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A/CN.4/113 and Corr. 1 (French only)

Draft 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)

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1958 , **vol. II**

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INTERNATIONAL LAW COMMISSION

DOCUMENTS OF THE TENTH SESSION, INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

ARBITRAL PROCEDURE

[Agenda item 2]

DOCUMENT A/CN.4/113

Draft 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)

[Original text: French]
[6 March 1958]

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1. General observations

1. The International Law Commission will recall that the subject of arbitral procedure has been on its agenda for a long time, and that much time and effort have already been devoted to it. The topic was selected and accorded priority at the very first session of the Commission (1949). A draft containing thirty-two articles (A/2163, para. 24) was adopted in 1952 and submitted to Governments. A new text (A/2456, para. 57), taking into consideration the comments of Governments, was prepared in 1953 and submitted in 1955 to the General Assembly at its tenth session, in order that a draft convention might be prepared from it in accordance with article 23 (*c*) of the Commission's statute.

2. After examination by the Sixth Committee and the General Assembly, the draft was referred back to the International Law Commission for further study in the light of further observations by Governments and the observations of the Assembly. The Assembly on 14 December 1955 adopted on the subject resolution 989 (X), which postponed until the thirteenth session, i.e. the forthcoming session of 1958, consideration of the question whether it would be desirable to convene a conference

of plenipotentiaries to conclude a convention or whether some other solution should be adopted.[1]

The reception given to the Commission's draft by the majority in the Sixth Committee and in the Assembly was, in fact, decidedly unfavourable to the adoption of a convention incorporating the draft's principles and articles. The majority considered that the draft would distort the traditional institution of arbitration; that it would turn that institution into a jurisdictional procedure, whereas according to custom it was diplomatic in character, and would link it with the institutional jurisdiction of the International Court of Justice by making it, as it were, a court of first instance; that the draft would face Governments with unacceptable demands for the surrender of sovereignty; and lastly, that it would cause the Commission to abandon its primary task—the codification of the law on the subject—and thus, on the pretext of developing the institution of arbitral procedure, damage it by considerably reducing its field of application.

3. We shall not attempt to analyse the various bodies of government opinion, some of which approved the draft or raised only minor objections to it, while others, in contrast, raised serious objections or even rejected the draft; nor shall we attempt to classify Governments according to their willingness to sacrifice more or less of their sovereignty in order to foster the organization of the universal community. Suffice it to say that, as the number of States Members of the United Nations increases, so the majority hostile to the Commission's draft seems bound to increase, for the more recently the new Members have required their sovereignty the greater will be their desire to maintain it whole and entire.

4. It is true that the Commission's draft drew its inspiration directly from the doctrine of the jurists—such as Moore, Lammasch, Politis, Lapradelle, van Vollenhoven and Renault—all of whom consider that the real future of arbitration lies in making it jurisdictional. It is not less true that such a prospect, and in particular the prospect of frequent recourse to The Hague Court, has proved unacceptable to the representatives of most of the Governments which compose the United Nations General Assembly. The Special Rapporteur accordingly felt that no good purpose would be served either by laying before the Assembly a draft convention which had but little chance of receiving consideration or by asking the Assembly to convene a conference of plenipotentiaries which could only resume, probably to no avail, the discussions already held in the General Assembly and in the Commission.

General Assembly resolution 989 (X) itself suggested a solution in its preambular paragraphs, which refer to "a set of rules on arbitral procedure [which] will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements" and recall "that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure". It was to be expected, therefore, that in this attenuated form the draft might prove acceptable to the Assembly.

It is open to the Commission, under article 23 of its statute, to act on these suggestions by recommending the General Assembly either "to take no action, the report having already been published", or "to take note of or adopt the report by resolution". This would remove the risk of the Commission's work being wasted. The Commission has not yet had an opportunity to opt for either of these alternatives.

Furthermore, it may be thought that the result thus achieved would differ little from that aimed at in previous conventions on the subject, since the ratifications obtained have not been very numerous and the sponsors of a *compromis* are always free to depart from it and to adopt provisions which they consider more appropriate to the nature of the dispute. (*Lex posterior derogat priori.*)

This, indeed, was the sense of the decision which the Commission adopted by 10 votes to 4, with 5 abstentions, at its 419th meeting. It decided to turn the draft convention into "a set of rules which might inspire States", as recorded in the Commission's report covering the work of its ninth session. (A/3623, para. 19).[2]

5. The Convention for the Pacific Settlement of International Disputes (1907)[3] defined arbitration in general but unimpeachable language in its article 37,[4] which opened a way that the Powers showed themselves willing to follow over half a century ago. In its draft the Commission followed this lead, while at the same time drawing upon doctrine.

It may be thought that there is, in the strict, no *general custom* with regard to arbitral procedure, for the simple reason that practice has shown it to be desirable

[1] The text of this resolution reads as follows:

"*The General Assembly,*

"*Having considered* the draft A/2456, para. 57) on arbitral procedure prepared by the International Law Commission at its fifth session and the comments (A/2899 and Add.1 and 2) 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* [*italics added*] 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 provisional agenda on the *thirteenth* [*italics added*] session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure."

[2] The Commission had previously rejected a proposal by Mr. Matine-Daftary that the Commission should consider the key articles of the draft before deciding on its recommendation to the Assembly.

[3] *The Hague Court Reports,* James Brown Scott (ed.), Carnegie Endwoment for International Peace (New York, Oxford University Press, 1916), pp. xxxi ff.

[4] Article 37 of the 1907 Convention reads as follows:

"International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

"Recourse to arbitration implies an engagement to submit in good faith to the award."

and article 38, in its first paragraph, continues:

"In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle."

that the *compromis* of arbitration should be the direct outcome of the will of the parties and that consequently they should vary according to the circumstances surrounding the dispute and the importance of the interests at stake. It might prove a difficult matter even to discern the local customs peculiar to any given group of States. This gives us another reason to doubt whether it would be useful, or even feasible, to draft a convention.

