Document:-
A/CN.4/35

Memorandum on Arbitral Procedure, prepared by the Secretariat

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1950 , vol. II

DOCUMENT A/CN.4/35

Memorandum prepared by the Secretariat

[Original Text: English]
[21 November 1950]

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I. INTRODUCTION

A. The International Law Commission

1. At is 1949 session at Lake Success, the International Law Commission decided to study for codification, and as one of three topics given priority for this purpose, the subject of arbitral procedure.[1] It agreed that

> "While the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration."[2]

Mr. Georges Scelle was elected Rapporteur for the subject of arbitral procedure.

2. At is fifth meeting, the International Law Commission considered the topic proposed by Mr. Alfaro, namely: the pacific settlement of international disputes. It was noted that the Interim Committee was studying that subject, but that it had expressed hope that the International Law Commission also would study the question. Two possibilities were suggested: the problem of pacific settlement as a whole, or questions arising from the operation of tribunals. The Chairman concluded that the Commission did not favour retaining the question of the pacific settlement of international disputes among the topics, the codification or which seemed necessary or desirable.[3]

3. At its sixth meeting, the Commission had before it the suggestion made in paragraph 99 of the Secretary-General's memorandum ("Survey of International Law" (United Nations Publications, Sales No.: 1948. V. 1 (1)) concerning arbitral procedure. In this memorandum it was observed that the League of Nations Committee of Experts had not contemplated working on this subject, but that cases arising thereafter had raised the question, particularly as regards excess of jurisdiction, essential error, and rehearing or revision of arbitral awards. Such codification might include appellate jurisdiction for the International Court of Justice, though this would be "clearly a legislative step".

There was general agreement in the International Law Commission to include the law of arbitral procedure, without changing its title in any way, in the list of topics to be retained.[4]

4. The Chairman suggested, at the seventh meeting, that two of the lists of subjects could almost certainly be successfully codified: the law of treaties, and "arbitral procedure which was directly linked to the application of Article 33 of the United Nations Charter". On the other hand, Mr. Scelle felt that the question of arbitral procedure could be left in the background without much inconvenience, for the arbitration system which had worked smoothly for a hundred years or so would not suffer thereby. Mr. Koretsky agreed with this view. Mr. Brierly, Mr. Hsu and Mr. Spiropoulos regarded arbitral procedure as of importance.

On the first vote taken, it was agreed that the law of treaties and arbitral procedure should be included among the topics for which priority should be given.[5]

5. At its 33rd meeting, the Commission considered General Directives on the Drafting of Reports. The only comments concerning arbitral procedure were those offered by the Chairman, as follows:

> "The question of arbitral procedure, which had been considered for the first time in 1875 by the Institute of International Law, had been amply dealt with in The Hague Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes. Since that time the rules of arbitral procedure had been frequently applied, and the Rapporteur would find abundant practical documentation in the many cases of arbitration. In particular, he might make a thorough study of a question which had already arisen several times, in the case of the Hungarian Optants, for example, as also before a Franco-Mexican claims commission and a German-American claims commission; namely, what were the powers of a commission made up of two members representing the two powers concerned and one arbitrator, after the representative of one of the powers had withdrawn?"[6]

6. At the same (33rd) meeting, there was discussion as to the matter of asking governments to furnish information upon the topics selected. The proposal of Mr. Spiropoulos was adopted, as follows:

(*a*) To decide at once to request governments to furnish the information mentioned in paragraph 2 of Article 19;

(*b*) To instruct the Special Rapporteurs to decide, together with the Chairman of the Commission and the Secretary-General, what documents they would require;

(*c*) To instruct the Chairman to address requests, through the Secretary-General, to governments for information[7].

B. Previous studies

7. Several previous steps toward a code of arbitral procedure may be mentioned. *The Institut de Droit International*, at its Geneva meeting in 1874 deliberated upon a draft presented by Mr. Goldschmidt and adopted in the following year a *Règlement* upon the subject (*Tableau Général de l'Institut de Droit International 1873-1892*, Paris 1893, pp. 123-131).

8. The Convention for the Pacific Settlement of International Disputes was adopted at the First Hague Conference in 1899, and was considerably revised and enlarged at the Second Hague Conference in 1907. It is not limited, of course, to arbitral procedure: Part. IV, Articles 37-90, deals with international arbitration. The procedure here laid down has often been referred to in

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[1] *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), p. 3.

[2] *Ibid.*

[3] 5th meeting, para. 82.

[4] 6th meeting, paras. 33-34.

[5] 7th meeting, para. 28.

[6] 33rd meeting, para. 8.

[7] *Ibid*, para. 15-22.

compromis or by tribunals (Scott, *The Hague Conventions and Declarations of 1899 and 1907*, Second Edition, New York 1915, pp. 41-88).

9. The Peace Code, presented by the Mexican Government to the Seventh International Conference of American States (Montevideo, 1933) and submitted by it to the consideration of Governments, provided in Chapter IV an elaborate code of procedure for arbitration (*The International Conferences of American States: First Supplement 1933-1940*, Carnegie Endowment for International Peace, Washington, 1940, pp. 55-59).

10. In 1927, the *Institut de Droit International* renewed its interest in the subject of arbitral procedure, at its Lausanne session, where a report was presented by F. L. de la Barra and A. Mercier. Since the *Institut* had other commissions dealing with obligatory arbitration, and with conciliation, it was decided to deal with arbitral procedure *stricto sensu*. The rapporteurs, referring back to the *Projet* of 1875, asserted that its principles had received the consecration of positive law, and went on to say:

> "*Mais, considérant que les progrès continus de l'arbitrage appellent le développement des règles de droit formel, il décide de poursuivre l'œuvre commencée et d'entreprendre l'élaboration d'un code de procédure internationale.*" [8]

The rapporteurs recommended also that a study be made as to the desirability of opening arbitral procedure to individuals.

11. The General Act of Geneva (1928), in which Chapter III deals with *ad hoc* arbitral tribunals, refers signatories, for procedure to be followed, to The Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes (United Nations, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948*, Lake Success, 1948, pp. 435-445).

C. Outline of the task

12. The term "arbitration" is by now generally regarded as referring to settlement of a dispute in accordance with law (see below, Section VII). The term "arbitral procedure" could be taken to refer to the whole process of agreement to submit to arbitration, including preliminary obligations (compulsory arbitration), to the constitution and procedure of the tribunal, the award and its enforcement, et cetera. The development of arbitration has now led to subdivisions: thus, judicial settlement has appeared with the establishment of permanent courts; and obligatory arbitration has become a part of the expanding methods for the pacific settlement of disputes. Thus, the term "arbitral procedure" comes to have a limited meaning; it appears to be confined to the procedure within a tribunal after it has been set up by the parties through a special agreement among themselves. If this description were accepted, study of the term would exclude from consideration general treaties of arbitration or compulsory pacific settlement of disputes, though it would derive from them any rules of procedure applicable to an arbitral tribunal after it has been agreed upon.

[8] *Annuaire de l'Institut*, vol. 33, tome II, p. 627.

12*a*. The above appears to coincide with the viewpoint of the International Law Commission, in its discussion concerning pacific settlement of disputes. Some members, however, apparently envisaged a broader consideration than technical details of procedure and the Commission might wish to include such items as a sequence of methods for settling disputes, of which arbitration would be one method; or provisions for encouraging or improving agreements to arbitrate; statements or limitations as to what should or should not be submitted for arbitration; provisions for a permanent bureau to handle arrangements for whatever tribunal; establishment of some method of revision or appeal from an unsatisfactory award; relationship between *ad hoc* arbitral tribunals and organs of the United Nations (e.g., for deposit and distribution of documents); or rules for obligatory submission of designated types of disputes to arbitration.

This memorandum will be limited to the procedure to be followed after the *compromis d'arbitrage* has been made.

13. In his book entitled *The Process of International Arbitration* (New York, 1946, p. 3) Carlston observes that "upon the careful and skilled drafting of the procedural rules, therefore, the successful conduct of an international arbitration will often depend". He asserts (p. 30) that

> "the variability in the factors affecting the successful conduct of any international arbitration is too great to enable the creation of any one comprehensive code which would furnish an unfailing guide for the conduct of all arbitrations."

Later, however, he concludes (pp. 261-262) that,

> "notwithstanding the strictures previously made in these pages concerning the unworkability of a universal code of international arbitration procedure, progress can be made in the formulation of a series of draft arbitration conventions and procedural rules which, with such further refinements in each individual arbitration as may be required, could serve as a basis for future arbitration proceedings. These could include recommended procedures for the solution of such typical controversies as boundary disputes, accumulations of international claims of varied character, war damage claims, and the like . . .
>
> "Every effort should be made to establish accessible and convenient arbitration facilities, with simple, flexible procedures, to which parties can readily resort for the settlement of their disputes."

II. THE "COMPROMIS"

14. The *compromis d'arbitrage*, according to Ralston (*Law and Procedure of International Tribunals*, Revised Edition, 1926, p. 5) "has come into vogue to designate the form of treaty which refers a given subject-matter of dispute to arbitrators, either especially designated or whose designation is arranged for, describes and limits the powers of the arbitrators and usually in substance the general tenor of their possible sentences, with a provision for carrying them out". Witenberg (*L'Organisation Judiciaire: La Procédure et la Sentence Internationales*, 1937, p. 6) defines the *compromis* as "*un traité aux termes duquel un ou plusieurs Etats con-*

viennent de confier à un arbitre ou à un organisme judiciaire préconstitué la solution d'un ou plusieurs litiges déjà nés."

14*a*. Since it is the charter of the tribunal, the *compromis* is of fundamental importance. It represents the agreement of the sovereign parties for the purpose of settling the dispute between them. It is to be observed, however, that this agreement has sometimes been reached, and an obligation created, in a previous instrument. Thus, a treaty of peace may require parties to arbitrate certain issues; a general treaty of whatever nature may contain a "compromissory clause" under which an obligation exists to arbitrate issues arising under that treaty; or states may be bound by a general treaty of arbitration or of pacific settlement to submit certain issues to arbitration. In such instances, the obligation to arbitrate exists before the *compromis* is made; but it will usually be necessary, nevertheless, to agree upon a *compromis* for the dispute when it arises.

15. A surprising degree of informality and variety is to be found in the instruments which make arrangements for arbitration. They range from solemn treaties to verbal arrangements. The list contained in the invaluable *Survey of International Arbitrations 1794 — 1938* by A.M. Stuyt, shows, aside from instruments called treaties, conventions, agreements or protocols, the following variations (numbers in parentheses are as listed in Stuyt) :

Exchange of notes, letters or telegrams (70, 97, 103, 132, 136, 295, 321, 356, 374, 380, 381, 390, 396 a, 408)
Verbal note (72)
Act, legislative (30, 206, 224, 382, 402)
Declarations (38, 44, 163, 183, 194)

Arrangements (36, 146, 166, 187)
Memorandum (50, 67, 178, 227)
Decrees (66, 122, 126, 305, 316)

Contracts (211, 212, 250, 370)
Protocol of Conference (77, 85, 89)
Proposition and acceptance (90)
Instructions to Commissioner (175, 246)
Letter and legislative action (177)

Verbal arrangement (3, 137)
Public Notice (35, 36)
Resolution of Leagne of Nations Council (358)
Engagements (62)
[redacted]
Collective Note or Letter (88, 138)

15*a*. The provisions found in these instruments vary from the mere statement of agreement to arbitrate down to the most precise and detailed rules of procedure. Often, a series of later instruments is needed in order to complete the procedure or to resolve controversies due to inadequate foresight in the *compromis*. It is easy to conclude that more care should be taken in the making of these instruments. Feller says (*The Mexican Claims Commissions, 1923-1934: A Study in the Law and Procedure of International Tribunals,* 1935, p. 318):

> "It need hardly be said that the claims convention should be drawn up with the most scrupulous clarity. Those who have participated in the drafting of treaties or legislation will know that draftsmen are often tempted to permit a difficult or controverted point to remain intentionally ambiguous. Such a temptation should never be indulged in when drafting a claims convention. Ambiguities cause conflict and delay, and may often wreck the whole structure of settlement."

15*b*. While it would doubtless be impossible to prescribe a uniform *compromis,* adaptable to all circumstances, suggestions may be offered as to what should be included in such an instrument. Not only may time and money be saved by proper drafting, but some degree of uniformity would assist arbitrators in their tasks. There is no trained profession of arbitrators, but individuals may be chosen who have knowledge of some past arbitrations; they would feel more confident if they knew that the arbitrations which they were called upon to conduct would be along lines uniform with past experience.

