

# **Model Rules on Arbitral Procedure with a general commentary**

1958

Text adopted by the International Law Commission at its tenth session, in 1958, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 22). The report, which also contains a general commentary on the draft articles, appears in *Yearbook of the International Law Commission, 1958*, vol. II.



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what exceptions, variations or additions seem good to them. In this respect, it is desirable to make it quite clear that, within the limits stated, the application of the present articles, in so far as adopted by the parties to a dispute, will always be subject to any special provisions in the arbitral agreement or *compromis d'arbitrage*. Consequently, although for reasons of convenience or emphasis certain of the articles contain phrases such as "Unless otherwise provided in the *compromis* . . .", this should not be taken to mean that the application of other articles is not equally subordinated to the will of the parties and to variation or even exclusion under the terms of the *compromis*.

21. Naturally, where in the preceding paragraph reference is made to the limitations implied by the principle of non-frustration, it is not intended to suggest that States can in practice be prevented from drawing up their arbitral agreement or *compromis* in such a way that it will be possible for one or other of them to frustrate the purpose of the arbitration. But (at any rate with the exception of those cases where the agreement or *compromis* expressly permits it) the party taking the frustrating action will be acting in a manner which, even if not actually contrary to the arbitral agreement as such, will be contrary to the basic principles of general international law governing the process of arbitration. The present articles are designed (and this is now one of their chief objects) to ensure that, if the parties draw up their arbitral agreement or *compromis* in such a way that its object can be frustrated, they will at least do so with open eyes. If two States, aware of what they are doing, choose to draft their agreement or *compromis* in this way, they are entitled—or at any rate they have the faculty—to do so. But if they wish to close the door to the possibility of frustration, the present articles indicate by what means this can be done.

## II. Text of the draft

22. The final text on arbitral procedure in the form of a set of model draft articles, as adopted by the Commission at its 473rd meeting, reads as follows:

### MODEL RULES ON ARBITRAL PROCEDURE

#### *Preamble*

The undertaking to arbitrate is based on the following fundamental rules:

1. Any undertaking to have recourse to arbitration in order to settle a dispute between States constitutes a legal obligation which must be carried out in good faith.
2. Such an undertaking results from agreement between the parties and may relate to existing disputes or to disputes arising subsequently.
3. The undertaking must be embodied in a written instrument, whatever the form of the instrument may be.
4. The procedures suggested to States parties to a dispute by these model rules shall not be compulsory unless the States concerned have agreed, either in the *compromis* or in some other undertaking, to have recourse thereto.
5. The parties shall be equal in all proceedings before the arbitral tribunal.

### THE EXISTENCE OF A DISPUTE AND THE SCOPE OF THE UNDERTAKING TO ARBITRATE

#### *Article 1*

1. If, before the constitution of the arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration, such preliminary question shall, at the request of

any of the parties and failing agreement between them upon the adoption of another procedure, be brought before the International Court of Justice for decision by means of its summary procedure.

2. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

### THE COMPROMIS

#### *Article 2*

1. Unless there are earlier agreements which suffice for the purpose, for example in the undertaking to arbitrate itself, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, as a minimum:

- (a) The undertaking to arbitrate according to which the dispute is to be submitted to the arbitrators;
- (b) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;
- (c) The method of constituting the tribunal and the number of arbitrators.

2. In addition, the *compromis* shall include any other provisions deemed desirable by the parties, in particular:

- (i) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;
- (ii) The power, if any, of the tribunal to make recommendations to the parties;
- (iii) Such power as may be conferred on the tribunal to make its own rules of procedure;
- (iv) The procedure to be followed by the tribunal; provided that, once constituted, the tribunal shall be free to override any provisions of the *compromis* which may prevent it from rendering its award;
- (v) The number of members required for the constitution of a *quorum* for the conduct of the hearings;
- (vi) The majority required for the award;
- (vii) The time limit within which the award shall be rendered;
- (viii) The right of the members of the tribunal to attach dissenting or individual opinions to the award, or any prohibition of such opinions;
- (ix) The languages to be employed in the course of the proceedings;
- (x) The manner in which the costs and disbursements shall be apportioned;
- (xi) The services which the International Court of Justice may be asked to render.