There are, however, some general principles which are admitted by all civilized nations: those embodied in the essential articles of the 1907 Convention, the General Act of 1928[5] or the Pact of Bogotá.[6] For this reason we maintain that it is not permissible to draft a text which would fall short of those instruments, and that it is better not to draft one at all than to disavow them.

II. The undertaking to arbitrate and the "compromis"

6. First and most vital among these essential principles of arbitration is, in our view, the *inviolability of the promise given to have recourse to it,* or of *the undertaking to arbitrate,* regarded as an obligation in itself, or, if it is desired to emphasize this, a partial surrender of sovereignty. The same applies to any international treaty or agreements, provided only that it has an individuality which can be identified and proved.[7]

The "undertaking to arbitrate" may, of course, be embodied in the *compromis* itself, as its first provision, especially in the case of an *ad hoc compromis* or a *concrete* case of arbitration. The idea cannot, however, be entertained that if there is no *compromis,* or if the *compromis* has not yet been drawn up, a "bare undertaking" to arbitrate is not binding because it is only an *abstract* promise relating to hypothetical or future disputes. *That would be tantamount to declaring null and void arbitration treaties or arbitration clauses* such as our Commission has itself included, on several occasions, in the various bodies of rules it has drafted.

Unfortunately, Governments accustomed to the diplomatic technique of arbitration frequently incline to the view that, until a *compromis* relating specifically to a particular dispute has been reached or made final, no legal obligation exists. The truth is that, even then, Governments are bound by an implicit obligation, namely, the obligation to conclude the *compromis* and thereafter to comply with the decision delivered under it. This—the fundamental obligation, the obligation of good faith—is certainly the one presenting most difficulty. Hence the purpose of the draft as a whole is to assist them in this respect by providing them with appropriate methods and objective forms of co-operation.

The essential difference between the draft which your Special Rapporteur laid before you last year (A/CN.4/109, annex), and which he lays before you again, and the one you approved in 1953 (A/2456, para. 57) is that *every trace of obligation has been eliminated.* This has been done for the good reason that—we repeat—there is no hope of the majority, either in the Sixth Committee or in the General Assembly, changing its view and accepting compulsory recourse to these procedures and forms of co-operation, above all if there is any question of co-operation with The Hague Court.

7. It was for this reason that your Special Rapporteur proposed last year that we should shift the relative emphasis on the different articles by changing their order, placing the former article 9, concerning the *compromis,* immediately after the article dealing with principles, in other words by making it article 2.

It will be noted that article 1 is the only article not concerned with procedure; but it is based directly on article 39 of the Convention of 1907,[8] and all the proposed procedural articles are the logical outcome of this article and its legal content. It is followed directly by the article concerning the *compromis,* in order to make it clear that even after Governments have *undertaken to compromise* they are still *completely free* to include in the *compromis* necessary to settle a dispute all such provisions as they may agree upon, without binding themselves, from the moment of their agreement, to have recourse or to submit to any form of intervention. The draft articles are made available to them as a means of arriving at a *compromis* if they should fail to conclude one, either completely or partly. If they do not accept the articles, whatever may be the reasons which prevent them from doing so, they will no doubt have failed to carry out their obligation, yet no person can compel them to comply with it. Indeed, they would have been in the same situation if, after concluding a convention of any kind, they had refused to comply with one of its provisions. When arbitration fails, the breach of law will probably be less noticeable, because in many cases both parties will be to blame. Doubtless, here too, it will be hedged about with extenuating circumstances which can always be blamed on the other side; but it will exist none the less.[9] At all events your Special Rapporteur has no objection to specifying in article 1 that the procedures open to disputing States shall not be applicable unless they have agreed to have recourse thereto.[10]

8. With all traces of obligation eliminated, your Special Rapporteur also felt justified in hoping that the 1955 draft might be left more or less as it was and that it might be re-submitted to the Assembly with only its scope and its title changed. The objections raised by Governments before the General Assembly's tenth session and by their representatives during that session were reviewed in our previous report (A/CN.4/109). It might have seemed sufficient, therefore, to follow article 23 of the Statute of the Commission and to leave the Commission free to recommend the General Assembly either "to take no

[5] General Act for the Pacific Settlement of International Disputes, adopted at Geneva on 26 September 1928. See League of Nations, *Treaty Series,* vol. XCIII, 1929, No. 2123.

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

[7] Note the entire agreement expressed on this point by Sir Gerald Fitzmaurice, for example in his statements at the 419th and 420th meetings of the Commission.

[8] Article 39 of the 1907 Convention reads as follows:

"The arbitration convention is concluded for questions already existing or for questions which may arise eventually.

"It may embrace any dispute or only disputes of a certain category."

[9] Mr. García Amador pointed out at the 422nd meeting of the Commission that the obligation to arbitrate was an "imperfect" obligation. That is very true; but what obligation under international law is not imperfect, especially since the adoption in the Charter at San Francisco of Article 2, paragraphs 2, 3 and 4, and of Chapter VII which has a paralysing effect? Failure to comply with an obligation embodied in an agreement, or with an existing international rule, is nevertheless an international offence, even if it goes unpunished and cannot be tried in a court of law.

[10] See the proposal to this effect made by Mr. García Amador at the 420th meeting of the Commission (para. 11).

action, the report having already been published", or "to take note of or adopt the report by resolution".[11]

At the ninth session, however, between the meetings of the drafting committee set up to study the key articles of the draft and the plenary meetings, it emerged that some members of the Commission, and particularly the newcomers who had been unable to attend its earlier deliberations, wanted to give the draft further study, or at any rate to reconsider its "key articles", in the light of the comments made by Governments or by their representatives in the General Assembly. It appeared that, despite the optional nature of the draft, a few members of the Commission wanted even to make amendments of substance rather than merely to remove any vagueness and ambiguity.

Prominent among the misunderstandings created by these articles, especially article 1, was the fear that it would lead to *compulsory arbitration;* it was to dispel this fear that your Special Rapporteur decided to propose some minor drafting changes.

