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Report concerning the Draft Convention on Arbitral Procedure adopted by the Commission at its Fifth session by Mr. G. Scelle, Special Rapporteur (with a "model draft" on arbitral procedure annexed)

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ARBITRAL PROCEDURE

[Agenda item [1]]

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Draft convention on arbitral procedure adopted by the Commission at its fifth session

Report by Georges Scelle, Special Rapporteur

(with a "model draft" on arbitral procedure annexed)

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CHAPTER I

General observations

1. Arbitral procedure, which was selected by the International Law Commission at its first session, in 1949, as one of the items accorded priority for codification, has been the subject of progressive study: in 1952, the Commission at its fourth session adopted a draft containing thirty-two articles, which was transmitted by the Secretary-General to Governments for their comments [1]; in 1953, at its fifth session, the Commission adopted the final draft, also containing thirty-two articles, with a commentary by Mr. Lauterpacht, who was then Rapporteur to the Commission.[2]

2. This draft which was submitted to the General Assembly at its tenth session (1955), in accordance with article 22 of the Commission's Statute, was prepared with due regard to the observations received from Governments at the time, and was the subject of valuable detailed comments by the Secretariat of the Commission (A/CN.4/92).

3. After consideration by the Sixth Committee, the draft was again referred by the General Assembly to the International Law Commission for further study, in the light of the Assembly's deliberations and of other observations received from Governments. The General Assem-

[1] *Official Records of the General Assembly, Seventh Session, Supplement No. 9,* chap. II.

[2] *Ibid., Eighth Session, Supplement No. 9,* para. 57.

bly, therefore, did not accept the International Law Commission's recommendation, based on paragraph 1 (*c*) of article 23 of its Statute, that the Assembly should recommend its Members to conclude a convention based on the draft.

4. Resolution 989 (X), adopted by the General Assembly on 14 December 1955, reads as follows:

"*The General Assembly,*

Having considered the draft on arbitral procedure prepared by the International Law Commission at its fifth session and the comments thereon submitted by Governments,

Recalling General Assembly resolution 797 (VIII) of 7 December 1953, in which it was stated that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure,

Noting that a number of suggestions for improvements on the draft have been put forward in the comments submitted by Governments and in the observations made in the Sixth Committee at the eighth and current sessions of the General Assembly,

Believing that a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements,

1. *Expresses* its appreciation to the International Law Commission and the Secretary-General for their work in the field of arbitral procedure;

2. *Invites* the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session;

3. *Decides* to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure."

5. It is clear from resolution 989 (X), which was adopted in pursuance of article 23, paragraph 2, of the Commission's Statute, that the General Assembly, although believing that a set of rules on arbitral procedure was likely to inspire States "in the drawing up of provisions for inclusion in international treaties and special arbitration agreements", expressed no view as to the desirability of convening a conference of plenipotentiaries to conclude a convention, and left a decision on that point to its thirteenth session, which was at liberty to declare for some other solution—for example, the preparation of a "model draft" on arbitral procedure, as had indeed been proposed by some members of the Sixth Committee.

6. It emerged from the discussions that, although the objections to the Commission's draft could be classified in four or five categories of varying scope, there was a large majority against merely approving the letter and spirit of the draft; and that the minimum of twenty members, regarded as necessary for a fruitful discussion of a draft convention, would probably be difficult to find. The addition of new members to the United Nations since 1955 is unlikely to have much effect on the General Assembly's views.

7. These views may be briefly summarized as follows: The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the *compromis*. The General Assembly took the view that the International Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, the codification of custom.

8. While recording these facts very objectively, the Special Rapporteur is somewhat relieved to note from the comments on the 1953 draft that several Governments of States with a long democratic tradition and a constant concern for juridical correctitude were, with certain minor reservations, favourably disposed to the adoption of the draft in both its letter and spirit (see, in particular, the observations of Canada, Denmark, Greece, the Netherlands especially Sweden, the United Kingdom and the United States of America). The enthusiastic and full approval accorded the draft by Professor de Aréchaga, who was consulted by the Government of Uruguay,[3] and by the representative of Pakistan, Mr. Brohi,[4] should also be noted; both of the Governments concerned had clearly sensed the attunement of the draft to the conciliatory spirit of the United Nations Charter (Articles 33 *et seq.*) and its progressive character. But the fact must be faced that the attitude of the Governments of States that have newly acquired sovereignty, or of those deeply imbued with the dogma of State sovereignty—particularly of the group of Soviet States that coalesced against the draft and carried the decision—or of certain American States, has remained steadfastly *unshakeable*, and will probably be maintained at the General Assembly's next session, which will be attended by representatives of eighty-one Member States.

9. We should be the last to deny that the draft submitted by the Special Rapporteur and elaborated by a majority—albeit a slight majority—of the Commission, clearly tends towards a juridical and jurisdictional concept of arbitration, although leaving the institution its independence and its purely voluntary character. There is no question of making it, as some of its opponents have suggested, into a kind of first instance subject to appeal to the International Court of Justice. The sole purpose of providing for purely external action by the Court is to cope with the deadlocks which frequently arise in the traditional procedure and the effect of which—it can scarcely be denied—has sometimes been to bring the parties original undertaking to nought;

[3] *Ibid.*, annex I, sect. 11.

[4] *Ibid., Tenth Session, Sixth Committee,* 468th meeting, paras. 1-13.

more or less scandalous examples have been quoted in our earlier reports. The draft was mainly based on the soundest French juridical doctrine—that of jurists like Lapradelle, Politis, Merignhac, and the revered master Louis Renault, who, more than fifty years ago, regretted that arbitral procedure had kept following in the wake of diplomatic practice and who foresaw no prospect of progress unless it was definitely diverted into juridical channels (see A/CN.4/35). The doctrine was given final shape by J. B. Moore, Oppenheim, van Vollenhoven and many others now dead. It is pointed out in the *Commentary on the Draft Convention on Arbitral Procedure* prepared by the Secretariat that "the chief significance of the draft lies in the several means which it provides for ensuring that the obligation to carry out the agreement to arbitrate shall not be frustrated at any point by a subsequent failure by one of the parties to fulfil that obligation" (A/CN.4/92, p. 8). But it was precisely this tendency to make of the mere undertaking to resort to arbitration, and not of the occasionally ambiguous provisions of the *compromis*, the very linchpin of the draft that aroused the most bitter opposition, because it was a threat to the concept of arbitration as a diplomatic extension of the dispute. Hence the twofold objection that the draft was contrary to sovereignty and a departure from established custom.

10. The two arguments must be explained. The sovereignty argument is either too wide or too narrow. Every treaty, every duly recorded and valid international undertaking, entails a renunciation of sovereignty. The objection may mean that the undertaking to resort to arbitration is purely provisional, so long as the judgment is not final and the parties reserve the right to challenge it at every stage of the procedure. If so, the argument is anti-juridical, and actually denies the validity of the undertaking itself and of any arbitration agreement. If the meaning is that the *bare* undertaking or the agreement has no real existence unless a *compromis* has been reached *in every case* on all points, and particularly on the different phases of the procedure, then the settlement of the dispute plainly becomes problematical. The precise purpose of the draft is to ensure that the decision to arbitrate is unaffected by any flaws in the *compromis*, where that decision is beyond all question, and the renunciation of sovereignty, whether immediately or as from some future date, is proved. Whenever the sole, unadorned, argument used is that the draft convention is an impediment to the *sovereign*—i.e. in fact, arbitrary—decisions of Governments, the objection is meaningless. Governments are always at liberty not to "compromise"; but, as soon as they do, their sovereignty no longer exists so far as the arbitrable dispute is concerned.

