Arbitration if they wished. That point might be brought out in the Commission's report.

10. Mr. AGO agreed with the Special Rapporteur and Mr. François on the advisability of omitting the reference to the Permanent Court of Arbitration which was, in fact, only a panel of judges and not a ready-made court that could function at short notice. Only the latter kind of body could meet the need if the parties failed to agree on an arbitral board between themselves.

11. On the question of the reference to advisory opinions, he agreed with Sir Gerald Fitzmaurice. States were not authorized to apply to the Court for an advisory opinion on the subject-matter of their dispute, and even if they could do so through an international organization — a possibility which seemed out of the question — an advisory opinion could never, by its very nature, represent a final settlement.

12. Mr. YOKOTA said he was also in favour of deleting all mention of advisory opinions, for the reasons he had given previously (435th meeting, para. 7). The article was quite adequate as it stood, since it stated that preliminary questions should be referred to the International Court of Justice, unless the parties to the dispute agreed otherwise. There was no reason to prevent the parties from submitting to the ordinary procedure of the Court, if they wished to do so.

13. Mr. AMADO said that, since there was no question of revising the Statute of the International Court of Justice, there was no point in referring to advisory opinions in article 3.

14. Despite his great respect for the Permanent Court of Arbitration, he thought that the inclusion of a reference to that Court as an alternative recourse would weaken the draft. Surely, the whole object of the model draft was to prevent either of the parties from eluding the obligation to arbitrate through some loophole in the procedure.

15. Mr. GARCIA AMADOR, while appreciating the technical objections to the inclusion of a reference to advisory opinions in paragraph 1 of article 3, thought that Article 96 of the Charter, by virtue of which the United Nations had in the past requested advisory opinions, provided a means of surmounting the difficulties. Incidentally, one disadvantage of the advisory opinion procedure not so far pointed out was the danger of long delay. Whereas the summary procedure of the International Court of Justice was comparatively rapid, it would be many months before the disagreement on a preliminary question could be brought before the General Assembly and the advisory opinion finally delivered.

16. In one sense, it would be a pity if no reference were made in the article to such advisory opinions. Preliminary disagreements on the existence or arbitrability of a dispute were generally due to a claim by one of the parties that the matter lay within its domestic jurisdiction. As the Commission well knew, under Article 2, paragraph 1, of the Charter, matters essentially within the domestic jurisdiction of any State were outside the competence of the United Nations, but unfortunately none of the questions so far referred to the International Court for an advisory opinion had been such as to shed light on the much disputed question of what matters were " essentially within the domestic jurisdiction " of a State. The Court in delivering an advisory opinion on the arbitrability of a dispute might in its opinion state some general principles which could be of assistance in interpreting Article 2, paragraph 1, of the Charter. Such a consideration was not, however, sufficient to justify including a reference to advisory opinions in article 3, paragraph 1, if most members of the Commission were opposed to it.

17. Mr. SCELLE agreed with Mr. García Amador's argument in favour of including a reference to advisory opinions in article 3. The chief advantage of an advisory opinion was that it would enable a State not in the right to submit to the statement of the Court regarding the respective rights of the parties, without the Court's having to render a formal judicial decision. There was, moreover, a certain body of opinion in favour of permitting arbitration in disputes between specialized agencies. The procedure of requesting an advisory opinion in such cases would be helpful.

18. Replying to Sir Gerald Fitzmaurice, he said that circumstances might well arise in which a specialized agency would be called upon to request an advisory opinion, on the initiative of a Member State. A member of the International Labour Organisation (ILO), for instance, might well seize the ILO's Committee on Standing Orders and the Application of Conventions and Recommendations of a dispute due to the fact that failure by a neighbouring State to apply a particular labour convention was causing it acute embarrassment in its own territory. The International Labour Organisation could then ask for an advisory opinion on the matter. Similar situations could arise in the International Civil Aviation Organization (ICAO) or other specialized agencies or within the United Nations itself.

19. Mr. Verdross' original point was, he thought, adequately met by the words " by both or either of the parties " in the amended version of paragraph 1.