Although the question of the non-retroactivity of the undertaking had received due discussion in the General Assembly, the decision was also taken to delete article 1, paragraph 2, of the draft,[12] relative to non-retroactivity, in order to preclude any inference that non-retroactivity was the only permissible stipulation and to leave the parties the fullest latitude on that point in drawing up their *compromis*. The Commission, in fact, took the view at its 420th meeting that all disputes without exception, including political disputes and even those relating to matters of exclusive competence, could be submitted to arbitration *if the parties so agreed.*

9. It even appeared to be the wish of some members of the Commission that, at the most, the draft should merely reiterate the solution envisaged in the conventions already concluded on the subject—such, *inter alia,* as those referred to in paragraph 5 of this report. Should the Commission accept this view, the Special Rapporteur would of course have to defer to it; *but in that case the draft would be of no further use.* Furthermore such an act of preterition would seem to conflict with General Assembly resolution 989 (X), the burden of which seems to be that the Assembly expects the International Law Commission to produce a new draft. The Special Rapporteur would be reluctant to include any of these previous procedural agreements in the present draft even as an alternative to its provisions. To do so would destroy its economy and its progressive character if it is admitted that it possesses this latter quality. The texts of previous conventions are very varied and are still in force for some States. They are available to the Governments concerned, which are always free to choose them in preference to the solutions envisaged in the proposed draft. There seems to be no reason why the draft should bring them to the notice of Governments which are familiar with them and may have recourse to them at any time.

The Special Rapporteur would, however, have no objection to inserting at the end of article 2 a stipulation that the disputing Governments remain free, in drawing up a *compromis,* to refer to procedures provided for in previous agreements, and particularly in agreements to which they themselves are parties. That goes without saying, but such a clause would further emphasize the essentially optional nature of the draft.

Thus articles 1 and 2 would read as follows:

Article 1

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 apply to existing disputes (arbitration ad hoc) or to disputes arising in the future (arbitration treaties—arbitration clauses).

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

4. The procedures offered to States parties to a dispute by this draft shall not be compulsory unless the States concerned have agreed, either in the compromis or in some other undertaking, to have recourse thereto.

Article 2

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 under which the dispute shall 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.

The compromis shall likewise include any other provisions deemed desirable by the parties, such as:

(1) 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;

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

(3) Such power as may be conferred on the tribunal to make its own rules of procedure;

(4) The procedure to be followed by the tribunal, on condition that, once constituted, the tribunal shall remain free to override any provisions of the compromis which may prevent it from rendering its award;

(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 languages to be employed in the proceedings before the tribunal;

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

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

This enumeration is not intended to be exhaustive.

The amendments to article 2 of the draft (former article 9) were adopted by the Commission at its ninth session (422nd meeting) by a majority of 19 votes.

III. The question of arbitrability

10. The purpose of article 3 is to decide the question of arbitrability. It is perhaps one of the most important articles in the draft. Its object is to ensure that the obligation to arbitrate is complied with where one of the

[11] At the 417th meeting of the Commission Sir Gerald Fitzmaurice, Mr. Gilberto Amado and Mr. Padilla Nervo advocated leaving the draft as it stood. At the 418th meeting, however, the Commission decided by 13 votes to 2, with 4 abstentions, to reconsider the draft in the light of the comments of Governments.

[12] Article 40 of the 1907 Convention was less cautiously worded. It provided that the contracting Powers "reserve to themselves the right of concluding new Agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it".

parties contests either the existence of a dispute or the allegation that the dispute is covered by the undertaking to arbitrate. In such a case there is a possibility that no *compromis* may be arrived at and that the provision for arbitration, if any, may be stillborn. It is accordingly necessary to settle this preliminary question, and the way to do this is to refer the case to an existing court.

There are two of these: the Permanent Court of Arbitration (duly constituted) and the International Court of Justice. The article leaves the parties free to choose, but indicates a preference for the International Court of Justice, which is an institution continuously in being and whose procedure may be more rapid than that of the Permanent Court of Arbitration. The choice of the latter would entail a double process of arbitration, firstly on the question of arbitrability and secondly on the substance. The parties may prefer double arbitration of this kind. They remain free, however, to choose another method of settling the difficulty provided that they do so within a fairly short time.

The former article 3, which would have been embodied ultimately in any draft convention, implied an *obligation* and empowered each of the parties to call upon either of the Courts at The Hague, albeit a preference was indicated for the International Court of Justice. On the one hand, however, it was open to question whether the article was compatible with the Statute of the International Court of Justice; and on the other hand, since the draft now under examination no longer entailed any obligation it cannot bestow upon one of the litigants the right to initiate proceedings unilaterally before either Court. All it can do is place such Governments as may agree to have recourse to this article under a duty to agree to lay their preliminary dispute before one or other of the two Courts, preferably the International Court of Justice.

If the arbitral tribunal had already been constituted—which implies that the dispute as to arbitrability did not arise until after a *compromis* had been drawn up—it would be for that tribunal to settle this dispute.

Article 3 would accordingly read as follows:

Article 3

1. If, before the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to arbitrate, such preliminary question shall, failing agreement between the parties upon the adoption of another procedure, be brought by them within three months either before the Permanent Court of Arbitration for summary judgement, or, preferably, before the International Court of Justice, likewise for summary judgement or for an advisory opinion.

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. The decision shall be final.

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

IV. The arbitral tribunal

11. The Special Rapporteur's original view that the first step to be taken by Governments bound by an undertaking to arbitrate was to set up the tribunal that was to settle their dispute, in order to equip their juridical community with a pseudo-institutional organ; and that they should, if necessary, do this before even drawing up the *compromis*. He arrived at this view in the light of articles 21 and 22 of the General Act.[13] Later on, after the Commission and the General Assembly had discussed the subject, he came to feel that it was preferable to avoid departing from generally established practice, to give priority to the *compromis,* and to include in it, so far as feasible, provisions concerning the constitution of the arbitral tribunal. As we know, these are generally considered the most difficult provisions to draw up.

Since there is here a second reference to possible recourse to the International Court of Justice or one of its judges as a means of solving these difficulties, we cannot refrain from mentioning some texts which indicate that until quite recently the progressive development of arbitral procedure aroused far fewer misgivings than it does today.