This enumeration is not intended to be exhaustive.

### CONSTITUTION OF THE TRIBUNAL

#### *Article 3*

1. Immediately after the request made by one of the States parties to the dispute for the submission of the dispute to arbitration, or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, either by means of the *compromis* or by special agreement, in order to arrive at the constitution of the arbitral tribunal.

2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision on arbitrability, the President of the International Court of Justice shall, at the request of either party, appoint the arbitrators not yet designated. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties,

the appointments shall be made by the oldest member of the Court who is not a national of either party.

3. The appointments referred to in paragraph 2 shall, after consultation with the parties, be made in accordance with the provisions of the *compromis* or of any other instrument consequent upon the undertaking to arbitrate. In the absence of such provisions, the composition of the tribunal shall, after consultation with the parties, be determined by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

4. Where provision is made for the choice of a president of the tribunal by the other arbitrators, the tribunal shall be deemed to be constituted when the president is selected. If the president has not been chosen within two months of the appointment of the arbitrators, he shall be designated in accordance with the procedure prescribed in paragraph 2.

5. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence, in international law.

#### Article 4

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.

2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. Once the proceedings have begun, an arbitrator appointed by a party may not be replaced except by mutual agreement between the parties.

3. Arbitrators appointed by mutual agreement between the parties, or by agreement between arbitrators already appointed, may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 3, paragraph 2, may not be changed even by agreement between the parties.

4. The proceedings are deemed to have begun when the president of the tribunal or the sole arbitrator has made the first procedural order.

#### Article 5

If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of an arbitrator, it shall be filled in accordance with the procedure prescribed for the original appointment.

#### Article 6

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may only propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In either case, the decision shall be taken by the other members of the tribunal.

2. In the case of a sole arbitrator or of the president of the tribunal, the question of disqualification shall, in the absence of agreement between the parties, be decided by the International Court of Justice on the application of one of them.

3. Any resulting vacancy or vacancies shall be filled in accordance with the procedure prescribed for the original appointments.

#### Article 7

Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral proceedings shall be recommenced from the beginning, if these have already been started.

#### POWERS OF THE TRIBUNAL AND THE PROCESS OF ARBITRATION

#### Article 8

1. When the undertaking to arbitrate or any supplementary agreement contains provisions which seem sufficient for the

purpose of a *compromis*, and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 2. In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the institution or continuation of the proceedings. In the contrary case, the tribunal shall order the parties to complete or conclude the *compromis* within such time limits as it deems reasonable.

2. If the parties fail to agree or to complete the *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal, within three months after the parties report failure to agree—or after the decision, if any, on the arbitrability of the dispute—shall proceed to hear and decide the case on the application of either party.

#### Article 9

The arbitral tribunal, which is the judge of its own competence, has the power to interpret the *compromis* and the other instruments on which that competence is based.

#### Article 10

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. If the agreement between the parties so provides, the tribunal may also decide *ex aequo et bono*.

#### Article 11

The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied.

#### Article 12

1. In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate or complete the rules of procedure.

2. All decisions shall be taken by a majority vote of the members of the tribunal.

#### Article 13

If the languages to be employed are not specified in the *compromis*, this question shall be decided by the tribunal.

#### Article 14

1. The parties shall appoint agents before the tribunal to act as intermediaries between them and the tribunal.

2. They may retain counsel and advocates for the prosecution of their rights and interests before the tribunal.

3. The parties shall be entitled through their agents, counsel or advocates to submit in writing and orally to the tribunal any arguments they may deem expedient for the prosecution of their case. They shall have the right to raise objections and incidental points. The decisions of the tribunal on such matters shall be final.

4. The members of the tribunal shall have the right to put questions to agents, counsel or advocates, and to ask them for explanations. Neither the questions put nor the remarks made during the hearing are to be regarded as an expression of opinion by the tribunal or by its members.

#### Article 15

1. The arbitral procedure shall in general comprise two distinct phases: pleadings and hearing.

2. The pleadings shall consist in the communication by the respective agents to the members of the tribunal and to the opposite party of memorials, counter-memorials and, if necessary, of replies and rejoinders. Each party must attach all papers and documents cited by it in the case.