11. The meaning of the second objection is that the Governments raising it do not admit that the International Law Commission was set up to foster the development of law, and perhaps not even that its task is to unify law; for arbitration practice is far from uniform, often varying from region to region, or from one treaty to another, and perhaps even in each separate case. This aspect of the objection is, of course, particularly impressive, as disputes submitted to arbitration—and, with them, the procedure in each case—may vary infinitely in scope. But, if that is so, and Governments wish to be free to fit procedure to the circumstances and to the nature of the dispute, then it would appear to be *pointless* to prepare a code of procedure, especially in the form of a convention.

12. The Special Rapporteur therefore shares the doubts of certain members of the Sixth Committee as to the advisability, or even the possibility, of pursuing the proposal made in 1953 and submitting a further revised draft convention to the General Assembly. He feels, on reflection, that it would be preferable to submit the draft as a mere "model" for Governments, especially for those that have concluded an arbitration agreement in the form either of an abstract binding arbitration treaty or of an arbitration clause in a treaty on a specific subject. The General Assembly could then confine itself to approval in principle, or theory, of the work done, although such approval is bound once more to meet with stubborn objections to the juridical and jurisdictional approach.

13. On the other hand, it is not easy to advise the Commission to reconsider a draft convention with a view not only to mitigating but to *neutralizing* the very varied criticisms directed against it. For these criticisms went beyond a mere rejection of the present draft; they repudiated both previous efforts to put arbitration on a jurisdictional basis and their results, and thus represented a *retreat* from what could have been regarded as achieved, not only by the General Act for the Pacific Settlement of International Disputes, adopted in 1928 and revised in 1949,[5] but by the Convention for the Pacific Settlement of International Disputes (1907).[6] It should be noted as symptomatic that the General Act, which was ratified by twenty-four States some thirty years ago, has been ratified by only four since the United Nations assumed responsibility for it. The time would therefore appear to be rather ill-chosen to ask Governments to discuss the possibility of undertaking new juridical obligations. Despite the reasons for the retreat referred to, as briefly outlined above, we think the International Law Commission should decline, as it were, to abdicate, or to register the proven present weakening of the law.

14. It lies, of course, with the Commission to determine its own line of conduct. But one point should be noted: if well-intentioned Governments are to be offered an ordinary model draft that they can freely accept in whole or in part, then the *basic* elements and original tenor of the 1953 draft can stand; whereas the offering of a new draft convention can be—we repeat—but a surrender that would, in our view, be valueless and even likely to be damned with faint praise.

15. Having made the above points, we shall now look more closely at: (1) the study made of the provisions of the Commission's draft in the General Assembly, in the light of the powers granted to the Commission under article 1 of its Statute; (2) the amendments made in certain of the articles of the draft to meet criticisms of them

[5] Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949. See United Nations, *Treaty Series*, vol. 71, 1950, No. 912.

[6] *The Hague Conventions and Declarations of 1899 and 1907*, 2nd ed., James Brown Scott (ed.) (New York, Oxford University Press, 1915), pp. 41 ff.

in the Assembly; (3) certain new articles, mostly borrowed from part IV of The Hague Convention for the Pacific Settlement of International Disputes (1907), which will this year attain its fiftieth anniversary.

16. The new text is annexed to this report.

CHAPTER II

Consideration of the Comments of Governments

A. OBSERVATIONS ON THE MAIN ARTICLES OF THE DRAFT

1. The undertaking to arbitrate (former article 1)

17. Article 1 contains three paragraphs which set the tone for the whole draft. Its purpose is to emphasize that every undertaking to resort to arbitration constitutes *per se* a legal obligation which must be met, whether it be an abstract undertaking contained in an arbitration agreement, or an arbitration clause, or an undertaking concluded in connexion with an actual dispute, the material facts of which are known at the time the undertaking is signed. This article merely repeats a stereotyped formula that has been in use since 1907; but adds the provision that, if it is to be deemed legally valid, the undertaking must result from a *written instrument*, which may or may not be what it has been agreed to call a "*compromis*".

18. The word "*contestation*" in the French text has been criticized. It can be replaced by "*différend*". The reference is, of course, only to disputes between States (comment by Yugoslavia).

19. The exclusion of political disputes has been proposed—as if all disputes did not have a political background, and as if arbitration were not particularly indicated in the case of political disputes! Also proposed has been the exclusion of disputes within the "sole jurisdiction" of a State—as if such exclusion could be any more clearly defined, considering the difficulty of knowing the exact meaning of "sole jurisdiction", than the expression "essentially within the domestic jurisdiction of any State" used in Article 2, paragraph 7, of the United Nations Charter! Such formulae are liable to provide all sorts of loopholes (objections by Argentina, France, Guatemala, Iran and Peru). Honduras proposes the exclusion of disputes that are within the purview of regional agencies, although it is not clear what difficulty there can be in reconciling arbitral procedure with Articles 52 to 54 of the Charter. Indeed, paragraph 4 of Article 52 explicitly refers to Articles 34 and 35, which mention arbitration among the methods of pacific settlement of disputes.

20. Lastly, it has been recommended that the draft exclude future disputes, or disputes arising *after* the signature or entry into force of the convention (Argentina, Canada, Guatemala, Honduras, Norway and Yugoslavia). This is the "non-retrospective" aspect. It may have its value as a legitimate precaution; but why it should conflict with the freedom of will of States that see fit, even then, to agree to arbitrate, is hard to see.

21. There is, however, one case in which the exclusion of recourse to arbitration might be considered—namely, where the dispute has already been settled by a judgment against which there can be no appeal for review or annulment. The "finality of the arbitral award" is traditional in customary law, as the means of putting a permanent end to the dispute which has arisen. This is the "conciliatory role" of arbitration, which is sometimes regarded as preferable even to its juridical role. Chapter V of the draft appears to explain it, but it does not explicitly refer to it. It might be worth while to mention it unambiguously in article 24, paragraph 5, in the traditional terms: "The arbitral award settles the dispute definitively, and without appeal, with due regard to the articles on review and annulment".

2. Order of the articles

22. That said on *the scope* of arbitral procedure, it might be possible to give the traditionalists some satisfaction, at least as to form, by merely altering the order of the articles: the apparently minor place given to the *compromis* (article 9) could be changed by assigning article 2 to it. This would mean reverting to the method used in the 1907 Convention (article 52) instead of following the order adopted in the General Act, which dealt with the constitution of the tribunal before the *compromis* (article 25).