First of all, the General Assembly in part C of resolution 171 (II) dated 14 November 1947:

> *"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* [*italics added*];"[14]

The Commission is also asked to note that the recognized precedents for article 4 of the draft include, first of all, article 45 of the 1907 Convention—a pioneer effort, albeit in an inadequate and complicated form, to induce States ultimately to constitute an arbitral tribunal, especially if they have acceded to the Permanent Court of Arbitration.

A much clearer precedent is set in article 23 of the General Act, as revised and adopted by the General Assembly,[15] which reads as follows:

> "1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments.
>
> "2. If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen.

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[13] These articles read as follows:

Article 21: "Any dispute . . . which does not, within the month following the termination of the work of the Conciliation Commission . . ., form the object of an agreement between the parties, shall . . . be brought before an arbitral tribunal which, unless the parties otherwise agree, shall be constituted in the manner set out below."

Article 22: "The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third Powers . . ." It should be noted that, according to article 17 of the General Act, legal disputes should in principle be referred to the International Court of Justice, unless the parties agree to have resort to an arbitral tribunal.

[14] Part A of the same resolution contained these words: "*Considering* that it is . . . of paramount importance that the Court should be utilized to the greatest practicable extent *in the progressive development of international law,* [*italics added*], both in regard to legal issues between States . . .".

[15] 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.

"3. If, within a period of three months, the two Powers so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a subject of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointments shall be made by the oldest member of the Court who is not a subject of either party."

Lastly, a third precedent is set by article XLIII of the Pact of Bogotá, which reads as follows:

"The parties shall in each case draw up a special agreement clearly defining the specific matter that is the subject of the controversy, the seat of the Tribunal, the rules of procedure to be observed, the period within which the award is to be handed down, and such other conditions as they may agree upon among themselves.

"If the special agreement cannot be drawn up within three months after the date of the installation of the Tribunal, it shall be drawn up by *the International Court of Justice* through summary procedure, and shall be binding upon the parties." [*Italics added.*]

Our draft is less categorical than the Pact of Bogotá. It arranges the questions at issue in order and ultimately, but only *in extremis,* gives the arbitral tribunal itself the task of drawing up the *compromis* on behalf of the parties. It is none the less faithful to the precedents.

In view of this fidelity, and of the ultimate resort to the International Court of Justice, it is difficult to see why the General Assembly or, *a fortiori,* the International Law Commission should reject this ultimate recourse, especially since article 23 of the revised General Act and article XLIII of the Pact of Bogotá were *conventional* provisions, whereas article 4 of our draft remains optional in character. We therefore propose to retain it more or less unchanged. It reads as follows:

Article 4

1. Immediately after the request made by one of the Governments 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 in 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 be made in accordance with the provisions of the compromis or of any other instrument pursuant to the undertaking to arbitrate and after consultation with the parties. In so far as these texts contain no rules with regard to the composition of the tribunal, the composition of the tribunal 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 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 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. They may call upon experts.

The Commission's attention is drawn to the detailed nature of this article and to the fact that it does not go quite as far as the precedents quoted, although it supplements them.

V. Immutability of the tribunal

12. Once the tribunal has been constituted, its composition should normally remain unchanged until the award has been rendered.

This is what is termed the "principle of immutability". Its purpose is to preclude the replacement of judges by Governments during the proceedings with a view to influencing the tribunal's ultimate decisions; the withdrawal or resignation (the French term is "*déport*") of the judges themselves under the political influence of their Governments or of public opinion; or ill-considered challenges by one of the litigants.

The principle of immutability has met with the objection that Governments should be left free to recall the judges appointed by them, or "national judges", whenever they please. The Special Rapporteur takes the contrary view that everything possible should be done to counter the all too common practice of appointing arbitrators who do not aspire to be genuine judges but remain representatives or advocates of their respective Governments. Such a step is in the interests of the very institution of arbitral justice—which, moreover, has at its command counsel and advocates appointed by the parties. Sometimes, indeed, it is regrettable enough that the latter cannot be effectively prevented from holding any communication with the judges. As a strictly juridical matter, the judges, as soon as they have taken up their functions, should be regarded as *an international organ,* as members of a genuine court. Their award is to be final and binding; it should therefore be enforceable as an indivisible whole. Had the parties been reluctant to comply with it, they could have had recourse to another institution, that of conciliation commissions. Conciliation may precede arbitration but may not replace it, for it does not produce a binding decision; the parties can only accept the decision, and often do. As a body of jurists, however, the International Law Commission will be unlikely to confuse the two different procedures.

Article 5 of the draft, concerning the immutability of the tribunal, read as follows:

Article 5

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

It will be noted, furthermore, that articles 6, 7 and 8 of the draft leave a Government free to replace unilaterally one or more national arbitrators until such time as proceedings before the arbitral tribunal have begun, and that it may do so even after proceedings have begun, provided,

in this case, that the other party to the dispute gives its consent. This is one of the forms of equality between the litigants before the court.

It is provided also that the post of one of the arbitrators may be vacated and that one of the litigants may challenge a judge, provided that he does so in good faith and under the tribunal's supervision. The principle of immutability is thus rendered flexible, and intervention by the International Court of Justice can be avoided by agreement between the parties.

Should the proposed articles fail to win acceptance, the only remaining way to ensure that arbitration is really effected would be to permit the remaining members of the tribunal to render their award in the absence of any arbitrators who have been withdrawn or have resigned. This was recognized in the Commission's original draft. We should have no great objection to the reintroduction of this principle. Theory and practice have varied on this point; but we have come to the conclusion that the solution provided by the draft as it stands is preferable from the standpoint of the authority of the arbitral decision.[16]

Articles 6 and 7 read as follows:

Article 6

If a vacancy should occur on account of the death or the incapacity of an arbitrator, the vacancy shall be filled by agreement between the litigants or, if they cannot agree, in accordance with the procedure prescribed for the original appointments.

Article 7

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

2. If the withdrawal should take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal, in accordance with the procedure prescribed in article 4, paragraph 2.