20. Mr. AGO said he could not quite understand the Special Rapporteur's suggestion that States could seek an advisory opinion from the International Court of Justice through international organizations. To take the specific example referred to by him, in the event of a member State of a specialized agency complaining that another State had failed to implement a convention concluded under the auspices of that agency, the question at issue would be considered by the machinery which was provided for that purpose within the agency concerned. It was only in the event of difficulties or doubts arising within the agency as to the way in which a given convention should be interpreted that the agency would ask the Court for an advisory opinion ; and in that case the agency would be acting on its own behalf, not on behalf of the States which were parties to the dispute that had arisen concerning the convention's application. Moreover, the Court's advisory opinion would certainly not of itself settle the dispute, but would only provide the basis on which it could be subsequently settled by the agency's internal machinery.

21. In his view, therefore, it would be wrong to refer to the possibility of an advisory opinion in article 3, at least as long as the text was intended to apply solely to disputes between States.

22. Sir Gerald FITZMAURICE said he had not been

convinced by the Special Rapporteur's further explanations, and fully agreed that, for the reasons indicated by Mr. Ago, all mention of advisory opinions should be eliminated from article 3. If an international organization asked the Court for an advisory opinion, it did so, as Mr. Ago had said, for reasons of its own, no matter how the question had arisen.

23. A reference to the advisory opinion procedure in article 3 would, he believed, produce consequences at variance with one of the main aims of the article, namely, to secure a rapid decision on any question of arbitrability that arose. As Mr. García Amador had pointed out, the international organization concerned would have to place the question on the agenda for the next session of its general conference. Even if the general conference acceded to the parties' request, the organization would still have to submit it to the International Court of Justice ; but the general conference might well reject the request, in which case the parties would have to submit the question to the Court in the ordinary way, as they might have done in the first place. Moreover, as Mr. Yokota had pointed out, reference to two possible procedures presented the parties with a choice, which might well prove another source of difficulties and delay.

24. As against those serious disadvantages, he could see no conceivable advantage in referring to a protracted and round-about procedure which would very rarely be applicable and, in any case, was not appropriate to the type of disagreement which the Commission was at present considering.

25. Mr. BARTOS said that, although the Special Rapporteur was undoubtedly correct in principle, he agreed that, for the practical reasons mentioned by other members of the Commission, the reference to the advisory opinion procedure could not be retained in its present form. The cases which the Special Rapporteur had had in mind might well arise ; it was not only certain specialized agencies such ICAO and ILO that might have occasion to seek an advisory opinion from the International Court of Justice on points arising out of disagreements between States, but also the General Assembly of the United Nations — as had indeed already happened in the case of the allegations concerning non-observance of the human rights provisions in the Peace Treaties — and the Security Council. On the other hand, there was no means whereby the States parties to a dispute could compel the international organization concerned to seek an advisory opinion from the Court if it did not wish to. Nor could the Commission, which was laying down rules for the parties, stipulate that the international organization must comply with their request.

26. Although he was therefore in favour of retaining the reference to the advisory opinion procedure, he thought it should be redrafted and placed elsewhere, either in a separate article stating merely that the parties would abide by any advisory opinion that was obtained by an international organization in matters relating to the dispute, or, if the Commission decided to include a section relating to international organizations, in that part of it which referred to their role in supervising the application of conventions.

27. Mr. EL-ERIAN said that other members of the Commission had sufficiently stressed the practical difficulties of the Special Rapporteur's proposal. He still had serious doubts about its legal aspects. Referring to the advisory opinion which the Permanent Court of International Justice had rendered in 1923 with regard to interpretation of the domestic jurisdiction clause in Article 15, paragraph 8, of the Covenant of the League of Nations, which had been one of the points at issue in the dispute between France and Great Britain as to the nationality decrees in Tunisia and the French Zone of Morocco,[1] he pointed out that the advisory opinion procedure rested on the assumption that the international organization concerned was already seized of the dispute and then encountered a legal difficulty on which it sought the Court's advice. It was clear, therefore, that the advisory opinion procedure provided for in the Court's Statute was intended to apply to an entirely different type of situation from any that could arise under article 3, and he accordingly appealed to the Special Rapporteur to reconsider his proposal.

28. Mr. PADILLA NERVO said he was in favour of deleting from article 3 all reference to the Permanent Court of Arbitration.