23. This order of priority—the point was apparently not made clear to the General Assembly—was adopted in the Commission's draft to indicate that the aim in making the constitution of the tribunal the first and immediate duty of the Governments bound by the undertaking to arbitrate was to ensure that observance of that undertaking would be controlled, not by a permanent "institutional" tribunal, but by a juridical body qualified by its binding competence to complete the *compromis*—or even to draw it up, should the parties be unable to do so (article 10)—and to assist the procedure with its real, if delegated, authority. That was also the ultimate purpose of the General Act; but it was also what aroused the instinctive opposition of the staunch supporters of "sovereignty" as an absolute concept.

3. The compromis *(former article 9)*

24. It must be stressed that a *compromis* can contain many other points which are to be found in the former article 9 of the draft. For example, the power to arbitrate can be vested in an already existing tribunal, even a State judicial body, as has sometimes happened (Yugoslavia); the names of the arbitrators can be included in the *compromis* (Netherlands); reference can be made, not only to the "law" applicable, but to the general principles of law (Brazil); the points on which the parties are or are not agreed can be listed; the way in which costs are to be shared can be laid down; the services that may be required of the International Court of Justice can be mentioned (Netherlands), etc. Anything can be put in a *compromis*, even if it is doubtful whether the agreement between the parties can in practice cover all the difficulties that might arise during the procedure.

25. But *what is unacceptable* is that a *convention* on procedure should allow flaws in the *compromis* that may hinder or block the course of the procedure, and above

all implicitly or explicitly result in extinguishing the obligation. In other words, the tribunal cannot be " the slave of the *compromis* ", and must retain control of the proceedings until the award. Otherwise—we repeat—it is no longer the provision prescribing arbitration that is intrinsically binding, but only the *compromis*. The undertaking ceases to exist if it contains a purely optional clause that may paralyse the procedure. Where a " convention on procedure " is concerned, there is a basic contradiction in not making provisions *essential* to its efficacy and to the settlement of the dispute compulsory. They cannot be made subject to free agreement between the parties by inserting reservations like: " Unless the parties have agreed otherwise . . .".

26. Now, that *logical necessity* has been rejected by a large majority of States with a view to toning down the draft—from which we conclude that, if its spirit and scope are to be preserved and it is to be submitted as a model for the consideration of the parties, it must not be deprived of its intrinsic qualities, including the binding nature of the provisions essential to its efficacy.

4. Arbitrability of the dispute (former article 2)

27. The first of these provisions concerns the *arbitrability of the dispute*. Some Governments, not among the least important, have agreed that this preliminary question must be settled if the contract of record is not to be brought to nought. According to paragraph 1 of the former article 2:

> " If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, such preliminary question may, in the absence of agreement between the parties upon another procedure, be brought before the International Court of Justice by application of either party. The decision rendered by the Court shall be final."

The very existence of the obligation to arbitrate may indeed be challenged in very good faith, especially where it is a question of applying an arbitration treaty or arbitration clause.

28. The draft requests the International Court of Justice to decide this issue, and this is the point on which the opposition aroused by the novelty of the obligation has perhaps been most bitter. It has been said that this is an indirect way of extending the area of the Court's compulsory jurisdiction, especially as applied to States which have either not subscribed to the optional clause or subscribed to it with reservations that make it illusory (for instance, Argentina, Byelorussia, Chile, Czechoslovakia, Egypt, Guatemala, Honduras, India, Iran, Israel, Peru, Poland, Turkey, USSR and Yugoslavia).

29. A possible answer is that acceptance of this article may be regarded as equivalent to the optional clause so far as concerns the special purpose in view, and that the Court therefore cannot disavow its jurisdiction, as the Permanent Court of International Justice did in the East Karelia case,[7] since it is a matter of treaty interpretation. The preliminary obstacle to the observance of the undertaking to arbitrate is thus completely removed.

30. And we can here invoke the precedent created by resolution 171 (II) of the General Assembly, adopted on 14 November 1947, which states:

> " *Considering* that it is also of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law,
>
> . . .
>
> " *Considering* that the International Court of Justice could settle or assist in settling many disputes in conformity with these principles if, by the full application of the provisions of the Charter and of the Statute of the Court, more frequent use were made of its services."

After urging States Members—in paragraph 1 of the operative part of the resolution—to accept the compulsory jurisdiction of the Court in accordance with Article 36 of the Statute of the Court, the General Assembly:

> " 2. *Draws the attention* of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice;
>
> " 3. *Recommends* as a general rule that States should submit their legal disputes to the International Court of Justice."

31. This resolution seems to have been drafted with special reference to arbitration treaties. Article 2, of course, entails no widening of the compulsory jurisdiction of the Court, but only the application of an agreed undertaking freely entered into by the parties.

32. The resolution adopted by the General Assembly on 14 November 1947 applies to all cases in which it was felt that the draft convention should provide for recourse to the services of the International Court of Justice. Some ten years ago there was at any rate less sign of reluctance on the part of Governments to use those services. A possible cure for their distaste, should it continue, might be to submit the question of arbitrability to another international legal organ, for example, the Permanent Court of Arbitration. But that method would involve substantial delays and complications, particularly as regards the constitution of the court to settle the preliminary issue, even if the summary procedure prescribed in article 86 and following articles of the 1907 Convention were to be used. Thus arbitration would be provided at two levels, which might arouse fewer misgivings.

33. This solution, although dilatory, would at any rate enable account to be taken of a sound objection to be found in the ever-apt observations of the Netherlands Government, which we ourselves are very often inclined to support: Would the decision of the International Court

[7] See Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 5.

of Justice on the arbitrability of the dispute not be liable to conflict, indirectly at least, with any application for annulment of the arbitral award submitted to the same Court (article 31 of the draft)? A solution advocated in the observations of the Netherlands Government is that the International Court of Justice should decide merely whether or not the arbitral tribunal should be constituted—which would remove any risk of conflicting judgments. The Court's decision would amount to a kind of presumption that a dispute probably exists and that the initiation of arbitration proceedings is " recommended ". The " recommendation " concerned would leave the arbitral tribunal itself complete freedom of action. But the International Court of Justice might then be reluctant to assume what would in that case be an *extra-judicial* responsibility, instead of giving a legal ruling on the scope of the initial undertaking to arbitrate.

34. The possibility might also be considered of providing for resort to another court designated by the parties themselves, and, finally, if the arbitral tribunal has already been constituted, of referring the question of arbitrability to it. But here we are once more faced with the difficulties that will arise in constituting that tribunal, and with the danger—unfortunately not imaginary—that if its members are in the service of the parties, its very judgment on the question of arbitrability will be particularly open to question. We should therefore prefer to leave the article under review almost unchanged, in the following terms:

> " If the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is wholly or partly within the scope of the obligation to have recourse to arbitration, such preliminary question shall, failing agreement between the parties within a period of three months upon another method of settling the question, be referred, by application of either party, to the International Court of Justice either for summary judgment or for an advisory opinion."

The last phrase has been added as we think it unlikely that an advisory opinion of the Court on the preliminary question of arbitrability can be ignored by any Government concerned about its legal commitments.

35. As to paragraph 2 of this article, concerning protective measures, we regard it as the necessary complement to action on the preliminary question, whatever the court to which the dispute is referred for settlement.