13. Article 8 fills one of the most troublesome gaps in the undertaking to arbitrate and in the *compromis*. Hackworth recognizes in his *Digest of International Law*[17] that this is one of the most frequent grounds on which arbitral awards are challenged after delivery.[18] This is the question of the disqualification of one of the arbitrators or even of the sole arbitrator or umpire. There can, however, be no disqualification if the challenging party acts out of spite or in bad faith, or fears an adverse result of the case. Article 8 contains precautions against this which foreshadow those embodied in article 39, concerning revision. The article reads as follows:

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 before 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.

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

VI. Powers of the tribunal—Procedure

14. Once the tribunal has been constituted, its powers must be defined. The Commission will find that reference is made under this heading to a number of points which at first glance may seem to have been covered already under article 2 concerning the *compromis*, or which would fit in there. There is, however, no duplication. There may, and sometimes will, be a *compromis* in existence to which no recourse is necessary. If it fails to mention these matters, the tribunal will not enjoy the special powers which the draft recommends for adoption by the parties.

The first suggests the possibility of leaving to the arbitral tribunal the power to complete, or even to draw up, the *compromis*. It is possible that neither the *compromis*, the undertaking to arbitrate nor supplementary agreements contain provisions sufficient to enable the arbitrators to render an award. The tribunal is the judge of this, and, in the absence of the necessary agreement on all points which the tribunal requires to be clarified, either party may request the tribunal itself to complete or to draw up the *compromis*.

This may be regarded as a key article. Here again the course followed is that indicated by the precedents.

Article 53 of the Convention of 1907 empowered the Permanent Court of Arbitration to draw up the *compromis* if the two parties were agreed or in the case of a dispute covered by a general treaty of arbitration which had been concluded or renewed after that Convention had come into force and which did not exclude the competence of the Court. Article 54 provided for the establishment, in the latter case, of a commission of five members, selected by the slow and complex procedure already laid down for the composition of the tribunal.

Article 27 of the General Act provides, more bluntly, that:

> "Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by one or other party."

This provision is brief perhaps, and does not cover all the possible situations.

Article XLIII of the Pact of Bogotá, after referring to the need for a special agreement (*compromis*) to be drawn up by common consent between the parties, goes on to stipulate that:

> "If the special agreement cannot be drawn up within three months after the date of the installation of the Tribunal, it shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the parties."

This course has several times been adopted in practice. Since some States have proved reluctant to establish a kind of dependence between the International Court of Justice and the Permanent Court of Arbitration, the course preferred in our Commission's draft has been to confer the appropriate powers to conclude the *compromis* directly upon the arbitral tribunal, constituted as described above, in order to create complete confidence.

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[16] Among the precedents favourable to the immutability principle we may mention two which are of especially long standing and typical: the commission constituted under article 6 of the Jay Treaty, and the notorious incident of the *Hungarian Optants* (see A/CN.4/92, pp. 28 and 29).

With regard to methods of filling vacancies for arbitrators, see article 59 of the Convention of 1907 and article 24 of the General Act.

[17] G. H. Hackworth, *Digest of International Law* (Washington, U.S. Government Printing Office, 1943), vol. VI, chap. XIX.

[18] See document A/CN.4/92, pp. 31-33, and in particular article 20 of the Convention for the Establishment of an International Central American Tribunal, signed at Washington on 7 February 1923.

Article 9 accordingly reads as follows:

Article 9

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 the case as set forth in article 2 to enable it to proceed. 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-limit as it deems reasonable.

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

3. If both paries consider that the elements available to the tribunal are insufficient for the purposes of a compromis but are themselves unable to draw up a compromis, the tribunal may do so in their stead, at the request of either party, within three months after they report failure to agree or after the decision, if any, on the arbitrability of the dispute.

15. Article 10 provides as follows:

Article 10

The arbitral tribunal, which is the judge of its own competence, possesses the widest powers to interpret the compromis.

This is axiomatic. Every judicial organ is the judge of its own competence, gives rulings on any objections raised to it, and may adapt its procedure to the substance. This applies whether its competence is based on law or on a *compromis*. For a court to refuse a ruling on the ground that its competence was challenged would be a denial of justice on its part. As early as 1875, article 14 of the draft rules on international arbitral procedure prepared by the Institute of International Law provided that:

> "If the doubt concerning the jurisdiction depends on the interpretation of a clause in the *compromis, the parties are presumed to have given the arbitrators power to settle the question,* unless otherwise stipulated." [*Italics added.*]

Reference may also be made to article 73 of the Convention of 1907, Article 36, paragraph 6, of the Statute of the International Court of Justice, etc.[19]

Since the International Law Commission took a definite stand on this matter in compiling its 1953 draft on the basis of Judge Lauterpacht's report, it appears unnecessary to dwell on it here.

16. Article 11 likewise lays down a purely technical instruction, which is designed to promote the uniformity of international jurisprudence. This provision could have been included in article 2, concerning the *compromis,* and can be transferred to that article if the Commission so desires.

Article 11

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.

Before the International Court of Justice had been established, this provision read: "The arbitral tribunal decides according to the principles of international law". The second paragraph of article 18 of the Revised General Act is similarly worded:

> "If nothing is laid down in the special agreement as to the rules regarding the substance of the dispute to be followed by the arbitrators, the Tribunal shall apply the substantive rules enumerated in Article 38 of the Statute of the International Court of Justice."

This article presents no difficulty. The next article is another matter.

17. Article 12 reads as follows:

Article 12

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.

This problem of *non liquet* is complex, and when the arbitral tribunal is considering its decision it may be uncertain whether, for example, it has ascertained the full facts (even if the tribunal itself has drawn up the *compromis*).

Since the purpose of the draft as a whole is to secure a decision and solve the dispute—by, among other means, inducing the parties to give the tribunal all necessary information and facilities, including the power to adjudicate *ex aequo et bono*—the International Law Commission has taken the view that *non liquet* is inadmissible. Several writers, including Witenberg, Mérignhac and Lauterpacht (the 1953 Special Rapporteur) refuse to accept *non liquet* on the ground that the reference in Article 38 of the Statute of the International Court of Justice to "the general principles of law", makes it unthinkable.