3. The time limits fixed by the *compromis* may be extended by mutual agreement between the parties, or by the tribunal when it deems such extension necessary to enable it to reach a just decision.

4. The hearing shall consist in the oral development of the parties' arguments before the tribunal.

5. A certified true copy of every document produced by either party shall be communicated to the other party.

#### Article 16

1. The hearing shall be conducted by the president. It shall be public only if the tribunal so decides with the consent of the parties.

2. Records of the hearing shall be kept and signed by the president, registrar or secretary; only those so signed shall be authentic.

#### Article 17

1. After the tribunal has closed the written pleadings, it shall have the right to reject any papers and documents not yet produced which either party may wish to submit to it without the consent of the other party. The tribunal shall, however, remain free to take into consideration any such papers and documents which the agents, advocates or counsel of one or other of the parties may bring to its notice, provided that they have been made known to the other party. The latter shall have the right to require a further extension of the written pleadings so as to be able to give a reply in writing.

2. The tribunal may also require the parties to produce all necessary documents and to provide all necessary explanations. It shall take note of any refusal to do so.

#### Article 18

1. The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it.

2. The parties shall co-operate with the tribunal in dealing with the evidence and in the other measures contemplated by paragraph 1. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

#### Article 19

In the absence of any agreement to the contrary implied by the undertaking to arbitrate or contained in the *compromis*, the tribunal shall decide on any ancillary claims which it considers to be inseparable from the subject-matter of the dispute and necessary for its final settlement.

#### Article 20

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

#### Article 21

1. When, subject to the control of the tribunal, the agents, advocates and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

2. The tribunal shall, however, have the power, so long as the award has not been rendered, to re-open the proceedings after their closure, on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or if it considers, after careful consideration, that there is a need for clarification on certain points.

#### Article 22

1. Except where the claimant admits the soundness of the defendant's case, discontinuance of the proceedings by the claimant party shall not be accepted by the tribunal without the consent of the defendant.

2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

#### Article 23

If the parties reach a settlement, it shall be taken note of by the tribunal. At the request of either party, the tribunal may, if it thinks fit, embody the settlement in an award.

#### Article 24

The award shall normally be rendered within the period fixed by the *compromis*, but the tribunal may decide to extend this period if it would otherwise be unable to render the award.

#### Article 25

1. Whenever one of the parties has not appeared before the tribunal, or has failed to present its case, the other party may call upon the tribunal to decide in favour of its case.

2. The arbitral tribunal may grant the defaulting party a period of grace before rendering the award.

3. On the expiry of this period of grace, the tribunal shall render an award after it has satisfied itself that it has jurisdiction. It may only decide in favour of the submissions of the party appearing, if satisfied that they are well-founded in fact and in law.

### DELIBERATIONS OF THE TRIBUNAL

#### Article 26

The deliberations of the tribunal shall remain secret.

#### Article 27

1. All the arbitrators shall participate in the decisions.

2. Except in cases where the *compromis* provides for a quorum, or in cases where the absence of an arbitrator occurs without the permission of the president of the tribunal, the arbitrator who is absent shall be replaced by an arbitrator nominated by the President of the International Court of Justice. In the case of such replacement the provisions of article 7 shall apply.

### THE AWARD

#### Article 28

1. The award shall be rendered by a majority vote of the members of the tribunal. It shall be drawn up in writing and shall bear the date on which it was rendered. It shall contain the names of the arbitrators and shall be signed by the president and by the members of the tribunal who have voted for it. The arbitrators may not abstain from voting.

2. Unless otherwise provided in the *compromis*, any member of the tribunal may attach his separate or dissenting opinion to the award.

3. The award shall be deemed to have been rendered when it has been read in open court, the agents of the parties being present or having been duly summoned to appear.

4. The award shall immediately be communicated to the parties.

#### Article 29

The award shall, in respect of every point on which it rules, state the reasons on which it is based.

#### Article 30

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the tribunal has allowed a time limit for the carrying out of the award or of any part of it.