5. Constitution of the arbitral tribunal (former articles 3 and 4)

36. This is the second stumbling block in arbitral procedure; but it is a subject which has traditionally received closer study, since the choice of judges has always been regarded as the main difficulty in the *compromis*. Yet the method proposed for solving that difficulty has met with roughly the same criticisms as in the past, further aggravated by the fact that it would vest power " in one man ", although an eminent person, i.e. the President or Vice-President of the International Court of Justice. It has been suggested that the party which has opposed the constitution of the tribunal should be entitled to appeal to the Court against the decision referred to in paragraph 2 of article 3 of the draft (Costa Rica). The Netherlands Government has emphasized the need to mention cases in which the parties have arranged for the assistance of a third party in the appointment of the arbitrator(s). The Special Rapporteur would have absolutely no objection to the text proposed in the Netherlands observations, among the advantages of which is the stipulation that the tribunal should be composed of an uneven number of arbitrators—as indeed he himself had originally proposed.

37. The draft would then read as follows:

> " 1. Immediately after the request made for the submission of the dispute to arbitration, or after the decision of the International Court of Justice on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps 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 of the International Court of Justice, the appointment of the arbitrators not yet designated shall be made by the President of the Court at the request of either party. 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 be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate and after consultation with the parties. In so far as the relevant text contains no rules with regard to the composition of the tribunal, that composition shall be determined, after consultation with the parties, by the President of the International Court of Justice or by the judge acting in his place, it being understood that the number of the arbitrators must be uneven."

38. Long before the 1953 draft came into existence, continuous efforts had been made to ensure the constitution of the tribunal, despite the ill will or default of the parties (1907 Convention, articles 45 and 87; Treaty of Versailles, article 304 regarding mixed arbitral tribunals;[8] General Act, article 23). A draft convention on arbitral procedure cannot appear to ignore these precedents and fall more than fifty years behind the times. It lies with the Commission to decide which, in its view, is the wiser course: to accept this retrograde step or to abandon its ambition to draft a convention. The need for intervention by the President of the Permanent Court of International Justice was first laid down in article 23 of the General Act of 1928. The Commission adopted this solution; but it was to be applied *omisso medio*, i.e. without recourse to third Powers.

[8] *The Treaty of Peace between the Allied and Associated Powers and Germany* (London, H.M. Stationery Office, 1925), pp. 169-171.

39. The reader will note, not without some surprise, that the next article (article 4), which states that " subject to the circumstances of the case, the arbitrators should be chosen from among persons of recognised competence in international law ", was objected to by one Government as depriving the parties of a free choice of arbitrators!

6. Immutability of the tribunal (former articles 5 to 8)

40. The following articles, concerning the immutability of the tribunal once constituted, were bound by their comparative novelty to arouse serious objections also.

41. Here also the two conceptions of arbitration came into conflict. In the traditional or diplomatic conception, the arbitrators appointed by either party are the representatives of the party appointing them. They are not so much judges as counsel briefed to put forward their principals' claims, so that—except where there is only one arbitrator—the umpire is in fact the sole judge. In this conception, " national " judges never lose their national status and can be replaced at any time by the Government which appointed them. They may also, under that Government's pressure, exercise their right to resign or " withdraw " to indicate their disagreement with the way they think the case is going. By agreement with agents and counsel, with whom they maintain close and uninterrupted contact, they continue their diplomatic activity throughout the whole course of the procedure, and have, in fact, no independence. Their role may be compared with that of the *ad hoc* judge in the International Court of Justice, who, in the words of the first President of the Permanent Court of International Justice, must be regarded " as a sop to the juridical weakness of international litigants ".

42. The jurisdictional conception, on the contrary, is designed to ensure the independence of all members of the arbitral tribunal, not merely of the umpire. The basic idea is that " national " judges cease to be so—at least as far as possible—from the time when the tribunal is finally constituted, and that the mere fact of their acceptance by both parties or of their designation by an impartial authority makes them appointed judges, members of a " judicial organ " that is international, though temporary and destined to disappear as soon as its award is rendered. This jurisdictional conception has admittedly not been very popular with Governments anxious to maintain, throughout the entire proceedings, not only contact with but influence over the judges they have appointed.

43. Paragraph 2 of article 5 of the draft represents a compromise between the two conceptions. Under that paragraph, each party retains the right to replace an arbitrator appointed by it, so long as the tribunal constituted has not yet begun its proceedings. Once the proceedings have begun, i.e. when the President has made his first order, the replacement of a " national " arbitrator can only take place by agreement between the parties. Hence, as a rule, the composition of the tribunal should remain the same until the award is rendered.

44. The following articles of the draft (articles 6, 7 and 8) were designed as far as possible to curb activities of either party calculated to lessen the tribunal's authority or freedom of action. They deal with vacancies that may occur on account of the death or incapacity of arbitrators (article 6) and with the resignation of arbitrators under varying degrees of pressure (article 7) after the proceedings have begun. As was to be expected, several Governments objected to the proposed application in such cases of the methods prescribed for the initial formation of the tribunal, and in particular against the right vested in the tribunal itself to apply those methods and to consent to " withdrawals ". It was maintained that this would make the tribunal into a supra-national body (Czechoslovakia) and that it should lie with the parties which appointed the arbitrators to replace them (India, Yugoslavia). The opposition always takes the same form.

45. Article 8, on disqualification, aroused the same objections, with regard to the limitation of the freedom of States and the power of decision given to the arbitral tribunal. Yet it is clear that abuse of the right of disqualification may suffice to impede, if not to ruin, the development of the procedure, and that, in view of the difficulties made and the meticulous care taken at the *compromis* stage in selecting the arbitrators, any such occurrence during the proceedings should be regarded as exceptional.

46. Article 8, paragraph 1, provided that:

> " 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 propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only 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."

47. It will be noted that, if the arbitrator concerned was one appointed by the President of the International Court of Justice, it may seem unusual to leave the decision to the arbitral tribunal. Paragraph 2 of the same article stipulates that, in the case of a sole arbitrator, the question of disqualification shall be decided by the International Court of Justice on the application of either party. The Governments of Canada, India and the Netherlands thought that in all cases of disqualification the decision should be taken by the International Court of Justice, not the arbitral tribunal [at least if the arbitral tribunal is equally divided on the question (Canada)].

48. The Special Rapporteur would accept this view and agree that intervention by the International Court of Justice is warranted in such an exceptional case as that of a proposal for disqualification. But, again, there is reason to think that its intervention would be distasteful to the supporters of the political conception of arbitration, and that reservations would be made that would nullify all these provisions if they were stipulated in a draft convention.

7. Powers of the tribunal (former articles 9 to 21; additional articles 1 to 7)

49. The same would probably apply to the other powers vested in the tribunal: for example the right, under article 10, to decide whether the essential elements of the

undertaking to arbitrate are sufficient as a basis for a judgment by the tribunal, even if such elements do not take the form of a *compromis* proper; and the right of the tribunal itself to complete or to draw up a *compromis* should the parties fail to do so after being called upon by the tribunal to conclude the *compromis* within such time limit as the tribunal will consider reasonable.

50. Article 10 of the draft reads as follows:

"1. When the undertaking to arbitrate 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. [There were no objections to this sentence.] 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 9 to enable it to proceed with the case. [On this point, the provision may seem a little bold.] In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case, the tribunal shall order the parties to conclude a *compromis* within such time limit as the tribunal will consider reasonable.