Since the subject is highly controversial the Special Rapporteur appreciates that some hesitation may be felt; in his view, however, hesitation should arise only if the parties fail to grant the tribunal, in the *compromis,* the power to adjudicate *ex aequo et bono,* i.e. to act as though it had legislative functions (see article 2).

It is therefore, quite understandable that the Commission should reconsider its former wording and decide to amend paragraph 2 of the former article 12 (see A/2456, para. 57) as follows:

> "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.* It would be a different matter if the parties had expressly withheld from the tribunal the right to decide *ex aequo et bono* and if the tribunal were unable to find grounds for a decision in the facts."

The Special Rapporteur, however, does not favour this new wording, which jeopardizes the result of the case and the fulfilment of the undertaking to arbitrate.

Article 28 of the Revised General Act reads as follows:

> "If nothing is laid down in the special agreement [*compromis*] or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono.*"

This wording is free of ambiguity and is an improvement.

18. Articles 13 to 21 are concerned only with procedural technicalities and seem unlikely to provoke any discussion.

Article 13 empowers the tribunal to establish its own rules of procedure if the parties are unable to agree on

[19] For judicial decisions see, *inter alia,* document A/CN.4/96, pp. 46 ff.

them. The tribunal is likewise given this power if the rules of procedure established by the parties prevent it from arriving at an award. This is a reiteration of the provision which the Commission agreed last year to include in article 2, paragraph 3. The Commission will probably wish to delete one of the two provisions, unless it prefers to make that laid down in article 2 a general rule, and to reproduce it as a special rule of procedure in the article now under consideration.

This article further stipulates that all questions shall be decided by a majority.

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 make its rules of procedure.

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

Article 14 states a self-evident principle, that of equality in proceedings, which is no more than a consequence of equality before the courts. Some applications of the principle are considered later.

Article 14

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

19. Articles 15 to 19 were included in the previous report to the Commission (A/CN.4/109) in response to some observations made in the General Assembly, which appeared to regret that the draft had considered the reminder of traditional and generally accepted practices as negligible. Article 20—another addition—is an application of the principle of equality. These articles read as follows:

Article 15

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

Article 16

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

Article 17

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. 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.

Article 18

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.

Article 19

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 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.

Article 20

1. After the tribunal has closed the pleadings it shall have the right to reject any new papers and documents 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 new papers and documents which the agents or counsel of the parties may bring to its notice and to require the production of such papers or documents, provided that they have been made known to the other party.

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

20. Article 21 (formerly article 15) could be placed before article 20, for it is concerned with the general subject of the hearing of evidence before the closure of proceedings. It is based partly on theory, partly on the jurisprudence of arbitral tribunals, and partly on the jurisprudence of The Hague Court.[20] Its underlying principles can be traced back to the 1907 Convention (articles 74 and 75) and to Articles 48 and 49 of the Statute of the International Court of Justice.

Article 21

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.

Article 22 reads as follows:

Article 22

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

This article should create no difficulties, since it is designed to ensure that the tribunal disposes of every aspect of the dispute referred to arbitration. We have used French procedural terminology, which seems to us clearer than the English phrase: "amending the pleadings". We need hardly say that the connexion between the principal claim and incidental claims must be established, since otherwise the award would carry the stigma of action *ultra vires*.

Article 23, concerning provisional measures, is the equivalent of article 33 of the General Act of 1928 and

[20] See document A/CN.4/92, pp. 56 ff.

Article 41 of the Statute of the International Court of Justice.[21]

Article 23

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, any provisional measures necessary for the protection of the rights of the parties.

VII. Closure of proceedings

21. Article 24 reads as follows:

Article 24

1. 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.

2. So long as the award has not been rendered, the tribunal shall have the power to reopen the proceedings after their closure on the ground that new evidence is forthcoming of such a nature as to have a decisive influence on its decision.[22]

The second paragraph of this article has been added to the former article 18. It supplements the article concerning evidence and the article concerning revision, which it makes less necessary.[23]

Article 25

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

Article 26 relates to discontinuance of proceedings by the claimant party. It is designed to ensure that the two parties receive equal treatment and that either of them may require the tribunal to dismiss the case. It reads as follows:

Article 26

1. Discontinuance of proceedings by the claimant party, either during the hearing or at the close thereof, shall 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 27 empowers the tribunal to take note of a settlement reached by the parties either during or at the closure of proceedings and to give it the authority of *res judicata*. This is current practice in private arbitration arrangements. The article reads as follows:

Article 27

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.

It may, of course, refrain from doing so if it considers the settlement illegal, but must, in such a case, refrain from rendering an award.

VIII. The award

22. Article 28 authorizes the tribunal to extend the period fixed by the *compromis* for the rendering of the award. The former article 23, adopted by the Commission in 1953, stipulated that in such a case the consent of at least one of the two parties was required. Such a provision, the effect of which would be to give one of the parties an advantage according to the turn taken by the proceedings, would conflict with the equality rule, and probably stemmed from a misunderstanding. The tribunal must be the sole judge as to whether it has sufficient information to be able to render its award. It is of course understood that, since the new draft is in no way binding, the period fixed by the *compromis*, if any, is applicable if the parties cannot agree to extend it. It will also be realized, however, that to stipulate a definite period in the *compromis* is, as a rule, one of the most unfortunate steps that could be taken, and one of those most likely to hinder the settlement of the dispute. Article 28 might thus read as follows:

Article 28

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

As worded above, article 28 appears to be compatible with article 2.

IX. Default

23. The provision made in the draft for procedure by default refers to the award but applies to the proceedings as a whole. Some latitude in this respect is essential to the settlement of the dispute.

Here again there are many precedents both in arbitration practice and in the texts of conventions.[24] At all events article 29 is very circumspectly worded:

Article 29

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 after it has satisfied itself that it has jurisdiction and that the claim is well-founded in fact and in law.