16. A *compromis* should include certain items: (1) The statement of agreement to arbitrate is of course essential; (2) A clear statement of the issue is oftentimes difficult to achieve, and should be carefully phrased. The arbitrator must work within the question stated, and dissatisfaction may result if the limits within which he must decide are not clear to him; (3) In so far as an agreed statement of facts can be included, time and energy will be saved; (4) An adequate method of selecting members of the tribunal is needed, so that there may be assurance as to its formation, and as to filling vacancies; (5) The law, or principles by which the tribunal is to be guided, should be clearly stated. The judge must know whether he is strictly and technically bound by a treaty or law, or whether he may decide *ex æquo et bono,* or otherwise; (6) Various questions of competence should be anticipated, though rules of customary law can fill some gaps. Can the tribunal act in the absence of a member, or in default of appearance by a party ? Can the tribunal require provisional or interim measures ? May it decide as to its own procedure ? (7) The procedure to be followed by the tribunal, if not clearly provided for, may lead to interminable delay and wrangling. The *compromis* should either authorize the tribunal to establish its own procedure, or lay down definite rules as to written and oral pleadings, the order of presentation, the time and manner of intro-

duction or production of evidence, et cetera; (8) The form in which the award should be presented, the method by which it is determined, and the extent of its obligation (e.g., as to revision, if any) should be stated, and provision, if any, as to its execution; (9) Finally, certain general provisions should be included as to expenses, staff, date and place of meeting, registry or distribution of documents, et cetera.

III. ESTABLISHMENT OF THE TRIBUNAL

A. Types

17. The parties are of course free to refer their questions to any person or body available, or to create a tribunal in whatever shape they may wish — in so far as they are not bound by previously contracted obligations.

18. Up to the 19th century, it was customary to refer a dispute to a sovereign, or to an ecclesiastical person, or to some existing body. A number of examples are given in de Lapradelle and Politis, *Recueil des arbitrages internationaux*, vol. I, pp. XXIX and XLIV, and in Witenberg, pp. 11-12. In most such cases, this meant a "sole arbiter", a position which has certain advantages. It calls for less expense; it may eliminate oral argument, thereby saving much time, energy and wrangling; it avoids argument and dissension among the judges and should provide a more rapid and definitive determination of the issue. These advantages do not accrue in all situations, of course; for example, in a claims commission where one man would have to write many opinions; and in general states hesitate to trust to such an extent upon the judgment of one person. The sole arbiter is still frequently used; but he is not so often a sovereign or ecclesiastic and is more frequently a person skilled in the law. It is to be observed that, of 59 arbitrations held since 1920 and included in the three volumes of *Reports of International Arbitral Awards* (cited hereafter as *I.A.A.*), edited by the Registry of the International Court of Justice, 31 were entrusted to a sole arbitrator, of whom only one was a sovereign.

19. After the Jay Treaty of 1794, a trend developed towards arbitration by a small number of persons, more or less experts, and often including members from a third state, not a party to the dispute. Such a tribunal might be created in a number of ways.

The "mixed commission" was composed of an equal number of representatives from each party. In this type, parity of representation is the essential element, protecting equally the rights of each state, and rejecting the idea of decision from the outside. There is no umpire with a casting vote. The effort is to reach unanimous agreement.

20. The "mixed arbitral commission" is composed of an equal number of representatives chosen by each party, with one or more persons chosen from a state not a party to the dispute. Most of the tribunals fall under this classification. This type may be subdivided into those in which the neutral sits regularly, usually as presiding commissioner, and those in which he acts as umpire in those cases only in which the commissioners fail to agree. As to this type, Feller says (*op. cit.*, p. 317):

> "It is a grave mistake to construct a tribunal out of two national members and one neutral member. Few men are capable of holding the balance between two contending national commissioners. If the governments do not object to the possibility of decision by compromise rather than by adjudication, they should provide for two national commissioners with an umpire in case of disagreement. Otherwise, they should provide either for one, or better still three, neutral commissioners."

21. Less frequently, a commission may be composed entirely of nationals of states not connected with the dispute, with no representatives of the parties sitting on the bench.

22. In a number of cases, a dispute has been referred to an existing body, either national (e.g., the Senate of Hamburg, the French Court of Cassation) or international (e.g., the Permanent Court of Arbitration at The Hague or the Central American Court of Justice). In the latter instances, as certainly also where reference is made to the International Court of Justice one is reaching beyond arbitration to judicial settlement.

B. Selection of judges

23. The selection of judges is a matter of prime importance: complaints in this respect have led to some reluctance to resort to arbitration. Judges should be capable and disinterested persons; it would desirable to have available a number of persons of training or experience as arbitrators, but development in the field of arbitration has not led in this direction. The provision of a panel of judges, such as for the Permanent Court of Arbitration, could be expected to result in accumulative experience on the part of its members, but in practice this has not been true. In his treatise on the Permanent Court of International Justice, Judge Hudson notes (*op. cit.*, p. 7) that "in forty years the Court has had almost five hundred members, less than thirty of whom have served as members of constituted tribunals". It would be useful if some means could be found of developing a supply, or a profession, of competent and experienced arbitrators.

The methods of selection have followed a pattern, or patterns, but have been nevertheless somewhat haphazard.

24. The *compromis* may designate in itself, and by name, the person or persons to serve. This would mean that the Governments had agreed in advance upon the person (this is most often true in the case of a sole arbiter) or persons. Thus, in the *Case of the Religious Properties in Portugal:*

> *"Le Tribunal sera composé des trois arbitres suivants que les quatre Gouvernements choisissent d'un commun accord : l'Hon. Elihu Root, Son Excellence le Jonkheer A.-F. de Savornin Lohman, M. Lardy."* (*I.A.A.*, vol. I, p. 9).

25. The *compromis* may name no one, but may establish a procedure to be followed in the selection of members of the tribunal, or may refer to a procedure elsewhere established. In the *compromis d'arbitrage* between France and Peru, of 2 February 1914, it was

agreed that each should name an arbiter, and " il sera procédé à la désignation du Surarbitre dans la forme prescrite par l'article 87 de la Convention de la Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux " (*ibid.*, p. 216). It is to be noted that the method to be employed is sometimes prescribed by another instrument, e.g., the Treaty of Versailles (see the case of the Cessions by Germany to France under Article 357 of the Treaty of Versailles, *ibid.*, p. 61).

26. Where national members are concerned, it is to be presumed that they will be appointed, and replaced as needed, by their respective Governments. It can usually be assumed that such appointments will be made, but there have been cases in which they were not made; and such situations raise important questions as to the ability of the tribunal to function. Provision is sometimes made for ultimate choice of neutral members, but not for national members, the assumption being that Governments will duly make their appointments.

27. In the case of the Hungarian Optants, the Mixed Arbitral Tribunal having ruled that it had jurisdiction, the Romanian Government announced that it would withdraw its arbitrator in the agrarian cases. The matter was carried before the League of Nations and, since this possibility of carrying on had been provided, an adjustment was finally reached. (See Francis Deák, *The Hungarian - Rumanian Land Dispute*, 1928). No such alternative was available to the Mixed Claims Commission, United States and Germany, when in dealing with the Black Tom and Kingsland cases, a dispute arose as to whether the case should be reopened, and when the umpire upheld the right of the commission to do so, the German Commissioner and Agent withdrew. The umpire, overruling the objection that the Commission was not competent to act without German participation, made an award of a large sum to be paid by Germany (*Opinions and Decisions in the Sabotage Claims handed down June 15, 1939, and October 30, 1939*). A similar difficulty appeared in the French Mexican Commission under the Convention of 12 March 1927. A question having arisen as to the expiration of the term of the Commission's powers, the Mexican Government refused to participate further. M. Verzijl, the Presiding Commissioner, proceeded nevertheless and gave awards in 23 claims. Another convention was required in order to straighten out the difficulties (Feller, *op. cit.*, pp. 70-76).

28. The Soviet Union does not usually employ arbitration in its disputes with other states, but does to a large extent employ commercial arbitration. Its agreement with the Lena Goldfields Company provides an interesting example of effort to meet the difficulty above described:

> " The Arbitration Court shall be composed of 3 (three) members, one of whom shall be selected by the Government, one by the Lena Goldfields Company and the third, who is to be the super-arbitrator, shall be chosen by the two parties together by mutual agreement.
>
> " If such agreement is not reached within 30 (thirty) days, from the day of receipt by the defending party of a written summons to the Arbitration Court, giving an exposition of the matters in dispute, and the designation of the member of the Court selected by the prosecuting party, then, within 2 (two) weeks, the Government shall nominate 6 (six) candidates from among the professors of the Freiberg Mining Academy or of the Royal Technical High Schools of Stockhold and shall request the Lena Goldfields Company to appoint one of them as super-arbitrator within a period of 2 (two) weeks.
>
> " If the Lena Goldfields Company fails to appoint the super-arbitrator within the said 2 (two) weeks, there being no insuperable obstacles to prevent such appointment, the Government shall be entitled to request the Council of one of the said higher academic institutions to appoint a super-arbitrator from among the aforesaid 6 (six) candidates nominated by the Government.
>
> " If the Government, in the absence of insuperable obstacles, fails to nominate the 6 (six) candidates for the super-arbitratorship within the said period of 2 (two) weeks the Lena Goldfields Company shall be entitled to request the Council of one of the aforesaid higher academic institutions to nominate 6 (six) candidates and to appoint a super-arbitrator from among their number, as stated above.
>
> " If upon receipt of a notice from the super-arbitrator giving the day and place of the first session of the Court one of the parties, in the absence of insuperable obstacles, fails to send his arbitrator to the Arbitration Court or he refuses to participate in the session, then the matter in dispute shall, at the request of the other party, be settled by the super-arbitrator and the other member of the Court, such settlement to be valid only if unanimous." (Translation by Professor John N. Hazard.)

29. The same question of the competence of a tribunal to act in the failure of appointment of a national member has been referred for advisory opinion to the International Court of Justice by General Assembly resolution No. 294 (IV) of 22 October 1949 (A/1043). Under the terms of the peace treaties, disputes thereunder should be referred to commissions composed of national members and a third member to be appointed by the Secretary-General of the United Nations. Bulgaria, Hungary and Romania having refused to appoint their members, the Court is asked to say whether disputes do exist of the type calling for settlement in this manner; if so, whether the three Governments are obligated to appoint members; and if so, whether the Secretary-General is authorized to proceed to the third appointment, and whether the tribunal composed of a representative of one party and a third member appointed by the Secretary-General is competent to give a decision.

29*a*. The above difficulties, all comparatively recent, indicate a real need for provisions in the *compromis* to cover such cases. Such a provision might be a general one, permitting some other authority to decide in case of controversies, or more specific ones leading to an ultimate assured selection and participation, or providing for procedure in default.

30. The outside or neutral members of tribunals have been chosen in a number of ways. They may have been agreed upon by Governments in advance (e.g., No. XXXIV, in *I.A.A.*), and designated in the *compromis*, a procedure more frequent in the case of a " sole arbiter ", or in the case of the " umpire ", a person to whom the matter is referred when the national commissioners are unable to agree.

30*a*. More frequently the *compromis* merely provides that the question shall be referred to some friendly sovereign or state to be named for that purpose; or that the neutral members shall be named by agreement, presumably, though it is not always clear, agreement between the Governments; or that the national comissioners shall choose the neutral members. The clauses do not always make clear what is to be the function of the odd man. Thus, in the treaty between Peru and the United States of 12 January 1863 (Stuyt, No. 71):

> " The commissioners as named shall immediately after their organization, and before proceeding to any other business, proceed to name a fifth person to act as an arbitrator or umpire in any case or cases in which they themselves differ in opinion."

Further assurance of selection is given in a number of instances by provision that a final determination of the neutral arbiter shall be made by lot (e.g., Stuyt, Nos. 22, 47) or by reference to some other party (e.g., Stuyt Nos. 55, 78). Or, it may be stipulated that the choice of an arbiter shall be made by another authority (e.g., Stuyt, No. 36), " to be named by France, but to be previously approved of by Great Britain and Naples ". In one case, three neutral members were to be chosen, one appointed by each Government, the third by these two (Stuyt, No. 20); in the Salem Case (*I.A.A.* No. XXXII), if the Governments were not able to agree, the third arbitrator was to be named by the President of the Council of the Permanent Court of Arbitration at The Hague (see also the Martini case, *I.A.A.* No. XXVI). In the arbitration between Germany and Portugal (*I.A.A.* No. XXVII a) one arbitrator was named by M. Ador, as requested by the parties; this one arbitrator later requested that two others be named, and this was done.

31. Very few of the agreements assure a final choice of arbiters. Assuming — as usually can be assumed — that Governments will make the appointments which they have agreed to make, attention has, in the treaties, been directed rather to a final choice of neutral members. Quite a number of treaties, though probably less than a majority of them, provide, as has been seen, for a final choice by lot, or final designation by some specified authority (e.g., *I.A.A.* Nos. VIII, IX). Many agreements are in vague terms, such as that between Brazil and Great Britain (Stuyt No. 28) which says only: " The Commission to be composed of 4 members, to be named by the respective Governments or Ministers." Every *compromis* should contain procedure for a final choice of neutral arbiters; and, in view of recent difficulties it may be desirable to make similar provision for designation of national members, or for procedure by default where such appointment is not made.

32. The Convention for Pacific Settlement of International Disputes, revised at The Hague in 1907, provides (Article 45) that each party is to appoint two arbitrators, of whom only one can be its national, and these arbitrators choose an umpire. If they do not agree upon an umpire, the choice of an umpire is entrusted to a third power, selected by the parties by common accord. If they cannot agree upon a third Power, each shall name a different Power, and the two Powers are to make the selection in concert. Finally, if agreement is not reached in this fashion, each of the two Powers names two candidates from the panel of the Permanent Court of Arbitration, and an umpire is drawn from them by lot.