#### Article 31

During a period of one month after the award has been rendered and communicated to the parties, the tribunal may,

either of its own accord or at the request of either party, rectify any clerical, typographical or arithmetical error in the award, or any obvious error of a similar nature.

*Article 32*

The arbitral award shall constitute a definitive settlement of the dispute.

INTERPRETATION OF THE AWARD

*Article 33*

1. Any dispute between the parties as to the meaning and scope of the award shall, at the request of either party and within three months of the rendering of the award, be referred to the tribunal which rendered the award.

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within the above-mentioned time limit the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of either party.

3. In the event of a request for interpretation, it shall be for the tribunal or for the International Court of Justice, as the case may be, to decide whether and to what extent execution of the award shall be stayed pending a decision on the request.

*Article 34*

Failing a request for interpretation, or after a decision on such a request has been made, all pleadings and documents in the case shall be deposited by the president of the tribunal with the International Bureau of the Permanent Court of Arbitration or with another depositary selected by agreement between the parties.

VALIDITY AND ANNULMENT OF THE AWARD

*Article 35*

The validity of an award may be challenged by either party on one or more of the following grounds:

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
- (d) That the undertaking to arbitrate or the *compromis* is a nullity.

*Article 36*

1. If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party.

2. In the cases covered by article 35, sub-paragraphs (a) and (c), validity must be contested within six months of the rendering of the award, and in the cases covered by sub-paragraphs (b) and (d) within six months of the discovery of the corruption or of the facts giving rise to the claim of nullity, and in any case within ten years of the rendering of the award.

3. The Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for annulment.

*Article 37*

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal constituted by agreement between the parties, or, failing such agreement, in the manner provided by article 3.

REVISION OF THE AWARD

*Article 38*

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, pro-

vided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision, and that such ignorance was not due to the negligence of the party requesting revision.

2. The application for revision must be made within six months of the discovery of the new fact, and in any case within ten years of the rendering of the award.

3. In the proceedings for revision, the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application.

4. If the tribunal finds the application admissible, it shall then decide on the merits of the dispute.

5. The application for revision shall, whenever possible, be made to the tribunal which rendered the award.

6. If, for any reason, it is not possible to make the application to the tribunal which rendered the award, it may, unless the parties otherwise agree, be made by either of them to the International Court of Justice.

7. The tribunal or the Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for revision.

III. Comments on particular articles

*Notes:*

(i) The following comments are not intended as an article-by-article commentary. Only those articles are commented upon which are either new or involve substantial changes not otherwise self-explanatory. Many of the changes made, as compared with the 1953 text, are only changes of a technical or drafting character or in the nature of re-arrangement.

(ii) No attempt is made to indicate the reason why in a number of cases no changes have been made in order to meet criticisms made in the General Assembly or elsewhere by Governments. In the first place, the reasons for and against the proposed changes are fully set out in the 1957<sup>22</sup> and 1958<sup>23</sup> reports of the special rapporteur, Mr. Georges Scelle. In the second place, the fact that the articles are now presented as a model draft rather than as a potential general convention of arbitration which would be binding upon States has the effect of placing these criticisms against a different background thus causing them to lose a good deal of their point.

23. *Preamble.* Subject to language changes, the first three paragraphs of this preamble correspond to article 1 of the 1953 text. Paragraph 4 is new, but merely states the position already set out earlier in the present commentary, according to which the articles have no binding effect unless specifically embodied by the parties in a *compromis* or other agreement. Paragraph 5 corresponds to article 14 of the 1953 text.

24. In view of the fact that all the provisions of the preamble relate to the substantive law of arbitration rather than to arbitral procedure as such, the Commission felt that in the present context of the draft it would be preferable to state them in preambular form and not keep them as substantive articles. In effect they govern any arbitration, but they govern it as principles of general international law rather than as deriving from the agreement of the parties.