29. As regards the advisory opinion procedure, it was true that there was a fundamental difference between the type of situation contemplated by the Special Rapporteur and those cases in which the General Assembly, for example, had in the past sought an advisory opinion ; under article 3 it would be necessary for the parties to agree to have recourse to the advisory opinion procedure, whereas what had actually happened in the past was that a majority had asked for the Court's opinion on the legal propriety of certain acts committed by a minority, not only without the minority's agreement but against its express wishes. He also agreed with Mr. García Amador that the advisory opinion procedure would give rise to considerable delay and uncertainty if States would only have recourse to it through an international organization ; but he was by no means convinced that Article 65 of the Statute of the International Court of Justice necessarily debarred States from themselves seeking an advisory opinion from the Court. Article 34 laid down that only States could be parties in cases before the Court, and Article 65 merely stated that the Court could " give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request " ; he very much doubted whether the Court, if it were asked by two States to give an advisory opinion, would conclude from those two articles, taken together, that it was debarred from doing so. As the Special Rapporteur had pointed out, there were, moreover, weighty political reasons in favour of

[1] Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 4.

including a reference to the advisory opinion procedure. On balance, he therefore considered it would be advisable to do so, although, as Mr. Bartos had suggested, a better place might be found than article 3.

30. Mr. SANDSTRÖM said he was in favour of deleting all reference to the Permanent Court of Arbitration and the advisory opinion procedure, for the reasons indicated. While Mr. Padilla Nervo was possibly correct in arguing that the terms of Article 65 of the Statute of the International Court of Justice did not necessarily exclude the possibility that States might seek the Court's advisory opinion, it seemed probable that such had been the intention ; for in the ordinary course of events it was neither necessary nor natural for States which were parties to a dispute to seek an advisory opinion ; what interested them was to have the dispute settled by a judicial decision. International organizations, on the other hand, might need an advisory opinion to guide them in their future course of action. The absence of any mention of States in Article 65 was, therefore, in all probability deliberate.

31. The CHAIRMAN called for a vote on the proposal that all reference to the Permanent Court of Arbitration should be deleted from article 3.

The proposal was adopted by 14 votes to none, with 1 abstention.

32. The CHAIRMAN called for a vote on the proposal that all reference to the advisory opinion procedure of the International Court of Justice should be deleted from article 3.

The proposal was adopted by 11 votes to 3, with 1 abstention.

33. Mr. BARTOS said he had abstained in the second vote because he was in favour of deleting reference to the advisory opinion procedure from article 3, but not in favour of deleting it altogether from the draft.

34. Mr. AMADO said he had voted in favour of deleting all reference to the advisory opinion procedure, not because he was opposed to it but because it was, unfortunately, ill suited to an imperfect world.

Article 3 was referred to the Drafting Committee.

ARTICLE 4

35. The CHAIRMAN said that the consideration of article 4 would be deferred owing to the absence of Mr. Zourek, who had a proposal to introduce concerning that article.

ARTICLE 5

36. Mr. SCELLE, Special Rapporteur, introduced article 5 of the model draft.

37. Paragraph 1 of the article set forth the fundamental principle of the immutability of the arbitral tribunal.

38. Once the arbitrators had been appointed, they became members of an international organ entrusted with the task of deciding the dispute. The arbitrator appointed by a party was not an advocate for that party ; the task of defending the interests of each of the parties was the duty of its agent and counsel.

39. Paragraph 2 made it possible for one of the parties to replace its arbitrator before the proceedings had begun ; that provision had been introduced because a number of Governments had expressed the view that it should always be possible for one of the parties to replace an arbitrator appointed by it (see A/CN.4/L.71). In his view, the replacement should only be permitted so long as the arbitrator had not actually begun to function as such. The second sentence of paragraph 2 made it possible to replace an arbitrator during the proceedings by agreement between the parties.

40. Paragraph 3 defined the moment at which proceedings were deemed to have begun.

41. Mr. GARCIA AMADOR said that article 5 had not given rise to any serious criticism on the part of Governments, and it was therefore possible for the Commission to approve it without much discussion. He believed that the same was true of the following two or three articles of the model draft.

42. Mr. BARTOS asked the Special Rapporteur whether the first sentence of paragraph 2 applied also to the case of an arbitrator appointed by the President of the International Court of Justice, or another authority, after one of the parties had failed to appoint an arbitrator in due time.

43. He also wished to know whether an arbitrator appointed jointly by the two parties could be replaced by agreement of the parties at any time.

44. Mr. SCELLE, Special Rapporteur, said that if an arbitrator was appointed by the President of the International Court of Justice, or by another authority, that arbitrator was not deemed to be an arbitrator appointed by one of the parties. The party concerned could not therefore replace the arbitrator so appointed.