33. Under the General Act for the Pacific Settlement of International Disputes of 1928, as revised 28 April 1949, the arbitral tribunal is to be composed of five members, including one national appointed by each party. (It may be observed that if there are more than two states parties, the proportion of the tribunal may be disturbed.) The other two arbitrators and the chairman are to be chosen by common agreement; should this fail, a third Power, chosen by agreement of the parties, is requested to make the appointments. If they cannot agree upon such a third Power, each party shall designate a different Power, these two to make the appointments. Should they fail to agree, the appointments are to be made by the President of the International Court of Justice and, failing him, by the Vice-President or, finally, by the oldest member of the Court who is not a subject of either party.

34. According to the American Treaty on Pacific Settlement (Pact of Bogotá 30 April 1948), each party shall name one arbiter and transmit that name to the Council of the Organization of American States. At the same time, each party presents to the Council a list of ten jurists chosen from the panel of the Permanent Court of Arbitration at The Hague. If these lists contain three names in common, these together with the two named by the parties, constitute the tribunal; if more than three, the three are chosen by lot; if two, these two, the two arbiters directly selected by the parties, choose the fifth; if one, he is a member and another is chosen by lot; if none, one arbiter is chosen from each list by lot. In the last two cases, the four arbiters chosen name the fifth person, who becomes the presiding officer, and if they cannot agree, each of them arranges the list of jurists in order of preference, and the first of these to obtain a majority vote is chosen.

34*a*. It is thus apparent that the problem of a final choice is recognized and that attempts, somewhat complicated, have been made to solve it. Granted the international organizations which exist today, it would seem possible to devise a simpler method of achieving a final choice.

35. Provision is more frequently made for filling vacancies, usually by the same method employed for the original appointment. The obligation of a government to replace its own appointments is often found stated. Sometimes (e.g., Stuyt No. 22) full details are given to care for the absence of a member. The problem here is much the same as that discussed above, failure to appoint; but a distinction needs to be made between

deliberate refusal of a government to carry out its obligations as to appointments, and justifiable or excusable failure to do so.

36. The *compromis* rarely states qualifications for members to be chosen for the tribunals. The *Institut de Droit International* in its 1875 session proposed to exclude women; and in the Lacaze case (Stuyt, No. 66) diplomatic agents were excluded. The most frequent limitation set is with regard to nationality. Thus, the General Act of 1928 (Article 22) says :

> " The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third Powers. They must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. "

36*a*. Complaint has frequently been made against the prevailing practice of appointing nationals as judges. Such criticisms were made with regard to the Alabama case, the Behring Sea Fisheries case, and others. It is said that such national judges consistently vote in favour of their own states, rather than upon the merits of the case; and it is argued that the tribunal should be composed of judges rather than of representatives of the parties, since each state may have its own agent and counsel to defend its interests before the tribunal. In general, the presence of national judges adds to the expense, to the size of the tribunal, and to the difficulty of reaching a decision.

36*b*. In the Committee of Jurists which planned the Permanent Court of International Justice, M. Loder opposed national judges on the Court, since such participation is a " characteristic essentially belonging to arbitration " and the Report of the Committee admitted that its proposal to have them made the Court resemble a court of arbitration more nearly than a court of justice.[9] (M. O. Hudson, *The Permanent Court of International Justice*, 1943, p. 182.) Judge Hudson observes (p. 359) that, on the bench of the Court, *ad hoc* or national judges have as a general rule upheld their Government's contentions, but they have rarely stood alone in their views, and in striking instances were against their Governments. He adds that " national judges have served a useful purpose in familiarizing other judges with special features of their national laws, and at times with their national psychology as affected by the particular case ".

36*c*. *A compromis* occasionally calls for a " person of loyalty and impartiality " (Stuyt, No. 60); very rarely does it go so far as the agreement of 1840 between Great Britain and Portugal (Stuyt No. 35), which in Article XII asserted that

> " the Commissioners are placed by their respective Governments in the position of arbitrators in all matters falling within the limits of their jurisdiction; and that therefore they are to be left unbiassed and uncontrolled in the discharge of the duties confided to them. "

The Pact of Bogotá asks for persons " of recognized competence in questions of international law and of the highest integrity ". Perhaps this is as much as could be asked for in the absence of a class of skilled arbitrators, for whom more specific qualifications could be set.

36*d*. Ralston (p. 35) observes an imperfection in protocols, in that no provision is made for challenging either arbitrator or umpire because of unfitness, personal prejudice, or for other reasons. Such a provision he noted in the Convention establishing the Central American Court of Justice. In this connexion may be observed the refusal of President Taft to arbitrate between Cuba and other governments, because similar American claims existed. (Hackworth, *Digest of International Law*, Vol. VI, p. 83.)

37. Attention is called briefly to the advantages offered by a permanent tribunal, or a permanent bureau of which other tribunals can make use. A permanent location would make possible a library and other equipment, as well as a convenient meeting place. A permanent staff could aid any tribunal with regard to distribution of documents and other services, even after dissolution of the tribunal, such as maintaining archives or publishing proceedings. If judges were chosen regularly from a panel, there would be much gain in knowledge as to procedure and methods of decision. It seems probable that expenses would be less. Such a permanent bureau or tribunal could be established on a bilateral basis if there were enough cases to warrant it; a central body would be useful in other instances. It is surprising that disputant states have not made more use than they have of the convenience provided for them in the Permanent Court of Arbitration at The Hague.

C. Constitution of the Tribunal

38. The treaties contain but little as to the manner in which members of the tribunal are notified of their selection, and of arrangements for assembling them together, or for notification to those concerned that the tribunal is established and ready for business. There seems to be no established procedure for these purposes, though such notices are sometimes given (e.g., Stuyt, Nos. 35, 36).

39. The *compromis* often does name a place at which, and/or a time within which, the tribunal is to meet (see Section IX, below).

40. Formerly, and particularly in treaties with the United States, an oath or " solemn declaration " was required from each member of the tribunal as he took his seat. The oath might be spelled out verbatim in the *compromis* (e. g., Stuyt, No. 12); and the place might be specified — a court, or " before a competent authority ", or in the presence of the Ministers of the states parties. In more recent treaties, according to Acremant (*La Procédure dans les Arbitrages Internationaux*, p. 106), the requirement of an oath is not so often found.

41. Provision is irregularly made for a presiding officer. Where an odd member is found, the odd

[9] This raises a question as to whether arbitration should be defined as a legal procedure, through means of their own choice, *and with their own representatives on the bench.*

member (ordinarily a neutral) usually serves as chairman or president of the tribunal; if there is an umpire who sits as a member of the tribunal, he would naturally serve in this capacity. The president may also be chosen in rotation.

42. The umpire sometimes sits regularly with the tribunal; sometimes he is called upon only in case the national members disagree. In the former case, where he participates in each decision, he is rather a president with a casting vote; in the latter case, he is a real umpire. Occasionally, more than one umpire, or *surarbitre,* is provided and the work divided between them by lot or otherwise (e.g., Stuyt, Nos. 22, 47).

42*a*. Instances in which the umpire or the arbitrator has been a national of one of the parties, have not been uniformly successful. The umpire is inclined to "lean over backward" against his own state; and in any case is subject to criticism by other parties (e.g., the *I'm Alone* case, and the German-American Mixed Claims Commission).

43. A term of office need not be stated, except for a permanent tribunal, such as the Permanent Court of Arbitration at The Hague, which provided for a renewable term of six years. In the case of an *ad hoc* tribunal, the term is automatically cared for where a time-limit is set within which the work of the tribunal is to be finished.

IV. JURISDICTION

A. Where found

44. The *compromis,* as has been said above, is the charter of an international tribunal, and its terms provide the authoritative answer to questions as to the competence of the tribunal. The determination of the jurisdiction of the tribunal is thus largely a matter of interpretation of the treaty. For the Permanent Court of International Justice ("Free Zones" case, Series A/B, No. 46, p. 163), the special agreement "represents, so far as the Court is concerned, the joint will of the parties". Umpire Plumley said, in a phrase often quoted (case of the French Company of Venezuelan Railroads, Ralston, *Venezuelan Arbitrations* of 1903, p. 367):

> "The limits of this honorable commission are found and only found in the instrument which created it, the protocol of February 19, 1902. An arbitral tribunal is one of large and exclusive powers within its prescribed limits, but it is as impotent as a morning mist when it is outside these limits."

45. The *compromis* however is often silent or inadequate as to the jurisdiction of the tribunal which it creates; and, where it does speak on the subject, questions may arise as to the correct interpretation of the text. In either case, it seems well established that the tribunal has the right to judge as to its own powers (*compétence de la compétence*). Witenberg asserts (p. 108) that,

> "*en chaque cas particulier et surtout si une contestation s'élève à cet égard, le juge international a compétence pour décider de l'étendue de sa compétence.*"

45*a*. In the case of the Betsey, under the Jay Treaty, the British commissioners argued that the decrees of the English High Court of Appeals were final, and even suggested that if the treaty were interpreted to the contrary, the British commissioners would be justified in withdrawing. The matter was referred to the Lord Chancellor, Loughborough, who replied that "the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and that they must necessarily decide upon cases being within, or without, their competency" (Moore, *International Arbitrations*, pp. 326-7, 2277 ff).

45*b*. According to Secretary of State Webster,

> "Its [the mixed commission under the treaty with Mexico of 11 April 1839] right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of claims which might be laid before it" (Moore, *International Arbitrations*, p. 1242).

45*c*. In Administrative Decision No. V of the German-American Mixed Claims Commission, Judges Parker said, referring to the protocol which created the tribunal:

> "Where the meaning of such an agreement is obscure, custom and established practice may be looked to in arriving at the intention of the parties. But where the agreement creating the tribunal and defining its jurisdiction is clear, it is not competent to look beyond the terms of the agreement in determining its jurisdiction" (*American Journal of International Law*, vol. 19 (1925), p. 614).

45*d*. The above principle is often found stated in general treaties of arbitration, under which decision may have to be made as to whether a particular dispute should go to the tribunal; in the ordinary *compromis* this question has already been decided. Article 73 of The Hague Convention of 1907 says concisely:

> "The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other papers and documents which may be invoked, and in applying the principles of law."

One may refer also to Article 36 of the Statute of the Court. Lapradelle and Politis (vol. II, p. 51) observe, in this connexion,

> "*Nous avons précédemment montré l'indéniable justesse de cette solution, qui, bientôt confirmée dans la pratique, est désormais consacrée par le droit positif.*"

Carlston (p. 74) cites many authorities to the same end.

45*e*. Where the *compromis* provides — as usually it does — that the decisions shall be final and conclusive, it may be argued that questions of competence are covered by that decision. Reference will be made later to the ways in which the action of the tribunal may be challenged.

B. As to procedure

46. The *compromis* frequently contains some provisions as to the procedure to be followed, and in a few cases very detailed regulations; but no agreement could foresee all possible procedural questions which might

arise. This is recognized in some treaties which authorize the tribunal to establish its own rules. Thus, in the Agreement of 11-12 February 1871, between Spain and the United States (Stuyt, No. 91):

"4. The arbitrators shall have full power, subject to these stipulations, and it shall be their duty before proceeding with the hearing and decision of any case, to make and publish convenient rules prescribing the time and manner of the presentation of claims and of the proof thereof; and any disagreement with reference to the said rules of proceeding shall be decided by the umpire."

46*a*. According to Ralston (p. 204):

"We may therefore regard it as established that whether so expressed or not in the protocol, commissions have an inherent right to establish rules governing the method of presentation and consideration of cases submitted to them."

46*b*. Article 15 of the draft resolution of the *Institut de Droit International* (1875) provided that in the absence of provisions in the *compromis*, the arbitral tribunal has the power to lay down detailed rules, including evidence. See, similarly, Article 74 of The Hague Convention of 1907. Sandifer (*Evidence before International Tribunals,* p. 28) observes that it is customary, in the absence of rules in the agreement, for tribunals to draw up their own rules, and he refers, for illustrations, to Moore, *International Arbitrations,* pp. 2133-2239. It may be observed that procedure is least restricted, and the authority of the judge greatest, in the case of the sole arbiter.

C. Procedure in the absence of a member

47. In various ways, a Government party to a case may fail to carry out its obligations, or to perform its expected part, in the work of the tribunal, as a result of which the tribunal would be unable to arrive at a conclusion, unless provision has been made to meet such a situation. This may appear because of the failure to make an original appointment, or to fill a vacancy; it may be due to withdrawal of a representative, or his refusal to appear, or to inability of one kind or another.

47*a*. These situations have been discussed (paras. 26-29, 35, above) with regard to selection of persons concerned; the problem also presents itself, in these situations, as to the competence of the tribunal to act. More attention needs to be paid, it would seem, in the drafting of treaties to the authority of the tribunal to proceed to a decision in these various situations. Witenberg (p. 49) claims that,

dans ces diverses hypothèses il semble que le tribunal arbitral puisse continuer ses travaux malgré l'absence irrégulière du ou des juges nationaux,

but practice shows some uncertainties, requiring supplementary negotiations and conventions to regularize situations.