25. *Article 1.* This article, like a number of others in the text, e.g. articles 3, 6, 27, 33, 36, 37 etc., involves the exercise of functions by the President of the Inter-

<sup>22</sup> See *Yearbook of the International Law Commission, 1957*, vol. II (A/CN.4/SER.A/1957/Add.1), document A/CN.4/109.  
<sup>23</sup> A/CN.4/113 of 6 March 1958.

national Court of Justice, or by the Court itself. Criticisms of similar provisions in the 1953 text were made on the ground that this set up the International Court of Justice as a sort of super-tribunal not subordinate to the agreement of the parties. Despite doubts expressed by certain of its members, the Commission did not consider these criticisms to be well-founded, particularly in the present context of the draft, according to which the articles in question will be binding upon the parties only in so far as they accept those articles and make them part of the arbitral agreement. On the other hand, the articles are necessary if the process of arbitration is not to be liable to possible frustration as described in paragraphs 18, 19, 20 and 21 above. The practice of conferring functions upon the President of the International Court, or even upon the Court itself, is a fairly common one and has never given rise to any difficulty. Further comments on this matter are contained in paragraphs 45 and 46 of the commentary to the 1953 text.

26. *Article 2.* There is now included, amongst the matters which a *compromis* must deal with, the specification of the undertaking to arbitrate in virtue of which the dispute is to be submitted to arbitration. The list of matters which ought if possible to be regulated by the *compromis* remains substantially unchanged.

27. *Article 4.* This article, as compared with the 1953 text, has been amplified so as to include possible cases not previously covered.

28. *Article 5.* This article covers the previous articles 6 and 7 of the 1953 text. The changes effected are based in particular on the feeling that it is not in practice possible to prevent an arbitrator from withdrawing or resigning if he wishes to do so, and that in such event it is not necessary to do more than provide for the filling of the vacancy by the same means as were employed for the original appointment.

29. *Article 7.* This article is new. It is obviously undesirable that the proceedings should have to start again from the beginning merely because a vacancy has occurred and has been filled. There is, moreover, no difficulty over the written proceedings, which the new arbitrator is able to read. On the other hand, if the oral proceedings have begun, the new arbitrator ought to have the right to require that these be started again.

30. *Article 8.* The first paragraph of this article does not differ substantially from the corresponding article 10 of the 1953 text, but embodies technical improvements and simplifications in what was a somewhat complicated provision. As regards paragraphs 2 and 3 of the previous article 10, various objections were felt to the idea of the tribunal itself drawing up the *compromis*; nor was this felt to be necessary. Whether or not there is a *compromis* in the technical sense of that term, there is always an undertaking to arbitrate, whether this has been completed by the drawing up of a *compromis* or not. Even if the parties are unable to draw up or complete the *compromis*, it is always possible for the tribunal to proceed with the case, so long as one of the parties requests it to do so. Either the nature of the dispute will have been defined in the original agreement to arbitrate or, alternatively, it will be defined in the application made to the tribunal to proceed with the case and in the subsequent written pleadings the deposit of which the tribunal will order.

31. *Article 9.* Despite the considerations set out in paragraph 42 of the commentary to the 1953 text, in favour of retaining the term "widest", which appeared in the corresponding article 11 of that text, the Commission

decided that the use of this term was unnecessary and might give rise to difficulties.

32. *Article 10.* The substance of this article, as compared with the corresponding article 12 of the 1953 text, remains the same; but as the phrase "shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice" was considered to be unsatisfactory, and no other general phrase referring to that provision seemed free from drafting difficulties, it was decided to set out the actual terms of Article 38, paragraph 1. Paragraph 2 of old article 12 (the question of *non liquet*) now appears, somewhat amended, as article 11.

33. *Articles 13 to 17.* These articles, as explained in paragraph 15 above, have been newly introduced, in order to meet certain wishes expressed in the course of the General Assembly's discussions. They are articles relating to the routine procedure of arbitration and call for no special comment, except with reference to article 17, which is based on the consideration that it is undesirable, once the written proceedings have been closed, for further documentary material to be presented or adduced in evidence by the parties. Nevertheless, it is equally not desirable to exclude all possibility of presenting such new material. The essential consideration is that, if new material presented by one of the parties is admitted, the other should have an opportunity of dealing with it in writing and should be able to require a prolongation of the written proceedings for that purpose. In this way the possibility of new written material being presented on the eve of the oral hearing, so that the other party has inadequate time to consider or reply to it in writing before the oral hearing takes place, can be eliminated.