"2. If the parties fail to agree on a *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal shall draw up the *compromis*.

"3. If neither party claims that the provisions of the undertaking to arbitrate are sufficient for the purposes of a *compromis* and the parties fail to agree on a *compromis* within three months after the date on which one of the parties has notified the other of its readiness to conclude the *compromis*, the tribunal, at the request of the said party, shall draw up the *compromis*."

51. To the usual objections regarding sovereignty and free will, and the transformation of the arbitral tribunal into a "supra-national" court, some States (Peru, Turkey) added the criticism that this article confers unprecedented powers on the tribunal. They forget that assistance by the tribunal in the drawing up of the *compromis* was already prescribed, though in less clear terms and in less detail, in the 1907 Convention (article 54), the General Act (article 27) and the Pact of Bogotá [9] (article XLIII), which provides for intervention by the International Court of Justice.

52. It may also be pointed out that under article 13, paragraph 2, of the draft, the tribunal has the power to formulate its rules of procedure, if the parties have not agreed on the subject and are not bound by the Convention.

53. The powers given the tribunal to interpret the *compromis* when it has been drawn up by the parties (article 11) have also been much criticised. To begin with, the everyday statement that a judicial body is always "the judge of its own competence"—which may have been confusing—was regarded as offensive and even unacceptable (Afghanistan, Brazil, Czechoslovakia, Egypt, Greece, Iran, Peru, Syria, etc.). It does not mean, however, that the tribunal has the right to deem the *compromis*—which is the very source of its competence—null and void. On the contrary, the tribunal is obliged to apply the *compromis*. All that is meant is that, when the rules adopted need interpretation, it is the tribunal that must give the interpretation after hearing the parties, not the parties themselves. Otherwise, the procedure might be permanently interrupted in the event of disagreement between the litigants on the interpretation. If the expression "judge of its own competence" is considered incorrect, the intervening clause can be deleted and the article simplified and toned down as follows: "The tribunal possesses the necessary competence to interpret the *compromis*." What matters is that there should be no possible doubt on the subject.

54. It goes without saying that this provision in no way impairs the economy of the draft as regards either the decisions of the International Court of Justice concerning the arbitrability of the dispute (article 2) or that Court's competence to give a finding on the possible nullity of the award, particularly in the event of its being informed that the tribunal has exceeded its powers, or that there has been a serious departure from a fundamental rule of procedure (articles 30 and 31) (observations of Canada, Greece, the Netherlands and Pakistan).

55. As to the rules of law to be applied by the arbitral tribunal, the draft provides that the parties may agree on this point in the *compromis*, and that only in the absence of such agreement shall the tribunal be guided, though not strictly bound, by Article 38, paragraph 1, of the Statute of the International Court of Justice. This provision of article 12 of the draft seems as liberal as may be. Nor would there be any objection to mentioning (as requested by Brazil) the rules of international law in general as well as those set forth in the said Article 38, or to empowering the tribunal (as proposed by Sweden) to decide non-legal disputes *ex aequo et bono*—which is an aspect of the arbitral institution's conciliatory role.

56. On the other hand, it would appear necessary, at any rate in a model draft on arbitral procedure, to keep the provision (accepted by a substantial majority of the Commission) that the tribunal may not bring in a finding of *non liquet*. Like the tribunal's right to judge *ex aequo et bono* should it have any difficulty in finding a legal basis for its award, this strikes us as a necessity in view of the conciliatory nature of arbitral procedure, designed as it is to settle definitively disputes entailing an undertaking to arbitrate. To leave the parties a free choice in deciding this question (as proposed by Brazil, Czechoslovakia, India and Peru) might fit in with a "circumspect" *compromis*; but it strikes us as out of tune both with a model convention and with the traditional spirit of the institution.

57. The power vested in the tribunal under article 15 with regard to evidence has aroused no serious criticism. The Governments of Costa Rica, the Netherlands and Yugoslavia even proposed the exclusion of all reservations, particularly as regards the decision to visit the scene.

[9] American Treaty on Pacific Settlement, signed at Bogotá, on 30 April 1948. See United Nations, *Treaty Series*, vol. 30, 1949, No. 449.

58. In this connexion it is to be noted that provisions concerned with pure current and traditional procedure—such as those contained in article 13, paragraph 1, and articles 14, 18, 19 (apart from a slight comment by the Netherlands concerning the presence at the deliberations of all the arbitrators) and article 21 (on discontinuance of the proceedings)—called forth only minor observations. Some States would even appear to be in favour of including other similar points in the draft, for instance, as regards the role of agents and counsel, pleadings, the order of proceedings, etc. It would suffice for this purpose to take instruments like the 1907 Convention and the General Act as models in amplifying, and no doubt improving, the purport of the document, while avoiding further difficulties.

59. But difficulties arose again when Governments sensed a threat to their arbitrary prerogatives and their freedom of action, for instance in the case either of incidental or additional claims or counter-claims (article 16) or of provisional measures prescribed by the tribunal for the protection of the rights of the parties (article 17).

60. In the latter case, certain Governments were so suspicious of the tribunal that they feared it might take advantage of the powers vested in it to prejudge the interests at issue, and compromise the subject-matter of the dispute in advance. They forget that the tribunal would then be flagrantly exceeding its powers and there would be every reason for bringing an action for nullity. In another sense, the arguments suggest that a powerful litigant may be suspected of proposing to take advantage of the situation, and, for example, to refuse to abandon the action whatever the nature of the award. In such a case, it is the *bounden duty* of a tribunal to apply the protective measures.

61. The other case, that of incidental claims (or additional claims or counter-claims) is more calculated to provoke discussion. The whole question revolves round the decision to be taken on the role that should be assigned to the arbitrator or to the arbitral tribunal. Should the Governments concerned be left free to narrow the dispute down to the aspects to which they have agreed to confine it, or should it be accepted that the main function of the arbitral institution is to *settle the dispute in its entirety*, to liquidate it for the future, and that the tribunal must therefore be given the power to decide on the scope of the subject-matter of the dispute?

62. Once again a choice must be made between the conciliatory role played by arbitration and the reluctance of Governments to " go to law ". In the English text of article 16, the tribunal's competence to decide on incidental claims is restricted to claims " arising directly out of the subject-matter of the dispute ". This formula is preferred by the Netherlands Government to the French text, which refers to claims that the tribunal " *estime en connexité directe avec l'objet du litige* ". Argentina would prefer the article to deal only with " counter-claims relating to questions which necessarily arise out of the subject-matter of the dispute ". India takes the view that both parties should at any rate give their consent—which does not settle the question.

63. It is, in our opinion, scarcely permissible that, as an aftermath of arbitration, a situation has to be reviewed that is legally cleared up in principle, though still only partially so. A distinction may have to be drawn between counter-claims and additional claims. A counter-claim raises a question of justice, and finds its warranty in the principle that States are equal before the law; but the parties may wish to exclude it by agreement if it is not directly linked with the main claim. As to additional claims, they can of course only be recognized by the tribunal if they are *intimately connected* with the merits of the case and *necessary to justify the judgment* in law. Moreover, an action for nullity on the ground that the tribunal exceeded its powers may be raised later. Hence it would appear necessary to use terms that are somewhat vague, but that leave some latitude to the arbitral tribunal.