48. A striking recent example of failure to create the tribunal in accordance with treaty obligations is the refusal of Bulgaria, Hungary and Romania to appoint members of a commission. The treaties of peace with these countries provide:

"1. Except where another procedure is specifically provided under any Article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 39, except that in this case the Heads of Mission will not be restricted by the time limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment."[10]

The three states having refused to appoint their national commissioners, or to agree upon a third member, a question was raised as to whether the Secretary-General could make an appointment, and whether a tribunal thus constituted with two members could act upon questions put before it. The fourth regular session of the General Assembly (A/1043) requested from the Court an advisory opinion in answer (among others) to the following questions:

"III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?

"IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations, constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?"

49. Reference may be made also the withdrawal of the American commissioners under the Jay Treaty (Lapradelle - Politis, vol. I, pp. 21, 67-69); to the dispute between Costa Rica and Nicaragua (*American Journal of International Law,* vol. 26 (1932), pp. 773-775), and others. The number of such situations has been sufficient to justify an effort to include in agreements for arbitration some answer to the problem. In the Treaty of Ghent, of 24 December 1814 (Moore, *International Arbitrations,* p. 4728), between the United States and Great Britain, it was agreed (article IV) that

"in event of the two commissioners differing upon all or any of the matters so referred to them, or in the event of both or either of the said commissioners

[10] The passage is quoted from article 40 of the Hungarian Treaty. Cf. article 36 of the Bulgarian and article 38 of the Rumanian Treaty.

refusing, or declining or wilfully omitting to act as such,"

the governments would refer the reports of the commissioners to a friendly sovereign or state. It may be suggested that this provision would have been more complete had the "friendly sovereign or state" been designated, and had either party unilaterally been authorized to lay the dispute before this arbiter. The same attitude which resulted in the refusal of one party to participate would lead equally to its refusal to designate, or to refer materials to the proposed arbiter. In the agreement concerning the Croft case (Lapradelle - Politis, vol. II, p. 12) it was provided (the Senate of Hamburg being the arbiter):

Faute de présentation des réponses par l'un ou l'autre gouvernement, le Sénat statuera sans délai et ex parte.

See also Article 73 of the *Règlement* of the Franco-German Mixed Arbitral Tribunal (*Recueil des Décisions des Tribunaux Arbitraux Mixtes* (hereafter cited *T.A.M.*) vol. I, p. 54).

D. Provisional or interim measures

50. A respectable amount of evidence may be adduced in support of the right of a tribunal to require observance by the parties of designated measures intended to maintain the *status quo*, or to protect the interests of a party pending decision by the tribunal.

50*a*. Authority for this purpose is sometimes stated in the *compromis*. Thus, France and Switzerland, in submitting a dispute concerning the "Free Zones", agreed that

"until the Court's definitive decision shall have been given, neither party shall take any steps calculated to modify the *de facto* situation now prevailing at the frontier between Switzerland and the French territories." (Hudson, *World Court Reports*, vol. II, pp. 448, 451, 453.)

"The General Act of 1928, in Article 33, provides that

"1. In all cases where a dispute forms the object of arbitration or judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the International Court of Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted."

50*b*. In the long-drawn-out controversy between the United States and Mexico over the Chamizal tract of land, court action was contemplated to evict certain families in that area. The Secretary of State wrote to the Attorney-General:

"We cannot justify agreeing with Mexico upon a special tribunal to determine the title to this territory and then determine it ourselves in a proceeding which, so far as Mexico is concerned, is entirely *ex parte*, and which is taken without any reference whatever to Mexico or to the tribunal created by a convention between the two countries" (Hackworth, *Digest*, vol. VI, p. 112).

On this subject, reference may be made to E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), and to P. Guggenheim, *Mesures conservatoires dans la procédure arbitrale et judiciaire*, in Hague Academy, *Recueil des Cours*, vol. 40, pp. 645-764.

51. The tribunal is sometimes authorized to decide upon a point of law, after which the parties are expected to reach an agreement in accord with this decision; if they fail to do so, they may be required to come again before the same, or another tribunal. Witenberg (pp. 306, 341) relates this to decisions *ex aequo et bono* or in accordance with equity. In the same line of thinking are declaratory judgments. In the Chórzow Factory case, judgment No. 11 of the Permanent Court of International Justice, it was said (Series A, No. 13, p. 20):

"The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation of law, once and for all and with binding force as between the parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."

Professeur Borchard argues strongly for declaratory judgments (*American Journal of International Law*, vol. 29 (1935), p. 488), quoting a sentence elsewhere uttered: "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole." He claims that many decisions of bitter political controversy might have been resolved if the court had been asked merely to declare the law, leaving it to the parties to reach agreements thereafter.

E. "Legislative" decisions

52. Makowski, in his lectures before The Hague Academy of International Law (*Recueil des Cours*, vol. 36, p. 289) criticises the procedure, authorized for some tribunals, by which the tribunal is called upon to establish a regime for the future. He offers as examples the Behring Sea Fisheries arbitration of 1896 (Stuyt, No. 195); the North Atlantic Fisheries case of 1909 (Stuyt, No. 291); and the Free Zones case before the Permanent Court of International Justice. The tribunal was asked, in the first of these cases, to lay down regulations for seal-hunting for the future. In an arbitration between Greece and Turkey of 1897 (Stuyt, No. 215), the award drafted a new consular convention. Such functions, says Makowski, are administrative functions, though called legislative functions by some writers; in either case, it is not a proper function for a judicial body, and if the judge cannot find enough existing law upon which to give an answer, he should refrain from giving an answer. Witenberg, on the other hand (p. 342) thinks that such extensions beyond the strictly judicial function assist in the development of law, and should be encouraged.

F. Limitations upon jurisdiction

53. An obvious limitation upon the competence of the tribunal is the duration of its life. The *compromis* may require that the tribunal complete its work by a given date, after which it is not competent to act; and, in any case, when it has completed its assignment and adjourned,

it is no longer in existence. Nevertheless, questions may arise (e.g., excess of powers, interpretation of award, nullity, revision — for which, see below) after its dissolution. With regard to this general question, Dr. Hyde says:

> " it is desirable that appropriate provision be made in the *compromis* both to prevent the cessation of the arbitral function until the expiration of a specified period of time after the rendition of the award, and to confer requisite authority upon the tribunal during that period to cause the finality of an award and the judicial control thereof to be subject to the condition subsequent that opportunity for re-hearing on such grounds and within such periods of time as are agreed upon shall have not been utilized, or shall have been utilized in vain." (C. C. Hyde, *International Law Chiefly as Interpretive and Applied by the United States*, Second Revised Edition, Boston, 1947, vol. II, p. 1629.)

54. Ralston (p. 35) observes that

> " an imperfection seems to exist alike in the general run of protocols and in The Hague Conventions, in that no provision whatsoever is made for challenging either arbitrators or umpires because of unfitness, personal prejudice, interest in the subject-matter, or otherwise. "

He refers, as an exception, to the convention establishing the Central American Court of Justice. Mérignhac (*Traité théorique et pratique de l'Arbitrage international*, Paris, 1895, p. 253) remarks that the tribunal decides as to the incapacity of the arbiters. In the treaty of 28 July 1817, between Great Britain and Portugal (Stuyt, No. 23) it was provided that:

> " When the parties interested shall imagine that they have cause to complain of any evident injustice on the part of the mixed commissions, they may represent it to their respective governments, who reserve to themselves the right of mutual correspondence for removing, when they think fit, the individuals who may compose these commissions. "

55. The tribunal should not exercise its jurisdiction in such a way as to decide upon the rights or interests of a state not a party to the arbitral agreement. Thus, the Permanent Court of International Justice (Series B, No. 5, pp. 27-29) refused to consider an issue between Finland and Russia since Russia had not consented to submit the question. In a case before the Central American Court of Justice, Salvador asked that Nicaragua be enjoined to abstain from fulfilling its treaty with the United States. The Court (see *American Journal of International Law*, vol. 11 (1917), p. 729) refused to pronounce on this point because

> " its jurisdictional power extends only to establishing the legal relations among the high parties litigant and to issuing orders affecting them, and them exclusively, as sovereigu entities subject to its judicial power."

55*a*. The award in a boundary dispute between British Guiana and Venezuela (Stuyt, No. 207) also traced a boundary line for Brazil, not a party, and was criticized as having exceeded its powers. Article 84 of the Hague Convention of 1907, and Article 59 of the Statute of the International Court of Justice declare that a decision is not binding on any except the parties to the dispute.

G. Excess of powers

56. There is general agreement that if the tribunal fails substantially to follow the provisions of the *compromis*, the award is null, or voidable. Summaries of the views of writers are given in Carlston, pp. 81-87, and by Brierly, in the *British Year Book of International Law*, 1928, p. 114. It is further held that the distinction between lack of jurisdiction (*incompétence*) and excess of jurisdiction (*excès de pouvoir*) though perhaps justifiable in domestic law, is hardly worth maintaining in international law. The question is simply whether, under the terms of the agreement, the tribunal had authority to take the action, or to make the decision, which is in question. The terms of the *compromis* are the final authority, but nullity should not be claimed unless departure from these terms is clear and substantial.

57. The situation appears in easily understandable form in a case in which the arbitrator gives a decision contrary to, or clearly departing from, the terms of the *compromis*. A famous example is that of the award of the King of the Netherlands, in the Northeastern Boundary dispute between the United States and Canada (Stuyt, No. 27), in which the arbiter was asked to choose between two boundary lines as claimed respectively by the parties. Instead, he recommended another line, thus substituting mediation for arbitration, and a boundary line different from the two between which he was required to choose. The United States immediately protested, and a solution was negotiated in the Webster-Ashburton Treaty of 1842. In the bitter boundary dispute between Costa Rica and Panama (Stuyt, No. 298) two claims of nullity were made.

57*a*. In various other types of cases, nullity has been claimed on grounds fairly clear under the *compromis*. In a dispute between Honduras and Nicaragua (Stuyt, No. 180), it was claimed that the tribunal had no authority to demand that Nicaragua disarm. The arbiter in the Aves Island case (Stuyt, No 54) was called upon to decide territorial title, but added an extraneous requirement as to fishing privileges. The umpire, in the case of the Caracas General Waterworks Co., awarded payment to a party other than the claimant (Stuyt, No. 262); a similar case is that of Corruti (Stuyt, No. 144; and see Nos. 179, 296). The award in the case of the Chamizal tract (Stuyt, No. 300) was protested because it divided the tract, instead of deciding title to the entire tract.

58. In other cases, the question whether the terms of the *compromis* have been properly followed is much more controversial, and may become confused with the question of error. A famous illustration is the long dispute over the Hungarian Optants (summarized, with references, in Carlston, pp. 116-124). In the case of Pelletier (Stuyt, No. 131), Haiti claimed and the United States agreed that the arbitrator had misconstrued the meaning of the *compromis* as to the law to be applied. In the case of the United States and Paraguay Navigation Co. (Stuyt, No. 60), Paraguay had conceded her

obligation to pay damages, and the tribunal was asked to fix the amount. It asserted, however, that no right to damages had been shown, and the United States claimed that the tribunal could not go behind the authority of the *compromis* and decide upon the original merits of the claim. See also the case of the Orinoco S.S. Co. (Stuyt, No. 292), in which the Permanent Court of Arbitration held that Umpire Barge had exceeded his powers, saying:

" Whereas excessive exercise of power may consist, not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied . . . . "

58*a*. Carlston (p. 189), with citations to writers) summarizes as follows, showing how the charge of excess of power shades off into other meanings:

" Stemming from these ideas a number of writers have said that the performance of an award may be refused if it is " unjust " or " absolutely contrary to the rules of justice " or " manifestly contrary to all reasonable justice " or " an open denial of justice " or " inequitable or unconscionable " or " in absolute conflict with the rules of justice and therefore incapable of being the subject of a valid international compact ", or if " manifestly unjust and contrary to reason ", or if there is " glaring partiality " or " evident injustice " or " a flagrant denial of justice ".

59. Similar difficulties have arisen where the *compromis* calls for the use of equity. In a boundary dispute between Bolivia and Peru (Stuyt, No. 249), the arbitrator was accused of having decided in accord with equity, though he was required by the agreement to be a " judge of law ". By Article IV, however, he was authorized to employ equity in some situation, and Bolivia complained that it was not equity which he applied. The United States complained as to the use of equity in the Cayuga Indians Claim, in the American and British Claims Arbitration Tribunal (Report of Fred K. Nielsen, pp. 304-306), and in the Norwegian Shipping Claims case (Stuyt, No. 339).

60. *Litispendence* would rarely be found in international tribunals. Such a tribunal is not barred from consideration of a case properly submitted to it because the case is being heard in a domestic court. In general, an international tribunal will respect the authority of another international tribunal and will not take jurisdiction over a matter while the other has it, nor change a decision made by another tribunal unless expressly authorized to do so by the parties. Where an international organization, such as the Council of the League of Nations, has authority to handle disputes, much reluctance is shown to interfere with other jurisdictions. Examples are the cases of the Salamis, the Maritza boundary, and the Hungarian Optants (discussed in Carlston, pp. 173-184).