34. *Article 19.* This article has been a good deal simplified in comparison with the corresponding article 16 of the 1953 text. In particular, the general reference to ancillary claims, in place of the phraseology used in the previous article 16, should get over a number of difficulties of definition which that phraseology might have entailed. The basic object is that the grounds of dispute between the parties arising out of the same subject-matter should be completely disposed of.

35. *Article 21.* Paragraph 2 of this article, which otherwise corresponds to article 18 of the 1953 text, is new. It seemed to the Commission desirable to give the tribunal this faculty in order to insure that no element material to its decision should be excluded.

36. *Article 22.* The corresponding article 21 of the 1953 text provided that in no case could discontinuance of the proceedings by the claimant party be accepted by the tribunal without the consent of the defendant party. It seemed to the Commission that this principle ought only to apply in those cases where the claimant party proposed to discontinue the proceedings without any recognition of the validity of the defendant's case, since in that event the defendant State may still have an interest in endeavouring to secure from the tribunal a positive pronouncement in its favour. Where, however, such recognition is given, it would obviously be unnecessary to require the consent of the defendant party before the proceedings could be discontinued.

37. *Article 25.* The drafting of the corresponding article 20 of the 1953 text was defective inasmuch as it seemed to imply that it would always be the defendant party which would fail to appear and defend the claim, and the claimant party whose case would accordingly be adjudged valid. It is, however, equally possible that the claimant party may fail to pursue its case, but that the

defendant party will not be content with anything short of an actual decision in favour of its own arguments in case the claimant should attempt to re-open the matter at a later date. The article has, therefore, been amended to take account of both possibilities. The second paragraph is new, but self-explanatory.

38. *Articles 26 and 27.* These articles include the matters previously dealt with by the single article 19 of the 1953 text. The second paragraph of article 27 is new. The Commission felt it undesirable to adhere to the somewhat rigid system of the previous article 19, which could be interpreted as involving the unremitting attendance on all occasions of all the members of the tribunal. It is, on the other hand, necessary to ensure that an arbitrator shall not, through his deliberate absence, be able to frustrate the rendering of the award.

39. *Article 28.* Paragraphs 1, 3 and 4 of this article correspond to the same paragraphs of article 24 of the 1953 text, and paragraph 2 corresponds to article 25 of that text. The first sentence of paragraph 1 is, however, new. Despite the general provision on the subject of majority decisions contained in article 12, it was felt desirable to repeat this requirement specifically in respect of the rendering of the award. Paragraph 2 of the previous article 24 concerning the statement of the reasons for the award now appears as article 29 of the present text.

40. *Article 32.* This article is new. It no doubt goes without saying that the award constitutes a final settlement of the dispute, but it seemed desirable to the Commission to emphasize this fact in view of the provisions concerning the possible interpretation, revision or annulment of the award. These possibilities do not alter the fact

that, subject to any necessity for interpreting, or to any eventual revision or annulment of the award, it constitutes, in principle, a definitive and final settlement.

41. The provisions concerning interpretation in article 33, which previously figured in article 28 of the 1953 text, remain substantially unchanged apart from re-wording and re-arrangement.

42. *Article 34.* This article is new. Its object is to ensure that the documents and written records of arbitral proceedings, which may be of great value for the study of international law and in other ways, should not become lost or forgotten. It goes without saying that the Secretary-General of the Permanent Court of Arbitration, or other depositary, would not permit any inspection of the records by a third party without obtaining the consent of the parties to the dispute.

43. *Article 35.* Sub-paragraph (*d*) is new as compared with the corresponding article 30 of the 1953 text. Despite the cogent considerations contained in paragraph 39 of the commentary to that text, the Commission decided to add the nullity of the undertaking to arbitrate or of the *compromis* as a ground of the nullity of the eventual award. It is difficult, in principle, to deny that the nullity of the original undertaking or *compromis*, if established, must automatically entail the nullity of the award. Such cases should, however, prove exceedingly rare. The principle at issue is the same as that which governs the essential validity of treaties, and it is noticeable that there are very few precedents involving the nullity of a treaty or other international agreement, when drawn up in proper form, and apparently regularly concluded between duly authorized plenipotentiaries or governmental organs empowered to act on behalf of the State.