24. Articles 30 to 34 are, once again, devoted either to technicalities of judicial procedure or to the reiteration of undisputed traditional principles. They read as follows:

Article 30

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 deemed to have been rendered when it has been 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 31

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

Article 32

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately,

[21] For bibliography and jurisprudence, see document A/CN.4/92, pp. 72 ff.

[22] Paragraph 2 may be regarded as duplicating paragraph 3 of article 21.

[23] See document A/CN.4/92, pp. 75 ff. (Santa Isabel Claims case).

[24] Cf. article 40 of the 1907 Convention; Article 53 of the Statute of the International Court of Justice; the Mixed Arbitral Tribunals; the case of the *Corfu Channel*. See document A/CN.4/92, pp. 78 ff., in this connexion.

unless the tribunal has fixed a time limit within which it must be carried out in its entirety or partly.

Article 33

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.

(Article 33, which is the original work of the Commission, has been discussed at length.)

Article 34

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

In the previous report (A/CN.4/109) it seemed possible to propose to the Commission a further additional article similar to Article 94 of the Charter of the United Nations providing for the measures to be taken in case of failure to comply with the award. On second thoughts the Special Rapporteur considers that such an article would be undesirable, would lie outside the scope of arbitral procedure, and should be omitted.[25]

X. Interpretation of the award

25. The article on this subject is based on article 82 of the 1907 Convention and Article 60 of the Statute of the International Court of Justice, and it implements article 79 of the latter's rules. It is also based on the old legal maxim: *Ejus est interpretari cujus est condere.* In its decisions the Permanent Court of International Justice at The Hague has several times had occasion to define interpretation. For instance, the Court has said:

> "The interpretation adds nothing to the decision, which has acquired the force of *res judicata,* and can only have binding force within the limits of what was decided in the judgment construed."[26]

Article 35

1. 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.

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within a time limit of three months 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.

The Special Rapporteur wonders whether the latter paragraph is really necessary. Since the time limit for requests for interpretation laid down in paragraph 1 is very short it seems unlikely that the tribunal which rendered the award should be unable to interpret it. The most that might be needed would be a provision that, should the arbitrators not be available, the tribunal might be constituted in the manner prescribed in article 4.

[25] This 8th additional article read as follows: "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, if it deems it necessary to do so."

[26] Publications of the Permanent Court of International Justice, *Collection of Judgments,* Series A, No. 13, *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)*, p. 21. See also document A/CN.4/92, pp. 95 ff.

XI. Annulment of the award

26. Neither the Special Rapporteur nor the Commission itself has accepted the categorical theory that an arbitral award should be treated as final even if found to be morally unacceptable or practically unenforceable. *Summum jus summa injuria.* Arbitration practice, moreover, has always conflicted with that principle. There is, however, abundant literature on the subject, and while the jurists agree in principle they do not agree on the cases in which the award is null and void or on the grounds for annulment.[27] It would be impossible for the Commission to study this literature in detail, and it has accordingly had to confine itself to enumerating, in the article 36 quoted below, three cases commonly recognized as invalidating an award.

Moreover the Commission has taken the view that the dispute should be referred to the International Court of Justice, which would act in this case as a court of cassation. Among the precedents for this we may mention a resolution adopted by the Institute of International Law at its session in 1929 held at New York;[28] more particularly, the discussions held in the Council and Assembly of the League of Nations under the chairmanship of Rundstein, the eminent Polish jurist, between 1928 and 1931; and lastly, article 67 of the rules of the International Court of Justice.

This solution has, however, been criticized as making for the establishment of a hierarchy among international tribunals, and as tending to limit their independence of the International Court of Justice.

The Commission will decide for itself whether an application for annulment may be made, by agreement between the parties, to the Permanent Court of Arbitration, to the International Court of Justice, or even to another arbitral tribunal which might be agreed on between the parties and which would be asked not merely to annul the award but to try the case again. At all events article 38 stipulates that if the award is declared invalid the whole case is re-opened.

Article 36

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 37

1. The International Court of Justice shall be competent, if the parties have not agreed on another court, to declare the nullity of the award on the application of either party.

2. In the cases covered by article 36, sub-paragraphs (a) and (c), the application must be made within sixty days of the rendering of the award and in the case covered by sub-paragraph (b) within six months.

3. The application shall stay execution unless otherwise decided by the court to which it is made.

[27] See, for example, Professor Verdross's detailed study of the connexion between excess of jurisdiction and the tribunal's recognized right to be the judge of its own competence, in *Zeitschrift für Öffentliches Recht* (Vienna and Berlin, Verlag von Julius Springer, 1928), vol. VII.

[28] *Annuaire de l'Institut de droit international* (1929), vol. II, pp. 303 and 304.

Article 38

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.

XII. The problem of revision

27. On this subject the Special Rapporteur can do little more than refer to the observations in his previous report (A/CN.4/109) and in his first report (A/CN.4/18).

There is an adage which runs: "Nothing is settled until it is settled right"; in the interest of the system of arbitration itself, this must be taken to heart if the system is to be preserved as an instrument of pacification.

Furthermore the authority of *res judicata* is not in question here, for there is no case for revision unless a "new fact" has come to light since the award was rendered and makes it appear that, had the judges known it, they would have made a different award. Lastly, revision cannot be regarded either as an appeal procedure or as a cassation, for both the new fact and the second decision will be dealt with by the same tribunal as rendered the award. There is consequently no question of a judicial hierarchy being estabished in this case.

Hence the Special Rapporteur has been unable to alter his view, and continues to advocate this procedure as warmly as in his first report (A/CN.4/18, para. 95).

Here again the principle adopted can be traced back to the 1907 Convention of The Hague (article 83) and even to the Convention of 1899. It was embodied in the Pact of Bogotá of 30 April 1948 after having been applied in practice by mixed arbitral tribunals. We need hardly point out that it has figured in such celebrated cases as those of the *Pious Fund of the Californias,* the *North Atlantic Coast Fisheries,* and the *Orinoco Steamship Company,* either in the negotiations on the *compromis* or in the proceedings.