64. It should be noted that the arbitral tribunal is thus, in fact, to some extent empowered to decide on the scope of the subject-matter of the dispute, its competence in this respect being akin to that vested in the International Court of Justice as regards the arbitrability of the dispute. The Court may already have " suggested " in its preliminary judgment or advisory opinion (article 2) what the scope of the subject-matter of the dispute should be, so that some divergence of opinion may arise between the Court and the arbitral tribunal. Despite that risk, the Special Rapporteur thinks that the judgment rendered by the arbitral tribunal must not be made inadequate to the dispute it is supposed to settle, through Governments being left free to make it inoperative by the unwarranted exclusion of all incidental claims.

8. Force of the award (former articles 20 to 27; additional articles 8 and 9)

65. The basic classical article on this subject is article 26, which runs: " The award is binding upon the parties when it is rendered. It must be carried out in good faith ". The observations of Costa Rica suggest that the tribunal may, if it considers it necessary to do so, specify the date or dates on which the award or any of its provisions are to enter into force. That is self-evident. Honduras adds that, if either party to a dispute fails to comply with its obligations under the award, the other party may appeal to the Security Council, which may, if it considers it necessary to do so, make recommendations or decide on the measures to be taken with a view to ensuring that the terms of the award are observed. This may be regarded as an application to arbitration of Article 94 of the United Nations Charter —an application justified and necessary on the same grounds.

66. There is, we think, no need to stress *how necessary* for the effectiveness of the arbitral procedure it is to maintain the article on judgment by default (article 20). However, to satisfy certain States, a provision might be added to the effect that the arbitral tribunal may grant the defaulting party a sort of period of grace before judgment is pronounced (Argentina).

67. Article 21, under which there can be no *discontinuance of proceedings* by the claimant party without the consent of the respondent, has the same purpose in view, i.e. not to put the success of the arbitration at the mercy

of the ill will of one litigant. This article, it may be added, provoked no criticism.

68. Article 22, which concerns the possible embodiment in the award, as *res judicata*, of a settlement reached by the parties, is not binding on the tribunal. Guatemala has rightly proposed that it be specified that the tribunal is free to give or to withhold its consent.

69. As to the extension of the period fixed by the *compromis* for the rendering of the award (article 23), the proposal has been made that the tribunal should be able to grant it only with the consent of the parties. In our view, the choice should lie entirely with the tribunal itself, which should alone decide whether or not it is sufficiently informed by the procedure. But that, we consider, is the only ground on which it may infringe the *compromis*.

70. Lastly, as regards the signing of the award (article 24), the Netherlands comment that the signature of the president of the tribunal would be sufficient—and those of the arbitrators who voted for the award superfluous—appears to conflict with article 25, under which any member of the tribunal may express his separate or dissenting opinion, i.e. indicate how he voted. If, however, the arbitrators are debarred in advance by the *compromis* from stating their opinions, the fact that the president alone signs is likely to endow the award with, if not more unquestioned, at any rate more "unquestionable" and more final authority, since officially backed comments are excluded. Perhaps the Commission should reconsider this question.

71. The arbitral award is not a ukase. The reasons for it must be stated if it is not to be null and void. Some States, (Argentina for example), took the view that the reference in article 24, paragraph 2, which is repeated in article 30, sub-paragraph (*c*), is too vague, and that the arbitral tribunal should state the reasons on which the award is based separately for each question submitted to it. The mere obligation to give reasons would appear to imply, in fact, that all the reasons must be given. There is no objection to including the following clarification in the article: "The award shall state the reasons on which it is based for every point on which it rules".

B. Objections hardly to be entertained

72. Three questions have still to be considered: (1) interpretation, where necessary, of the award; (2) action for annulment of the award; and (3) action for revision of the award. The objections to the provisions of the draft on these questions can hardly be entertained, although they emanate from a compact majority of States.

1. Interpretation (former articles 28 to 31)

73. It has been argued, surprisingly enough, that the arbitral award, even if open to various interpretations, even if lacking in clarity, even if incomprehensible in certain respects, must be regarded as final and ending the dispute once for all. In such circumstances, it might rather be asserted that there is no award, either in whole or in part (Brazil, Egypt).

74. Nevertheless, there is point to the protests aroused by the proposal to leave any necessary interpretation of the award to the International Court of Justice, if the arbitral tribunal cannot act. The States that, on the whole, fear such intervention by the Court were again at one in describing it as second-degree and compulsory jurisdiction (Afghanistan, Argentina, Chile, India, Israel, Turkey, Yugoslavia, etc.). The Netherlands Government, although of the opinion that the request for interpretation should be made, proposes submission of the request to the Court only when the parties have not adopted some other solution. That view could be accepted, if need be; one might go even further and drop the idea of submission to the Court, since it may arouse the fear already mentioned, i.e. the fear of the possibility of, at least implicitly, conflicting judgments.

75. The Special Rapporteur would be prepared to agree that every request for interpretation should as a rule be submitted, if possible, to the tribunal that rendered the award, and to that tribunal alone; and that the latter should act very expeditiously, lest it be unable to function through being already dissolved. The Commission had adopted a time limit of one month. That we regard as a maximum, and we should be disinclined to extend it to three months, as proposed by the Netherlands Government. Instead, provision might be made for, where necessary, extending the competence of the arbitral tribunal for that period of one month, to enable it to deal with the request for interpretation. There is little likelihood that the composition of the tribunal would have changed in that short period, or that vacancies could not be filled by the method laid down for its original constitution. The parties would, moreover, still be free to adopt some other solution, so long as it was an agreed solution and the interpretation achieved a real settlement of the dispute. Particularly recommended would be appeal to the Permanent Court of Arbitration.

2. Annulment of the award (former articles 30 to 32)

76. Here again we find the same doctrine: that the arbitral award is final, even if it turns out to be morally unacceptable or, in fact, inapplicable. Once more we refuse to consider this ostrich-like policy, as it is inconsistent with the elementary principles of law. Its adoption would spell condemnation by negative absolutism of a copious literature that is consistent at least in its principles, if not always in its practical applications. The articles relating to the annulment of the award must perforce appear in a model draft on procedure, despite the reservations of certain Governments (for example, the United Kingdom), which may have considered the grounds listed in article 30 too vague or too wide, and were particularly averse to accepting corruption on the part of one of the arbitrators as a reason for annulment, while others (for example, Costa Rica) proposed the addition to the list of "coercion" of the tribunal. In our view, intervention by the International Court of Justice must be maintained in this case as the only acceptable solution, since the Court's prestige, as also the exceptional nature of the proceedings, is likely to prove reassuring. Here again, the time limit for initiating the proceedings must still be fairly short.