45. An arbitrator appointed by agreement between the parties could, of course, be replaced by agreement between the parties.

46. Mr. BARTOS said that paragraph 2, concerning the replacement, should contain the following additional stipulations. Firstly, a " national " arbitrator who should have been appointed by one of the parties but who, in default of action by that party, had been appointed in the manner described in article 4, should be treated in law as though he had been appointed by the party concerned and was hence capable of being replaced by another arbitrator appointed by that party. If, on the other hand, the parties had agreed that the arbitrators would be appointed by an international official, in his capacity as such and not acting in lieu of a party which had failed to make the appointment in due time, then those arbitrators could not be replaced by order of the States concerned. Secondly, if it was agreed that a certain number of arbitrators taking the place of " national " arbitrators were to be appointed by agreement, or that the appointment by one of the

parties was subject to the consent of the other, then the removal or replacement of the arbitrators would require the concurrence of both parties. It was, of course, self-understood that those provisions would only operate so long as the proceedings had not in fact begun.

47. To the extent of his remarks, therefore, he disagreed with the Special Rapporteur; he added, however, that he would not press for a vote on the clause in question.

48. Mr. AGO said that he was not altogether satisfied with paragraph 2 which might give some scope for dilatory tactics. He suggested that the provision contained in the second sentence of that paragraph should apply — in the same way as that in the first sentence — only to an arbitrator appointed by one of the parties; as drafted, the text appeared to suggest that any arbitrator could be replaced during the proceedings by agreement between the parties.

49. He suggested the deletion of the words " written or oral " in paragraph 3. Usually oral proceedings did not commence until after the written proceedings, and the wording used in the draft might therefore give rise to doubt about the exact moment to which it was intended to refer. The paragraph should simply state that the proceedings were deemed to have begun when the first order concerning procedure had been made.

50. Mr. SCELLE, Special Rapporteur, agreed to the deletion of the words " written or oral " from paragraph 3.

51. Mr. SANDSTRÖM said that it was ncessary to make some provision to cover the case of an arbitrator appointed by both parties. Paragraph 2, particularly if amended in the manner suggested by Mr. Ago, would not make it clear whether it was possible for the parties to replace such an arbitrator by agreement and, if so, whether that right was limited to the period before the proceedings had begun.

52. Sir Gerald FITZMAURICE agreed that some provision had to be made to cover the case mentioned by Mr. Sandström. Perhaps the best course was to amend the second sentence of paragraph 2 in the manner suggested by Mr. Ago, and to draft a separate paragraph to deal with the question of arbitrators appointed jointly by both parties.

53. The CHAIRMAN said that the question could perhaps be dealt with by the Drafting Committee.

54. Mr. AMADO said that the points raised concerned questions of substance and should be disposed of by the Commission rather than by the Drafting Committee.

55. Mr. SCELLE, Special Rapporteur, said that he would consult with Mr. Ago and Sir Gerald Fitzmaurice and submit a revised text to the Commission.

The meeting rose at 6.15 p.m.

437th MEETING

Tuesday, 6 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 5 *(continued)*

1. Mr. SCELLE, Special Rapporteur, said that he and Mr. Ago had agreed on a redraft of article 5, in the light of the discussion at the 436th meeting. Paragraph 1 would remain unchanged and the remainder of the article would read:

> " 2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. An arbitrator appointed by a party may not be replaced during the proceedings before the tribunal except by agreement between the parties.
>
> " 3. Umpires appointed by agreement between the parties may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 4, paragraph 2, may not be changed even by agreement between the parties.
>
> " 4. The proceedings are deemed to have begun when the president of the tribunal or the sole arbitrator has made the first order concerning procedure."

2. Mr. SANDSTRÖM asked whether an order fixing the date and place of the first meeting of the tribunal would constitute a first order concerning procedure within the meaning of paragraph 4.

3. Mr. SCELLE, Special Rapporteur, answered in the affirmative.

4. Mr. FRANÇOIS said that the expression " save in exceptional circumstances " in paragraph 3 was somewhat vague.

5. Mr. SANDSTRÖM said that the phrase in question appeared to constitute a recommendation to the parties rather than a mandatory provision.

6. Mr. SCELLE, Special Rapporteur, said that it was difficult to make the provision more definite. Some indication that the changes in question were generally undesirable was, however, appropriate.

7. The CHAIRMAN said that a decision on article 5 would be postponed until a later meeting so that members could study the new text.