Article 39 seems explicit enough; it reads as follows:

Article 39

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, 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 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 at The Hague.

XIII. Conclusion

28. In his previous report (A/CN.4/109), the Special Rapporteur paid particular attention to the observations made on the 1953 draft (A/2456, para. 57) by Governments and by their representatives to the General Assembly. He had already proposed that the Commission should abandon the idea of turning the draft into a draft convention, and, instead, compile merely a "model draft" or, if that seemed too pretentious a term, a "set of rules", which would be available to such Governments as might wish to use it, either in drawing up a *compromis* or at a later stage, during the actual proceedings, to assist them in bringing the arbitral proceedings to a successful conclusion and in fulfilling their undertaking to arbitrate. The Commission accepted this proposal at its ninth session (419th meeting).

In this report the Special Rapporteur has made a special effort to trace the *line of descent which links the articles of the draft with the texts of the conventions*—he might almost say, the texts of the constitutions—*which antedated them.* It may be felt that, in adopting them *in toto,* the Commission would be animated less by the *desire* to develop public international law, though this is one of its tasks, than by the *duty* of recording the traditional state of international law on the subject.[29]

The Commission has since recognized that it would be unwise to ask the representatives of Governments to contract actual obligations—however logical an outcome of the institution of arbitration these obligations might be—in the existing uncertain condition of the world community which, if not in its infancy, is at any rate clearly in a state of transition. It defers to the suggestion implicit in General Assembly resolution 989 (X) of 31 December 1955; yet it would doubtless be inacceptable to *scientific opinion* which has been moulded by the overwhelming majority of jurists, and to *public opinion,* which is still sustained by the Charter of San Francisco, to hold as null and void the progress gradually made by international arbitration in actual practice over the past half-century. It is this progress, not the fruit of theoretical speculation, that has gone into the making of the draft. In its ultimate liberalism, the Commission's draft may appear more shy than presumptuous.

Annex

Model draft on arbitral procedure

Article 1

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 apply to existing disputes (arbitration ad hoc) or to disputes arising in the future (arbitration treaties—arbitration clauses).

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

4. The procedures offered to States Parties to a dispute by this draft shall not be compulsory unless the States concerned have agreed, either in the compromis or in some other undertaking, to have recourse thereto.

Article 2

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 under which the dispute shall 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;

[29] See the preamble and articles 1, 15, 16 and 17 of the Statute of the International Law Commission.

(c) The method of constituting the tribunal and the number of arbitrators.

The compromis shall likewise include any other provisions deemed desirable by the Parties, such as:

(1) 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;

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

(3) Such power as may be conferred on the tribunal to make its own rules of procedure;

(4) The procedure to be followed by the tribunal, on condition that, once constituted, the tribunal shall remain free to override any provisions of the compromis which may prevent it from rendering its award;

(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 languages to be employed in the proceedings before the tribunal;

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

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

This enumeration is not intended to be exhaustive.

Article 3

1. If, before the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to arbitrate, such preliminary question shall, failing agreement between the parties upon the adoption of another procedure, be brought by them within three months either before the Permanent Court of Arbitration for summary judgement, or, preferably, before the International Court of Justice, likewise for summary judgement or for an advisory opinion.

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. The decision shall be final.

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

Article 4

1. Immediately after the request made by one of the Governments 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 in 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 be made in accordance with the provisions of the compromis or of any other instrument pursuant to the undertaking to arbitrate and after consultation with the parties. In so far as these texts contain no rules with regard to the composition of the tribunal, the composition of the tribunal 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 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 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. They may call upon experts.

Article 5

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

If a vacancy should occur on account of the death or the incapacity of an arbitrator, the vacancy shall be filled by agreement between the litigants or, if they cannot agree, in accordance with the procedure prescribed for the original appointment.

Article 7

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

2. If the withdrawal should take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal, in accordance with the procedure prescribed in article 4, paragraph 2.

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 before 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.

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

Article 9

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 the case as set forth in article 2 to enable it to proceed. 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 limit as it deems reasonable.

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

3. If both parties consider that the elements available to the tribunal are insufficient for the purposes of a compromis but are themselves unable to draw up a compromis, the tribunal may do so in their stead, at the request of either party, within three months after they

report failure to agree or after the decision, if any, on the arbitrability of the dispute.

Article 10

The arbitral tribunal, which is the judge of its own competence, posseses the widest powers to interpret the compromis.

Article 11

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.

Article 12

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 make 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.

Article 15

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

Article 16

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

Article 17

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. 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.

Article 18

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.

Article 19

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 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.

Article 20

1. After the tribunal has closed the pleadings it shall have the right to reject any new papers and documents 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 new papers and documents which the agents or counsel of the parties may bring to its notice and to require the production of such papers or documents, provided that they have been made known to the other party.

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

Article 21

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.

Article 22

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

Article 23

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, any provisional measures necessary for the protection of the rights of the parties.

Article 24

1. 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.

2. So long as the award has not been rendered, the tribunal shall have the power to reopen the proceedings after their closure on the ground that new evidence is forthcoming of such a nature as to have a decisive influence on its decision.

Article 25

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

Article 26

1. Discontinuance of proceedings by the claimant party, either during the hearing or at the close thereof, shall 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 27

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.

Article 28

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

Article 29

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 after it has satisfied itself that it has jurisdiction and that the claim is well-founded in fact and in law.

Article 30

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 deemed to have been rendered when it has been 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 31

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

Article 32

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 its entirety or partly.

Article 33

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, typogaphical or arithmetical error or any obvious material error of a similar nature in the award.

Article 34

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

Article 35

1. 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.

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within a time limit of three months 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.

Article 36

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 37

1. The International Court of Justice shall be competent, if the parties have not agreed on another court, to declare the nullity of the award on the application of either party.

2. In the cases covered by article 36, sub-paragraphs (a) and (c), the application must be made within sixty days of the rendering of the award and in the case covered by sub-paragraph (b) within six month.

3. The application shall stay execution unless otherwise decided by the court to which it is made.

Article 38

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.

Article 39

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, 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 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 at The Hague.