H. Consequences of excess of jurisdiction

61. Lauterpacht, in the *British Year Book of International Law* for 1928, p. 117, discusses the question whether an award in excess of jurisdiction is null. He finds difficulty in three existing rules: (1) that the arbitrator is competent to interpret the *compromis;* (2) that he cannot disregard his terms of reference; and (3) that there is no sanction available, if nullity is claimed because of disregard of the terms of reference. He therefore suggests that, since we now have institutions which were not available when article 81 of the Hague Convention of 1907 was adopted, parties who may wish to claim nullity because of excess of powers should be heard by the International Court, and that arbitral agreements in the future should include provision for such appeal and decision.

V. PARTIES

Who may be parties ?

62. It is usually a state which is a party to an agreement to arbitrate, and states which appear before an international tribunal. Thus, the Statute of the International Court of Justice says (Article 34): " Only states may be parties in cases before the Court ".

63. Certain exceptions, however, may be found. Arbitrations have often been arranged between states and subordinate politieal entities, or between the latter, as for example, between Basel-Stadttheil and Basel-Landschaft (Stuyt, No. 30), or between Afghanistan and Lahore (Stuyt, No. 31), or between Uri and Tessin (Stuyt, No. 19), or between Bakwena and Bamangwato (Stuyt, No. 145).

64. Similarly, states have engaged in arbitrations with international bodies, such for example as the Council of the Ottoman Public Debt (Stuyt, No. 353), the Reparations Commission (Stuyt, Nos. 351, 361), or the Regierungskommission des Saargebiets (Stuyt, No. 372). Under the Agreement regarding the Complete and Final Settlement of the Question of Reparations, signed at the Hague 20 January 1930, the Bank for International Settlements could appear before a designated arbitral tribunal as a party. The Specialized Agencies have been authorized by the General Assembly of the United Nations to request advisory opinions from the International Court of Justice, and may appear to plead before the Court; and the United Nations, acting through certain of its organs, may do the same. Granted the opinion of the Court (Advisory Opinion of 11 April, 1949, *I.C.J. Reports 1949*, p. 174) approving the right of the United Nations to claim reparations for injuries to its officials, the possibility appears that the United Nations might be a party, perhaps a defendant, before a tribunal.

65. The 14th Commission of the *Institut de Droit International,* at its Lausanne session in 1927, reported the following recommendation:

" *L'Institut, considérant qu'il y a une lacune grave dans l'organisation judiciaire internationale au point de vue de la protection des intérêts privés, considérés dans le plan international, et que les progrès doivent être réalisés par étapes, dans ce domaine, estime nécessaire de faire une étude de ce problème et de l'inscrire à l'ordre de ses travaux.*" [11]

[11] *Annuaire de l'Institut,* vol. 33, tome III, p. 321.

65*a*. There is, of course, a general trend of opinion in favour of giving to individuals a stronger position under international law, and some development in that direction may be noted in arbitral practice. While in theory a state appears before a tribunal in its own behalf, in practice it appears in many instances on behalf of one its nationals who has suffered damages as a result of an international illegality. The claim that it was the state, rather than the individual, which suffered the injury, is regarded by some writers as fictitious. They argue that the tribunal, when it considers such matters as the nationality of the claimant or the measure of damages, really regards the individual rather than the state as the claimant.

65*b*. The doctrinal note in Lapradelle - Politis (vol. II, p. 29) on the Croft case observes that this is the first instance in which the *compromis* authorizes the individual claimant to share in the selection of the arbiter and to present a memorial. The authors approve this procedure, though a different view is presented in the doctrinal note by E. von Ullman to the White case (*ibid.*, pp. 342, 343). In the doctrinal note to the Alabama case (*ibid.*, pp. 915, 916) the authors agree that, for such a type of case, it was better to exclude individuals:

> "*Contrairement au droit commun des Commissions mixtes, les réclamants n'avaient pas accès au tribunal, ni la faculté de lui soumettre, à l'appui de leurs demandes, des exposés personnels . . . dans les hypothèses de ce genre, il y a avantage à réserver l'action en justice aux seuls gouvernements. Mais on ne saurait en conclure qu'il impose, dans tous les cas, l'exclusion de la procédure des particuliers intéressés.*"

66. In a few cases, the agreement to arbitrate has been made between an individual (or corporation) and a state, or has authorized arbitration between them. Thus, the Treaty of St Germain-en-Laye (Article 320) authorized settlement of disputes between Austria and the Sopron-Koszeg Railway Co. through arbitrators designated by the Council of the League of Nations (*I.A.A.*, vol. II, No. XXV). Other instances cited by Stuyt are: Philippe d'Auvergne and the Duc de Rohan, under the Final Act of the Congress of Vienna (No. 18); the Convention between Egypt and the Suez Canal Co. (No. 75); the Concession Agreement of 1925 between the Union of Soviet Socialist Republics and the Lena Goldfields Co. (No. 370). Individuals presented their claims before the *Tribunaux Arbitraux Mixtes*, and were also allowed to present claims before the Central American Court of Justice. In the latter case, there were complaints as to the results; study of its experience might suggest some limitations as to procedure.

B. Representation of the parties

67. By article 62 of the Convention for the Pacific Settlement of International Disputes (1907),

> "The parties have the right to appoint delegates or special agents to attend the tribunal, for the purpose of serving as intermediaries between them and the tribunal.
>
> "They are further authorized to retain, for the defense of their rights and interests before the tribunal, counsel or advocates appointed by them for this purpose."

67*a*. The authoritative and general direction of a case on behalf of a state is usually, where the amount of work is sufficient, in charge of an "agent" appointed by that state. This procedure seems to be followed whether or not provision is made therefor in the *compromis*. The Claims Protocol of 26 August 1900 (Stuyt, No. 236) between the United States and Russia, contained no mention of agents and the arbitrator, M. Asser, was called upon by the United States to decide as to the status of an agent. He replied that the defendant must recognize the agent named by the other state and must accept communications from him as official.

67*b*. The function of the agent is to represent his state, rather than to argue the case. He is responsible for transmitting and receiving memorials, counter-memorials, replies, et cetera; he makes demands for information upon the other party and answers demands from him; he watches over the procedure and protects the interests of his principal in such respects. Ralston quotes (p. 194) from Lobo's report of the Brazilian-Bolivian Arbitral Tribunal as to the value of an agent:

> "The functions of such agents for the sifting of truth and the success of the decision are of great importance. They examine the documents with minuteness and independence in regard to the jurisdiction of the tribunal, the legal capacity of the parties and of their attorneys, the observance of the rules and regnlations, the sufficiency and nature of the causes of the suit, the exaggeration of damages claimed, the responsibility of the governments and all else that the claim might require for its perfect elucidation."

67*c*. In the Fur Seal Arbitration (Moore, *International Arbitrations*, p. 910), British counsel having suggested that motions be made by counsel rather than by agents, the President replied:

> "We will not recognize the agents as arguing the matter. We recognize them as representing the government. Counsel will argne the matter and we will dispose of it."

The agent is responsible for approval, before presentation, of briefs prepared by private claimants.

67*d*. Fellers says (pp. 317, 318), with regard to the functions of the agent:

> "Agents should be severely discouraged from submitting every possible claim to the tribunal. The agent of a government stands in a much different position from the attorney of a private litigant. He should consider himself, to a certain extent, as a judicial officer, and pass upon all claims before their submission, so that only such claims as are truly meritorious are presented for decision. The failure to scrutinize claims before submission is undoubtedy the chief reason for the unduly long periods required for the determination of claims adjudications. At the same time, agents should be scrupulous in claiming damages which approximate the losses suffered."

67*e*. Little is said as to the qualifications of agents. The Hague Convention of 1907 added to the earlier

article 37 (renumbered 62) that members of the Permanent Court may not act as agents, counsel or advocates, except on behalf of the Power which appointed them members of the Court. Under the protocol in the case of the Canada (Moore, *International Arbitrations*, p. 4687) the Secretary of State of the United States and the Minister of Brazil were to be considered as agents. The *compromis* in the Croft case (Lapradelle - Politis, vol. II, p. 28; see also pp. 90, 607) provided that the *Chargé d'Affaires,* consul, or other public agent of Great Britain or Portugal, actually in Hamburg, should serve as agents of their respective governments, and further provided that neither should be replaced by a lawyer. This leaning toward the diplomat rather than the lawyer, as an agent, appears to be exceptional.

68. It is understood, whether provided in the agreement or not, that counsel may be appointed by governments. Counsel prepares and presents the oral argument; it is the responsibility of the agent to transmit the written papers.

68*a*. In the case of private claims, it sometimes occurs that no official counsel is provided, and that the argument is presented by the counsel for each claimant, introduced by the agent, who is responsible for the proper presentation of the argument by such counsel. It may be desirable, in the case of a large staff, and where many claims are being considered, to set a limitation upon the number of counsel who may appear. In the agreement concerning Civil War claims between Great Britain and the United States, of 1871 (Stuyt, No. 93), the arbitrators were bound " to hear, if required, one person on each side, on behalf af each government, as counsel or agent for such government, on each and every separate claim ".

69. The matter of filling vacancies in tribunals has been discussed above, as well as the question of the competence of a tribunal to proceed where one government fails to appoint members or refuses to appear. The question appears in slightly different form when counsel or agent fails to appear, for whatever reason, to present or argue a case. This failure may as effectively block action by the tribunal as if the government itself had refused to participate.

69*a*. In the memorandum arranging for the Croft case (Lapradelle - Politis, vol. II, p. 12) it was provided that, " faute de présentation des réponses par l'un ou l'autre gouvernement, le Sénat statuera sans délai et *ex parte* ". It is not clear whether such a provision would cover the failure of counsel to appear, if this can be differentiated from the refusal of governments to be represented. The authors refer also to the cases of the Macedonian and Griqualand, and urge that treaties contain clauses to care for the situation.

C. Assignment of claims

70. Ralston discusses (pp. 156-158, 233) several cases of assignment of claims by private claimants, in which tribunals have held such assignments to be proper. If, however, the assignment is to a person of another nationality, the tribunal may not be able to exercise jurisdiction.

D. Intervention

71. According to the Statute of the International Court of Justice, a state which considers that it has an interest of a legal nature which may be affected by the decision of the case may request the Court for permission to intervene (Article 62); and whenever the construction of a convention to which states other than those concerned in the case are parties, these states are to be notified, and each has a right to intervene in the proceedings, being bound by the judgment in this case (Article 63). Article 84 of the Hague Convention of 1907 contains a provision similar to that in Article 63 of the Statute.

71*a*. The award of an arbitral tribunal can be binding only upon the parties which have agreed to submit of the decision of the tribunal, and it has been observed above that tribunals are very careful in their awards not to trespass upon the rights of third states. The decision of such a tribunal may, however affect the rights of third parties, and this state may wish to intervene in order to protect its rights, or it may be asked (*appel en cause*) by a party to participate in order to obtain a more perfect answer to the problem before the tribunal. An example of intervention before the Permanent Court of International Justice was that of Poland in the Wimbledon case; but in the case of such a permanent judicial body difficulties do not so much arise, as in an *ad hoc* tribunal, with regard to particular provisions of the *compromis*, or as to selection of judges, et cetera, in the case of an *ad hoc* tribunal, the intervention of a third state is rarely provided for, and diplomatic negotiations may be needed to arrange for such intervention on terms which will protect the rights of all concerned. The *Projet* of the *Institut de Droit International* (1875) proposed the rule (article 16):

> " *L'intervention spontanée d'un tiers n'est admissible qu'avec le consentement des parties qui ont conclu le compromis.*"

Witenberg (p. 199), referring to multilateral treaties, suggests:

> " *On peut se demander si tous les Etats de la communauté internationale n'ont pas un véritable droit à la légalité internationale, s'ils n'ont pas tous compétence pour la faire respecter et qualité à considérer que toute violation du droit d'un membre de la communauté internationale est une atteinte aux droits de chacun des membres de cette communauté.*"

72. In the case of private claims, the intervention of third party individuals can more easily be arranged. Provision for such intervention was regularly put into the *Règlements de Procédure* of the *Tribunaux Arbitraux Mixtes* (e.g., *T.A.M.*, vol. I, pp. 38, 48, 245, 803). In the Landreau Claim (Stuyt, No. 338) such a right was recoguized; see also quotation in Ralston, pp. 211, 212.

VI. PROCEDURE

A. Source of rules

73. According to Carlston (p. 5)

" neglect of the procedural aspects of international arbitration has been not only the source of unnecessary disputes between litigants but also a cause of the

expensive, leisurely, protracted course for which international arbitrations have at times been condemned."

He observes, in this connexion, that the failure to adopt the procedural rules to the necessities of the arbitration led to the abandonment of the Special Claims Commission, United States and Mexico (Stuyt, No. 355), and the transfer of its task to a national commission which, untrammelled by procedural rules, dealt with 2833 claims in 2 1/2 years, whereas the international commission was able to decide only 18 claims in 8 years. There are several sources from which are derived, or may be derived, the rules of procedure used by arbitral tribunals.