3. Revision article 32 [former article 29]

77. The objections that have developed around this subject are, as before, in sharp contradiction with the legal proverb dear to the Anglo-Saxons which says: "Nothing is settled until it is settled right". At times, too, they reveal a certain confusion between the different types of further action that a judicial award may suggest: appeal, cassation, revision. Yet the quite distinctive concept of the "new fact", which is clearly defined in article 29 itself, is long-established and hardly to be obscured except by inveterate political considerations. This is surprising if it be remembered that the adoption of the principle of revision goes back to the Convention of 1907 (article 83), that a famous application of it occurred in 1910 in the *Orinoco Steamship Company* case,[10] that the principle is laid down in Article 61 of the Statute of the Permanent Court of International Justice, etc. The principle of appeal and the appeal itself must therefore be regarded as normal; to abandon the principle would—we reiterate—be retrograde beyond words.

78. We had occasion, in 1950, in our first report on arbitral procedure (A/CN.4/18) to stress that it was impossible to maintain the common assumption of the "irrefragable" force of *res judicata* which normally attaches to every court finding, because it had become a matter of common knowledge after the new fact had arisen that the arbitrator had been materially unable to render his judgment with full knowledge of the facts, since he was not in possession of the necessary elements on which to base his conclusions. The characteristic of the new fact is, indeed, that it was unknown to the judge or judges when the proceedings closed, and was calculated to exercise a *decisive* influence upon the award (A/CN.4/18, para. 95). We added that the importance of revision was all the greater in that what was concerned was the award rendered by an international court in a suit between States involving powerful collective interests, and not only private interests that might become lost among the host of other lawsuits brought in a particular State. What is at stake here is not a need of public order but a need of "*international* public order". Today we might say "world order", considering the potential universality of the world-wide society embodied in the United Nations.

79. The four paragraphs of article 29, the contents of which were meticulously examined and re-examined by our Commission, carefully describe the application procedure, the time limits within which the application must be made, and the two findings required: on the existence of the new fact and the admissibility of the application; and on the merits of the case. As with the request for interpretation, it goes without saying that the application should normally be made to the tribunal which rendered the award, since it can in no way be made responsible for its award's imperfections. Not until it proves impossible to reconstitute the arbitral tribunal are the parties advised to apply to the International Court of Justice or to another court agreed between them. Here again we should be in favour of the special reference to the Permanent Court of Arbitration which we proposed in 1950, following the 1910 precedent. More liberal provisions than those contained in this text are hardly conceivable.

80. Let us mention in conclusion the Netherlands Government's proposal to add a paragraph to article 29 whereby "the application for revision shall stay execution unless otherwise decided by the tribunal or the Court". This is the same solution as should be adopted in the case of requests for interpretation.

CHAPTER III

Conclusions

81. Such are the reflections suggested by a further study of the draft adopted by the International Law Commission at its fifth session, and of the deliberations in the Sixth Committee and in plenary meetings at the tenth session of the General Assembly.

82. It will doubtless be noted that, despite the observations of most Governments and the fact that the draft was referred back by the Assembly to the International Law Commission, we have preserved the general economy of the draft, and, broadly speaking, the wording of texts already amended—in the light of the first comments received from Governments—at the fifth session of the Commission. As we have said, a new draft convention could win the fairly general support of Governments only if it represented an almost total *abandonment* of the progress made over the last fifty years or more in the theory and practice of arbitration by those chancelleries most traditionally devoted to the *juridical* solution of international disputes. Such a convention, reduced to a series of purely formal articles and procedural references—in the hope, perhaps, of avoiding protests against any obligation designed to ensure the effectiveness of the undertaking to arbitrate and to prevent arbitrary decisions by Governments—would in our opinion be without real value. It is even questionable whether it could produce a sound synthesis of arbitration practices, adapted to the multifarious cases that may arise and to the divergent views of Governments.

83. Indeed, the fact that international organization is now passing through a period of transition and the contradictory social and constitutional conceptions of the various groups of States—among them those which have most recently attained to major international competence, i.e. to full sovereignty—should warn against harbouring disappointing illusions. Hence we have thought it wise to propose that the International Law Commission do no more than submit to the General Assembly a mere model of arbitral procedure adapted to the stage now reached in the development of law in those States that are manifestly prepared to accept juridical *and judicial* obligations consistent with the spirit of concord and conciliation which informs the Charter of the United Nations. This new draft, *although in itself entailing no treaty obligation,* may nevertheless be of value to all chanceries desirous of using it, in whole or in part, as a basis for the final settlement of disputes that may disturb their mutual relations.

[10] *The Hague Court Reports,* James Brown Scott (ed.) (New York, Oxford University Press, 1916, p. 226.

Annex

Model draft on arbitral procedure

Article 1

1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future (arbitration treaty - arbitration clause).

2. States parties to an undertaking to arbitrate may decide that it shall not apply to disputes arising, or due to circumstances arising, prior to its conclusion.

3. The undertaking shall result from a written instrument, whatever the form of the instrument may be.

4. The undertaking constitutes a legal obligation which must be carried out in good faith.

Article 2 (former article 9)

Unless there are prior 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:

(*a*) The subject-matter of the dispute;

(*b*) The method of constituting the tribunal and the number of arbitrators;

(*c*) The place where the tribunal shall meet.

In addition to any other provisions deemed desirable by the parties, the *compromis* may also specify the following:

(1) The law and the principles to be applied by the tribunal, and the power, if any, to adjudicate *ex aequo et bono;*

(2) The power, if any, of the tribunal to make recommendations to the parties;

(3) The procedure to be followed by the tribunal, on condition that, once constituted, the tribunal shall remain free to remove obstacles which may present it from rendering its award;

(4) The points on which the parties are or are not agreed;

5) The number of members constituting a quorum for the conduct of the proceedings;

(6) The majority required for the award;

(7) The time limit within which the award shall be rendered;

(8) The right of members of the tribunal to attach or not to attach dissenting opinions to the award;

(9) The appointment of agents and counsel;

(10) The languages to be employed in the proceedings before the tribunal;

(11) The manner in which the costs shall be divided;

(12) The division of expenses; and

(13) The services which the International Court of Justice may be asked to render, etc.

Article 3 (former article 2)

1. If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is wholly or partly within the scope of the obligation to have recourse to arbitration, such preliminary question may, failing agreement between the parties upon another procedure, be brought either before the Permanent Court of Arbitration for summary judgment or, preferably, before the International Court of Justice, by application of either party. The decision rendered by either of these Courts shall be final.

2. In its decision on the question, either Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal.

[*Variant of article 3*

If the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is wholly or partly within the scope of the obligation to have recourse to arbitration, such preliminary question shall, failing agreement between the parties within a period of three months upon another method of settling the question, be referred by application of either party, to the International Court of Justice either for summary judgment or for an advisory opinion.]

Constitution of the tribunal

Article 4 (former article 3)

1. Immediately after the request made 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 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 of the International Court of Justice, the appointment of the arbitrators not yet designated shall be made by the President of the Court at the request of either party. 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 be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate, and after consultation with the parties. In so far as the relevant text contains no rules with regard to the composition of the tribunal, that composition shall be determined, after consultation with the parties, by the President of the International Court of Justice or by the judge acting in his place, it being understood that the number of the arbitrators must be uneven.

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

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

Article 5 (Immutability of the tribunal)

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. An arbitrator may not be replaced during the proceedings before the tribunal except by agreement between the parties.

