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Summary record of the 141st meeting

Topic:
Arbitral Procedure

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141st MEETING

Thursday, 12 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, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

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

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

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

6. Mr. YEPES said that, in accordance with the Chairman's ruling [1] at the preceding meeting, he wished to submit the following new text to replace article 6 of the special rapporteur's text, which the Commission had not accepted:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> " Nevertheless, generally speaking and having due regard to the circumstances of the case, the following rules shall be applicable to the constitution of the arbitral tribunal :
>
> " (*a*) The arbitrators shall be chosen from among persons of high moral character who possess the qualifications and knowledge required for the matter ;"

19. Mr. LIANG (Secretary to the Commission) suggested that, if narrowly interpreted, the phrase " the qualifications and knowledge required for the matter " might prove too restrictive.

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

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

22. Further consideration also appeared to be required in the case of sub-paragraph (*b*). In several cases, such as the " I'm Alone " case [2] and the Alaska Boundary Commission dispute,[3] the parties had felt that it would further settlement by arbitration to limit the arbitral tribunal to their own nationals. That might or might not be a good principle, but the Commission must recognize that the practice existed.

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

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

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

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

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

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

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

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

27. Mr. SCELLE pointed out that what Mr. Amado had said amounted to criticism of article 22 of the Revised General Act, which provided that three out of five arbitrators should be nationals of third Powers. The Revised General Act had recently been endorsed by the General Assembly. It was surprising to find that the International Law Commission apparently lagged behind the General Assembly in that respect.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39. Mr. KERNO (Assistant Secretary-General) said that the Commission could not profitably examine article 8 until it had taken a final decision on article 7, consideration of which had been deferred. He therefore suggested that article 9 be considered next.

It was so agreed.

ARTICLE 9 [8] and ARTICLE 7
(resumed from the 140th meeting)

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

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

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

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

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

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

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

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

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

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

[8] Article 9 read as follows :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

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

142nd MEETING

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

CONTENTS

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."