74. In a given tribunal, the rules (1) may be stated in the *compromis*. Usually, such provisions relate only to the methods and dates for filing papers; rarely does a *compromis* provide adequate rules. Sometimes, however, elaborate rules are stated, such as those in the Annex to the Agreement of 5 May 1829, between Brazil and Great Britain (Stuyt, No. 28). Other examples are the *Règlements* of the *Tribunaux Arbitraux Mixtes,* or the *Shufeldt* claim (Stuyt, No. 390). While some provision should be made in the *compromis* with regard to the needs of the specific case, there is a danger of making the rules too detailed or inflexible, and some discretion should be allowed to the tribunal for modifying the rules as occasion may require.

75. The *compromis* may (2) authorize the tribunal to make its own rules of procedure. Indeed, where such rules are lacking in the *compromis,* it has been customary for tribunals to adopt their own rules. Ralston observes (p. 197) that "arbitral courts have the right to adopt ordinary rules to govern their procedure and determine the privileges and duties of litigants before them". Article 15 of the 1875 *Projet* of the *Institut de Droit International* gave such a power to the tribunal; as did also article 74 of The Hague Convention of 1907.

75*a*. In order to do this, however, the tribunal must meet in advance, or take some time from proceedings, in order to prepare its rules; and as a result, they may be too hastily prepared. Arbiters have rarely had much previous experience, and do not have the knowledge needed for the purpose. Sandifer says, in this connexion (p. 30):

"While the practice of thus entrusting tribunals with discretion in formulating their own rules of procedure, including rules of evidence, seems wise, on the whole, it has the disadvantage of opening the door to carelessness and looseness in dealing with these important matters. Some tribunals have virtually left the parties to their own devices, although there is a noticeable tendency in more recent tribunals to impose more stringent and specific rules. An important benefit, however, balancing this is the fact that this procedure has left tribunals free to follow the practice of other tribunals, with the result that a considerable degree of uniformity of practice has developed."

75*b*. According to Feller (p. 318):

"Rules of procedure are a most important factor in the functioning of a tribunal. Under the system established by the Mexican Claims Convention they were drawn up by the commissions themselves. This entailed considerable delay and many of the commissions did not begin to hear claims until many months after their organization. It would be advisable for the governments themselves to draw up a set of rules which could be annexed to the convention. The commission should, of course, be given full liberty to amend these rules as occasion should warrant."

76. Again, procedure may be established (3) by reference to another instrument, such as the Convention of 1907 for the Pacific Settlement of International Disputes, the *Règlement* of the *Institut de Droit International,* or the General Act of 1928. None of these, however, have more than a few general rules of guidance, leaving many questions to worry inexperienced arbitrators. In the case of a permanent or continuing tribunal, it is more easily possible to provide or develop adequate procedure. It is to be observed, however, that the rules of the International Court of Justice would not always fit the needs of an *ad hoc* tribunal; indeed, it is to fit the needs of each particular case that *ad hoc* tribunals are employed, and a variety or flexibility of procedure is essential to this purpose.

77. To obtain such flexibility it has been suggested (4) that the *compromis* should lay down some general rules, leaving to the tribunal the power to elaborate or modify them as needed; or that (5) foreign offices, within which much experience with arbitral procedure has been accumulated, or the respective agents attached to the foreign offices, should agree in advance upon procedure; or that (6) a uniform code of arbitral procedure should be made available, upon the basis of study and experience, of which the whole or part could be adopted to the needs of each tribunal.

78. Writers seem doubtful whether (7) a code of arbitral procedure could be made which would be satisfactorily applicable to all types of arbitration. It would, in the first place, probably fail to achieve acceptance by all states on certain controversial points. The types of cases and the factors influencing or conditioning states in their willingness to submit to arbitration are so varied as to preclude acceptance of the same rules for all cases. A tribunal created to adjust a boundary dispute would require quite a different procedure from that of a claims commission which must deal with hundreds of private claims. The law or principles laid down in the *compromis* for the guidance of the arbiters may lead to different methods of hearing cases. In the case of a sole arbiter, there may be needed only written materials, and no hearing whatever. Such details as that the arbitrators should "meet for the dispatch of business at least 3 days in every week" (Stuyt, No. 28) may be appropriate in one case but not in another.

79. Carlston concludes, as to rules of procedure (in *American Journal of International Law,* vol. 39 (1945) p. 448):

"Procedure is no unalterable course of conduct to which all tribunals must adhere. It should always be adapted to facilitate the course of the particular arbitration and to enable the economical accomplishment of its task within the time fixed. In each arbitration the rules of procedure should be desigued to reconcile the divergence of national viewpoints concerning procedure, to require of litigants no more procedural steps

than are necessary to enable a satisfactory disposal of the particular case, to conserve litigants' interests from injury by departures from the contemplated course of proceedings, and to bring the arbitration to the speediest possible end compatible with justice. Only through a conscious and careful adaptation of procedural rules to the requirements of each arbitration as it arises will the procedural ills of international arbitration be minimized and its utility as a means for the settlement of disputes between states be fostered."

B. Written presentation

80. In order to achieve efficient presentation of the case, and in order to assure that the task will be finished within certain time-limits, the *compromis* frequently contains detailed provisions as to the various documents to be presented, and the order and time-limits within which they are to appear. (See article 63 of The Hague Convention of 1907, and article 41 of the Rules of the International Court of Justice).

80*a*. The documents usually called for are a "memorial" (*requête*) or "case", a "counter-memoria" (*réponse*) or "counter-case", and "reply" (*réplique*), and perhaps "rejoinder"; and time-limits are fixed for the delivery of each. According to Ralston (pp. 198, 199), the term "case" is used for more important arbitrations, and the term "memorial" for private claims. Each instrument should be accompanied by the documents needed to support the claims or arguments therein advanced.

80*b*. Many technical difficulties which cannot be included in this brief survey have arisen with regard to the order of presentation, and as to the acceptability of evidence. An illnstration may be found in the Las Palmas Island arbitration (Stuyt, No. 366), in which the Netherlands Government did not submit all documents with its first pleading; the United States protested vigorously. In the arbitration between Sweden and the United States of 1930 (Stuyt, No. 395) the Swedish Agent protested that its answer must be written without sufficient knowledge of what defense Sweden would be called upon to rebut. Manifestly, the strategy of the conduct of the case may be vitally affected by the order in which material is introduced. Where memorials and replies are submitted simultaneously (e.g., when it is not known, or admitted, which is the respondent party), duplication, confusion, and waste of time may result, with additional expense. The differences between civil law and Anglo-American (or other) law produce further difficulties, such as whether the memorial should contain merely facts without argumentation, or as to the effect upon the tribunal of first presentation. Such matters are discussed in detail by Sandifer, *Evidence before International Tribunals;* Feller, *op. cit.*, Chapters 14 and 15; Witenberg, *op. cit.*, pp. 169-258; R. L. Lansing, "*The Need of Revision of Procedure before International Courts of Arbitration*", *Proceedings of the American Society of International Law*, 1912, p. 158 *et seq.;* W. C. Dennis, "*The Necessity for an International Code of Arbitral Procedure*", *American Journal of International Law*, vol. 7 (1913), pp. 289-290.

80*c*. It may be observed that most cases submitted to arbitral tribunals have been the subject of long diplomatic discussion or correspondence, and that the facts and arguments are well known. Consequently, the procedure could be simplified without disadvantage to either party. It has, indeed, been often asserted by tribunals that they seek a solution, and desire all facts, and that they are unwilling to be bound by too technical rules of evidence. Sandifer, (p. 10) after citing a number of illustrations to show that the courts are not tied to any system of taking evidence, concludes: "The liberal practice of international tribunals in the treatment of evidence appears to be in accord with the trend in modern legislation on this subject."

C. Oral hearings

81. The verbal presentation of evidence is not as important, before an international tribunal, as written materials. A large part of the testimony of individuals may be accepted in the form of depositions, so that the witness does not need to be physically present. So much emphasis is placed upon written material that the *compromis* may say that, after written materials are in, "nouveaux moyens de preuves ne seront qu'exceptionnellement admis" (*T.A.M.*, vol. I, p. 37). Very practical considerations have led to this situation. There are difficulties as well as expense in bringing individuals to the place of meeting. Procedure becomes more complicated and a longer time is required for completion of the work. Where only one case is to be heard, the tribunal need not assemble until the written evidence has been received and considered. Oral hearings may easily be dispensed with in many such cases, especially before a sole arbiter.

81*a*. Witenberg (pp. 219-221) discusses the proceedings of tribunals, in this respect, under three categories, for each of which he lists a number of examples: those in which no oral proceedings are permitted (e.g. Stuyt, Nos. 55, 65, 69, 82, 91, 116); those in which oral proceedings are permitted if the tribunal regards this as necessary (e.g., Stuyt, Nos. 35, 55, 85, 350); and those in which the agents decide, and may call upon the tribunal to hear, oral evidence (e.g., Stuyt, Nos 40, 81, 376, 396). In practice, the tribunal decides how such evidence shall be handled, and has sought in a broad way to accept all relevant evidence, provided it is not introduced at such a time or in such a way as to be injurious to the other party.

D. Additional information

82. The tribunal may be authorized to require production of additional evidence as needed. Thus, in the arbitration of 1876 between the Argentine Republic and Paraguay (Stuyt, No. 111),

> "it shall be in the power of the arbitrator alone to call for such additional documents or titles as may by him be deemed necessary in order to assist him in deciding or in grounding the verdict which he is called upon to pronounce."

In the treaty of 1909, between Canada and the United States (Stuyt, No. 290), the parties agreed to pass legislation enabling the issuance of subpoenas to require the attendance of witnesses; and in the *I'm Alone* case, the United States found it necessary to pass additional legislation for this purpose. Sandifer suggests (p. 213)

that there should be included in arbitral agreements provision for the reciprocal enforcement of rules compelling the attendance of witnesses when needed (see also Feller, p. 256). The authority thus given to the tribunal would seem to include also the summoning of experts; and tribunals have at times sent out their own experts to survey disputed boundaries (e.g., Stuyt, No. 393). The expenses of such witnesses or experts are paid by the party in whose interest they were summoned, and by the tribunal when they are called by it.

83. It is sometimes desirable that a tribunal should visit a place in connexion with its work and authority is sometimes specifically stated in the *compromis* to this end. In the Convention of 1815, between France and Great Britain (Stuyt, No. 22),

> " *les Commissaires seront autorisés à faire toutes les recherches qu'ils jugeront nécessaires pour parvenir à la connaissance ou obtenir la production de ces titres et preuves.* "

In the arbitration between the Orange Free State and Transvaal (Lapradelle and Politis, vol. II, p. 576) the commissioners physically traced the course of a river. The arbitrator (M. Desjardins) in Ben Tillett's Case personally visited the prison in which he had been imprisoned (Stuyt, No. 217). In the Grisbadahna case (Stuyt, No. 288) and in the arbitration between Austria and Hungary of 1897 (Stuyt, No. 206) the tribunal paid visits to the disputed boundary areas. Such a visit was made by the Permanent Court of International Justice in the case of the Diversion of Water from the Meuse (Series A/B, No. 70, p. 9). See M. O. Hudson, *Visits by International Tribunals to Places Concerned in Proceedings, American Journal of International Law,* vol. 31 (1937), p. 696.

84. Little is to be found in the literature concerning the presiding officer of the tribunal. When there is a neutral odd man, sitting regularly with the tribunal, he is usually called upon to preside. The natural, and apparently usual procedure, is for the members of the tribunal to elect their own presiding officer; sometimes they agree to serve in rotation. In some cases, such as the Tribunaux Arbitraux Mixtes, numerous specific duties are assigned to him, but for the most part his choice and his authority are not provided for in the *compromis.*

VII. LAW OF THE TRIBUNAL

85. Arbitration has, in modern times, been regarded as a legal proceeding, as distinguished from other methods of settling disputes between states — e.g., conciliation — in which the conclusion reached is not necessarily derived from legal rules. The statement of John Bassett Moore on this point is well-known: " Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. " (Moore, *Digest of International Law,* Washington, 1906, vol. VII, p. 25). He adds, however, that arbitration " represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations ".

85*a*. While there has been since 1794 an effort to obtain through arbitration decisions based on law, it is nevertheless true that provisions concerning the law to be used, as found in treaties of arbitration and the practice of the tribunals themselves, reveal much confusion. The will of the parties, as expressed in the *compromis,* is supreme for the tribunal, and it must make its decision in accordance with whatever principles of guidance are designated by the parties. The *compromis* may go so far as to state in precise words the rules of law to be followed, as was done in the arrangements for arbitration of the Alabama Claim, The " three rules " of the Treaty of Washington (Stuyt, No. 94); or the tribunal may be called upon to decide in accordance with international law, or the general principles of law, or equity, or justice, or *ex aequo et bono,* or as *amiable compositeur,* or various combinations of these. The terms employed are often vague or indeed nothing may be said in the *compromis* as to the law to be followed. The tribunal is competent to interpret the *compromis* (see Article 73 of The Hague Convention of 1907), but its interpretation may, as has been seen above, raise questions as to whether it has followed the intended meaning of the parties. In the Mixed Claims Commission between Mexico and the United States (Stuyt, No. 33) the Mexican members claimed « *Nous n'avons pas à juger des litiges, mais à résoudre des difficultés* » (Lapradelle - Politis, vol. I, p. XLIII).