3. The proceedings are deemed to have begun when the president of the tribunal, or the sole arbitrator, has made the first order concerning written or oral proceedings.

Article 6

Should a vacancy occur on account of the death or incapacity of an arbitrator or, prior to the commencement of proceedings, the resignation of an arbitrator, the vacancy shall be filled by the method laid down for the original appointments.

Article 7

1. Once the proceedings before the tribunal have begun, an arbitrator may withdraw only with the consent of the tribunal. The resulting vacancy shall be filled by the method laid down for the original appointments.

2. Should the withdrawal take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal, in the manner prescribed in paragraph 2 of article 4.

Article 8

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 propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In all cases, and particularly in the case of a sole arbitrator, the decision shall be taken by the International Court of Justice on the application of either party.

2. The resulting vacancies shall be filled in the manner prescribed in paragraph 2 of article 4.

POWERS OF THE TRIBUNAL

Article 9 (former article 10)

1. When the undertaking to arbitrate 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 to enable it to proceed with the case. In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case, the tribunal shall order the parties to conclude a *compromis* within such time limit as it deems reasonable.

2. If the parties fail to agree on a *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal shall draw up the *compromis*.

3. If neither party claims that the provisions of the undertaking to arbitrate are sufficient for the purposes of a *compromis* and the parties fail to agree on a *compromis* within three months after the date on which one of the parties has notified the other of its readiness to conclude the *compromis*, the tribunal, at the request of the said party, shall draw up the *compromis*.

Article 10 (former article 11)

The arbitral tribunal shall be fully competent to interpret the *compromis*.

Article 11 (former article 12, paragraph 1)

In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice and, in general, by international law, unless it has been vested with the power to adjudicate *ex aequo et bono*.

Article 12 (former article 12, paragraph 2)

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

Article 13

1. In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the tribunal is unable to arrive at an award on the basis of the *compromis*, the tribunal shall be competent to formulate its rules of procedure.

2. All questions shall be decided by a majority of the tribunal.

Article 14

The parties shall be equal in any proceedings before the tribunal.

1st additional article

When a sovereign or head of State is chosen as arbitrator, the arbitral procedure shall be settled by him.

2nd additional article

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

3rd additional article

1. The parties shall have the right to appoint special agents to attend the tribunal to act as intermediaries between them and the tribunal.

2. The parties shall also be entitled to retain for the defence of their rights and interests before the tribunal counsel or advocates appointed by them for the purpose.

3. The agents and counsel shall be entitled to submit orally to the tribunal any arguments they may deem expedient in the defence of their case.

4. The agents and counsel shall have the right to raise objections and points of law. The decisions of the tribunal on such objections and points of law shall be final.

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

4th additional article

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 statements, counter-statements and, if necessary, of replies; the parties shall attach all papers and documents referred to in the case.

3. The time 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.

5th additional article

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

2. Records of the hearing shall be kept by secretaries appointed by the president. The records shall be signed by the president and by one of the secretaries: only those so signed shall be authentic.

6th additional article

1. After the pleadings are closed, the tribunal shall have the right to reject any new papers or documents which either party may wish to submit to it without the consent of the other party.

2. The tribunal shall remain free to take into consideration any new papers or documents which the agents or counsel of the parties may bring to its notice. In this case, it shall have the right to require the production of these papers or documents, but is obliged to make them known to the other party.

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

Article 15

1. The tribunal shall be the judge of the admissibility and the weight of the evidence presented to it.

2. The parties shall co-operate with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.

3. The tribunal shall have the power, at any stage of the proceedings, to call for such evidence as it may deem necessary.

4. At the request of either party, the tribunal may decide to visit the scene connected with the case before it.

7th additional article

1. In the case of any notice which the tribunal may have to serve in the territory of a third Power, the tribunal shall apply direct to the Government of that Power. Any such application submitted shall be dealt with by whatever means the Power applied to has at its disposal under its domestic legislation. Applications may be rejected only if the said Power deems them liable to impair its sovereignty or security.

2. The tribunal shall also have at all times the right to act through the Power in whose territory it sits.

Article 16

The tribunal shall decide on any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute.

Article 17

The tribunal, or in case of urgency its president, subject to confirmation by the tribunal, shall have the power to prescribe, at the request of one of the parties and if circumstances so require, any provisional measures to be taken for the protection of the respective interests of the parties.

Article 18

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

Article 19

The deliberations of the tribunal, which shall be attended by all of its members, shall remain secret.

Article 20 (former article 21)

1. Discontinuance of proceedings by the claimant party may not be accepted by the tribunal without the consent of the respondent.

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

Article 21 (former article 22)

The tribunal may, if it thinks fit, take note of a settlement reached by the parties and, at the request of the parties, embody the settlement in an award.

THE AWARD

Article 22 (former article 23)

The award shall be rendered within the period fixed by the *compromis*, unless the tribunal decides to extend the period fixed in the *compromis* in order to be able to render the award.

Article 23 (former article 20)

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

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 may render an award if it is satisfied that it has jurisdiction and that the claim is well-founded in fact and in law.

Article 24 (former articles 24 and 25)

1. The award shall be drawn up in writing. 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, unless the *compromis* excludes the expression of separate or dissenting opinions.

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 rendered by being read in open court, the agents of the parties being present or duly summoned to appear.

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

Article 25 (former article 24, paragraph 2)

The award shall state the reasons on which it is based for every point on which it rules.

Article 26

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the tribunal has fixed a time limit within which it must be carried out in whole or in part.

8th additional article

Should either party fail to observe its obligations under an arbitral award, the other party may inform the Security Council of the United Nations, which shall make whatever recommendations it thinks fit or shall decide on the measures to be taken to ensure the enforcement of the award, it if deems it necessary to do so.

Article 27

For a period of one month after the award has been rendered and communicated to the parties, the tribunal, either of its own accord or at the request of either party, may rectify any clerical, typographical or arithmetical error or any obvious material error of a similar nature in the award.

9th additional article

The arbitral award shall settle the dispute definitively and without appeal.

INTERPRETATION

Article 28

Any dispute between the parties as to the meaning and scope of the award shall, at the request of either party and within one month of the rendering of the award, be submitted to the tribunal which rendered the award. A request for interpretation shall stay execution of the award pending the decision of the tribunal on the request.

ANNULMENT OF THE AWARD

Article 29 (former article 30)

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 serious departure from a fundamental rule of procedure, including total or partial failure to state the reasons for the award.

Article 30 (former article 31)

1. The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article.

2. In cases covered by paragraphs (*a*) and (*c*) of article 29, the application must be made within sixty days of the rendering of the award, and in the case covered by paragraph (*b*) within six months.

3. The application shall stay execution unless otherwise decided by the Court.

Article 31 (former article 32)

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal constituted by agreement of the parties, or, failing such agreement, in the manner provided in article 4.

REVISION

Article 32 (former article 29)

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 have a decisive influence on the award, provided 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 normally be made to the tribunal which rendered the award.

6. If, for any reason, it is not possible to make the application to that tribunal, as reconstituted, the application may, unless the parties agree otherwise, be made by either party either, and preferably, to the International Court of Justice or to the Permanent Court of Arbitration.