86. Few treaties clearly limit the judges to decision according to international law; where such a provision is found, the decision should be a legal answer. According to Dr. James Brown Scott, approved in the Norwegian Shipping Claims case and quoted with emphasis by Ralston (p. 53): " In the absence of an agreement of the contending countries excluding the law of nations, laying down specifically the law to be applied, international law is the law of an international tribunal." With this general rule Mérignhac (p. 287) agrees. Carlston says (p. 80):

> " An international tribunal would, as a matter of custom and practice, be compelled to adopt international law as the basis for its decision of a case, even in the absence of its designation as such in the *compromis.* If, however, the *compromis* decreed rules for decision which varied from customary international law, the tribunal would be constrained to follow them just as a municipal court would be required to apply legislation as superior to the common law. The international tribunal, however, would lack power or jurisdiction to do otherwise."

87. Witenberg (p. 296) finds a hierarchy of sources to which the judge may turn: first, the treaty; this being lacking, customary law; and finally, general principles of law. Strupp, however, rejects " general principles of law " (Hague Academy, *Recueil des Cours,* vol. 33, pp. 446-454); they are recognized, of course, in Article 38 of the Statute of the International Court of Justice.

87*a*. There is thus raised the question whether there is in existence a body of rules of international law sufficiently broad and comprehensive to enable a judge to issue a decision based upon law in all cases; and also the question whether the tribunal shall be permitted or required to answer *non liquet* in some cases. The doctrinal note by Asser (Lapradelle - Politis, vol. I, p. 398) suggests that in the case of the Northeastern Boundary

of the United States, the King of the Netherlands should have refused to decide, rather than lay himself open to the charge of exceeding his powers. The authors of the doctrinal note to the Alabama case (Lapradelle - Politis, vol. II, p. 913; see also Carlston, p. 158), after noting that the arbiter should decide by international law, remark:

> "*Il se peut cependant qu'il n'y ait pas de règles de droit ou que les parties ne soient pas d'accord sur leur portée. Dans ce cas, le devoir des arbitres est de refuser de se prononcer.*"

Other authorities, however, insist that the judge must utter a decision. The *Institut de Droit International* in its *Règlement* of 1875, article 19, asserted that

> "*le tribunal arbitral ne peut refuser de prononcer sous le prétexte qu'il n'est pas suffisamment éclairé soit sur les faits, soit sur les principes juridiques qu'il doit appliquer.*"

87*b*. This question need not be debated here. From the viewpoint of the arbitral tribunal, the parties would doubtless feel frustrated and regret the waste of time and of money if the tribunal were to say *non liquet;* and the *compromis* should be so stated that this danger would not arise.

88. The above situation doubtless serves to explain, in part, why principles of guidance other than, or in addition to, international law are often to be found in the treaties. They include such phrases as "justice, equity and the law of nations" (Stuyt, No. 3); or, "according to the proofs, the principles of right and justice, the law of nations" (Stuyt, No. 40); or, "according to public law, justice and equity" (Stuyt, No. 82). Such phrases may perhaps correspond in intent to the phrase "general principles" found in the Statute of the Court; they may be regarded as still within the realm of law.

89. In other treaties, however, the term "international law", or even "law" is entirely absent. The judges are instructed to decide "according to the principles of justice and equity, and to the stipulations of the treaty" (Stuyt, No. 65); or, "conformable to justice, even though such decisions amount to an absolute denial of illegal pretensions" (Stuyt, No. 78); or, "to the best of their judgment, and according to equity and justice, without fear, favor or affection" (Stuyt, Nos. 49, 73, 93).

90. The word "equity" has been the source of much confusion and controversy in the tribunals. The meaning of the term is not entirely clear in Anglo-Saxon law, where it is employed actually as a remedy for law: "the keeper of the King's conscience". Outside of Anglo-Saxon law, equity has a broader meaning, though apparently still within the concept of law. Judge Hudson, in his opinion in the case of the Diversion of Water from the Meuse (Series A/B, No. 70, p. 76), said "what are widely known as principles of equity have long been considered to constitute a part of international law". Equity is not simply the conscience, or the subjective opinion, of the judge; it must stay within legal principles; it is used to supplement and fulfil the law (Carlston, p. 155, with citations to many writers).

91. Whether "equity" and *ex aequo et bono* are synonymous terms it would be difficult to determine from practice. Ralston tells us (pp. 54-56) that the latter is sometimes used as synonymous with equity, sometimes as meaning unrestrained by legal procedures and technicalities (e.g., Aroa Mines case), sometimes as synonymous with "justice" (e.g., Landreau claim, or Sambiaggio case). In the Norwegian Shipping Claims case (Stuyt, No. 339), the umpire quoted Dr. Lammasch with approval:

> "the words 'on the basis of respect for law' have no other meaning than that 'the arbiter shall decide in accordance with equity, *ex aequo et bono,* when positive rules of law are lacking'."

In the Cayuga Indians case (Nielsen's Report, p. 314), the tribunal said:

> "When a situation legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved."

92. One may reasonably conclude that, if arbitration is to be regarded as a legal procedure, much more clear statement is needed in the treaties as to the law to be used, so that a distinction can be made between arbitration and other methods of settlement. The terms employed in practice shade down from law, *strictum ius,* through "general principles of law", through equity in its narrower legal sense and equity in the broader sense of "justice", through *ex aequo et bono,* to the function of the tribunal as *amiable compositeur* (see the table prepared by Strupp, in Hague Academy, *Recueil des Cours,* vol. 33, p. 438). Boundary lines between these shades of meaning are difficult to draw. In general, however, the arbiter has two sources upon which to base his award: positive law, and something of a broader but juridical nature, reflecting a sense of justice in the community of nations. Both these categories, by whatever terms described, should be distinguished from the procedure which seeks a satisfactory compromise, or which provides a settlement in disregard of, or even in opposition to, law. Here lies the difference between arbitration, a settlement by law, and conciliation, settlement by compromise. Witenberg suggests (p. 342), that even when the judge steps outside his strictly juridical role, he is assisting toward peace and the development of law, and should, therefore, be encouraged in this function.

93. With regard to domestic law, international tribunals must sometimes take it into consideration. In so doing, they deny prevailing weight to it, or to its interpretation by domestic courts. In the Norwegian Shipping Claims case, the tribunal said (Hackworth, *Digest,* vol. VI, p. 120):

> "The Tribunal cannot agree, therefore, with the contention of Norway that it should be entirely free to disregard the municipal law of the United States, when this has been implicitly accepted by Norwegian citizens in their dealings with American citizens, although this law may be less favourable to their present claims than the municipal laws of certain other civilized countries.
>
> "But the Tribunal cannot agree, on the other hand, with the contention of the United States that it should be governed by American Statutes whenever the United States claim jurisdiction.

"This Tribunal is at liberty to examine if these Statutes are consistent with the equality of the two Contracting Parties, with Treaties passed by the United States, or with well established principles of international law, including the customary law and the practice of judges in other international courts."

The Permanent Court of International Justice, in the case of the Brazilian Loans (Series A, No. 20/21, Judgment No. 15, p. 124) said similarly:

"Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries."

VIII. THE AWARD

A. Nature and content

94. The decision of the tribunal is stated in its award. Where there is only one judge, a "sole arbiter", there is no question as to the method by which this decision is reached; but where there are several members of the tribunal, there may be uncertainty. It is surprising how frequently the *compromis* fails to make provision as to the number required for a decision, and as surprising how little is to be found in the literature of the subject. If not found in the *compromis*, a method of voting or of reaching a decision may be provided for in the rules of procedure agreed upon by the tribunal; perusal of such regulations, however, shows that they also neglect the question.

94*a*. In the St. Croix River case, under the Jay Treaty (Stuyt, No. 1), the Attorney-General of the United States took the position that the concurrence of all three commissioners was necessary to a decision; but, as Ralston observes (p. 109), the effect of the determination was practically to recognize the power of the majority to speak for the commission. Ralston notes also the argument by the United States, in the Reserved Fisheries case (Stuyt, No. 96) that a majority of the commission did not have power to make an award. The award of the majority was, however, carried out.

94*b*. Where the *compromis* makes a provision in this respect, it is usually for a majority decision, by two of three or three of five, or *à la pluralité* (Stuyt, No. 20). By article 78 of The Hague Convention of 1907, "all questions are decided by a majority of the members of the tribunal". In numerous awards (e.g., the Alabama award, or cases before the Mexican-United States Claims Commission under the agreement of 1923), there have been dissenting opinions. Where there is an umpire, to whom questions are referred when national commissioners disagree, there is no difficulty as to voting procedure.

94*c*. The rule seems well established in practice that decision is to be taken by majority vote, but difficulties may be avoided by provision in the *compromis* for the number of votes, or the method of reaching a decision.

95. The form and content of arbitral awards have varied greatly. According to Carlston (p. 50, with many citations):

"The practice of tribunals to support their decisions by reasons has been so crystallized in thousands of cases, the views of writers are in such harmony on this point, and its importance to the parties is so grave that the inclusion of reasons in support of the judgment has in international arbitral practice assumed the status of a fundamental rule of procedure the violation of which will lead to nullity."

He cites as illustrations the Chamizal arbitration, the Norwegian Shipping Claims case, and the Cayuga Indians case; and observes that criticism was made on this ground of the awards by President Cleveland in the Cerruti case, by President Loubet in the Panama-Costa Rica Boundary ease, and by the President of the Argentine Republic in the Bolivia-Peru Boundary arbitration of 1909. To these may be added the award in the I'm Alone case. Article 56 of the Statute of the International Court of Justice says "The judgment shall state the reasons on which it is based"; and article 79 of The Hague Convention of 1907 has the same provision.

95*a*. In spite of some instances (Ralston, pp. 107-8) in which tribunals asserted that reasoned opinions were not required, it is well established in practice that the tribunal should explain the grounds upon which its decision is based, and dissenting opinions are not rare. Practical considerations, such as cost of publication, suggest that such opinions ought to be as concise as possible.

95*b*. An ideal award should include (1) a statement of the issue; (2) a statement of the facts; (3) statement of the argument; (4) statement of the law, as applied in the award; (5) the decision; (6) some reference to the composition and personnel of the tribunal; (7) signature or other authentication, and perhaps (8) provision for notification of the award to those concerned. In each case, the relationship to the terms of the *compromis* should be made clear.

96. It is an accepted rule of international law, whether or not stated in the *compromis*, that the award given is binding on the parties. Such an obligation is frequently stated in the treaties, and often in such emphatic form as to prove embarrassing. By the Jay Treaty, in regard to the commission on the St. Croix River case (Stuyt, No. 1), both parties agreed "to consider such decision as final and conclusive, so as that the same shall never thereafter be called in question, or made the subject of dispute or difference between them". Such terms as "without appeal", "final and conclusive", "forever barred" were frequent among earlier agreements to arbitrate.

96*a*. The effect of the rule, or of the stated obligation, is to make the decision of the tribunal *res judicata, chose jugée* — a final and binding obligation upon the parties from which there is no legal escape except through subsequent agreement between them. It is important thus to emphasize the legal obligation; but, like the clause *pacta sunt servanda*, it is difficult to maintain it as a rule absolute and without exception. For various good reasons, a party may be dissatisfied with the award, and wish to challenge it.

B. Recourse against the award

97. When an *ad hoc* tribunal has completed its task, or when the time-limit set for it has expired, the tribunal is ended. It no longer exists, and can therefore not answer subsequent questions as to its work. Even though the tribunal continues in existence, it must be limited by the *compromis* for that particular case, if any; the Permanent Court of International Justice, in the Jaworzina case (Series B, No. 8, p. 38), asserted that " in the absence of an express agreement between the parties, the Arbitrator is not competent to interpret, still less to modify his award by revising it ". Witenberg, on the other hand (p. 362), argues that since interpretation does not involve judgment or revision, the tribunal may be permitted to interpret its own award. He observes that the multiplicity of cases in modern times produces more requests for interpretation, and cites a number of modern treaties in which provision for interpretation is made. Article 82 of The Hague Convention of 1907, and Article 60 of the Statute of the International Court of Justice provide for interpretation by the tribunal.

98. The right of a tribunal to correct errors in writing or calculation, or such matters, seems to be admitted. Corrections of this nature are necessary in order to make clear the intent of the tribunal, which should not have to depend upon a typist's error, or mathematical error.

99. Reconsideration of an award may be asked also on the ground that fraud, or the lack of certain evidence now prepared to be submitted, had led the tribunal into a wrongful decision. Whether such a situation should be regarded as " essential error " is controversial among writers. The discussions of the *Institut de Droit International* in 1875 seem to have based error upon fraud. In the cases of Weil and the La Abra Silver Mining Co., the United States, convinced that there had been fraud, returned to the Mexican Government amounts which had been paid under the award (Stuyt, No. 82). Carlston (p. 61) notes the Mannesman case, where copies of documents were submitted in which all facts injurious to the claimant's case had been suppressed.

99*a*. The American Agent, in 1933, asked for a rehearing before the German-American Claims Commission, of the " Sabotage cases ", and the umpire granted the request, saying (Carlston, p. 227):

> " The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to re-open and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion. "

100. It is to go a step further when one asks for reconsideration by a tribunal on the ground that the tribunal has been in error in its interpretation or application of law, or on the ground that it has not followed the principles of guidance prescribed in the *compromis*. At this point one enters the wide field of controversy as to essential error, nullity, excess of jurisdiction, etc. Regardless of the rule that an award is *res judicata*, efforts have often been made, and have often succeeded, to re-open cases in which the award was not satisfying to one of the parties. This is sometimes done through diplomatic arrangement, perhaps involving a new tribunal, sometimes through complaisance on the part of agents or arbiters before the tribunal becomes *functus officio*, sometimes through formal action of the tribunal itself. Such cases are noted by Witenberg (p. 373), by Carlston (pp. 229-232) and by Ralston (pp. 207-210).

100*a*. There is little agreement as to the meaning of the word " revision " in this connexion. Sandifer (who limits his discussion to modification sought on the basis of fraud or new evidence) says (p. 284):

> " A rehearing is somewhat analogous to appeal or cassation, as it involves first a finding that there is sufficient new evidence or sufficient evidence of fraud to warrant re-opening the case for a retrial or re-argument on the merits. Revision, however, as the tern has come to be generally used, is more limited in scope, consisting of an amendment of the award without a re-argument . . . strictly speaking neither of these terms are words of art as they are not infrequently used loosely in an interchangeable sense to denote any procedure in which it is sought to obtain the reopening of an award for the purpose of amending it."

101. Without attempting any classification or analysis of the various situations above, one may conclude that there is much dissatisfaction, and consequent confusion, with the rule of *res judicata*. It was, in fact, the lack of any means of recourse which led to the numerous complaints against some arbitral decisions, and the trend is now in the direction of providing some means of appeal. The *Tribunaux Arbitraux Mixtes* laid down precise regulations for reconsideration of sentences (e.g. *T.A.M.*, vol. I, pp. 43, 55). The Hague Convention of 1907 in Article 83 suggests that the parties may reserve in the *compromis* the right to demand revision, but only on the ground of new evidence. The United States, which in earlier arbitrations had insisted upon the finality of awards, has increasingly moved away from that position, and has often asked for reconsideration (see Hackworth, *Digest*, vol. VI, section 557). The Convention for the Central American Court of Justice allowed for revision. The *Institut de Droit International*, at its New York session in 1929 (*Annuaire*, vol. 35, tome II, p. 304), recommended that the *compromis* should include provisions for submission to the Permanent Court of International Justice disputes concerning jurisdiction. Carlston (Chapter 7) discusses the proposal of Rundstein for the Council of the League of Nations, and the Finnish proposal at the 1929 Assembly of the League, and concludes that any danger for arbitration which might arise from such proposals is offset by the danger of the legal *impasse* which now exists when reconsideration is desired.

101*a*. The difficulties which have arisen in so many cases, the trend toward a right of appeal, the existence of permanent tribunals to which appeal can be made, and the various proposals and discussion thereof, all

indicate the possibility and need for study and codification of arbitral procedure with respect to revision of awards.

102. States other than the parties to the dispute may be affected, or may conceive themselves to be affected, by the submission of the dispute to a tribunal; for example, the dispute may involve the interpretation of a treaty to which states other than the disputants are signatories. In general treaties of arbitration, provision is sometimes made for notification to third states; thus, article 84 of the Hague Convention of 1907 says:

> "When it concerns the interpretation of a convention to which powers other than those in dispute are parties, they shall inform all the signatory parties in good time. Each of these powers is entitled to intervene in the case . If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them."

See also the General Act of 1928, as amended by resolution of the General Assembly of the United Nations on 28 April 1949, and Articles 62 and 63 of the Statute of the International Court of Justice.

102*a*. Reference has been made above to situations in which a tribunal has carefully refrained from taking cognizance of facts or law as affecting a third state (see para. 55 above); and it may be repeated at this point that the decision of the tribunal is binding only upon the parties.

103. In the case of an *ad hoc* tribunal (i.e., in the absence of compulsory jurisdiction) the question of sanctions does not arise. It may usually be assumed that, if two states are willing to submit an issue to arbitration, they will also be willing to accept the decision. Historically, this has been true; there have been difficulties in interpretation or application of the award (see Witenberg, pp. 354-358), but few, if any, instances of defiant rejection of the award. The subject of sanctions, then, does not arise in the discussion of arbitral procedure as here treated; it is related to the broader subject of compulsory arbitration (see Chapter VI of the Pact of Bogotá).

103*a*. If, however, one may distinguish modes of execution from sanctions, various instances may be given in which the tribunal has attempted to provide for carrying out its award. The *compromis* may authorize the tribunal to fix the terms of time and the methods of payment, or may itself state these terms; it may even provide for payments to be made to the tribunal itself, for distribution to claimants (Stuyt, No. 22); it may provide guarantees (e.g., Stuyt, No. 65):

> "To meet these payments, the Government of the Republic of Costa Rica hereby specially appropriates fifty per cent of the net proceeds of the revenues arising from the customs of the said Republic; and if such appropriation should prove insufficient to make the payments as above stipulated, the Government of said Republic binds itself to provide other means for that purpose."

The authority of the tribunal to require certain methods of execution must derive from the *compromis*.

IX. MISCELLANEOUS

104. Where the tribunals are of an *ad hoc* character — as has been most often the case — arrangements must be made in each instance for the payment of expenses. Such expenses may amount to large sums, in cases where the tribunal continues for a long period and hears many cases. The United States Mexican Claims Commissions, under the agreements of 1923, for the years 1925 to 1932, according to Feller (pp. 52-55), cost the United States $2,574,730 and cost the Mexican Government 4,385,344 pesos. The cost to the French Government of the French Mexican Commission was 3,202,600 francs; the cost to the British Government of its commission with Mexico was £ 24,860.

104*a*. Provision is frequently made in the *compromis* that each party shall pay its own expenses, including those for its national commissioner, and that other expenses shall be divided equally between the two parties; very rarely, however, does the *compromis* state an amount to be paid, or any method of calculation. In 1853, Great Britain and the United States agreed (Stuyt, No. 47) to pay the same amount to their national commissioners ($ 3,000 a year) and to pay a clerk $ 1,500 a year; the amount of salary to be paid to the arbitrator was to be determined at the close of the commission; all expenses were to be defrayed by a rateable deduction, not exceeding five per cent, of the sums awarded; any deficiency thereafter "shall be defrayed in moieties by the two Governments". In 1868, in a similar arrangement between the United States and Mexico (Stuyt, No. 82), the amounts paid to the Commissioners was raised to $ 4,500, and for the secretaries, $ 2,500.

104*b*. Hudson reports (*The Permanent Court of International Justice*, p. 9, footnote 44) that

> "For some years the usual honorarium was 25,000 gold francs. In the *Venezuelan Preferential Claims Case* agreement was reached that the arbitrators should receive an honorarium of $ 5,000 and an additional sum of $ 1,500 for expenses. *U.S. Foreign Relations*, 1904, p. 516. In the *North Atlantic Coast Fisheries Case* each member of the tribunal received £ 3,000; the members of the special tribunal in the *United States-Norwegian Arbitration* in 1922 each received $ 10,000. Exceptionally, the *compromis* of July 31, 1913 in the case relating to *Religious Properties in Portugal* fixed the honoraria to be paid to members of the tribunal and provided for a deposit with the Bureau of the Permanent Court of Arbitration for this purpose; each member of the tribunal was to receive 1,200 francs per week, including four weeks to be allowed for study of the documents of the written proceedings."

The agreement between Spain and the United Kingdom of 1923 (Stuyt, No. 352) included the promise of "the sum of £ 1,500, as inclusive emoluments" to be paid to the arbiter (M. Huber), and also travelling expenses in equal portions by the two Governments. In the Island of Palmas case agreement (Stuyt, No. 366) no amount was mentioned, but each party was required to put into the hands of the arbitrator one hundred pounds sterling "by way of advance of costs", and he was

authorized to fix the costs of procedure (which he estimated at £140). The *compromis* between Portugal and the United Kingdom, in the Campbell case (1930; Stuyt, No. 394), specified a fee of fifty thousant Belgian francs for the arbiter "which shall be paid to him as soon as the proceedings are closed and prior to the delivery of the award".

104*c*. According to Moore (*Digest*, vol. VII, p. 50):

> "where the arbitrator is the head of a state, the only acknowledgment given of his services is an expression of thanks, and the more substantial testimonial, whatever it may be, is bestowed upon the persons to whom he may have delegated the discharge of certain functions, such as the examination of documents and perhaps the making of a report."

He mentions the example of Quesada, in the Oberlander-Messenger case, who declined "any pecuniary testimonial, on the ground that his sense of the confidence with which he was honored . . . could not be measured in money". Mr. Taft, in the Tinoco case (Stuyt, No. 342) who had been authorized to fix expenses, said that there were none:

> "Personally, it gives me pleasure to contribute my service . . . I am glad to have the opportunity of manifesting my intense interest in the promotion of the judicial settlement of international disputes, and accept as full reward for any service I may have rendered, the honor of being chosen to decide these important issues between the high contracting parties."

104*d*. The tendency today is to appoint as arbitrators persons of some expert knowledge, rather than sovereigns or high officers, and such persons cannot afford, usually, to expend the necessary time upon an arbitration unless he is paid for it. It may be observed that the expense is less where there is only one arbiter, and that it may be further reduced by adjustment of rules of procedure, by location at a place where less travel is required, and in other ways. A central bureau to care for administrative needs for all arbitrations might also help to reduce expenses.

105. It is desirable, and indeed important financially and otherwise, that a tribunal should complete its work as rapidly as possible. Consequently, the *compromis* frequently fixes dates for, or time-limits within which, each document is to be presented. Thus, in the case of the Sulphur Monopoly, between Great Britain and the Two Sicilies (Stuyt, No. 36), all claims were to be presented within three months of the opening of the Commission; they were to be considered by the Commission within a further period of six months; and the compensation awarded was to be paid within a year after the dissolution of the Commission. Various time-limits have been set, depending upon the difficulty or size of the task. The minimum period is around three months; some allow for two and a half years. The tribunal may be called to meet within one year after ratification of the agreement, and required to pass to the umpire any matters not decided within three months. In a number of treaties, it is provided that the commissioners must finish their work within a specified period, and that any remaining cases shall be referred to the umpire who must finish within another specific period; all claims after this period are invalid (e.g. Stuyt, Nos. 65, 78). Detailed schedules may be provided, with exact dates for the presentation of each document; or there may be merely a requirement that the Commission finish its work by a given time, with no schedule of dates.

105*a*. Experience shows that delays are unavoidable, and that injustice may be done if it is not possible to extend the time-limits fixed. The illness of an arbiter, or of a witness, may cause delay; a new fact may necessitate more time for consideration; documents may be physically delayed. Some treaties therefore provide (e.g. Stuyt, No. 47) that the tribunal itself may grant extensions of time. A general rule applicable to all arbitrations would cause hardship, and would indeed be unworkable. Conditions vary in each instance, and allowance must be made for unforeseen circumstances. A code of arbitral procedure could, in regard to this, do no more than furnish alternative procedures for the benefit of those who make the *compromis*. It is doubtless true that the most effective way of saving time is efficient procedure, rather than deadlines.

106. Provision should be made for transfer and distribution of documents. The *compromis* may make specifications as to the number of documents, how printed, how many copies of each, and to whom, how and when they should be distributed. In many cases, use has been made of the Bureau of the Permanent Court of Arbitration at The Hague, and this experience demonstrates the usefulness of a central bureau or registry where documents may be received, recorded and distributed. Where there is no such central registry, transmission of documents may be made directly from one party to another, usually through the Foreign Offices or diplomatic or consular officials.

106*a*. According to Witenberg (pp. 97-100, with citations), the records most usually kept are (1) the *procès-verbaux*, summarizing from day to day the activities of the tribunal, (2) the register of cases presented to the tribunal, as received by the secretary, (3) the register of awards given, (4) sometimes also other records, such as notifications. These records are maintained by the secretary, and decisions should be signed by the members of the tribunal.

106*b*. There is, unfortunately, no central repository for such materials. They constitute the archives of the tribunal, but the tribunal does not survive, and the records are retained by the litigant governments. Sometimes they are published by those governments, but in general they are widely scattered and accessible to students only with difficulty. The publication of a collection of such materials under the auspices of the United Nations might be taken into consideration.

107. Questions may be raised also with regard to language to be used, with regard to publicity of sessions, with regard to immunities of members of tribunals, with regard to appropriate staff and equipment, etc. Many changes have occurred since the earlier arbitrations, when

an arbiter might require months for travel, when records were painfully kept by handwriting. Arbiters can now reach almost any part of the world in a day or so; communications can be more rapidly exchanged; a verbatim record can be maintained by automatic wire-recording. Such improvements suggest the possibility of holding any or all arbitrations at a prepared and equipped headquarters, where all needed resources would be available, where records could be kept and continuing service given even after a tribunal is ended.